Personalizing the Impersonal: Corporations and the Bill of Rights

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1. The text was formatted for the purpose of utilizing a paper size of 8.5 inches by 11 inches.
2. A table of contents was added.
3. Line numbers were added to facilitate reference.
4. An index of legal cases cited within the work (not including endnotes) was added to facilitate research and reference.
5. This page (page ii) of Fair Use Notice was added to the work.

Introduction

Between 1989 and 1992 Americans will celebrate the bicentennial of the ratification of the Bill of Rights. Even more than average citizens, however, corporations and their managers are marking this anniversary with approval[1] because they successfully have used the Bill of Rights as a shield against government regulation. Businesses now wield the Bill of Rights in much the same way that the fourteenth amendment was used during the Progressive era when corporations impeded state governmental regulation with constitutional roadblocks. In this sense, the supposedly defunct doctrine of substantive due process[2] -- under which the Court imposes its own economic views to strike down regulation -- retains surprising vitality. Indeed, the current era can be characterized as one of corporate due process.

Consider, for example, the following recent Supreme Court decisions: a textile corporation successfully invoked the fifth amendment double jeopardy clause to avoid retrial in a criminal antitrust action;[3] a consortium of major corporations, including the First National Bank of Boston, joined in a first amendment lawsuit that overturned state restrictions on corporate spending for political referendums;[4] an electrical and plumbing concern invoked the fourth amendment to thwart federal inspections conducted under the Occupational Safety and Health Act;[5] and, a California public utility relied on the first amendment to overturn state regulations designed to lower utility rates.[6]

Twenty years ago, the corporation had not deployed any of these Bill of Rights provisions successfully.

The corporation's invocation of the first ten amendments symbolizes the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives. Regarded as America's most cherished palladium of personal liberties, the Bill of Rights was appended to the Constitution at the behest of Jefferson and inherited, ideologically, from political philosophers concerned with individual liberties: Locke, Rousseau, and Montesquieu. The use of these amendments by corporations raises extraordinary historical and political questions.

This Article explores why, as an historical matter, the Supreme Court only recently conferred Bill of Rights guarantees on corporations. It also asks: what theory of the corporation[7] permits the Court to bestow these protections? Part I argues that intangible Bill of Rights protections are, in an unprecedented manner, important to the corporation in the modern political economy. Whereas the fourteenth amendment was useful in the nineteenth and early twentieth centuries to shield corporations from rudimentary, sporadic attempts by states to regulate, the Bill of Rights today helps corporations fight more sophisticated modern federal regulation. Part II explains why, although the Court increasingly confers Bill of Rights safeguards on corporations, it has abandoned earlier efforts to theorize about the corporation's entitlement to constitutional protections. This Part also suggests that the Court currently lacks a coherent or defensible theory of the corporation. Part III considers the future of the Bill of Rights and corporate theory.

I. The Corporate Bill of Rights in the Modern Political Economy

A. The Rise of Corporate Theory

To understand how the corporation -- as opposed to individuals -- can claim any constitutional rights, a review of corporate personhood theory is required.

The Constitution does not mention corporations.[8] To claim legal status, nineteenth century lawyers argued that corporations should be considered "citizens" or "persons" for application of various constitutional provisions. The Supreme Court has examined whether corporations are citizens under the following provisions: article III diversity jurisdiction,[9] article IV privileges and immunities clause,[10] and the fourteenth amendment. [11] Most of these cases were decided early in the nineteenth century -- before significant government economic regulation -- and involved the corporation's right to sue or be sued.

The Supreme Court's most renowned decisions, however, were in the 1880s and 1890s, holding that corporations are persons for the purpose of fourteenth amendment equal protection[12] and due process.[13] These opinions paved the way for companies to receive the benefits of *Lochner* era substantive due process and the Court's invalidation of state economic regulation prior to the New Deal.[14]

Two competing visions of corporate personality influenced the Court's nineteenth century decisions,[15] and to some degree still underlie modern opinions. The first and most traditional notion was the "artificial entity" theory viewing the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions.[16] This theory had its origins in English corporation law,[17] and in antebellum legislatures' practice of considering incorporation a special privilege, awarded by the state for the pursuit of public purposes.[18] Under this view, corporations cannot assert constitutional rights against the state, their creator.[19]

The second vision was the "natural entity" or person theory. This theory regards the corporation not as artificial, but as real, with a separate existence and independent rights. It is associated with continental theorists who, at the turn of the century, wrote about "group" or "corporate" personality in an effort to challenge individualism and to come to terms with institutions of modern society such as corporations, trade unions, universities, and professional associations.[20] This understanding of the corporation most favors corporate constitutional rights.[21]

These competing paradigms of the corporation were in tension in the Court's nineteenth century opinions. The "artificial entity" theory was invoked to deny corporations constitutional protection; the "natural entity" theory was used to accord them safeguards.[22] Competing corporate theories advanced by the Court reflected the theoretical debates in the treatise literature over the nature of corporate personality.[23]

The personification of the corporation occurred in 1886; the popular literature marks this as the year that the corporation "stole" the fourteenth amendment.[24] In *Santa Clara County v. Southern Pacific Railroad*[25] the Court simply decreed, without hearing argument, that a

corporation is a person for purposes of the fourteenth amendment. At issue was whether the due process clause barred the State of California from taxing the property of a railroad corporation differently from that of individuals. By the early twentieth century, the natural entity theory was established firmly, if not permanently. [26]

To understand why the corporation did not assert theories of corporate personality in the Bill of Rights context until the twentieth century, and to understand the recent interest in the corporate Bill of Rights, one must first survey the political economy of regulation as it developed in the twentieth century.

Two questions must be answered. First, how did regulation change in its form, content, and purpose over the century? Second, what legal and constitutional implications did regulatory changes have for corporations?

B. The Bill of Rights and an Evolving Political Economy

Despite earlier assertions of corporate personhood in the fourteenth amendment context, corporations did not come to rely on Bill of Rights protections until quite recently. As late as 1960 the corporation arguably enjoyed only the protection of the fifth amendment's due process clause.[27] Today, the corporation boasts a panoply of Bill of Rights protections: first amendment guarantees of political speech, commercial speech, and negative free speech rights; fourth amendment safeguards against unreasonable regulatory searches; fifth amendment double jeopardy and liberty rights; and sixth and seventh amendment entitlements to trial by jury.[28]

The evolution of the modern political economy and the modern regulatory state in part account for this striking change. Changes in America's political economy, over the course of the twentieth century, gradually enticed corporations to assert Bill of Rights protections against a changed regulatory state and increasingly to protect modern forms of intangible commercial property (like speech or federal subsidies).[29]

The corporation faced different kinds of regulation in three separate political periods: the Progressive era, the New Deal era, and the Modern, post-1960 era. Each of these eras was characterized by distinct political economies and regulatory structures. Within each period there were bitter struggles over how, and for what purpose, the regulatory state would assert its power.[30]

During the course of the twentieth century the political and regulatory environment consistently changed in ways that dramatically altered the legal and constitutional strategies of corporations. Over time, regulation became more federal and intrusive in character, property became more intangible and ephemeral, and regulation became explicitly designed to serve environmental, consumer, and social -- rather than economic -- goals. Each development encouraged the corporation to assert Bill of Rights privileges and to abandon the previous, increasingly ineffective, strategy of relying on fourteenth amendment protections.

(1) Progressive Era Regulation

a. The Political Economy

Before and during the Progressive era, the corporation frequently asserted fourteenth amendment rights against state regulation.[31] But during this epoch, federal regulation remained rudimentary and only infrequently triggered Bill of Rights claims.[32]

Progressive era regulation was irregular and primarily microeconomic in nature.[33] It included laws passed chiefly to regulate railroads, to curb the power and size of monopolies, to tax income and wealth, and, only later, to improve working conditions. Regulation was conducted primarily by state government.[34] Only gradually did the federal government become the focus of regulatory reformers.[35]

Historically, the federal government played a diminished regulatory function because states and localities assumed primary responsibility.[36] Undoubtedly, a fear of centralized regulatory authority stemmed from America's Revolutionary War experience. Regulation in America originally was conceived as a means of writing into state charters restrictions on corporate activity.[37] In Massachusetts, for example, the first state railroad corporations, created in the 1830s and 1840s, had economic restrictions embedded in their charters. [38] Some statutes even went so far as to define precisely acceptable rates of return. These controls, however, rarely were enforced.[39]

As the century progressed, the source of regulation shifted from weak charter provisions to pronouncements from state regulatory commissions.[40] These commissions -- created first in Rhode Island, New Hampshire, and Connecticut -- were founded primarily to oversee the railroads' rate-making process.[41] The most famous of these was the Massachusetts Board of Railroad Commissioners, founded by Charles Francis Adams in 1865.[42] The Commission was unlike modern regulatory agencies. Rather, it was akin to a "sunshine" commission: dedicated to information and education rather than direct action.[43]

This philosophy of voluntarism reflected the patrician origins of the early regulatory commissioners.[44] Their weak version of regulation was evident in the safety area, where commissions customarily would investigate railroad accidents and then urge voluntary reform on industry.[45] Only in the late 1880s and 1890s did state regulatory commissions take stronger measures such as setting rates for gas and electric utility monopolies.[46]

State regulation was even more aggressive in the early twentieth century when the Progressive movement gained stature. The states became "laboratories" of social reform, as wage and hour legislation and child labor laws, among others, were passed.[47]

Progressives harbored a deep ambivalence to federal regulation, and often preferred state controls.[48] Louis Brandeis, the Progressive era's most celebrated reformer, typified this attitude in the fight over the reform of industrial life insurance, one of his most important causes. Brandeis believed that the entire industry principally served to defraud working people of their life savings. His solution, however, was to impose strict state, rather than federal, regulation of the insurance industry. Brandeis believed that federal regulation would lead to capture of the

national legislature by the industry, but that the insurance industry could never capture every statehouse.[49]

The federal government did intercede in the economy during this period, but almost always in a sporadic manner for economic (as opposed to environmental or social) purposes. The establishment of the Interstate Commerce Commission (ICC) in 1887 marked the beginning of this trend. The Sherman Antitrust Act of 1890[50] and the Federal Trade Commission Act of 1914[51] followed. These regulatory efforts involved microeconomic questions: the ICC dealt with anticompetitive practice in the railroad industry; the Sherman Act targeted restraints of trade or conspiracies; and the FTC's chief mandate was to prohibit unfair methods of competition or deceptive trade practices.[52]

The first federal regulatory agency, the ICC, was established to regulate railroads, America's only national industry. The ICC primarily was concerned with setting rates and gathering information and, therefore, served as a weak federal agency.[53]

Although the Sherman Antitrust Act was passed in 1890, it relied on the resources of the Justice Department for sanctions and was enforced only sporadically prior to the height of the Progressive era. From 1890 to 1905, The Justice Department brought only twenty-two suits -- on average 1.5 per year. The number increased to thirteen per year over the next decade as Presidents Roosevelt, Taft, and Wilson demonstrated a stronger commitment to trust busting, as evidenced by the passing of the Clayton Antitrust Act in 1911.[54]

Not until Woodrow Wilson created the Federal Trade Commission in 1914 was the trust question broadly addressed. The Commission was intended to increase competition and solve the merger problem that dominated the American political scene from 1890 to 1920.[55] The Commission, however, was not particularly effective prior to the New Deal. The recession of 1914 gave Wilson and the Democrats the stigma of having regulated prosperity out of the economy. Also, the outbreak of World War I shifted the public's interest from trust busting to international politics. Indeed, the investigatory power of the Federal Trade Commission was limited explicitly by Wilson, who stopped short of altering the relationship between business and government. The FTC had no power over prices, wages, mergers, or stock offerings. It was limited in scope to correcting unfair trade practices as defined by common-law interpretation of the Sherman Act.[56]

Despite the intellectual fervor of the time, federal regulatory agencies never posed ongoing regulatory challenges to business during the Progressive era;[57] certainly not in a way that invoked the ire of the business community as have modern environmental and health and safety legislation. More importantly, the government rarely acted in such a way as to pose major Bill of Rights questions for corporations.[58]

b. The Corporate Legal Response

The response of corporations to the evolution of state regulatory mechanisms was not surprising; constitutional challenges were posed, under the fourteenth amendment, to state statutes. Within the context of the political economy of the nineteenth and early twentieth centuries, intangible Bill of Rights protections had little relevance for corporate actors.

Lochner illustrated how the fourteenth amendment and the doctrine of substantive due process were used to invalidate state regulation. In *Lochner* the Supreme Court held unconstitutional a New York State statute limiting the number of hours employees could work in a bakery. The challenge was brought by a bakery owner who maintained that the statute interfered with his freedom to contract and was therefore invalid under the fourteenth amendment.[59]

Lochner did not involve a corporate plaintiff; but by reading a substantive economic doctrine into the fourteenth amendment -- the doctrine of laissez-faire and freedom of contract -- the Court provided a powerful wedge for corporations. Since corporations had fourteenth amendment protections under *Santa Clara*, the addition of *Lochner* allowed corporations to challenge many state regulations.

For the next fifty years, under the banner of substantive due process, and in the guise of "persons," corporations challenged Progressive era regulation and maneuvered to protect more traditional forms of property.[60]

Once armed with the fourteenth amendment, corporations wielded it with considerable force. By 1938 Justice Hugo Black observed with dismay that, of the cases in which the Court applied the fourteenth amendment during the first 50 years after *Santa Clara*, "less than one-half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations."[61] The use of the fourteenth amendment to strike down state interferences with an increasingly corporate-dominated marketplace proceeded until the 1930s when the Court abandoned substantive due process.[62]

From the 1905 *Lochner* decision until the middle of the 1930s, the Court invalidated approximately two hundred economic regulations, usually under the due process clause of the fourteenth amendment; many of the challenges were brought by corporate plaintiffs. Most decisions centered on labor legislation, the regulation of prices, and restrictions on entry into businesses.[63] Cases involving corporations often concerned state restrictions on entries into a new business.[64]

Corporations continued to challenge state regulations using the fourteenth amendment until the doctrine of substantive due process was abandoned by the New Deal Supreme Court. In *West Coast Hotel Co. v. Parrish*,[65] for example, the Supreme Court upheld the constitutionality of state legislation establishing a minimum wage for women. The Court rejected the corporate plaintiff's assertion that its common-law right to freedom of contract was violated.[66]

The business press recognized the fourteenth amendment's vital role in protecting corporate interests. A 1936 Fortune magazine article opined that:

> [T]he effect [of granting corporations fourteenth amendment rights] was to impose between the state legislatures and the industries of the country the judgment of the Supreme Court and to insure to individual businessmen complete freedom from state regulation other than that which the Supreme Court held to be a proper exercise of governmental power. All this the words "due process of law" were held to imply.[67]

The article even suggested that the Court's defense of substantive due process was arguably the corporation's most important weapon against Progressive era reforms.[68]

Although business defended against government regulation by using fourteenth amendment property-oriented safeguards, Bill of Rights protections rarely were sought. When invoked, they were used to defend tangible property against economic regulation and operated much like due process property protections.

Corporations first received Bill of Rights guarantees in 1893. In *Noble v. Union River Logging Railroad*,[69] a railroad corporation invoked the fifth amendment due process clause to challenge the Secretary of the Interior's revocation of an approval for a right-of-way over federal public lands. The Court invalidated this action, viewing it as an attempt to deprive the railroad corporation of its property without due process.[70] Although the Court in *Noble* did not explain why the fifth amendment due process clause -- as opposed to the fourteenth amendment clause -- should apply to corporations, no other interpretation is possible, because the defendant was the federal government.[71]

Decided on the heels of opinions granting fourteenth amendment guarantees to corporations,[72] *Noble* represented an extension of due process property-oriented protections. In *Noble* the fifth amendment protected corporations' traditional property rights -- such as a right-of-way or an easement -- that were recognized at common law. Similarly, *Noble* thwarted Progressive era regulation. In this period the federal government regulated public lands for economic purposes; only later, in the 1960s, did it oversee them with an eye toward environmental, or social, objectives.[73]

Not until the twentieth century did corporations receive more intangible Bill of Rights protections. Most Bill of Rights protections, of course, are intangible in the sense that they protect interests that one cannot feel or touch. The right to speak or the right to privacy are examples. Such intangible interests -- particularly commercial speech, the right to privacy, and the right to government largess (for example, a government license or contract) -- have become increasingly important to corporations over the course of the twentieth century.[74]

Corporations did assert intangible Bill of Rights in the Progressive period, but only infrequently compared to the modern era. Only occasionally were fourth amendment privacy rights asserted against the weak and rudimentary federal agencies of the Progressive era: the Federal Trade Commission or the Justice Department in antitrust cases. This contrasts

dramatically with the modern period when corporations frequently invoke fourth amendment safeguards against a plethora of federal agencies involved in many regulatory inspection programs.

Usually, companies sought protection from overbroad government subpoenas for corporate documents.[75] In practice, only the FTC, and occasionally the Justice Department (enforcing the Sherman Act), would issue such requests. Circumstances such as these led the business press, at least, to conclude that Bill of Rights protections were not important -- compared to the fourteenth amendment -- in the political economy of the first half of the twentieth century.

The first time a corporation claimed, and was granted, intangible Bill of Rights protections was in 1906. In *Hale v. Henkel*,[76] the Supreme Court held that an overbroad subpoena for corporate documents could constitute an unreasonable search and seizure in violation of a corporation's fourth amendment rights. *Hale* was an effort to forestall Progressive era regulation. The case involved a criminal contempt charge arising from an antitrust action under the Sherman Act against two tobacco corporations. In refusing to comply with a government subpoena for potentially incriminating documents,[77] the corporations advanced only one constitutional argument: the fifth amendment privilege against self-incrimination.[78] The Court held this privilege inapplicable to corporations, requiring the companies to produce the documents. [79] The Court raised the question, on its own, whether a corporation is entitled to fourth amendment protections against unreasonable searches and seizures. The answer was affirmative.[80] The Court further ruled that an overbroad subpoena for corporate documents constitutes an "unreasonable" search.[81]

Several cases, decided before 1930, restricted the ability of government agencies to peruse corporate documents. The most famous was *Federal Trade Commission v. American Tobacco Co.*,[82] in which Justice Holmes held that the fourth amendment did not authorize government agencies "to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."[83]

While the fourth amendment provided some protection from government regulation, the use of the Bill of Rights as a corporate weapon was infrequent when compared with the use of the fourteenth amendment against state regulation.

(2) New Deal Regulation

a. The Political Economy

The regulatory state changed significantly during the New Deal. Federal regulation overshadowed state regulation and New Dealers added a concern for planning to the Progressive era antitrust impulse. But regulation remained primarily economic as opposed to social, consumer, or environmental. As a consequence, New Deal regulation, like Progressive era regulation, posed few Bill of Rights challenges for the corporation.

During the New Deal, macroeconomic management replaced microeconomic tinkering as the federal government worked feverishly to stimulate a moribund economy. The Federal Home Loan Bank Act, the Reconstruction Finance Corporation Act, the National Industrial Recovery

Act, and the Agricultural Adjustment Act -- all passed between 1932 and 1946 -- attempted to speed economic recovery. [84] Social goals such as consumer protection and environmental regulation were de-emphasized in this period of economic stagnation.[85]

By the end of the 1930s, a plethora of federal regulatory agencies blossomed. Four new federal commissions were created, more than had appeared in the years prior to 1933: the Securities and Exchange Commission, the National Labor Relations Board, the Federal Communications Commission, and the Civil Aeronautics Authority.[86] Existing agencies were endowed with additional authority to regulate industry.[87]

The New Deal elevated from the state to the federal level the Progressive era ideal of economic administration by technocratic experts.[88] Many New Deal reforms were designed to overcome the limitations of Progressive era regulation. After the stock market crash of 1929, for example, it became evident how little protection Progressive era measures, such as state "blue sky" laws, provided investors. "Blue sky" statutes originally were designed to protect against securities of doubtful value (pieces of the blue sky) and held great promise as antidotes to unscrupulous investment practices.[89] The New Deal solution to the failure of Progressive era state structures was to implement federal securities regulation.[90]

Historians have penned volumes attempting to explain the meaning of the creation of these New Deal agencies and programs.[91] Forty years later, there is still no consensus on their purpose, intentions, or effects. Some of the most intriguing writing on the New Deal suggests that Roosevelt's regulatory programs reflected a division among advisors to the president. Divisions in regulatory programs and philosophies triggered dissimilar constitutional responses by business.

The split recognized is between planners and antitrusters.[92] The planners -- people like Jerome Frank and Rexford Tugwell -- supported direct government measures to regulate the economy. The National Recovery Administration (NRA) embodied this vision; to bolster prices the NRA sponsored a system of industrial organization that called for output restrictions to boost prices and for standardization of work practices and product quality. This type of intense industrial supervision was tailored to an economic system beset by a deflationary crisis. Advocacy of planning also reflected the recognition of a new, powerful constituency in favor of regulation, labor, that was less noticed in the Progressive era.[93] NRA-type planning in such areas as the regulation of trucking and airlines remained a component of the New Deal even after 1935, when the NRA was declared unconstitutional.[94]

But after the first NRA phase of the New Deal, the antitrusters were ascendent.[95] Like the advocates of Woodrow Wilson's New Freedom, the antitrusters, or neo-Brandeisians, favored policies that would decentralize business and enforce competitive behavior. People like Thomas Corcoran, James Landis, Benjamin Cohen, and James Rowe -- disciples of Brandeis and Frankfurter -- advocated programs of decentralization: cheap power and rural electrification, and the social engineering of the TVA and the rural rehabilitation program.[96] They also favored reforms in areas of banking, securities, and holding companies.[97]

Undoubtedly, both planners and antitrusters had an effect on the New Deal regulatory state and the historic debate over which camp attained the upper hand may never be resolved.[98]

For the purposes of constitutional history, however, it is sufficient to suggest that neither reforms advocated by the planners or by antitrusters prompted Bill of Rights challenges by corporations. The new regulatory state erected during the New Deal did not create an intrusive system of monitoring, inspecting, and regulation -- for consumer, environmental, or social purposes -- that would later pose Bill of Rights threats to corporations.[99]

Instead, the constitutional challenges mounted by corporations during this period were directed either at undermining the very legislative authority of New Deal proposals (these tended to be planning proposals), or in working within the administrative system to delay the existing regulatory process (these tended to be the antitrusters' programs).

b. The Corporate Legal Response

Corporate managers remained impassive about the Bill of Rights in the Progressive and New Deal eras, in part because these rights were not useful in fighting economic regulation, and in part because they had other constitutional battles to wage. Until 1937, the main event was the fight over substantive due process. With the end of the *Lochner* era and the election of Roosevelt, business interests challenged New Deal planning reforms as overbroad exercises of constitutional powers.[100] Later, due process challenges to the antitrusters' regulation increasingly were fought in the administrative context.[101]

While the business press heralded the Supreme Court's substantive due process rulings,[102] it ignored the Court's Bill of Rights opinions regarding corporations.[103]

But business' self-confessed satisfaction with the substantive due process shield was short-lived. As Fortune magazine put it, "after the 1929 crash and the advent of Franklin Roosevelt's New Deal . . . the Constitution again became a hot issue."[104]

Citations to the Constitution riddled the business literature in the New Deal era. The Industrial Arts and the Business Periodicals Index -- the two principal indices of business literature -- contained numerous references to the constitutionality of Roosevelt's reform legislation.[105] No longer concerned with personhood, state regulation, and the fourteenth amendment, the focus shifted to restricting executive and congressional power exercised in the name of reform. The principal New Deal enactments rested on three constitutional powers: interstate commerce, taxation, and appropriation. Several of these were held unconstitutional.[106]

The National Industrial Recovery Act, for example, which set industrial hours and wages, was held to be an unconstitutional delegation of power.[107] The type of regulation and planning symbolized by the NRA did not, however, provoke Bill of Rights challenges by corporations. Rather, because the NRA was a system of planning, it was challenged successfully as an unconstitutional delegation of legislative power and an overbroad application of the commerce power.[108] To the extent planning was an integral component of New Deal regulation, it represented a departure from Progressive era reforms conducted on the state level. But the goals

of planning were primarily economic reform and price administration -- goals that raised constitutional questions other than Bill of Rights concerns.

Constitutional limitations on federal regulatory power supplanted debates over corporate personhood.[109] With the possible exception of publishing corporations, which claimed the first amendment exempted them from government antitrust prosecutions, Bill of Rights issues were completely overshadowed by other constitutional questions during the New Deal.[110]

During this period, corporations also began to manifest their opposition to government regulation in the administrative arena. As New Deal reforms withstood constitutional challenges, and federal regulatory powers expanded, corporations fought regulation using tactics of delay in administrative law. The procedural provisions of the Administrative Procedure Act, for example, served as a stalling device for regulatory opponents.[111] Corporations came to realize that by insisting on procedural guidelines for agency decisions they could stall, if not forestall regulatory action.[112]

This is not to say there was no litigation implicating the Bill of Rights in this era. Indeed, fourth amendment cases involving government subpoena power over corporate documents continued through the New Deal, building on the Progressive era *Hale* decision.[113]

During the New Deal, however, the Court narrowly circumscribed the fourth amendment rights of corporations against overbroad government subpoenas.[114] In one case,[115] the Court permitted the Administrator of the Department of Labor, under the Fair Labor Standards Act, broad access to a corporation's documents and records.[116] In *United States v. Morton Salt Co.*, [117] the Court upheld a broad request by the Federal Trade Commission that the well-known company produce a complete set of prices and terms for its products. The request was allowed even if it "was caused by nothing more than official curiosity."[118] The post-New Deal composition of the Court may have accounted for this temporary denial of Bill of Rights protections to corporations.

Commentators criticize *Morton Salt* for its complete contradiction of *American Tobacco*.[119] Indeed, by 1950, the Court seemingly snatched away any fourth amendment rights conferred in *Hale* and extended in *American Tobacco*. Arguably, except for the property-oriented fifth amendment due process clause, corporations had no Bill of Rights protections in 1950.[120] And, at least according to the business press, corporations and their managers were not particularly concerned. The corporation's true Bill of Rights battle was yet to come.

(3) Modern Regulation

a. The Political Economy

In the modern political economy, the Bill of Rights assumed new exigency for corporations. After 1960 what may be called Modern Regulation and Modern Property came to define the political economy. Modern Regulation targets social goals such as environmentalism. It is intrusive, and involves regularized inspections conducted principally by federal agencies (for example, EPA and OSHA) overseeing a wide array of economic sectors. Modern Property includes not only government-created wealth in the form of government contracts, but also the

currency of post-industrial society -- knowledge and information. In response to these changes, corporations invoked the Bill of Rights to protect novel forms of property and to challenge modern regulatory structures.[121]

Although regulation's role in the history of the American political economy remains controversial, there is one area of increasing agreement among business and government historians: regulation changes substantially, in nature and kind, in the period after 1960.[122] This transformation has important implications for the corporation and the Bill of Rights.

Four characteristics distinguish Modern Regulation. First, it differs in nature. In the Progressive and New Deal eras, most regulation was economic. Modern Regulation, however, strives to attain social goals: environmental protection, consumerism, minority employment, women's rights, and health and safety.[123] The Clean Air Act of 1970,[124] the Consumer Product Safety Act of 1972,[125] and the Occupational Safety and Health Administration Act of 1970[126] exemplify this type of regulation.[127]

Second, Modern Regulation differs from earlier regulation in that it is conducted primarily on the federal level. Before 1960, whatever limited social regulatory programs existed were administered almost exclusively by state and local government.[128] Before 1965, only one federal regulatory agency whose principal responsibility was to protect consumers, employees, or the public from corporate activities was created: the Food and Drug Administration, founded in 1931. Between 1964 and 1977 ten federal agencies were created for this purpose.[129]

Third, Modern Regulation is more instrusive, systematic, and routinized than Progressive or New Deal regulation. As laws and agencies increased in number and scope, the government encroached on what were formerly private corporate decisions. Corporate departments were "shadowed" by their alter egos in the regulatory bureaucracy; a plethora of statutes and regulations created elaborate new systems of reporting, monitoring, and whistle-blowing.[130] Whereas traditional regulation utilized irregular subpoenas of corporate documents, Modern Regulation instituted regular inspection of corporate premises and more.

Fourth, Modern Regulation governs many industrial sectors, not just one industry, and is broadly opposed by a wide coalition of corporate groups. Whereas agencies engaged in Progressive era regulation, such as the Interstate Commerce Commission, ordinarily supervised only specific industries, the new federal regulatory agencies, such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission, regulate many economic sectors at once: retail, trade, communication, services, utilities, and railroads.[131] This broad multisectoral regulation makes it difficult for one sector or industry to capture an agency in a manner that was possible in the Progressive or New Deal eras. But opposition to Modern Regulation has become a unifying point for corporate interests opposed to reforms passed at the behest of labor, consumer, and public interest groups.[132] One manifestation of this is the aggressive assertion of Bill of Rights protections for corporations.

This new type of regulation reflected the growth of consumerism and of the public interest movement; as the power of these two movements increased, they influenced government

regulatory programs.[133] Undoubtedly, it also reflected some of the reform impulses of the 1960s, and the twin realizations of limits to growth and of the environmental consequences of such expansion.[134]

New forms of property, as well as novel modes of regulation, are characteristic of the modern political economy. Since the 1960s, courts and commentators have come to recognize that wealth created by government is increasingly important in contemporary society.[135] This "state created property" takes many forms: government jobs, government benefits, occupational licenses, franchises, contracts, subsidies, and the use of public resources. Corporations, perhaps even more than individuals, benefit from this largess.[136]

This government-created wealth is one component of Modern Property.[137] But the term is employed in a broader sense than simply government largess. [138] To take account of much sociological and political writing of the last twenty years, it is suggested that Modern Property includes the intangible currency of the Post-Industrial Society: knowledge and information.[139] Information in all its forms -- including its use to influence public elections and referenda -- is central to the modern political economy.[140] The defense of this Modern Property is an increasingly urgent corporate concern.

For courts and commentators in contemporary society, the rise of this Modern Property, defined here as government largess, circumscribed the individual's ability to exercise Bill of Rights protections. "When government -- national, state, or local -- hands out something of value, whether a relief check or a television license, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess," writes one commentator. "It obtains new rights to investigate, to regulate, and to punish."[141] The overwhelming concern is that the government's new intrusive powers -- derived, mostly, from new forms of property -- would intimidate the individual and impair her ability to exercise Bill of Rights protections. A welfare recipient, for example, fearing the loss of her subsistence, probably would not assert fourth amendment rights against a government official knocking at the door.[142]

No one, however, addressed the question of whether new forms of property put a similar pressure on corporate Bill of Rights protections as on the Bill of Rights as applied to individuals.[143] Modern Property does not impose such a burden for two reasons. First, Modern Property, as the term is used in this Article, includes possession of information and knowledge that is not contingent on government largess; defense of this property does not trigger a government counteraction. Second, corporations are better able to withstand the pressure of threats of withholding government largess than are individuals; common concerns about a tyranny of the majority are not present for the corporation.[144] If anything, the corporation aggressively uses the Bill of Rights to protect its Modern Property, and to stymie Modern Regulation, at the expense of individual rights.

The Modern Property and Modern Regulation classifications are not intended to be rigid and immutable. Rather, they indicate the direction in which property and regulation have headed over the course of the twentieth century. This direction has triggered a greater willingness and necessity on the part of corporations than earlier to assert Bill of Rights safeguards.

b. The Corporate Legal Response

Corporations reacted to Modern Regulation and Modern Property by invoking the Bill of Rights. This was not their only response. Indeed, opposition to Modern Regulation, expressed in the political and legislative arena, is now a unifying ideology of the corporate community.[145] But assertion of intangible Bill of Rights safeguards to protect Modern Property and to thwart Modern Regulation complements the ideological battle. Denied the protections of *Lochner* and substantive due process, corporate managers merely shifted the constitutional battle from the fourteenth amendment to the first, fourth, and fifth amendments. This has created a modern corporate substantive due process umbrella.

i. The Fourth Amendment

In the hands of the corporation, the fourth amendment has been an effective shield against the regulatory state. Not until 1977 did the Court consider the constitutional implications of routine health and safety inspections[146] -- the trademark of Modern Regulation. When it did, however, it insulated corporations from "surprise" inspections.[147]

The Supreme Court's first analysis of Modern Regulation did not involve a corporation, but rather set the stage for later consideration of corporate fourth amendment rights. In *See v. City of Seattle*[148] the Court held that the principal tool of Modern Regulation -- the regulatory inspection -- requires a warrant.[149] The Court analogized to the predominant investigative technique used under old regulation: administrative subpoena of corporate books and records.[150] In *See*, a Seattle fire inspector attempted to inspect a commercial warehouse, without a warrant or probable cause, as part of a routine canvass to obtain compliance with Seattle's fire code. Appellant was arrested and contended that the inspection violated his fourth amendment rights. The Court framed the question in terms of the rise of federal regulation of "business enterprises," corporate or otherwise. "As governmental regulation of business enterprise has mushroomed in recent years, the need for effective investigative techniques to achieve the aims of such regulation has been the subject of substantial comment and legislation," noted the Court. [151] "Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws . . . ."[152]

The Court deemed "untenable" the notion that a subpoena, which it dubbed a "constructive search," is subject to fourth amendment limitations that do not apply to actual inspections of commercial property.[153] The result: an administrative warrant is necessary to enter and inspect commercial premises. [154]

Similarly, in the late sixties and early seventies a liquor corporation [155] and a firearms company[156] raised fourth amendment challenges to warrantless government inspections of commercial premises. Both challenges failed, in part because the Court found that industries endowed with state licenses, such as the liquor industry,[157] waived their fourth amendment rights. It appeared that corporations reliant on government largess, in this case for licensing, might have the same difficulty asserting Bill of Rights protections as individuals.

But these defeats proved only temporary setbacks for industry.[158] In 1977 the Supreme Court ruled that the liquor and firearms industries are narrow exceptions to the general rule that

corporations are protected, under the fourth amendment, against warrantless regulatory searches. *Marshall v. Barlow's Inc.* [159] upheld a challenge to a provision of the Occupation Safety and Health Act (OSHA)[160] authorizing warrantless workplace inspections. At issue was whether an OSHA inspector needed a warrant to enter the premises of an Idaho electrical and plumbing corporation.[161]

Marshall captures the political dynamic of corporate opposition to Modern Regulation. OSHA is the quintessential enactment of Modern Regulation; it was passed for social purposes and authorized an intrusive federal system of routinized inspections. Those filing amici curiae briefs on behalf of the federal government included the AFL-CIO and the Sierra Club, advocates of Modern Regulation. Those submitting amici curiae briefs in support of the corporation revealed the uniformity of company opposition: the Mountain States Legal Foundation and the Pacific Legal Foundation (both are law firms representing corporate interests), the National Federation of Independent Business, the American Conservative Union, and the Chamber of Commerce of the United States.[162]

Marshall's far-reaching implications include rendering presumptively invalid many inspection provisions of federal statutes.[163] In dissent, Justice Stevens argued that the majority severely hampered the ability of government inspectors to conduct surprise inspections and to uncover workplace safety violations.[164] *Marshall* was more than simply a corporate triumph over Modern Regulation. It represented the protection of New Property -- information about workplace operations that the corporation sought to conceal from government -- and it demonstrated the importance of the intangible Bill of Rights in the modern political economy.

The business press registered this urgency. "The Supreme Court decision banning OSHA inspections without a search warrant is a great victory for privacy and freedom in this country," wrote the Personnel Director of Nikon corporation in a trade journal.[165] "In the long run, it may also be a blessing in disguise for OSHA if it results in diminishing the reputation OSHA established as being an antagonist to American business and emerges as its adjunct."[166] This recognition of *Marshall* as a triumph over Modern Regulation typified the corporate community's response,[167] and heralded an unprecedented recognition by the business press of the importance of the Bill of Rights.[168]

After *Marshall* corporations continued to challenge the tools of Modern Regulation. In *Donovan v. Dewey*,[169] a mineral company disputed, on fourth amendment grounds, the warrantless inspection provisions of the Federal Mine Safety and Health Act of 1977.[170] Although the Court rejected the challenge, it did not overrule *Marshall*, but suggested that Congress' power over interstate commerce justified warrantless searches only in certain narrow cases such as liquor or firearms.[171]

In 1986, in *Dow Chemical Corp. v. United States*,[172] corporations posed their most far-flung constitutional challenge to the Modern Regulation of Modern Property. Dow Chemical corporation argued that the fourth amendment should prohibit the Environmental Protection Agency from flying planes over Dow's manufacturing facilities to monitor compliance with the Clean Air Act.[173] Although the Court permitted the flights, it appeared to endorse Dow's expansive view of the Constitution. The Court opined that Dow plainly had a reasonable,

legitimate, and objective expectation of privacy,[174] but found that Dow's facility was similar to "open fields" that are subject to public view and observation.[175] The taking of photographs, therefore, did not constitute a search.[176] Undoubtedly, the narrow grounds upon which the Court's decision rests will encourage further corporate challenges to the more sophisticated modes of Modern Regulation in defense of information, the most intangible form of Modern Property.

ii. The First Amendment

Corporations invoked the first as well as the fourth amendment to challenge Modern Regulation and safeguard Modern Property. In the late 1970s the Supreme Court conferred constitutional protections on two types of corporate speech: commercial and political. The importance of commercial speech in the modern political economy is evinced by corporations' legal actions and by the business press' defense of this form of communication. Political speech, as a means of influencing legislative economic decisions, and thwarting novel forms of regulation, also has assumed increased urgency for corporations.

The protection of "commercial speech" is a comparatively new constitutional phenomenon. Until the 1970s advertising was viewed as commercial speech, unprotected by the first amendment.[177] But in 1976, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[178] the Court held unconstitutional a Virginia statute prohibiting price advertising of prescription drugs. A consumer group brought suit, contending that it had a right to receive price information. The Court found that commercial speech is not so far removed from the "exposition of ideas" that it should be denied first amendment protection, though of a lesser degree than "core" political speech. Because the consumer's interest in this information was held to outweigh the government's interest in protecting the pharmacists' expertise, the statute was struck down.

Soon after, corporations pressed for protection of commercial speech. They did so both to thwart government regulation and to defend a form of Modern Property: advertising. In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[179] the Court overturned a state regulation, adopted during the mid-1970s energy crises, banning all utility corporations from promoting the use of electricity in advertisements. The Court applied a balancing test -- used for lesser-protected commercial speech -- and found that because the overbroad ban covered advertising that promoted the purchase of more energy efficient appliances, it was broader than necessary to serve the state interest in energy conservation.[180]

The *Central Hudson* Court acknowledged that communication, in the modern political economy, is a form of property. Commercial speech was defined as "expression related solely to the economic interests of the speaker and its audience."[181] In dissent, Justice Rehnquist protested that striking down state economic regulation was nothing more than a contemporary version of *Lochner*.[182] Indeed, *Central Hudson* was a *Lochner*-like invalidation of Modern Regulation: social regulation -- albeit conducted by state, not federal, government -- designed to achieve a national goal of energy independence.[183]

If Rehnquist criticized *Central Hudson* as a modern version of substantive due process, the business community welcomed protection of commercial speech as a guarantor of property rights. The inviolability of this form of speech, like the opposition to government regulation, has

become a unifying ideology of the corporate community. "We maintain that voices in a democratic society -- individual and corporate alike -- shouldn't be stifled or filtered through Big Nanny," opined a corporation-sponsored editorial defending unfettered commercial speech. "Whether the topic is cigarettes, or energy policy, or the latest in designer jeans, the first amendment shield must never be lowered, or selectively applied."[184]

Undoubtedly commercial speech rights are more important to certain corporations and sectors of the economy: those industries -- such as consumer goods and retailing -- that count advertising and marketing as part of their product. But corporations from diverse sectors publicly advocate commercial free speech rights and view them as property rights.[185]

The corporate legal literature now promotes commercial speech as a component of the bottom line, to be carefully monitored with an eye towards encroaching government regulation. Corporate managers are admonished to "run advertisements that are expected to raise profits (but should avoid false and misleading advertising because the FTC will fine them)."[186] The exercise of first amendment rights, in a commercial speech setting, becomes a property right, subject to cost-benefit calculations.

The importance of commercial speech rights to corporations is reflected in their aggressive assertion of those rights, often with adverse consequences for individuals. In 1987, Americans witnessed a fierce, and public, debate over corporate commercial speech rights when a bill was introduced in Congress to ban all forms of cigarette advertising.[187] Tobacco companies' subsequent efforts to oppose this legislation provoked a minor political furor. In late 1987, Phillip Morris Companies, Inc. mailed a press kit to a select group of newspaper and television editors. In it was a glossy black brochure. In deep red, on the cover, was a reproduction of the Order of Lenin, the highest honor conferred by the Soviet Union, and the words: "One world-famous newspaper without cigarette advertising."[188] Inside was a copy of Pravda. Kansas Representative Mike Synar, a sponsor of the antismoking legislation, later accused Philip Morris of "using the basest, grossest form of redbaiting to protect their multibillion-dollar investment, which costs young people their health and older Americans their lives."[189]

That a tobacco corporation would engage in such aggressive tactics to support its commercial free speech rights is indicative of the importance of these rights have in the modern political economy. But the invocation of corporate commercial free speech rights presents two problems for individuals. First, as the Philip Morris example illustrates, the assertion of corporate rights can sometimes involve what Representative Synar calls "redbaiting," or a certain measure of intimidation directed at individuals who favor restricting corporate commercial speech. Second, the assertion of corporate commercial speech rights deprives the individual of a certain kind of freedom -- the freedom to be protected from tobacco and tobacco advertising.[190]

In this way, the corporation's invocation of the Bill of Rights to protect Modern Property (the ability to advertise) and to thwart Modern Regulation (federal measures to protect health and the environment) impinges on individual liberties.

Corporations wield first amendment protections of political, as well as commercial speech, to derail government regulation. The Court initially conferred first amendment political speech safeguards on corporations in 1978 in *First National Bank of Boston v. Bellotti*.[191] In that case, a

consortium of Boston corporations[192] raised a first amendment challenge to a Massachusetts statute prohibiting corporate expenditures on a graduated income tax referendum.[193] The Massachusetts Legislature and the Massachusetts Supreme Judicial Court concluded that the tax question did not materially affect the property, business, or assets of the corporations.[194] Nonetheless, the Supreme Court struck down the statute, holding that corporate political speech is protected.[195]

Bellotti's corporate plaintiffs maintained that a graduated personal income tax would have a direct economic effect on them (by promoting a tax climate unfavorable to business or discouraging managers from moving to Massachusetts). [196] The corporate community applauded the "landmark"[197] decision as much for its economic as for its political content. "[P]rudence dictates a careful eye on gross revenues and net earnings," wrote a leading corporate spokesman, analyzing Bellotti for managers.

In addition, common sense dictates some correlation between money spent and the importance of the particular issue to the company's immediate business goals. It goes without saying that management is likely to spend far more to defeat legislation that would hinder its industry than it would to advocate a law with relatively minor business repercussions.[198]

In the modern political economy, the ability to spend money to influence referenda is a form of Modern Property. As the advice for corporate managers suggests, it is frequently in the corporation's interest to spend money for political purposes. The right to spend this money is therefore an important property right to be guarded.

Bellotti was as much a frustration of Modern Regulation as a defense of Modern Property. The regulation was modern in the sense that state regulation of corporate spending in referenda is a comparatively new phenomenon[199] compared to prohibitions against corporate expenditures on election of candidates, which date back to the Progressive era.[200]

The degree to which intangible, highly abstract first amendment rights become central in corporate economic calculations became apparent in 1986. In *Pacific Gas & Electric v. Public Utilities Commission*,[201] a public utility monopoly disputed a state regulation allowing a ratepayer advocacy group to enclose inserts in the utility's billing envelopes; the regulation's stated purpose was to allow for the dissemination of competing viewpoints and thus to lower utility rates. The Court ruled that the regulation violated the first amendment, as incorporated through the fourteenth, because it infringed the corporation's right not to associate with speech it opposed.[202]

This freedom of association right is a form of Modern Property. In his concurring opinion, Justice Marshall indicated that a corporation has a property interest in the extra space in its billing envelope.[203] Indeed, the Commission shared this view, suggesting that this property belonged to ratepayers.[204] The development of extra space in an envelope as an important property right is symbolic of the evolution of property in post-industrial society;[205] the corporate assertion of first amendment rights to protect this Modern Property suggests the stakes involved.

Pacific Gas & Electric represented a victory for corporations over a novel form of regulation. The ratepayer advocacy group seeking access to the utility billing envelopes was an elected citizens group whose mission was to challenge electric rates on behalf of consumers. Established in several states, these groups attempted to create a decentralized, participatory form of regulation operating independently of government and deriving monetary support directly from the citizenry. In theory, this form of participatory or populist regulation should be less susceptible to capture than a state or federal regulatory apparatus. But *Pacific Gas & Electric* eliminated the groups' funding and communications capabilities, perhaps permanently ending this regulatory experiment.

Corporations, encouraged by the legal community, plan further first amendment assaults on a multiplicity of government regulations. At a 1987 judicial conference in Hershey, Pennsylvania, corporate lawyers counseled corporations to use the first amendment to invalidate a range of federal regulations, including Securities and Exchange Commission disclosure requirements governing corporate takeovers and rules affecting stock offerings.[206]

iii. The Fifth Amendment

The use of the fifth amendment is the most striking example of how corporations invoke Bill of Rights protections to protect Modern Property in the form of government largess. After *Hale*,[207] the Court did not consider whether corporations enjoyed fifth amendment protections until the 1960s. [208] At that time, it reviewed the applicability of the double jeopardy clause to a corporation.[209]

In *Fong Foo*, a corporation and two of its employees were tried on charges of concealing material facts in connection with a million dollar contract to furnish radiosondes (weather gathering devices) to the government. The district court judge directed a verdict of acquittal, citing improper conduct by the prosecuting attorney. The Supreme Court held that the double jeopardy clause barred retrial of the defendants, including the corporation.[210] The company successfully invoked its right to safeguard its government largess, a government contract.

In 1980, a federal court ruled that corporations have liberty interests protected by the fifth amendment due process clause. In *Old Dominion Dairy Products, Inc. v. Secretary of Defense*,[211] a corporation challenged the Defense Department's determination that it was barred from supplying dairy products to the Armed Services because an audit revealed that *Old Dominion* was an "irresponsible" contractor lacking "business integrity."[212] The D.C. Court of Appeals ruled that the Department violated the corporation's liberty interest in its reputation.[213] The court relied on earlier cases that held corporations have fourteenth and first amendment liberty rights.[214]

Old Dominion is further indication that the Bill of Rights can be used by corporations to protect Modern Property. The award of military contracts is largess -- considered a form of Modern Property because it is created by the federal government.[215]

The willingness of corporations to assert first, fourth, and fifth amendment claims derives from the increased importance of the Bill of Rights in the modern political economy. Because much of Modern Regulation is conducted by federal government, the Bill of Rights is implicated

rather than the fourteenth amendment, as in the era of substantive due process. Modern federal regulation -- conducted for environmental, social, or consumer purposes -- often involves intrusive inspections that trigger fourth amendment concerns.

Modern Property often takes the form of government largess, and corporations invoke the fifth amendment to protect it. The ability to advertise commercially, or to participate in political referenda that affect the corporate environment, are increasingly important forms of Modern Property; corporations assert the first amendment to protect it.

Taken together, these Bill of Rights assertions represent a bold new challenge to government regulation. Denied the power of the fourteenth amendment when the era of substantive due process ended, corporations have taken refuge in the Bill of Rights.

In the process, substantive due process may have been revived. When the Supreme Court pronounces on the nature of the corporation (for constitutional purposes) it imposes its own economic views, as it did during the substantive due process era. The question: What is the nature of the corporation? is similar to the economic questions that the Supreme Court was criticized for asking in the *Lochner* era. In fact, theorizing about the nature of the corporation ends up as an inquiry into the propriety of regulation.

To determine the extent to which substantive due process has been revived for the corporation, one must consider the history of corporate theory and the Bill of Rights.

II. The Demise of Corporate Theory

In the era of Modern Regulation, the rise of the application of the Bill of Rights to corporations has coincided with the demise of corporate theory. Before 1960, the Court only considered corporations' constitutional guarantees within the strictures of corporate personhood theory: a corporation was either an "artificial" entity subject to expansive state regulation or a "natural" entity entitled to constitutional protections against the state. After 1960, the Court abandoned theorizing about corporate personhood.

In some respects, this drastic doctrinal reversal is extraordinary, especially considering the frequency with which corporate constitutional rights are now asserted. Without some theory of corporate personhood, it is unclear how corporations can claim the succor of Bill of Rights amendments written only for "persons."[216]

In other respects, the Court's modern, pragmatic, antitheoretical approach is the prosaic legitimation of the corporation's constitutional status. This pragmatic approach is a less controversial guarantor of corporate rights than a theoretical methodology that raises fundamental questions about the nature of a corporation and its role in society. The Court retreated to pragmatism in response to criticisms of corporate personhood theory -- by Legal Realists and economists -- and out of a concern for its own legitimacy to decide economic questions (including the ultimate question: What is a corporation?) in the post- *Lochner* era.

A. The Progressive and New Deal Periods: Personhood Theory

The Supreme Court only occasionally considered corporate protections under the Bill of Rights prior to 1960. When it did, it invoked a theory of corporate personhood. Fifth amendment privileges against self-incrimination were denied the corporation, because artificial entities subject to state regulation (defined to include federal superintendence) cannot invoke constitutional rights. Although the Court initially employed the natural entity theory to confer fourth amendment privileges on corporations, it later used the artificial entity theory to narrow those rights. This pattern was repeated in the first amendment area.

(1) The Fifth Amendment: Artificial Entities

Corporations were first "personalized" in *Santa Clara*, and by 1910 the Court accepted the natural entity theory for fourteenth amendment purposes.[217] While in *Noble* the Court never explained its reasons for conferring fifth amendment due process property rights on corporations, the logic of the natural entity theory appeared to govern.

Intangible Bill of Rights protections were another matter. Their applicability to corporations was first considered in 1906 in *Hale*,[218] which marked the beginning of the Court's schizophrenic view of corporate personality.[219] The Court utilized the artificial entity theory to deny corporations fifth amendment privileges against self-incrimination, [220] while embracing the natural entity theory to grant corporations fourth amendment safeguards.[221]

The reasons for *Hale*'s two-faced view of the corporation remain mysterious. The opinion may have reflected the growing debate in the legal literature over corporate personality. It may be that although the Court viewed the fourth amendment protection of papers to be akin to the

protection of property, the very personal, intangible privilege against self-incrimination is more difficult to grant a corporate entity. One commentator suggests the opinion represents a savvy accommodation to old style regulation because if both fourth and fifth amendment protections were granted corporations, prosecution under the Sherman Act would be impossible.[222]

Whatever the reasons, *Hale* marked the beginning of a period in which the Court viewed corporate Bill of Rights guarantees exclusively in terms of personhood theory; *Morton Salt*,[223] decided in 1950, marks the end of that period.

Hale involved a criminal antitrust action, brought under the Sherman Act, against two tobacco corporations: the American Tobacco Company and the MacAndrews & Forbes Company. A subpoena duces tecum was issued to *Hale*, the secretary and treasurer of MacAndrews & Forbes, requesting that he appear and produce a battery of letters and contracts executed between his corporation and several other tobacco firms.[224] *Hale* refused to comply, invoking the fifth amendment's privilege against self-incrimination.[225]

Rejecting this argument, the Court held that the words "no person" in the privileges portion of the fifth amendment do not suggest that corporations should be included within the amendment's protections.[226] The majority then rendered its most expansive rendition of the artificial entity theory,[227] drawing a sharp distinction between the individual and the corporation.[228] The individual exists antecedent to the state and therefore owes no duty to the state and cannot be deprived of any constitutional rights. The corporation, however, is a mere "creature of the State." Its powers are limited by law, and the legislature reserves a right to investigate the corporation.[229] An individual may refuse to answer incriminating questions, but a corporation may not if it is charged with an abuse of its state-conferred privileges.[230]

Hale, for the first time, modified the artificial entity theory to include the federal government. Since the defendant tobacco corporation was incorporated in New Jersey, the artificial entity theory, strictly applied, would only permit a state government to exercise its visitorial powers over the corporation. The *Hale* Court ruled, however, that because the defendant corporation is subordinate to Congressional power over interstate commerce, it is subject to dual sovereignty, and the federal government has the same right to inspect corporate documents as the State of New Jersey.[231]

Since *Hale*, the privilege against self-incrimination remains the only Bill of Rights safeguard unavailable to corporations; its reasoning survives as a relic of a bygone era of corporate theory.[232] Paradoxically, in modern times, corporations receive other fifth amendment protections: due process liberty rights and double jeopardy safeguards.

(2) The Fourth Amendment: Artificial v. Natural

Although *Hale* settled the personhood debate for the fifth amendment privilege against self-incrimination, it merely began it for the fourth amendment. In *Hale*, the Court raised the question, on its own, whether a corporation is entitled to fourth amendment protections. The Court held that corporations are entitled to such protection.

[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the fourth amendment, against unreasonable searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such a body.[233]

By suggesting that a corporation is a distinct legal entity, the Court for the first time explicitly adopted the "natural entity" theory of the corporation. There was no doubt about the utilitarian reasons for doing so: "corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises."[234] The Court went on to hold that an overbroad subpoena for corporate documents constitutes an "unreasonable" search.[235]

In a separate concurrence in *Hale*, Justice Harlan advanced the artificial entity theory to suggest that corporations should not be accorded fourth amendment protections.

In my opinion a corporation -- "an artificial being, invisible, intangible, and existing only in contemplation of law" -- cannot claim the immunity given by the fourth amendment, for it is not a part of the "People," within the meaning of that amendment. Nor is it embraced by the word "persons" in the amendment. [236]

After the New Deal, the artificial entity theory worked its way back into fourth amendment jurisprudence as a way of narrowly circumscribing the corporation's fourth amendment rights.[237] This was first done in *Oklahoma Press Publishing Co. v. Walling*,[238] in which the Court permitted the Department of Labor broad access to a newspaper corporations documents.

Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce.[239]

Furthermore, the Court found that corporations are not entitled to all of the constitutional protections individuals have "in these and related matters." [240]

In *United States v. Morton Salt Co.*,[241] the Court relied on a federal version of the artificial entity theory to permit the FTC broad authority to inspect a corporation's price lists. "[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy . . . . They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities," held the Court. "The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation."[242]

The Court championed, and then abandoned, corporate theory. From *Hale* to *Morton Salt*, the Court framed the question of whether a search for corporate documents is reasonable in terms of corporate personality: to the extent the corporation was an artificial entity, subservient to the state, the federal government could make broad requests for the production of corporate

documents. [243] The Court moved from the natural entity theory in *Hale*, which placed limitations on the federal governments' investigatory powers, to a federal version of the artificial entity theory in *Morton Salt* that allowed the government seemingly unlimited powers to inspect corporate documents for no other reason than "official curiosity." This shift may have reflected the increased legitimacy of federal regulation in the New Deal era. Whatever the reasons, during this period the Court always decided the question of a corporation's constitutional guarantees based on a corporate personhood theory.

(3) The First Amendment: Artificial v. Natural

Although corporations first received first amendment safeguards in 1978, [244] by that time the Court had considered the first amendment protections of unincorporated associations, newspaper corporations, labor unions, and other organizations. Although these cases have little precedential value for profit-making corporations, corporate theory worked its way into these decisions before and immediately after the New Deal.

First amendment rights were initially extended to a newspaper corporation in 1936. In *Grosjean v. American Press Co.*,[245] the Court ruled that a newspaper corporation has a first amendment liberty right to freedom of speech that would be applied to the states through the due process clause of the fourteenth amendment. In *Grosjean*, incorporated Louisiana publishers sued to enjoin enforcement of a state tax imposed on businesses selling advertising space in their publications. The corporations claimed that the tax infringed upon their right to freedom of the press under the first amendment.

The Court relied on precedents holding that corporations are "persons" for fourteenth amendment purposes, under the natural entity theory, and suggested that "the word 'liberty' . . . embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well."[246] On this reasoning a corporation should be free to sell advertisements without interference by the state. The holding may have little precedential value for private corporations, however, because the press -- which is specifically mentioned in the first amendment -- has a greater claim to constitutional protections than do other corporations.

Grosjean, however, ignored a 1906 opinion employing the artificial entity theory to specifically deny corporations fourteenth amendment liberty rights. In *Northwestern National Life Insurance Co. v. Riggs*,[247] an estate sued an insurance corporation that refused to honor certain policies due to alleged misrepresentation. A Missouri statute prohibited the use of the misrepresentation defense. The corporation charged that the statute deprived it of liberty and property rights without due process. Although the Court conceded that liberty included the right to pursue lawful claims and enter contracts, it ruled that corporations cannot enjoy this liberty right because "[t]he liberty referred to in . . . [the fourteenth] amendment is the liberty of natural, not artificial persons."[248] The tension between the artificial entity theory employed in *Riggs* and the natural entity theory of *Grosjean* was similar to fourth amendment tensions over the corporate soul.[249]

During this period the Court used the same mode of analysis to decide first and fourth amendment cases: to the extent a corporation was considered an artificial entity, it could be

denied constitutional protections; to the extent it was considered a natural entity, it was granted safeguards.

Three years after *Grosjean*, the Court adopted the *Riggs* artificial entity analysis to deny an incorporated labor union first amendment rights. In *Hague v. CIO*,[250] Justice Stone noted in his concurring opinion that "[a corporation] cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons."[251] *Hague* invalidated a Jersey City ordinance prohibiting individuals, labor associations, and the American Civil Liberties Union (ACLU) from distributing literature. Only the individual plaintiffs, not the labor union or the ACLU, could invoke first amendment protections.

Just as *Morton Salt* largely deprived corporations of fourth amendment privacy rights in 1950, so *Hague* deprived at least one form of corporate entity free speech rights in 1939. And as *Morton Salt* had marked the end of Supreme Court theorizing about corporate personality in the fourth amendment context, so *Hague* was the final attempt to formulate a theory in the first amendment context. [252]

B. The Modern Period: The Demise of Corporate Theory

As the Bill of Rights became important to the corporation in the period of Modern Regulation and Modern Property, the Court jettisoned theories of corporate personhood. Frequently the Court looked to the history of the amendment in question to justify corporate rights, as in the case of the fourth amendment; occasionally the Court examined the underlying purposes of an amendment, as in its handling of the first amendment; and sometimes the Court conferred Bill of Rights protections on corporations with no explanation, as with the fifth, sixth, and seventh amendments.

(1) The Fourth Amendment: Commercial Property

In the period of Modern Regulation and Modern Property the Court discarded theories of corporate personality for a mode of analysis concerned with the historical purposes of the fourth amendment. The old categories of artificial entity versus natural entity theories of the corporation were not applied in the context of intangible rights exercised against the modern regulatory state. Instead the Court focused on privacy interests in "commercial property": theories of property, implied consent, and the history of the fourth amendment " warrant" clause came into play.

The *See v. City of Seattle*[253] decision, which held unconstitutional the Seattle fire inspection system, inaugurated the move away from personhood theory.[254] In that case, instead, the Court focused on the fourth amendment protections to which "commercial premises" and "business enterprises" -- corporate or otherwise -- are entitled. Although *See* relied on the line of cases from *Hale* to *Morton Salt*,[255] the Court ignored the competing theories of the corporation developed therein. Rather, it analogized official entries upon commercial property to administrative subpoenas and held that it is untenable for subpoenas to be subject to fourth amendment limitations that are inapplicable to actual searches and inspections of "commercial premises." [256]

In *Colonnade Catering Corp. v. United States*,[257] the Court created a narrow exception to *See*'s warrant requirement based on the history of the fourth amendment and Congress' historic power over the liquor industry.[258] The Court never broached the question of corporate personality, and confined its analysis to what extent "private commercial property" has a right to privacy. [259] In *United States v. Biswell*,[260] the Court held that the firearms industry was exempt from a warrant requirement on a theory of implied consent. The Court reasoned that anyone entering that kind of business "does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."[261]

In *Marshall v. Barlow*,[262] the Court's most consequential fourth amendment decision, it struck down OSHA surprise inspection systems, using yet another mode of analysis. No longer did it employ a theory of implied consent, or pervasive regulation; instead, it employed the warrant clause of the fourth amendment,[263] suggesting that the clause applied to "commercial buildings" as well as private homes.[264] The history of this clause suggests that it protected merchants in the colonies immediately preceding the Revolution. In *Marshall*, the Court rejected the Secretary of Labor's artificial entity argument that the federal government can regulate any corporation involved in interstate commerce without regard to fourth amendment protections.[265] The Court easily could have adopted the artificial entity analysis of *Morton Salt* to circumscribe narrowly corporate rights, but chose not to do so.

The Court subsequently created narrow exceptions[266] to the *See* and *Marshall* warrant requirements using arguments about privacy rights that attach to commercial property;[267] theories of corporate personality from the *Morton Salt* and Hale era never re-emerged, even in dissent.

The Court's extraordinary shift in analytic paradigms may partly reflect the novel problems presented by Modern Regulation. The privacy issues arising from this form of government supervision were not raised by earlier requests for corporate "papers" that could be considered purely a request for property.

Another possible reason for the Court's shift in analytic paradigms may be that the Court's concept of the fourth amendment had changed. In the 1960s, the fourth amendment was construed to protect privacy rights, not property rights. [268] The theory of the corporation, however, could not readily accommodate itself to this analysis. Instead, the Court developed concepts of implied consent and commercial property as imperfect mechanisms for granting corporations privacy rights against regulatory searches.

But the rejection of corporate theory in the context of other Bill of Rights amendments suggests that deeper forces were at work than simply an accommodation to fourth amendment privacy theory.

(2) The First Amendment: Serving the Free Market

While the Court abandoned corporate theory for a collection of fourth amendment paradigms, in the first amendment context it supplanted personhood theory with a single notion: the free market of ideas. In both the political speech and the commercial speech context the

question became not whether the party asserting the right (a corporation) was entitled to free speech protections, but whether assertion of the right furthered free and open debate.

In *Bellotti,*[269] the Court wasted no time disapproving corporate theory. Relying in part on *Riggs* and *Hague,* the Massachusetts Supreme Court had employed the artificial entity theory to hold that individuals enjoy broader first amendment protections than corporations, which can claim only fourteenth amendment property protections.[270] The majority of the Supreme Court dismissed this reasoning as "an artificial mode of analysis"[271] and radically changed the terms of the debate:

> The Court below framed the principal question in this case as whether and to what extent corporations have first amendment rights. We believe that the Court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The first amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" first amendment rights, and if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the first amendment was meant to protect. We hold that it does . . . .[272]

The Court applied the same logic in according corporations their most expansive first amendment guarantees: the right not to speak or be associated with speech of others. *Pacific Gas & Electric*[273] overturned a state regulation allowing a ratepayer advocacy group to enclose inserts in a public utility monopoly billing envelope. The plurality's reasoning followed *Bellotti,* noting that corporations are no less able than other speakers to contribute to the "discussion, debate, and dissemination of ideas that the first amendment seeks to foster."[274] For the state to force a corporation to carry a particular message would alter what listeners hear, in effect distorting the free market of ideas.[275]

The free market concept that originated in the political speech arena also governs commercial speech decisions. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[276] for the first time extended commercial speech protections to corporations by holding that a state regulation banning all promotional advertising by electric utilities violated the first amendment. Relying on *Bellotti*, the majority found that the paramount right of the consumer to hear overshadowed any question about the right of the speaker to speak.[277] In so pronouncing, the Court abandoned corporate theory in the commercial speech context as it had in the political speech context.

The Court's forceful rejection of corporate theory in the modern era is matched by its equally ardent assertion that corporations' constitutional guarantees depend on the nature and purpose of the particular constitutional provision.[278] If the purpose of the first amendment is to promote a free market of ideas, all other considerations are subordinate.[279] Although this view legitimates the invocation of corporate Bill of Rights protections, it begs the question of how corporations can assert any rights to begin with.

(3) The Fifth Amendment: In Search of a Theory

If the corporation's constitutional rights depend on the underlying purpose of an amendment, the Court has yet to explain how the goals of the fifth amendment are served by application to

corporations. In the modern era the Court extended double jeopardy protections to corporations without a trace of an explanation. Lower courts have bestowed fifth amendment guarantees without any reasoning.[280]

In *Fong Foo v. United States*,[281] the Supreme Court held, without explanation, that the double jeopardy clause barred retrial of the defendants, including the corporation, on charges of concealing material facts from the government.[282] Similarly, in *United States v. Martin Linen Supply Co.*, [283] the Court held that the fifth amendment bars retrial of a textile corporation acquitted, under the federal rules of criminal procedure, of violating an antitrust consent decree. While citing *Fong Foo*, the Court did not indicate why corporations, in particular, can avail themselves of fifth amendment protections. Instead, the case was decided by taking "a closer look at the policies underlying the [double jeopardy] Clause."[284] Though the clause's purpose is to mitigate individual suffering, the Court had no problem applying it to a corporate defendant. The clause bars repeated attempts to convict the accused, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[285]

Although the ascription of intensely human feelings -- guilt, embarrassment, anxiety, and insecurity -- seems forced when applied to the corporation, the holding stands. The failure of the Court to broach issues of corporate personality when analyzing the double jeopardy clause in the 1970s, [286] contrasts with its theorizing about the self-incrimination clause at the turn of the century.[287]

(4) Corporate Theory: Critical of Corporate Rights

But corporate theory has not completely died as a constitutional mode of analysis. Abandoned by the Court's majority,[288] corporate theory survives in powerful dissents by Justice Rehnquist and in a recent lower court opinion. The reemergence of the artificial entity theory serves as a haunting critique of the Court's disaggregated approach to corporate rights.

Corporate theory made its modern debut in Justice Rehnquist's *Bellotti* dissent. Carrying the banner of the artificial entity theory, Rehnquist argued that *Grosjean* and NAACP, relied on by the majority, were limited exceptions to the *Riggs*[289] artificial entity theory. Rehnquist characterized the corporation as nothing more than an artificial creature of the state, guaranteed property rights implicitly by its charter. The political activities of corporations, however, are not so protected, and in fact pose great dangers. Therefore, the corporation has no liberty right to engage in political activity.[290] Rehnquist also dissented from the majority's opinion in *Central Hudson* that corporations enjoy commercial speech protections.[291] In his dissent he noted that corporations -- especially utility monopolies -- are chartered by the state, and subject to enhanced supervision.[292]

At least one district court has chosen to recognize corporate theory in the modern period. In *Michigan State Chamber of Commerce v. Austin*,[293] a district court rejected a chamber of commerce first amendment challenge to a state criminal statute proscribing corporate spending on political candidates. Relying, in part, on *Morton Salt* and the artificial entity theory, the court held that corporations enjoy lesser first amendment protections than individuals.[294] The court

argued that "favors from government often carry with them an enhanced measure of regulation."[295]

The Michigan legislature has granted corporations the advantages of perpetual life, limited liability, and wide-ranging powers to encourage economic expansion and prosperity [and] such advantages allow corporations to amass great aggregations of capital and influence. In the economic sphere such power is proper and often highly beneficial to the general welfare of our society. In the political sphere, however, such power coupled with the faceless nature of corporations may very well create an atmosphere of distrust or the appearance of corruption in the electoral process.[296]

The district court's invocation of corporate theory and fourth amendment cases in the first amendment context is instructive. First, it indicates that cases valid for one amendment are meaningful precedents for other amendments. Second, it suggests the necessity of creating a uniform theory of the corporation for all the Bill of Rights amendments, as distinct from the current disaggregated approach.[297] To do this requires an understanding of the demise of corporate theory.

C. From Theory to Pragmatism

Why has the Court abandoned corporate theory in the period of Modern Regulation, precisely when the Bill of Rights became so important to the corporation? Important challenges to traditional corporate theory, posed by Legal Realists and economists, undoubtedly influenced the Court. Simultaneously, the invocation by corporations of more intangible rights -- of association, privacy, and speech -- in response to Modern Regulation, and in defense of Modern Property, severely strained the argument that corporations are "persons." Moreover, the need to legitimize the judicial creation of new constitutional persons underlies the Court's pragmatic, antitheoretical approach.

(1) The Realist and Institutionalist Legacy

The powerful, corrosive critiques of the Legal Realists expedited the demise of corporate theory. As part of their attack on "conceptualism" and abstract legal reasoning,[298] the Realists forcefully challenged the validity of corporate theory. John Dewey powerfully undermined corporate theory in a 1926 Yale Law Journal article concluding that "each theory" of group personality "has been used to serve . . . opposing ends."[299] The Realists's critiques wound down the voluminous, pointed intellectual debate over corporate personality that arose on the continent and in America at the turn of the century.[300]

But the Realists' forceful attack on corporate theory as an infinitely manipulable doctrine cannot explain fully its demise. After all, the Supreme Court relied on corporate theory at least until the *Morton Salt* decision in 1950, long after Dewey's critique. Moreover, the Court's very use of corporate personhood theory to decide Bill of Rights cases, as in *Hale* and *Morton Salt*, belies Dewey's claims: there is a perfect correlation between the invocation of the artificial entity theory and the denial of corporate rights. Similarly, there is a perfect correlation between the invocation of the natural entity theory, as in *Hale* and *Grosjean*, and the conferral of corporate

rights. In the particular context of the corporation's Bill of Rights, the choice of a corporate theory had important consequences.

Economists, as well as lawyers, challenged theories of corporate personality in the New Deal era. In the 1930s a group of thinkers -- called Institutionalists -- began to conceive of corporations as social institutions rather than as a unified group of shareholders. Led by Adolph Berle, Gardiner Means, and Rexford Tugwell, the Institutionalists advanced the idea of corporations as competing interests rather than as artificial creatures or bodies endowed with a collective will.[301] The institutionalist thesis that under shareholder capitalism the separation of ownership and control places the interests of a managerial class above that of shareholders or workers, undoubtedly subverted corporate theory. The concept of a power struggle within a corporate body undermines the notion of a collective will implicit in the natural entity theory while raising the question of for whom, and for what interests, a corporation is chartered.

(2) Current Crises in Corporate Theory

Recent work in economics and organizational studies also subverts traditional corporate theory. This work reflects profound changes in the internal structure of the firm and in the American and world economies.

In the late nineteenth and early twentieth centuries few challenged the corporation as the essential engine of economic growth; the corporation was the organic building block of free market capitalism. Not so today. A changing world economy and the rise of the modern regulatory state provoked a profound debate about the nature of the corporation and its role in society. After a period of quiescence -- from roughly the end of World War II to the 1960s -- the central institution of contemporary society was challenged in multidimensional ways.

As late as 1959 the corporate form stood unquestioned. "In reviewing the literature about the current development of [the large, publicly-held] corporations, and about possible programs for their reform, one is struck by the atmosphere of relative peace," wrote political scientist Eugene Rostow. "There seems to be no general conviction abroad that reform is needed. The vehement feelings of the early thirties, expressing a sense of betrayal and frustration at a depression blamed on twelve years of business leadership, are almost entirely absent."[302] In the years of post-war prosperity, led by the export of American managerial expertise, the corporation, like the concept of free trade, enjoyed renewed legitimacy.[303]

In the 1960s and 1970s the rise of the environmental, consumer, and public interest movements challenged unfettered growth and questioned accepted notions of the corporate form. A "social responsibility" school of thought argued that a corporation serves many constituencies: workers, consumers, and community members.[304]

The takeover economy of the 1980s put further pressure on corporate theory. Corporate managers, responding to merger threats, appeal to states to pass antitakeover statutes. In so doing, ironically, they make a social responsibility-like argument that corporations are comprised of stakeholders: workers, consumers, and family members.[305]

But America has become an economy of triadic elites: traditional elites (managers) are joined by takeover elites (investment bankers, lawyers, and raiders) and shareholder elites (pension fund managers). Each has a different view of the corporation. The traditional manager, to justify state protection, suggests the corporation serves stakeholders; the pension fund manager argues that companies serve shareholders only, but is sometimes willing to take a long-term view of shareholder interests; takeover elites suggest the corporation should only serve the short-term interests of shareholders, even if this means breaking up the corporation.

A changing world economy -- in which the American firm is no longer predominant -- also threatens corporate theory. The very ability of American corporations to prevail against international competition has provoked calls for protectionism, industrial policy, and suggestions that the corporation serve some national good.[306] Within this new economy, corporate theorists believe the corporation is already undergoing a radical transformation.[307] Other societies are also reconsidering the goals and purposes of the corporate form. [308]

Economic changes are reflected in the organizational and economic literature of the firm. Building on the work of Berle and Means, modern organizational management theory regards the corporation as a coalition of competing interests and claims, all bargaining with one another.[309] The structure of this organization then becomes depersonalized, in the sense that it has no clear authority and does not act as one individual.[310]

The modern study of institutions resonates in economics. Contemporary economists challenge the traditional notion of a corporation as simply a profit maximizing enterprise. The corporation, rather, is torn by contradictory motivations and interests, including the self-serving programs of corporate officers. Instead of pursuing the optimal, textbook goal, of increasing share value, the modern firm often sets different goals, including increased sales volumes, management returns, market share, stability, or growth.[311]

An irony of the modern political economy is that the notions of material prosperity and the free market remain unchallenged while the central institution of that prosperity is undergoing a crises of legitimacy.[312] Traditional notions of corporate personhood have little relevance in this climate; the natural entity theory -- or the view of the corporation as a person -- contains little residual meaning.

To the extent the corporation is perceived as having different goals, and competing constituencies, the corporation does not act like a "person" with a singular purpose.

(3) Intangible Rights: The Strain on Personhood

Fact as well as theory has strained traditional notions of corporate personhood. The facts of the constitutional challenges brought by corporations in the period of Modern Regulation have made it increasingly difficult for the Court to maintain that corporations are "persons." These challenges required the Court to rule that corporations are akin to persons in increasingly improbable respects: that corporations enjoy some "privacy" that can be invaded by regulatory searches, or suffer the indignities of a second criminal trial, or the forced association with another's speech. As the metaphor of corporations as persons became increasingly strained, the

Court abandoned corporate theory in favor of notions about commercial property, the free market of ideas, and the historical purposes of each amendment.

The problem posed for the personhood theory by intangible rights asserted in the modern political economy is most strikingly evident in *Pacific Gas & Electric*. The Court's conferral of negative free speech rights on corporations hastened Justice Rehnquist to scorn the plurality for refusing to face up to the constitutional status of the corporate person.

> Extension of the individual's freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality. . . . The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.[313]

In the nineteenth century, however, the metaphor of corporations as "persons" -- capable of holding property under the fourteenth amendment -- was not entirely improbable. The concept of an organization holding tangible property and asserting tangible rights did not strain the imagination. It is entirely plausible that a group of people could band together to hold property jointly. It is less plausible that the same group can speak with one voice or have a singular privacy interest.

And even when corporations first began asserting intangible rights -- in 1906 in *Hale* -- the dissonance between fact and theory was not as significant. In *Hale*, for example, the Court granted fourth amendment rights to corporations to protect what is arguably a form of property: corporate papers.

But the more intangible the right, the more striking the difference between a corporation and a person, and the more difficult it becomes for the Court to treat corporations as persons. Consider, for example, the fourth amendment. For corporations to assert fourth amendment rights against warrantless regulatory inspections requires according corporate persons the very intangible right of privacy. In return, this requires a double constitutional leap. First, the Court must decide that corporations are persons. Second, the Court must decide that a privacy right of a corporate person has been violated. Even assuming that the Court employs the natural entity theory to hold that corporations are persons, the second prong of this analysis presents difficulties; how a corporation enjoys a privacy interest in its premises remains unclear.

Even the natural entity theory has difficulty explaining corporations as persons for purposes of these rights. To circumvent the obvious differences between people and corporations in awarding intangible rights, the Court attempts to reformulate the right to privacy, free from regulatory inspections, as a property right attaching to commercial premises.

The problem is no less acute in the first amendment context, where a corporate person is granted a freedom not to associate, or in the fifth amendment arena, where corporate bodies are accorded "liberty" interests or suffer indignities or embarrassment from retrial. The response of the Court to the metaphorical problems posed by the corporate invocation of intangible rights

was to either accord constitutional rights to corporations sub silentio, and without theoretical basis, (fifth amendment) or justify the conferral or corporate rights based on an appeal to the free market of ideas (first amendment).

(4) Judicial Legitimacy: The Specter of Lochner

More than the problems of personhood metaphors, concerns about judicial legitimacy explain the demise of corporate theory. The bestowal of constitutional rights on corporations, via the natural entity theory, raises the specter of *Lochner*.

The Court admits its concern with avoiding the errors of the *Lochner* era. "[The Court] is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution," wrote the majority in a recent opinion. "[T]his . . . was painfully demonstrated by the face-off between the Executive and the Court in the 1930s, which resulted in the repudiation of much of the substantive gloss that the Court placed on the Due Process Clauses of the fifth and fourteenth amendments. . . ."[314]

As Rehnquist's dissents in *Pacific Gas & Electric* and *Central Hudson* suggest, the Court is pushing the bounds of its legitimacy by granting rights, often novel, to entities that are not mentioned in the Constitution. A string of dissents by Justices Black, Douglas, and Rehnquist suggesting that corporations were never intended to be persons for fourteenth amendment purposes persuasively highlight this legitimacy problem.[315] These dissents, like Rehnquist's in *Pacific Gas & Electric*, publicly call into question the legitimacy of the Court to create a new class of constitutionally protected actors.

By granting these rights, the Court invalidates state imposed economic regulation. The invalidation of state restrictions on advertising to promote utility consumption in *Central Hudson* caused Justice Rehnquist to question the Court's legitimacy:

The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York* in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies. [316]

Rehnquist went on to suggest in a discussion of the artificial entity theory that no matter how much the Court attempted to deny that theories of the corporation are irrelevant, the Court implicitly had adopted the natural entity view of the corporation, which inevitably leads to *Lochner*-like results.

The search for legitimacy in the post-*Lochner* era may well explain the retreat from theories of corporate personality. The Court is on much safer ground looking to the purpose of the first, fourth, or fifth amendments than attempting to define the relationship of corporations to the state.

But by holding that corporations can speak, not associate with speech, or enjoy a right to privacy, the Court molds a political community. In so doing, the Court imposes its own view of

what a corporation is or should be. In the modern political economy, the question, what is a corporation, is every bit as important as the questions about freedom of contract and common-law entitlements considered during the *Lochner* period. For the Court to appear to be imposing its view of the corporation -- and therefore shaping a state and imposing an economic view -- creates problems of legitimacy reminiscent of *Lochner*.

It is perfectly legitimate for the Court to define the boundaries of the first, fourth, and fifth amendments. It is more troublesome to have the Court impose its own economic views of the nature of the corporation. Because that question ultimately becomes a question of how much economic regulation is proper in society (if regulation is proper, corporations should be considered artificial entities; if regulation is to be discouraged, corporations are considered natural entities), when the Court answers that question it revives substantive due process.

(5) Corporate Legitimacy: The National Debate

But something deeper is at work than the Court's concern over its own legitimacy. Its apprehensions mirror the business community's apprehensions over the continued legitimacy of the business corporation. The tremendous stakes involved in having the Supreme Court, through the Bill of Rights, insulate corporations from economic regulation, while actually defining acceptable corporate conduct, is suggested in the business press.

The reaction of the business community to *Bellotti*, for example, is most revealing. Trepidation was mixed with elation. In an article published shortly after the decision, Business Week summarized this collective corporate concern:

Though a clear victory for corporate freedom, the decision is less important for what is says than for what it portends. It will almost certainly trigger an increase in corporate spending on issue-oriented advertising, and it may pave the way for corporate political campaign contributions. But the 5 to 4 decision will also spark more precise legislative attempts at control, trigger lawsuits, and further fuel the growing national debate on the legitimacy of the corporation in American society.[317]

Many advocates of corporate first amendment rights caution that these rights should be used with restraint. Consider the reaction of Herb Schmertz, public affairs director of Mobil Oil corporation and perhaps the nation's most aggressive promoter of a public advocacy role for corporations, to *Bellotti*:

The *Bellotti* decision does, indeed, open new vistas for the corporate manager looking to assert his company's rights under the first amendment. At the same time, this affirmation by the nations highest court does not imply that these rights have been turned into a license. The freedom remains fragile. It should be exercised by corporations in an atmosphere of conscience and responsibility. [318]

Other business spokespersons regard the freedom, at least in the commercial speech area, as transitory, reflecting little more than the current generation's acceptance of free market theory.[319] While some corporate managers call for the aggressive assertion of corporate first amendment rights, others urge extreme caution: "I do not see the first amendment as the appropriate lever for

general views about Government regulation; if we do use it as that lever, we may discover that it snaps."[320]

This position reflects more general reservations shared by corporate managers about invoking first amendment rights. Reliance on such rights risks raising fundamental questions, not just about the relationship of business to government, but about the nature and purpose of the modern corporation.

Much political science writing in the past two decades raises serious questions about the corrupting influence of large corporations in American society. Since Charles Lindbloom argued in Politics and Markets[321] that corporations subvert the pluralist process, political theorists -- such as John Kenneth Galbraith, Arthur Miller, and Robert Dahl -- have focused on the corporation as a powerful private state that often skews government decisionmaking in its favor.[322] Much of this writing is concerned with how to cabin the private corporate state and mitigate the corruption of politics.

Therefore, managers have begun to ask whether corporations should exercise their first amendment rights at all.[323] The answer depends on how the corporation is viewed as an entity.[324] This corporate self-examination reflects the concerns of managers and the corporate community that the extension of intangible rights, especially first amendment rights, will raise fundamental questions about the legitimacy of the corporation. Questions about whose interests the corporation serves, and for what purposes it operates.

Undoubtedly, the very conferral of Bill of Rights protections has and will cause controversy. But for the Court to express a unified theory of the corporation would further add to the problem of legitimation.[325]

(6) Constitutional Operationalism

The Court's pragmatic, antitheoretical approach to corporate rights is a form of positivism that this Article will call Constitutional Operationalism. Operationalism was a scientific method, borrowed by the social sciences in the 1920s, and related to the quantum and relativity revolutions in physics. It held that scientific objectivity depended on the use of an operational definition of meaning. For a concept to be valid, it had to be defined in terms of particular physical operations: for example, the concept of length was defined in terms of an operation performed with a yardstick.[326] Every operation and every concept was a distinct and particular phenomenon; operationalism, therefore, is a form of philosophical nominalism.

The Court engages in Constitutional Operationalism by suggesting that a corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment's purposes are furthered. Therefore, the corporation is defined by the operation it performs. This pragmatic methodology obscures the antecedent, and theoretical, question of what is the nature and purpose of a corporation.

Behind doctrines of commercial property and the free market of ideas is hidden the tacit acceptance of the corporation as a person, entitled to all the rights of real humans. Under this methodology of constitutional operationalism, the rationale for equating corporations and

persons is not stated specifically, however, so it cannot be rebutted. There is no opportunity for denial; sub silentio the corporation is legitimated as a constitutional actor.

Why, and for what purpose, the Court has decided consistently to treat corporations as persons, and legitimize their constitutional claims, is beyond the scope of this Article. One possible answer may be that as the Court moved to expand Bill of Rights protections for individuals during the post-war period, an extension of corporate rights was required to gain a working majority. A second possible explanation is that rights, during this period, increasingly came to be seen as organizational rights, rather than simply individual in scope. In this sense, the Bill of Rights was gradually tailored to fit an organizational age. In the absence of any explicit explanation by the Justices, the motives for extending corporate rights may not be uncovered.

But it is certain that the conferral of corporate Bill of Rights protections, without any theory, has served an important legitimizing function. Extending these rights has legitimized corporations as constitutional actors and placed them on a level with humans in terms of Bill of Rights safeguards.

III. Corporations and the Bill of Rights: The Future

History shows intensified efforts by corporations and their managers to thwart government regulation using Bill of Rights safeguards. This effort will invite opposition. Some commentators already criticize the extension of first amendment protections to corporations[327] and broader critiques of corporations and the Bill of Rights may follow.

Continued extension of these safeguards promises to raise more fundamental questions about the nature and purpose of corporations. This will challenge the legitimacy of the Court to confer, sub silentio, rights on entities not mentioned in the constitution. Ultimately, the corporation's status may have to be decided by constitutional amendment.

A. The Onslaught of Corporate Rights

If, as historians and political scientists predict, the current era of government deregulation ushers in an age of renewed regulation,[328] the corporate push for constitutional rights will become ever more urgent. In a period of increased legislative re-regulation, the courts will become the avenue of redress for corporate institutions.

Corporate lawyers already advocate using the first amendment to broadside government regulation. The assertion of these rights may someday become an integral part of the takeover economy.[329] "Elections of company leaders, like political elections, involve some of the most important choices that are made in society," argues noted first amendment lawyer, Floyd Abrams. "I think it's not too far off to foresee a case in which there is a corporate takeover and one side will claim that the other is providing less than full information, and the other side will step up to the plate and say that the SEC has no authority to demand all this information." In the fight against regulation, Bill of Rights arguments are already becoming integral to the practice of corporate law.[330]

Corporations may yet seek to extend their Bill of Rights protections beyond the first, fourth, fifth, sixth, and seventh amendments already granted.[331] As businesses increasingly employ private security guards and firms, a corporation's right to bear arms, under the second amendment, might be challenged by dissident shareholders. Wartime could witness a government request to house troops on corporate property, thereby creating third amendment problems. The increasing variety, and escalating severity, of criminal sanctions imposed on corporate institutions may one day induce a corporation to invoke the eighth amendment's prohibition against cruel and unusual punishment. [332]

For now, discussion of these rights is speculative. History indicates, however, that intangible rights are ever more important to the modern corporation.[333]

B. Challenges to a Corporate Bill of Rights

Vigorous assertion of corporate rights will undoubtedly be countered by more sophisticated theoretical and practical objections to the corporate appropriation of the Bill of Rights: a wide variety of commentators already criticize *Bellotti*; more generalized arguments for denying corporations a variety of Bill of Rights protections have emerged.

(1) Particularized Critiques: The First Amendment

There has been little, if any, systematic thinking about the problem of corporations and the Bill of Rights as a whole. Instead, commentators have focused primarily on problems relating to corporations and the first amendment. This is probably because first amendment cases are the most visible and comprehensible to the public. Most of the commentary centers on *Bellotti* in particular, perhaps because the participation of corporations in campaigns traditionally has been a controversial issue in American history (even in our own era). Although some commentators support the Court's reasoning in *Bellotti*, most demur. Three principal objections have been raised.

The first criticism of *Bellotti* is that "corporate speech" is an illusion. Only individuals can speak, and corporate speech obscures the fact that managers use corporate assets to convey their own views;[334] the nature of corporate governance is such that communication becomes managerial speech, unratified by shareholders.[335] The argument is that even if it is not permissible to censor the speech of wealthy individuals, it is permissible to limit the power of individuals to use their ownership or management of corporations to influence politics.[336]

A corollary to this first objection is simply that the decision ignores the political power of corporations to wield undue influence on referendums. The Court's reasoning that more speech is better downplays the fact that corporate contributions might lower the usefulness, while raising the volume, of the debate.[337]

The second criticism of *Bellotti* is that the protection of corporate speech violates the dissenting shareholder's first amendment rights by forcing these shareholders to contribute to the expression of views with which they disagree. At the least, the shareholder is forced to chose between contributing to political expression with which they disagree or foregoing a profitable investment opportunity. Further, the argument is made that the first amendment does not preclude a requirement of stockholder consent that effectively may prohibit either some or all non-commercial speech.[338]

The third objection to *Bellotti* is that it creates an unfair advantage for corporations over labor, because corporations can speak out on political issues -- despite shareholder dissent -- while unions cannot. Unions, when speaking on political matters, must refund, upon request, to dissenting members the prorated cost of such activity. To this critics attribute the declining membership in unions and the failure of labor to pass effective private sector bargaining laws.[339]

Other commentators broadly criticize the "market theory" of the first amendment. This does not necessarily have implications for the corporation's ability to assert first amendment rights but it suggests that the "marketplace of ideas," like the economic marketplace in *Lochner*, is not inviolate. A better understanding of the first amendment is that it is meant to encourage a broad deliberation among the citizenry. Since this is not possible if some people have more resources than others, the government should intervene in the marketplace of ideas to encourage genuine deliberation.[340] In this school of thought, whether the corporation's first amendment rights would be curbed depends on whether corporations taint the deliberative process.[341]

(2) Generalized Critiques

Corporate use of the Bill of Rights is subject to more general objections. The treatment of corporations as persons under the Bill of Rights is intuitively problematic. The personification of the corporation also broadly enhances the power of corporate management in a manner inconsistent with most modern schools of thought on constitutional law. Finally, granting corporations Bill of Rights protections is a zero-sum game that pits the rights of corporations against those of "real" persons.

a. The Intuitive Approach

The concept of the corporation as person has done much to legitimize the corporation in American law.[342] But this idea also is intuitive in certain contexts: for example, when a statute clearly intended to cover corporations includes them as "persons." In that case, corporations as persons cum economic actors is metaphorically plausible.

Nowhere in the law, however, is the dissonance between a corporation and a person as great as in the Bill of Rights context.[343] From a layperson's or intuitive perspective, it must seem improbable that corporations can speak, assert privacy rights, or invoke the double jeopardy clause. Even in a legal world filled with fictions, the corporate claim to personal Bill of Rights guarantees must appear fantastic to the non-lawyer.

A second intuitive problem is inconsistency. To the layperson, the following remains a troubling question: Why do corporations enjoy certain Bill of Rights protections and not others? Either the corporation is entitled to constitutional protections or it is not, and it is illogical to accord corporate entities some rights and not others, or even some fifth amendment rights and not other fifth amendment rights. Either a corporation is a person or it is not. This inconsistency bears the imprint of history rather than the stamp of logic: the denial of the fifth amendment privilege against self-incrimination remains a relic from the era of corporate theory.[344]

b. Tyranny of the Minority: Managerial Power

Another broad objection to granting corporations Bill of Rights protections is that to do so unfairly promotes the power of corporate managers while diminishing that of shareholders, workers, and communities. Business literature suggests that the prerogative to challenge government regulation, wage political campaigns, or thwart government investigations by invoking constitutional rights is management's privilege.

Corporate managers regard the first amendment as a vehicle to express their own views on political questions. A leading spokesperson for corporate management stated, "[I]n the economic climate rife with public distrust of big business, corporate managements often find themselves impelled to speak out on issues that affect them. . . . Sometimes they wish to speak out to express corporate concern with the national welfare."[345] In this perspective, *Bellotti* is interpreted as a solicitation of managerial speech;[346] the expenditure of corporate funds on political speech is "purely a management decision."[347]

The assertion of other Bill of Rights protections may also serve managerial power. When fourth and fifth amendment safeguards are employed to challenge government health and safety regulation, for example, this may reflect a managerial political program rather than a desire to advance shareholder interests. Complying with government regulations may be in the long-term interests of shareholders, even if not profitable in the short term (for example, defective products that do not comply with government specifications). The expense of invoking these rights may constitute impermissible waste as much as asserting first amendment rights.

The Bill of Rights, applied to the individual, is an important safeguard against the tyranny of the majority. These same protections, however, when given to the corporation, can lead to a tyranny of the minority in which the corporate form is manipulated to magnify managerial power.

c. Personhood and Modern Constitutional Theory

Granting corporations Bill of Rights protections cannot be justified under any of the schools of contemporary constitutional thought: Originalism, Legal Process, Rights, Law and Economics, or Critical Legal Studies.

A theory of original intent provides no basis for extending rights to corporations because these entities are never mentioned in the Constitution. Neither does the so-called Legal Process school that suggests the purpose of constitutional review, and the conference of rights, is to protect those who are traditionally underrepresented in the political process.[348] Legislatures have long worried about the overrepresentation of corporations, and their managers or owners, in politics.[349] The modern rights theory is also blind to organizational considerations; its principal exponents never seriously consider corporate or other organizational entitlements.[350]

Even Law and Economics thinkers, who, of the modern theorists, have the most developed theory of the firm, cannot justify corporate constitutional rights. This school holds that a corporation "like other forms of organizations, is simply a legal fiction which serves as a nexus for a set of contractual relationships among individuals."[351] According to this view, corporations should have no constitutional protections, because without a concept of collective will, the corporation cannot be personified.[352]

Finally, writings in the Critical Legal Studies (CLS) tradition seemingly would reject the corporate appropriation of the Bill of Rights. Although the prescriptive, programmatic elements of CLS scholarship are less developed than those of other schools, much CLS writing is concerned with challenging established power structures, including, if not explicitly, the power of large corporations. Advocacy of Bill of Rights guarantees for corporations would be antithetical to much of their scholarship.[353]

d. The Zero-Sum Game

Too frequently the extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals. Fourth amendment rights applied to the corporation diminish the individual's right to live in an unpolluted world or to enjoy privacy. The corporate exercise of first amendment rights frustrates the individual's right to participate equally

in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment.[354] Equality of constitutional rights plus an inequality of legislated and de facto powers leads inexorably to the supremacy of artificial over real persons. And now the ultimate irony: Corporate entities have the constitutional right, says the Supreme Court, to patent living beings such as genetically engineered cattle, pigs, chickens, and, perhaps someday, humanoids.[355]

The corporate drive for constitutional parity with "real" humans comes at a time when legislatures are awarding these artificial persons superhuman privileges. Besides perpetual life, corporations enjoy limited liability for industrial accidents such as nuclear power disasters, and the use of voluntary bankruptcy and other means to dodge financial obligations while remaining in business.[356]

The legal system thus is creating unaccountable Frankensteins that have superhuman powers but are nonetheless constitutionally shielded from much actual and potential law enforcement as well as from accountability to real persons such as workers, consumers, and taxpayers.

Reformers, in an earlier era, warned of the threat of big government, and called for the creation of a new property, similar to the nineteenth century Homestead Act,[357] that would afford the individual a sanctuary of freedom from government power.[358] In the future individuals will require protection from corporations as well as government. As privatization proceeds apace, corporations are increasingly assuming functions traditionally reserved for states -- running prisons, providing security, collecting trash, handling mail and information, and even supplying education. The actions of large modern corporations have a state-like impact on the lives of individuals.

All this suggests that a sanctuary of freedom must be carved out for the individual as against corporations. A new understanding of the corporation and its relation to the Bill of Rights may be the starting point to achieve that sanctuary.[359]

C. A Constitutional Amendment

What is required is a constitutional presumption favoring the individual over the corporation. To establish this presumption, a constitutional amendment is needed that declares corporations are not persons and that they are only entitled to statutory protection conferred by legislatures and referendums. Only then will the Constitution become the exclusive preserve of those whom the Framers sought to protect: "real" people.[360]

Popular consideration of the corporation's relation to the Bill of Rights can help reconstitute American political life.[361] Some sociologists in the post-war era perceived the absorption of social, community, and cultural life into the corporate structure, which in turn generates its own hierarchy of status and power.[362] And some political theorists suggest that in the age of organizations -- dominated by large private structures -- politics is sublimated to activities organized in non-political institutions.[363]

A national discussion of the constitutional status of corporations would extricate political inquiry from this private institutional context. A debate about individualism versus corporatism

could be not only salutary but far-reaching; it could inaugurate the search for shared values in an age of value skepticism.

The language of such an amendment need not be complicated. An example:

This Amendment enshrines the sanctity of the individual and establishes the presumption that individuals are entitled to a greater measure of constitutional protections than corporations.

For purposes of the foregoing amendments, corporations are not considered "persons," nor are they entitled to the same Bill of Rights protections as individuals. Such protections may only be conferred by state legislatures or in popular referenda.

A debate over such an amendment would have the additional merit of clarifying the constitutional status of corporations. As the foregoing analysis suggests, corporations are accorded Bill of Rights protections for conflicting, and sometimes unstated, reasons. Most importantly, the amendment would allow the people to decide, rather than the Supreme Court, an important question about the proper place of regulation in American society.

Conclusion

The use, by corporations, of the Bill of Rights as a potent shield against government regulation is a recent historical phenomenon. Corporate Bill of Rights protections were asserted infrequently in the Progressive and New Deal eras; when they were, some were granted, some were denied. But in recent years every Bill of Rights guarantee requested by corporations has been granted. Measured both by the number of Bill of Rights cases brought,[364] and by the discussion in the business literature, these rights are increasingly important to American corporations and their managers.

This newfound importance is related to the modern political economy in which new forms of regulation, and new forms of property, have made the protection of intangible rights crucial to business organizations. The Bill of Rights protections, taken together, now form a substantive due process shield for corporations, reminiscent of the fourteenth amendment shield extant in the *Lochner* era. The current judicial era is one of corporate substantive due process.

Ironically, the rise in corporate Bill of Rights protections coincided with a demise in coherent theory, for constitutional purposes, of the corporation. This demise reflected several factors: the legacy of Legal Realists and other theorists deeply critical of corporate theory, the increasing dissonance between giant corporations and persons, the current crises in the business theory of the firm, and concern on the part of the Supreme Court about whether it legitimately can define the nature and purposes of a corporation.

The lack of a consistent basis for according corporations constitutional guarantees is all the more puzzling as the demand for corporate protection increases. Awarding these safeguards to an entire class of constitutional actors -- corporations -- is at least as extraordinary a step as creating wholly new categories of constitutional rights (such as the right to privacy).

The history of personhood theory suggests the need to clarify the constitutional status of corporations. This Article questions the legitimacy of the corporation's claim to constitutional parity with "real" persons and also suggests that the corporation's status should be determined by constitutional amendment rather than by judicial fiat.

Undoubtedly, these reform proposals hint at the political preferences of the author. But it is perhaps worth suggesting that the legal historian's biases should be apparent rather than hidden. Moreover, these preferences did not wholly exist prior to undertaking an historical inquiry, but were partially formed through research. And historical inquiry does more than shape political preferences: it can serve, as it did during the era of Legal Realism, to suggest reforms and solutions.[365]

But any search for reform encounters America's persistent dilemma: the contradiction between a yearning for an earlier era of individualism and a completely antithetical desire for the amenities of a modern economy driven by large organizations. This dissonance is apparent in the question of whether corporations should receive protections, ordinarily reserved for individuals, under the Bill of Rights. The degree to which corporations appropriate time-honored individual liberties will reveal much about the resolution of this American dilemma during the Bicentennial of the Bill of Rights.

APPENDIX I: THE CORPORATION'S BILL OF RIGHTS.

First Amendment

1. Political Speech. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (right to spend money to influence referenda).

2. Commercial Speech. Central Hudson Gas & Elec. Corp. v. Public Utilities Comm'n, 447 U.S. 557 (1980) (corporations right to commercial speech protected.)

3. Negative Free Speech Right. Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, reh. den., 475 U.S. 1133 (1986) (corporations have a "negative free speech right not to be associated with the speech of others).

Second Amendment

Not Decided.

Third Amendment

Not Decided.

Fourth Amendment

1. Freedom From Unreasonable Searches: Corporate Papers. *Hale v. Henkel*, 201 U.S. 43 (1906) (an overbroad subpoena for corporate documents constitutes an unreasonable search). But see *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) (an overbroad subpoena is not considered an unreasonable search).

2. Freedom From Unreasonable Warrantless Regulatory Searches. Marshall v. Barlow's Inc., 436 U.S. 307 (1978). But see Colonnade Catering Corp. v. United States, 397 U.S. 72 (1969) (exception for the liquor industry); United States v. Biswell, 406 U.S. 311 (1977) (exception for firearms industry); Donovan v. Dewey 452 U.S. 594 (1981) (exception for mining industry).

Fifth Amendment

1. Double Jeopardy. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (acquittal of corporation in accordance with the Federal Rules of Criminal Procedure not appealable because of fifth amendment protection against double jeopardy).

2. Takings Clause. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

3. No Privilege Against Self-Incrimination. *Hale v. Henkel*, 201 U.S. 43 (1906) (subpoena for testimony of corporate officer upheld against claim of corporate fifth amendment privilege).

4. Due Process. *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893).

Sixth Amendment

Right to Jury Trial in Criminal Case. Armour Packing Co. v. United States, 209 U.S. 56, 76-77 (1908) (a corporate defendant, convicted of violating a federal criminal statute, was considered an "accused" for sixth amendment purposes); see also United States v. R. L. Polk and Co., 438 F.2d 377, 379 (6th Cir. 1971) ("the fundamental principle that corporations enjoy the same rights as individuals to trial by jury").

Seventh Amendment

Right to Jury Trial in Civil Case. Ross v. Bernhard, 396 U.S. 531 (1970) (Court implies that corporation has a right to jury trial in civil cases because a shareholder in a derivative suit would have that right.); see also In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d cir. 1980) (the right to jury trial not guaranteed in complex cases).

Eighth Amendment

Not Decided

Ninth Amendment

Not Applicable

Tenth Amendment

Not Applicable

APPENDIX II: OTHER CORPORATE RIGHTS UNDER THE CONSTITUTION.

A. Article I -- Contracts Clause.

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (state revocation of corporate charter violates contracts clause of article I, raising an impregnable barrier around corporations, and thus rendering inviolable the "commercial institutions of the country"); see also 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1395 (1833).

B. Article III

1. Citizenship

Corporations Not Covered Citizens Under Article III. Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809) (corporations "as such" are not persons as term is used in Article III and Judiciary Act of 1789).

2. Diversity Jurisdiction.

Corporations Are Citizens for Diversity Jurisdiction. Bank of United States v. Deveaux 9 U.S. (5 Cranch) 61 (1809) (corporations are "citizens" for purposes of Article III jurisdiction; they are citizens by virtue of the group theory which holds that the members of the corporation, as real persons, qualify as citizens). But see Louisville, Cincinnati & Charleston Railroad Co. v. Leston, 43 U.S. (2 How.) 497 (1844) (Using the person or natural entity theory, the Court held that, for purposes of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806) diversity, the corporation is considered a person and a citizen of the state of incorporation.); Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. (16 How.) 314 (1853) (all shareholders are presumed to be citizens of the state of incorporation.); see also 28 U.S.C. 1332 (c) (1982) ("[A] corporation shall be deemed a citizen of any state by which it has been incorporated and of the State where it has it principal place of business. . . . ").

C. Article IV

1. Privileges and Immunities.

Corporations Are Not Citizens or Persons for Purposes of the Privileges and Immunities Clause. Bank of America v. Earle, 38 U.S. (13 Pet.) 519 (1839) (foreign corporations cannot claim rights of a person under the privileges and immunities clause).

D. Fourteenth Amendment

1. Privileges and Immunities Clause.

Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888) (corporations are not citizens for purposes of the fourteenth amendment privileges and immunities clause).

2. Equal Protection Clause.

Santa Clara County v. Southern P.R. Co., 118 U.S. 394 (1886) (corporations are persons for purposes of the equal protection clause).

3. Due Process Clause.

Minneapolis & S.L.R. Co. v. Beckwith, 129 U.S. 26 (1889) (corporations are persons for purposes of the due process clause).

4. Liberty Clause.

Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906) (liberty guaranteed by fourteenth amendment extends only to natural persons and not to corporations). But see First Nat'l Bank v. Bellotti, 435 U.S. 765, 778-79 (1978) (rejecting as "artificial mode of analysis" argument that corporations cannot claim fourteenth amendment protection of liberty).

E. Other Constitutional Rights.

1. The Right to Travel.

Never Decided By a Court. See Comment, Keeping the Home Team at Home, 74 CAL. L. REV. 1329, 1354 (authored by Charles Gray) (arguing that the constitutional right to travel as defined in United States v. Guest, 383 U.S. 745, 757 (1966) should not apply to business corporations; in this case the Raiders football franchise efforts to leave Oakland). But see Note, Eminent Domain Exercised -- Stare Decisis or a Warning: City of Oakland v. Oakland Raiders, 4 PACE L. REV. 169 (1983) (authored by Michael Schiano) (arguing the opposite position).

2. The Right to Privacy.

California Banker v. Schultz, 416 U.S. 21, 65 (1974) (corporations do not enjoy a right of privacy equivalent to that of individuals under the fourth and fourteenth amendments.) But see Belth v. Bennett, 740 P.2d 638, 640 (Mont. 1987) (corporations have a right to privacy under the Montana constitution).

ENDNOTES

1. An example of the importance corporations attach to the bicentennial of the Bill of Rights is the willingness of one corporation -- Philip Morris Companies, Inc. -- to sponsor a bicentennial advertising campaign built around the Bill of Rights.

   The multinational tobacco conglomerate plans to spend $60 million on the campaign, including $ 600,000 paid to the National Archives to allow Philip Morris to associate itself, on television and in print, with the Archives -- the federal government's keeper of the Bill of Rights. See Bill of Rights for Rent, N.Y. Times, Nov. 19, 1989, § 6 (Week in Review), at 21, col. 1 (editorial).

   The federal government -- through the Bicentennial Commission -- plans to spend approximately $ 17 million through the end of 1991 promoting the Bicentennial of the Bill of Rights. Telephone interview with Jack McDade, Comptroller of the Commission on the Bicentennial of the United States Constitution (Dec. 19, 1989).

   That one corporation plans to spend three times more than the federal government to promote the bicentennial of the Bill of Rights suggests the anniversary's importance to the business community.

2. Lochner v. New York, 198 U.S. 45 (1905), has come to embody the doctrine of substantive due process. This Article does not enter the current debate about the precise meaning of Lochner. See, e.g., Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873 (1987). For purposes of this Article, Lochner represents what it came to mean to the corporate community: the use of the Constitution to invalidate government regulation of the corporation. See infra notes 59-68 and accompanying text.

   Lochner itself did not involve a corporate plaintiff. But the Court read into the fourteenth amendment the power to overturn government economic regulation.

   Corporations were accorded fourteenth amendment protections under Santa Clara v. Southern Pac. R.R., 118 U.S. 394 (1896). Prior to the New Deal, Santa Clara and Lochner were the twin pillars of corporate opposition to government regulation.

   This Article suggests that after 1960 corporations resurrected the spirit of Lochner by challenging government regulation using the Bill of Rights, rather than the fourteenth amendment. This ushered in an era of corporate substantive due process.

3. United States v. Martin Linen Supply Co., 430 U.S. 564 (1976).

4. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1977).

5. Marshall v. Barlow's Inc., 436 U.S. 307 (1977).

6. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, reh'g denied, 475 U.S. 1133 (1986).

7. For purposes of this Article, the term "corporation" includes both public and private corporations. It does not include unions, universities, associations, partnerships, or any other form of organization; these forms are not discussed here. The Article is concerned particularly with the large, publicly held corporation of the kind that dominates the American economy. The term "corporation" sometimes is used interchangeably with "firm," "company," or "enterprise."

8. The Framers certainly were aware of corporations. In that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies. See Henderson, The Position of Foreign Corporations in American Constitutional Law, in 2 HARVARD STUDIES IN JURISPRUDENCE 1 (1918); J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970).

9. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 91 (1809) (jurisdiction determined by the "real persons" (shareholders) coming to court under the corporate name).

10. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (Corporations are not citizens within the meaning of article IV privileges and immunities clause; therefore, a state does not have to give extraterritorial effect to corporation charters granted by another state.); See also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) ("[t]he term citizens . . . applies only to natural persons . . . not to artificial persons created by the legislature").

11. See Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888) (corporation is not a citizen within the meaning of the privileges and immunities clause of the fourteenth amendment). Pembina did not decide, however, whether the corporation is a person for purposes of the fourteenth amendment due process and equal protection clauses.

12. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886).

13. Minneapolis & Saint Louis Ry. v. Beckwith, 129 U.S. 26 (1889).

14. See, e.g., Allgeyer v. Louisiana, 165 U.S. 578, 582 (1897) (due process protects liberty of contract); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 381 (1893) (due process clause subjects state economic regulatory legislation to a reasonableness test).

15. See Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. VA. L. REV. 173, 178-87 (1985).

16. Sometimes called the creature, concession, fiction, or artificial entity theory, this view can be traced to Friedrich Karl Von Savigny. See G. HEIMAN, OTTO GIERKE: ASSOCIATIONS AND LAW 27-33 (1977); see also Schane, The Corporation is a Person: The Language of a Legal Fiction, 61 TUL. L. REV. 563 (1987).

17. See J. HURST, supra note 8, at 4-5.

18. See Butler, Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges, XIV J. OF LEGAL STUD. 129 (1985).

19. In the era of Jackson, special charters were discredited as encouraging bribery, favoritism, and monopoly. See Horwitz, supra note 15, at 181.

20. See A. J. JACOBSON, THE PRIVATE USE OF PUBLIC AUTHORITY: SOVEREIGNTY AND ASSOCIATIONS IN THE COMMON LAW 599 (1980); Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 655 (1926); Vinogradeff, Juridicial Persons, 24 COLUM. L. REV. 594 (1924).

21. The principal continental theorist was Otto Gierke. See O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (E. W. Maitland ed. 1900); see also, Horwitz, supra note 15, at 179-91, 216-22 (the natural entity theory was not available in the United States until after Santa Clara).

22. See, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839) (a corporation is not a citizen for purposes of the privileges and immunities clause of article IV because a corporation is merely an "artificial being created by the charter"); see also appendix II; Horwitz, supra note 15, at 203-07 (discussing the partnership theory that replaced the artificial entity theory before the development of the natural entity theory).

23. See Comment, The Personification of the Business Corporation in American Law, 54 U. CHI. L. REV. 1441 (1987) (authored by Gregory A. Mark).

24. Sherrill, Hogging the Constitution, GRAND STREET 106 (Autumn 1987).

25. 118 U.S. 394, 396 (1886) ("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 the opinion that it does."). Later dissents by Justices Black and Douglas suggested that Santa Clara was decided wrongly, and that the legislative history of the fourteenth amendment did not support the proposition that corporations were meant to be included under its protections. See Connecticut Gen. Life Ins. v. Johnson, 303 U.S. 77, 82 (1938) (Black, J., dissenting); Wheeling Steel v. Glander, 337 U.S. 562, vacated, United States Gypsum Co. v. Glander, 337 U.S. 951, rev'd, 337 U.S. 951 (1949) (Douglas, J., dissenting).

26. Although Santa Clara did not actually employ the natural entity theory to grant corporations fourteenth amendment rights, the corporation was fully personalized in 1910 in a series of "unconstitutional conditions" cases. See Southern R.R. v. Greene, 216 U.S. 400, 401 (1910); Ludwig v. Western Union Tel. Co., 216 U.S. 146, 157 (1910); Pullman

Co. v. Kansas, 216 U.S. 56, 64 (1910); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 36 (1910).

27. See appendix I. The Supreme Court first conferred Bill of Rights protections on corporations in Noble v. Union River Logging R.R., 147 U.S. 165 (1893) (fifth amendment due process rights). Although the Court conferred fourth amendment protections on corporations in Hale v. Henkel, 201 U.S. 43 (1906), the Court limited these rights in United States v. Morton Salt Co., 338 U.S. 632 (1950).

28. See appendix I.

29. See infra notes 145-216 and accompanying text. The Bill of Rights is now chiefly useful to corporations as a means of challenging intrusive government regulation and protecting intangible property such as speech.

    Modern federal regulation can be highly intrusive; it is certainly more invasive than the state regulation of earlier eras. For example, the federal government's regularized system of health and safety inspections, often involving surprise inspections, has been challenged by corporations on fourth amendment grounds. See Marshall v. Barlow's Inc., 436 U.S. 307 (1977).

    Federal regulation can be so invasive as to involve spying by federal aircraft -- a practice challenged recently by one corporation. See Dow Chemical Corp. v. United States, 476 U.S. 227 (1986).

    Corporations also use the Bill of Rights to protect modern forms of property such as speech. Corporations have challenged restrictions on commercial free speech rights such as the right to advertise corporate products. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York, 447 U.S. 557, 574 (1980). Corporations, particularly within the tobacco industry, have been active in promoting the bicentennial of the Bill of Rights. According to congressional critics, this is an attempt to promote the corporations' own form of commercial speech. See Rothenberg, Philip Morris Ads Anger Congressmen, N.Y. Times, Nov. 16, 1989, at D7, col. 1.

30. These distinct eras of government regulation are widely recognized. See H. FIRST, BUSINESS CRIMES 1 (1990) (describing the environmentalist-consumerist era, 1968 to 1977); Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189 (1986).

31. See infra notes 59-68.

32. See infra notes 33-47.

33. M. SCHNITZER, CONTEMPORARY GOVERNMENT AND BUSINESS RELATIONS 23 (2d ed. 1983).

34. *Id*. at 23 ("Those laws regulating the railroads were initiated by the state government and only later by the federal government.") See generally THE PROGRESSIVE MOVEMENT (R. Hofstadter ed. 1963) (a collection of writings of great reformers).

35. The type of property regulated during this period was that traditionally recognized at common law. This included monetary currency, rights over goods, or rights over the inputs of the corporate economy: capital and labor. Compare Santa Clara with the type of property discussed infra notes 135-40. Property is the creation of law; its definition is controversial, and it changes over time. But what is meant by traditional property in this context is more tangible property, rather than wealth in the form of information or government created wealth. See generally Reich, The New Property, 73 YALE L.J. 733 (1964) (discussing "new property" created by government largess). Santa Clara, for example, involved tangible property in the form of corporate assets taxed by the state. Santa Clara v. Southern Pac. R.R., 118 U.S. 394, 395 (1896) (involving an effort by the state of California to tax land and fences owned by a railroad).

36. T. MCCRAW, PROPHETS OF REGULATION 11 (1984).

37. *Id*.; J. HURST, supra note 8, at 13-52.

38. See T. MCCRAW, supra note 36, at 11; see also S. SALSBURY, THE STATE, THE INVESTOR, AND THE RAILROAD: THE BOSTON & ALBANY, 1825-1867 (1967).

39. T. MCCCRAW, supra note 36, at 11-12.

40. *Id*. at 11, 17.

41. *Id*. at 17; see also E. KIRKLAND, MEN, CITIES AND TRANSPORTATION: A STUDY IN NEW ENGLAND HISTORY, 1820-1900 (1948).

42. C. ADAMS, AN AUTOBIOGRAPHY (1916).

43. Its goals were not to regulate directly, but to require corporations to open their books and provide information to the public. Often the information was required to be offered in a standardized form. See Rabin, supra note 30, at 1219.

44. See E. KIRKLAND, CHARLES FRANCIS ADAMS, JR. 1835-1915: THE PATRICIAN AT BAY (1965).

45. *Id*. at 11-28.

46. T. MCCRAW, supra note 36, at 58; see E. WINSTON CLEMENS, ECONOMICS AND PUBLIC UTILITIES (1950); M. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM (1957).

47. A. EKIRCH, JR., PROGRESSIVISM IN AMERICA 106-34 (1974). Federalism, noted James Bryce in his book, American Commonwealth, enabled people "to try experiments in legislation and administration which could not be safely made in a large centralized country." *Id*. at 107 (quoting J. BRYCE, AMERICAN COMMONWEALTH); see also S. HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890-1920 (1964) (a study of the "efficiency craze" of the Progressive era).

48. See G. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912 59-84 (1958); Rabin, supra note 30, at 1218 n.74; Rodgers, In Search of Progressivism, 10 REV. AM. HIST. 113 (1982).

49. P. STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 74-93 (1984); see also R. WIEBE, BUSINESSMEN AND REFORM (1962) (discussing business involvement in Progressive Era reforms).

50. 15 U.S.C. §§ 1-7 (1982).

51. 7 U.S.C. § 610 (1982).

52. D. GUJARATI, GOVERNMENT AND BUSINESS 6 (1984).

53. Other federal agencies similarly played only a weak investigatory role. Roosevelt's Bureau of Corporations, for example, was designed to produce the same type of studies as Adam's earlier sunshine-commission. The ICC has been portrayed as the classic regulatory agency captured by business. See G. KOLKO, RAILROADS AND REGULATION 1877-1916 introduction, ch. 1 (1966). The Kolko thesis has been widely debated. See Rabin, supra note 30, at 1206-08; Harbeson, Railroads and Regulation 1877-1916: Conspiracy or Public Interest, 27 J. ECON. HIST. 230 (1967); Purcell, Ideas and Interests, Businessmen and the ICC, 54 J. AMER. HIST. 568 (1967).

54. T. MCCRAW, supra note 36, at 144-45.

55. *Id*. at 124; see G. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 1-48 (1924); THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY: A LEGISLATIVE HISTORY OF U.S. REGULATORY AGENCIES (B. Schwartz ed. 1973).

56. *Id*. at 125; see also T. BLAISDELL, THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS (1932) (a study of the Commission's purposes and accomplishments); G. KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 ch. 1 (1963); A. STONE, ECONOMIC REGULATION AND THE PUBLIC INTEREST: THE FEDERAL TRADE COMMISSION IN THEORY AND PRACTICE ch. 1-3 (1977).

57. Even by 1930, the tepid ICC and FTC existed as the only significant federal regulatory agencies. T. MCCRAW, supra note 36, at 210 ("prior to 1930, only two important regulatory agencies existed: the Interstate Commerce Commission and the Federal Trade Commission").

58. The historical literature on Progressive era regulation does not ask the question posed here: To what extent did government regulation trigger Bill of Rights claims by the corporation? But the historic debate is cast in broader terms that are nevertheless relevant to constitutional inquiry.

Initially, the literature on the Progressive era emphasized the alignment of government agencies with corporate interests. See G. KOLKO, supra note 53, at ch. 1 (1966). Carried to its extreme, this argument suggests that corporations rarely pose constitutional challenges to government regulation because regulation was designed to advance the cause of business. There were, however, such challenges.

Recent historical literature portrays a more complicated story of Progressive era regulation. One historian suggests that rather than capturing the regulatory state, corporations accommodated themselves to regulation and American liberalism in this era. The result was what is now termed "corporate liberalism." See M. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM (1988).

Corporate liberalism emerged from the triumph of progressivism over socialism and populism. Socialists, during the Progressive era, envisioned an economy directed by the state, while Populists wanted a return to a precorporate small-scale producer society. The Progressive vision, and the one that triumphed, regarded the state as subordinate to society and the private marketplace. A distinction was drawn between positive government and statism, that called for direct state regulation of the economy. Positive government was accepted by Wilson and his followers; statism was rejected. Positive government meant limited government intervention that regarded corporations as autonomous entities.

According to this school of historical thought, the triumph of Wilson in the 1912 election was a triumph of corporate liberalism that largely set the parameters of the business-government relationship to the present day.

The central legal battle in the late nineteenth century and Progressive era was over antitrust policy and interpretations of the Sherman Act of 1890. 5 U.S.C. § 1-7 (1982). While Populists supported the Supreme Court's broad interpretation of the law in 1897 as forbidding any restraint of trade, including mergers and cartels, the Progressives opposed it. The Progressives sought to return to the prior "common-law" interpretation of the Sherman Act that would only rule out unfair restraints of trade by corporations (the prevention of free entry into a market, for example). The Court eventually adopted the common-law interpretation in 1911.

Woodrow Wilson's triumph in the 1912 elections solidified the Progressive position on antitrust. Wilson preserved the relationship between state and society. He supplemented

judicial power through the Federal Trade Commission, which had investigatory power. But he limited the power of the FTC to ameliorating unfair trade practices as defined under the common-law interpretation of the Sherman Antitrust Act. The FTC had no power over prices, wages, mergers, or stock offerings. While socialists wanted to treat all corporations as public utilities -- subject to public control -- Wilson explicitly rejected this.

If one accepts the thesis that a political economy of corporate liberalism emerged from this era, one then expects to find sporadic regulation that only occasionally poses constitutional challenges to corporations. Indeed, this is precisely what is found.

Whatever view is taken of the historical controversy, from the perspective of the Bill of Rights, Progressive era regulation did not trigger many Bill of Rights claims. The important legal challenges were in the antitrust area, and the constitutional questions posed by New Deal regulation loomed in the future.

See Frese, BUSINESS AND GOVERNMENT: ESSAYS IN 20TH-CENTURY COOPERATION AND CONFRONTATION (S.J. Judd & J. Judd eds. 1985) [hereinafter ESSAYS] for an excellent, but obscure, summary of recent scholarship on Progressive era regulation.

59. Lochner v. New York, 198 U.S. 45, 45-46 (1905).

60. See B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942) (on the history of substantive due process).

61. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938) (Black, J., dissenting) ("Neither the history nor the language of the fourteenth amendment justifies the belief that corporations are included within its protection." *Id*. at 85-86); see also C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1836-1918 741 (1960) (For the period from 1889 to 1918 attacks upon state statutes were made in 422 cases involving state police power. Fifty-three of these were held invalid, of which the greater number involved the regulation of public service corporations. Only 14 involved legislation affecting the general rights and liberties of individuals.).

62. See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391-94 (1937).

63. G. STONE, L. SEIDMAN, C. SUNSTEIN, M. TUSHNET, CONSTITUTIONAL LAW 739 (1986).

64. For example, in New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932), the Court invalidated, under the due process clause, a law prohibiting any person from manufacturing ice without first obtaining a certificate of need from the state; see also Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928) (invalidating a law limiting entry into the pharmacy business to pharmacists).

65. 300 U.S. 379 (1937).

66. See also Lincoln Federal Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949) (The Court explained that it had abandoned the Lochner constitutional doctrine and returned "to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition."); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (upholding law authorizing employees to take four hours leave with full pay on election day).

67. The Constitution of the United States, FORTUNE, July 1936, 57, 60; see also MacLeish, The Fourteenth Amendment, FORTUNE, June 1932, 52.

68. MacLeish, supra note 67, at 52 ("[T]he conflict between laissez faire and reform [begun by Theodore Roosevelt and Wilson] was less important, from the standpoint of the Constitution, than the fact that the Supreme Court had undertaken to judge whether state laws regulating business, etc., were proper or improper exercises of governmental power.").

69. 147 U.S. 165 (1893). In 1889, a railroad corporation, organized under the Territorial Code of Washington, sought to take advantage of an act of congress of March 3, 1875, 18 Stat. 482, granting railroads a right of way through the public lands of the United States. The railroad filed the documents, including articles of incorporation, required by act, and the right of way was approved by the Interior Secretary. Noble, 147 U.S. at 165-66.

    The firm was incorporated to build and run railroads in 1883. In 1888 its charter was revised to construct telegraph lines, haul logs, and carry freight. *Id*. at 165. The approval was cancelled in 1890 by the subsequent Interior Secretary because of his view that the corporation was not a public railroad company as contemplated by the 1875 statute, but was merely a logging concern carrying logs for private use and benefit. *Id*. at 167.

    The Supreme Court found, however, that the "[t]he railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose." *Id*. at 176. The court found that the right-of-way was a property right. *Id*.

70. The Court held: "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void." *Id*.

71. A discussion of the fifth amendment takings clause is beyond the scope of this Article. Corporate and individual exercise of taking clause protections has a long history. But because the language of the clause does not limit it to "persons," there has never been a question that corporations and other business organizations are entitled to its protection. Every other Bill of Rights clause discussed in this Article has been discussed in the context of corporate personhood theory.

Although not immediately relevant to personhood theory, the takings clause is the focus of those who would expand constitutional protections for business while diminishing the regulatory state. See R. EPSTEIN, TAKINGS (1986).

72. See Minneapolis & Saint Louis Ry. v. Beckwith, 129 U.S. 26, 31-33 (1889) (due process); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 395 (1886) (tax violated fourteenth amendment).

73. See C. MAYER & G. RILEY, PUBLIC DOMAIN, PRIVATE DOMINION (1985) (chronicling the history of federal regulation of public mineral rights). The federal government's control over the public domain is mandated by the Constitution. U.S. CONST. art. IV, § 3. This extensive state control over property is anomalous in the American political economy. Whereas most of the property discussed in Reich, supra note 35, is created in the modern era -- like licenses and franchises -- the use of public resources, has always been a form of property. Strictly speaking, this is not "Modern Property" in that it has existed since the beginning of the Republic; but the history of this type of property foreshadows questions raised by government largess in later eras.

74. See infra text accompanying notes 177-189.

75. See infra text accompanying notes 76-83.

76. 201 U.S. 43 (1906).

77. *Id*. at 44-47.

78. *Id*. at 46.

79. *Id*. at 74-75.

80. *Id*. at 76 ("In organizing itself as a collective body it waives no constitutional immunities appropriate to such body."); see also Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 154 (1897), and cases cited therein.

81. Hale, 201 U.S. at 76. The search was found unreasonable because it required the production of many corporate documents. In dicta, the Court noted that if Congress exercised its powers over interstate commerce to examine a corporation's books, this would not constitute an unreasonable search. *Id*. at 77.

82. 264 U.S. 298 (1924).

83. *Id*. at 306. In overturning an FTC order requesting the papers of a tobacco corporation, Justice Holmes wrote, "[a]nyone who respects the spirit as well as the letter of the fourth amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing

expeditions into private papers on the possibility that they may disclose evidence of crime." *Id*. at 305-06.

Hale and American Tobacco have been criticized as stretching the language of the fourth amendment. "The words of the fourth amendment are quite compatible with a conclusion that a subpoena for papers is neither a search nor a seizure. The fallback position is unnecessary that even if it is a search or a seizure, it may be reasonable. The words 'in a criminal case' had to be interpreted to include administrative and legislative investigations. . . ." K. DAVIS, ADMINISTRATIVE LAW TREATISE 227 (2d. ed. 1978).

Corporations were protected against invasive searches designed to secure corporate documents as well. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (government officers, "without a shadow of authority" went to the office of the company and made a clean sweep of all books, papers and documents and brought them to the district attorney's office for photographing. The Court found that the search violated the fourth amendment and overturned the district court judgment finding the corporation guilty of violating a federal statute); see also Go-Bart Importing Co. v. United States, 282 U.S. 344, 346 (1931) (A corporation received an order enjoining the use of materials taken from a corporate headquarters, in violation of the fourth and fifth amendments, to be used against two individual defendants and for violating the National Prohibition Act of 1929.).

84. D. GUJARATI, supra note 52, at 7; see also J. K. GALBRAITH, ECONOMICS IN PERSPECTIVE 221-51 (1987); A. SCHLESINGER, JR., THE COMING OF THE NEW DEAL (1958) [hereinafter NEW DEAL]; A. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL (1960) [hereinafter POLITICS].

85. See Rabin, supra note 30, at 1248 ("the principal objective of the New Deal was economic recovery").

86. T. MCCRAW, supra note 36, at 210.

87. *Id*.

88. J. LANDIS, THE ADMINISTRATIVE PROCESS (1938). Landis, the creator of the SEC, and author of influential works on regulation, was the most prominent example of a government expert who favored a regulated economy.

89. T. MCCRAW, supra note 36, at 211.

90. The federal securities law was an example of a New Deal reform that was supported by a business community anxious to bolster public confidence in the nation's financial markets. See Rabin, supra note 30, at 1254 n.192. This is the very type of regulation that would not engender constitutional challenges of any sort -- and did not during this period (although Bill of Rights assaults on securities regulations began to gather momentum in the 1980s).

91. Historians are unable to agree on most aspects of the New Deal, not just the purposes of New Deal regulatory programs. Why the economy plunged into a depression, whether Roosevelt himself was chiefly responsible for the architecture of the New Deal, whether the New Deal helped or hurt businesses are questions still debated in current historiography. See Ferguson, Industrial Conflict and the Coming of the New Deal: The Triumph of Multinational Liberalism in America, in THE RISE AND FALL OF THE NEW DEAL ORDER 3-6 (1989).

92. See E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966).

93. The increase in labor militancy and populist demands increased pressure for more planning and direct government action. See R. MCELVAINE, THE GREAT DEPRESSION: AMERICA 1929-1941 at 252-54 (1984).

94. See HAWLEY, supra note 92, at ch. 2-5.

95. *Id*.

96. *Id*.

97. *Id*. at 283-383.

98. Another important historical debate over the New Deal is whether regulatory agencies during that period were captured by the very businesses they were designed to regulate -- a controversy reminiscent of debates over Progressive Era regulation. See B. KARL, THE UNEASY STATE (1983); FRANKLIN D. ROOSEVELT: HIS LIFE AND TIMES 289 (O. Graham & M Wander eds. 1985).

    There is certainly truth to the argument of scholars that many New Deal reformers were "corporate liberals" -- Washington lawyers and insiders who ultimately were captured by the very interests they purported to regulate. See generally K. HALL, THE MAGIC MIRROR 284-85 (1989); P. IRONS, THE NEW DEAL LAWYERS 295-300 (1982) (discussing the impact of government lawyers during the period); R. JEFFREY LUSTIG, CORPORATE LIBERALISM (1982); T. MCCRAW, supra note 36, at 216-21 (1984) (examining the theoretical outlook in American politics during the early part of the century); Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421 (1986) (criticizing New Deal reforms for failing to extend checks and balances to the regulatory state). But others, such as Adolph Berle, Gardiner Means, and Rexford Tugwell were dedicated reformers. See also Ferguson, supra note 91, at 1-32 (analyzing the historiographic debate and showing that the question of whether the state was captive to private interests remains open).

    Evidence exists on both sides. Aviation and trucking, for example, were areas in which government regulation served protectionist functions. See BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); Huntington, The Marasmus of the ICC: The Commissions, the Railroads and the Public Interest, 61 YALE L.J. 467

(1952); Jaffe, The Effective Limits of the Administrative Process: A Reevaluation, 67 HARV. L. REV. 1105-35 (1954). But measures such as the Public Utility Holding Company Act of 1935, the Tennessee Valley Authority, and the Bonneville Power Administration were anathema to the utility industry, for example.

This broader historical debate has implications for corporations and the Bill of Rights. To the extent that the state was captured by corporate interests, one would expect no constitutional challenge to regulatory powers. Since constitutional challenges were undertaken, the question remains: for what reasons? This is an example of historic and constitutional inquiry intersecting in important ways.

99. See infra text accompanying notes 121-76.

100. See Rabin, supra note 30, at 1253-62.

101. See id. at 1263-72 (describing the pressures to bring some formality and due process to agency proceedings. Business recognized that due process could be used as tactic of delay.).

102. See supra notes 61-68 and accompanying text.

103. Neither the Bill of Rights, nor any of its constituent amendments, was listed in the main catalogue of business literature -- the Business Periodicals Index and its predecessor, the Industrial Arts Index -- until the 1960s. The Bill of Rights was not indexed in a business publication until October 1961. Our American Bill of Rights, MGMT. REC., October 1961, at 30. See also Constitutionalizing the Corporation, BUS. WK., Oct. 26, 1974, at 109; How the Constitution Supports Private Enterprise, NATION'S BUS., July, 1976, at 62.

104. The Constitution of the United States, FORTUNE, July 1936, at 57.

105. See generally THE INDUSTRIAL ARTS INDEX, 1913 to 1957, and THE BUSINESS PERIODICALS INDEX, 1957 to present. The Constitution was not mentioned in the index until 1922. See Constitution of the United States, COMM. & FIN. CHRONICLE, Dec. 23, 1922.

106. See Rabin, supra note 30, at 1253-62; Clark, A Socialistic State Under the Constitution, FORTUNE, Feb. 1934, at 68; see also The Constitution of the United States, FORTUNE, July 1936, at 57, 60.

107. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). For a brief discussion of how business viewed the constitution during this period see M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 293 (1986) ("[T]he business class owes much to the Constitution. The vast mercantile development of the last 150 years would not have been possible but for the liberty of movement and action which the Constitution guarantees, for

the interstate recognition of commercial obligations which it enforces, and for the freedom of trade throughout the United States which it requires.").

108. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935); see also A. SCHLESSINGER, JR., POLITICS, supra note 84.

109. The business press reflected concerns about overbroad uses of executive power. See The Case Against Roosevelt, FORTUNE, Dec., 1936, at 102; Must We have Government by Subterfuge? Why Not Amend the Constitution, PUBLIC UTILITIES, July 2, 1936; No Men Clear Decks: Supreme Court and New Deal Legislation, BUS. WK., Nov. 23, 1935, at 11; Supreme Court Looms Up, BUS. WK., Sept. 19, 1936, at 11; What AAA Decision Discloses About Our Form of Government, MAGAZINE OF WALL STREET, Feb. 1, 1936.

    See also W. ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM (1935) (discussing, in 1935, the need for fundamental reform following the New Deal); H. WALLACE, NEW FRONTIERS (1934) (discussing new social plans to address Depression Era changes); H. WALLACE, WHOSE CONSTITUTION: AN INQUIRY INTO THE GENERAL WELFARE (1936) (surveying the historical development of the Constitution).

110. See Blanchard, The Associated Press Antitrust Suit: A Philosophical Clash Over Ownership of First Amendment Rights, 61 BUS. HIST. REV. 43 (1987).

111. See Verkuil, The Emerging Concept of Administrative Procedure, 78 COLUM. L. REV. 258, 311-13 (1978).

112. See T. MCCRAW, supra note 36 at 210-11; Rabin, supra note 30, at 1262-72.

113. See supra notes 76-83.

114. See Wilson v. United States, 221 U.S. 361, 368 (1910), distinguishing Boyd v. United States, 116 U.S. 616 (1886) (no constitutional violation in a broad subpoena that asked for all letters and telegrams relating to an alleged fraud and conspiracy violation where there was no "unreasonable" search and seizure). Wilson did not develop any reason for its narrow construction of fourth amendment rights, and it was not until the 1940s that the Court granted government broader powers to search for corporate documents and reconsidered a theory of corporate personality. Cf. Essgee Co. v. United States, 262 U.S. 151, 157 (1922) (request for corporate documents not unreasonable when confined in scope).

115. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (The Department of Labor subpoenaed the records of two newspaper publishing corporations pursuant to the Fair Labor Standards Act, 52 Stat. 1060. The Court permitted a broad subpoena for corporate documents and seemed to suggest that any request for corporate documents is not a search and seizure protected by the fourth amendment.).

116. *Id*. at 204-06 (citations omitted).

> Correspondingly, it has been settled that corporations are not entitled to all of the constitutional protection which private individuals have in these and related matters. . . . And, although the fourth amendment has been held applicable to corporations notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of Wilson v. United States, distinguishing the earlier quite different one of Boyd v. United States, held the process not invalid under the Fourth amendment, although it broadly required the production of copies of letters and telegrams 'signed or purport[ed] to be signed by the President of said company . . . in regard to an alleged violation of the statutes of the United States. . . .
>
> See also Fleming v. Montgomery Ward & Co., 114 F.2d 384, 390 (7th Cir.) (A corporation is not protected by immunity against self-incrimination, but is protected against unreasonable searches and seizures.) cert. denied, 311 U.S. 690 (1940); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) (delegated power of Secretary of Labor to issue subpoenas within limits of congressional authority).

117. 338 U.S. 632, 641 (1950).

118. *Id*. at 652 ("Even if one were to regard the request for information as caused by nothing more than official curiosity nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with law and the public interest.").

119. K. DAVIS, supra note 83, at 232 ("What a flexible Constitution we have! The Fourth Amendment, according to a unanimous Supreme Court in 1924 . . . prohibits 'direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.' And the same Fourth Amendment, according to a unanimous Supreme Court in 1950, allows an agency to go fishing in corporate papers, even if the reason is 'nothing more than official curiosity.'"). Although Davis chooses to regard the question as the degree of reasonableness of an inspection, the Court saw the question as one of the nature of corporate personality, and whether that entitled the state to regulate the corporation. In United States v. Morton Salt, 338 U.S. 632, 652 (1950), the Court explicitly used a federal version of the artificial entity theory. The Court held that "[Corporations] are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege to act as artificial entities." *Id*.

120. Before 1960, corporations did not receive any other Bill of Rights protections. First amendment safeguards were invoked by other organizations: newspaper corporations for example, which have greater protections under the language of the first amendment, and trade unions and associations. See, e.g., Grosjean v. American Press Co., 297 U.S. 233, 243 (1936) (a newspaper corporation has a first amendment liberty right to freedom of speech, incorporated through the due process clause of the fourteenth amendment); Hague v. CIO, 307 U.S. 496, 520 (1939) (neither a labor union nor the ACLU could invoke first amendment protections incorporated through the fourteenth amendment due process liberty

clause); NAACP v. Button, 371 U.S. 415, 428 (1963) (NAACP may invoke first amendment rights). Although presenting different issues, the analysis used by the Supreme Court in these opinions is relevant to the history of corporate theory. In the cases decided in the 1930s the Court used corporate theory as a mode of analysis. In later years the Court retreated from corporate theory. See infra notes 245-52 and accompanying text.

121. See infra text accompanying notes 145-215.

122. Historians and political scientists suggest that differentiating among types of industrial sectors is important for social analysis. See, e.g., T. FERGUSON & J. ROGERS, RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS (1986). This Article suggests that differentiating among different types of regulation is important for legal and constitutional analysis.

123. M. SCHNITZER supra note 33, at 23-24.

124. 42 U.S.C. § 1857 (1970).

125. 15 U.S.C. § 2051 (1972).

126. 5 U.S.C. § 7902 (1970).

127. See B. MITNICK, THE POLITICAL ECONOMY OF REGULATION 21-78 (1980).

128. Vogel, The "New" Social Regulation in Historical and Comparative Perspective, in REGULATION IN PERSPECTIVE 155, 161 (T. McCraw, ed. 1981).

129. *Id*. Although modern social regulation is occasionally conducted by state governments, the trend is federal. And, moreover, the sheer quantity of federal regulation has been greater in the post-1960 era than in any previous era of American history. Sanders, The Regulatory Surge of the 1970's in Historical Perspective, in PUBLIC REGULATION 117 (E. Bailey ed. 1987).

130. Vogel, supra note 128, at 162-63. Vogel calls this regulation the "New Social Regulation." Some political theorists refer to Modern Regulation as the "New Wave" of government regulation. See Weidenbaum, The New Wave of Governmental Regulation of Business, BUS. & SOC'Y REV. 81-86 (1975).

    Vogel makes the distinction between new social and old economic regulation. "Economic regulatory agencies govern prices, output, terms of competition and entry/exit. Social regulations are concerned with the externalities and social impact of economic activity. The ICC, FPC, and CAB, the FCC and the SEC are examples of the former; the CPSC, EPA, EEOC, and OSHA illustrate the latter." Vogel, supra note 128, at 155 n.1.

For purposes of analyzing the Bill of Rights, this Article focuses on the nature of Modern regulation, not simply its purposes. Therefore, the definition of Modern Regulation is broad, including the four factors listed, with regard to the intrusiveness of the regulation.

131. M. WEIDENBAUM, BUSINESS, GOVERNMENT, AND THE PUBLIC 13-16 (1981). See generally STUDIES IN PUBLIC REGULATION (G. Fromm ed. 1981) (a collection of essays addressing different aspects of regulation economics); B. MITNICK, supra note 127; M. HEPER, THE STATE AND PUBLIC BUREAUCRACIES: A COMPARATIVE PERSPECTIVE (1987) (a collection of essays comparing the bureaucracies of various nations); J. WILSON, THE POLITICS OF REGULATION (1980) (a collection of essays addressing political influences on regulation).

132. See, e.g., Vogel supra note 128, at 164-65.

    [W]hat is novel about the politics of business-government relations during the last fifteen years is that conflicts over the scope of social regulation have affected directly the power and wealth of the private sector vis-a-vis nonbusiness interest groups. In essence, during the seventies, the controversy over the social regulation of business became the focus of class conflict: it pitted the interests of business as a whole against the public interest movement as well as much of organized labor. The nature of the conflict over regulation became analogous to the struggle over the adoption of the welfare state and the recognition of unions that defined class conflict during the 1930s. . . .

    Id. at 164. This differs from other eras when conflicts over regulation pitted one private sector interest against another -- conflicts over antitrust and tariff rates -- all had this effect during the New Deal and Progressive eras. Similar conflicts were played out in the 1970s over economic deregulation, oil deregulation, trucking, utilities, etc.

133. See id. at 170-75.

134. See T. FERGUSON & J. ROGERS, supra note 122; C. NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA (1986); M. PERTSCHUK, REVOLT AGAINST REGULATION (1982); D. VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 16-112 (1989).

135. Reich, supra note 35, at 733. See also Rabin, supra note 30, at 1286 n.328 (describing the wide influence of Reich's article). The judicial acceptance of the New Property argument came in Goldberg v. Kelly, 397 U.S. 254, 257 n.3 (1970) (Requiring a "fair hearing" prior to termination of AFDC benefits. In this respect the New Property was recognized as something created by government.).

136. Reich, supra note 35, at 734-37.

137. This term is different from the term "New Property"; Reich calls for the creation of a New Property that is not tied to government largess. *Id*. at 787. In this Article the term is not

prescriptive, but merely descriptive. It includes government-created wealth as well as property in the form of information.

138. Reich also acknowledges that government largess is only one of several new forms of wealth. *Id*. at 786.

139. See D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY XV (2d ed. 1976) (a post-industrial society is characterized not by a labor theory, but by a knowledge theory of value); see also D. BELL & I. KRISTOL, CAPITALISM TODAY (1971) (a collection of essays of contemporary capitalist thought); R. DAHRENDORF, CLASS AND CLASS CONFLICT IN AN INDUSTRIAL SOCIETY (1959) (writing of a "post capitalist" society); C. LINDBLOOM, POLITICS AND MARKETS (1977) (discussing the relationship between politics and economics); THE POLITICAL ECONOMY OF CORPORATISM (W. Grant ed. 1985) (a collection of essays addressing various aspects of "Neo-capitalism").

140. See G. GILDER, MICROCOSM ch. 1 (1989) (describing the twentieth century as one in which matter is overthrown so that only knowledge becomes important as a source of wealth).

141. Reich, supra note 35, at 746.

142. *Id*. at 762. Similarly, an applicant can be penalized by permanent exclusion from the bar for exercising his first amendment rights and refusing to answer questions about political affiliations. *Id*. at 763; see In re Anastaplo, 366 U.S. 82 (1961). In this way a government-created property -- the right to practice law -- is only granted if first amendment rights not to answer questions are curtailed.

143. Reich did not discuss whether corporations feel the pressure to forego their Bill of Rights guarantees. Reich, supra note 35, at 760-64. He does discuss the case of a foundation, licensed to broadcast by the government. *Id*. at 762. But the general problem of the corporation does not arise; indeed, Reich remains concerned with sheltering the "solitary human spirit" and fostering "individual values" for rootless twentieth century man. *Id*. at 787.

144. Reich wrote before the New Regulation. For him, reforms of the Old Regulation led to increased government power over the individual.

> The reform took away some of the power of the corporations and transferred it to government. In this transfer there was much good, for power was made responsive to the majority rather than to the arbitrary and selfish few. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on to government. And government carried further the powers formerly exercised by the corporation. Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out gratuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took

over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

Id. at 773.

145. See infra notes 184-89.

146. See infra notes 158-71.

147. *Id*.

148. See v. City of Seattle, 387 U.S. 541 (1967).

149. *Id*. at 554. See overruled Frank v. Maryland, 359 U.S. 360, 366 (1959) (the "protection of the community's health" should prevail, wrote Frankfurter for a 5-4 Court, which held the warrantless inspection of a private dwelling, by a health inspector looking for rats, did not violate the fourth amendment).

150. See, 387 U.S. at 544-45, 545 n.5, ("[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the fourth amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome") (citing United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Hale v. Henkel, 201 U.S. 43 (1906)).

151. 387 U.S. at 543-44.

152. *Id*.

153. *Id*. at 544.

154. *Id*. The Court's reasoning is criticized from a linguistic perspective. Davis, for example, notes that the fourth amendment refers to "persons, houses, papers, and effects". The opinion, however, "said nothing of the possibility that business 'papers' may be protected even though commercial premises may be considered not to be 'houses.'" K. DAVIS, supra note 83, at 247.

Added to this problem of language is a theoretical issue. The opinions relied on in See -- Morton Salt, Oklahoma Publishing, and Hale -- all involved corporations, and were based on a theory of the corporation that permitted broad government visitorial powers. See did not involve a corporation. By relying on cases that did, it used these cases for the wrong proposition, and thus turned fourth amendment discussion in a new direction.

See is also criticized for changing the focus of the fourth amendment. The main purpose of the fourth amendment -- both the historic purpose and today's practical purpose -- is to

protect "privacy." An individual has interests in privacy that a corporation does not have, including the body, the home, the bedroom, the personal diary. Privacy interests relate more to what is personal than to what is impersonal. A corporation's principal privacy interest is in its papers . . . .

Id.

Davis also notes that the strongest privacy interest is in the home, because it was writs of assistance used to enter homes that the colonists found most abhorrent. See also Go-Bart Importing Co. v. United States, 251 U.S. 344, 346 (1931); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). According to Davis, "[e]ach of those cases had to do with the corporation's books and papers, not with an inspection of its premises or equipment. K. DAVIS, supra note 83, at § 49, 251.

155. In Colonnade Corp. v United States, 397 U.S. 72 (1969), a federal agent inspected a liquor corporation, without a warrant, searching for tampered bottles. Upholding the search, the Court created a narrow exception to See's warrant requirement based on the history of the fourth amendment and Congress' broad power over the liquor industry. *Id*. at 74-75.

Following the English parliament, Congress imposed excise taxes when the fourth amendment was ratified, and had a history of regulating the liquor industry. *Id*. at 75 nn.6-7. The Court did not broach the question of corporate personality, and confined its analysis to what extent a "businessman" or "private commercial property" has a right to privacy.

156. The firearms industry was also exempted from See's warrant requirement. In United States v. Biswell, 406 U.S. 311 (1971), the Court upheld a warrantless search for illegal guns in a pawn shop. Although the firearms industry is not as pervasively regulated as the liquor industry, the Court surmised that anyone entering that business "does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id*. at 316. The exception to the general principle that warrantless searches violate the fourth amendment was limited to searches of commercial premises in a closely regulated industry or marked by a history of careful legislative supervision. *Id*. In those industries, the commercial owner gave his implied consent to the search. *Id*.

157. In Colonnade the Court stated:

We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

Colonnade, 397 U.S. at 77.

The Court relied on See for the proposition that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Id*.

158. See also G.M. Leasing Corp. v. United States, 429 U.S. 338, 338 (1976) (The warrantless invasion of corporate offices violates the fourth amendment. Unlike Biswell or Colonnade, the intrusion was not based on the nature of the business, its license, or on a regulation of its activities.).

159. 436 U.S. 307 (1977).

160. 29 U.S.C. §§ 651-678.

161. Marshall, 436 U.S. at 310.

162. *Id*. at 308-09.

163. *Id*. at 339 n.11; see, e.g., 30 U.S.C. § 813 (Federal Coal Mine Health and Safety Act of 1969); 30 U.S.C. §§ 723, 724 (Federal Metal and Nonmetallic Mine Safety Act); 21 U.S.C. § 603 (Inspection of Meat and Food Products).

164. Marshall, 436 U.S. at 329-30 (Stevens, J., dissenting).

165. Hayes, What Can You Do when OSHA Calls? PERS. ADMIN., Nov. 1982, at 66.

166. *Id*. The view of Nikon, a multinational camera corporation, may not be representative. As a sizeable multinational, Nikon may welcome regulation, if it is regularized, whereas smaller corporations may be opposed to government regulation altogether. Recent scholarship suggests that different corporate sectors, and corporations of different size, have different interests in regulation. See T. FERGUSON & J. ROGERS, supra note 122, at 44-46; T. FERGUSON & J. ROGERS, THE HIDDEN ELECTION at ch. 1 (1984).

Some historians also suggest that corporations, far from opposing regulation, seek to capture the agencies they attempt to regulate. See, e.g., G. KOLKO, supra note 53, at ch. 1; G. KOLKO, supra note 56, at ch. 1.

But the Modern social regulatory agencies are less susceptible to capture because they regulate many sectors, not just one industry. For instance, the EPA cannot be captured by the many industries that it regulates, but the ICC could be captured by just the railroad industry. And the alliances of large and small businesses in Marshall suggest that many corporate sectors can unite against the intrusive aspects of Modern Regulation, particularly surprise inspections. 436 U.S. at 308-09.

It is not necessary here to enter the debate about capture, or to determine whether regulation is opposed altogether or welcomed by certain industries and sectors. It is

sufficient for Bill of Rights purposes to note corporations' uniform opposition to the intrusiveness of Modern Regulation.

167. See Blow for Freedom?, CHEMICAL WK., June 7, 1978; Man From OSHA Must Have Warrant, FLEET OWNER, July 1978; OSHA Needs Warrant for Inspections, PROFESSIONAL BUILDER AND APARTMENT BUS., July 1978.

168. Neither the Bill of Rights nor any of its constituent amendments was listed in the Business Periodicals Index until the 1960s. The Bill of Rights was not indexed in a business publication until October 1961. See Our American Bill of Rights, MGMT. REC., Oct. 1961, at 30.

    In the mid-1970s, the Business Periodicals Index exploded with references to the Bill of Rights, and thereafter major articles on the first ten amendments, as they relate to corporations, have appeared in the business press. See generally Business Periodicals Index, 1975 to present. See also How the Constitution Supports Private Enterprise, NATION'S BUS., July 1976 (National Chamber of Commerce publication).

    Mobil Oil's advertising campaigns are recent evidence of the importance of the Bill of Rights to corporations. Begun in the 1970s, the campaigns focus on the first ten amendments. Mobil ran a series of "advertorials" in the New York Times trumpeting the Bill of Rights as the "Second American Revolution." See An Inexhaustible Mine of National Wealth, N.Y. Times, Oct. 15, 1987, § A, at 31; see also The Danger of the Levelling Spirit, N.Y. Times, Oct. 8, 1987, § A, at 39.

169. 452 U.S. 594 (1981).

170. 30 U.S.C. § 801 (1977).

171. Donovan, 452 U.S. at 606; see also New York v. Burger, 482 U.S. 691, 692 (1987) (warrantless inspections permitted for the junkyard industry); Collins & Hurd, Warrantless Administrative Searches: It's Time to Be Frank Again, 22 AMER. BUS. L.J. 189 (1984) (a review of Supreme Court decisions concerning administrative searches); Comment, The Fourth Amendment and Administrative Inspections, 16 HOUS. L. REV. 399 (1979) (authored by George T. Perry, Jr.).

172. 476 U.S. 227 (1986).

173. Dow Chemical owned a 2000 acre facility in Midland, Michigan. The complex's numerous buildings and interconnecting pipework were surrounded by an elaborate security system that barred ground level public view of the plant. *Id*. at 240. The EPA, rather than secure an administrative warrant, hired a pilot to photograph the plant from altitudes of 12,000, 3,000, and 1,200 feet. *Id*. at 243. The district court granted Dow's motion for summary judgment, reasoning that, because the configuration of building and pipes photographed constituted "trade secrets" protected by state tort law, the government had violated the

company's reasonable expectation of privacy. The Sixth Circuit reversed, id. at 243, and the Supreme Court upheld the reversal.

174. Dow, 476 U.S. at 235 (citing See v. City of Seattle, 387 U.S. 541 (1967); see also New York v. Burger, 482 U.S. 691 (1987).

175. Dow, 476 U.S. at 235 (citing Oliver v. United States, 466 U.S. 170, 171 (1984)).

    Justice Powell's partial dissent concluded that the Court did not explain how its decision squared with Katz v United States, 389 U.S. 347 (1967). Dow, 476 U.S. at 244. Katz held that the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

    389 U.S. at 351.

176. See Federal Prying from the Sky, 73 NATION'S BUS., Oct. 1985, at 34.

177. The issue was not considered until 1942 when, in Valentine v. Chrestensen, 316 U.S. 52 (1942), overruled, Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Court considered the case in which a man passed out handbills advertising a tour in violation of a city ordinance. The Court upheld the ordinance, holding that "purely commercial advertising" has no first amendment protection.

178. 425 U.S. 748, 771 (1976).

179. 447 U.S. 557, 574 (1980).

180. Advertising bans on legal services, contraceptives, abortion clinics, and real estate were all struck down because the consumer had a right to hear the information. See, e.g., Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (lawyer's services); Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (contraceptives); Linmark Associates, Inc. v. Willinoro, 431 U.S. 85 (1977) (housing); Bigelow v. Virginia, 421 U.S. 809 (1975) (abortions).

    The Court has allowed regulations of commercial speech when such speech is false, deceptive, or misleading. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 658 (1985); Friedman v. Rogers, 440 U.S. 1, 13-16 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 473 (1978). It also has allowed regulation when the speech proposes illegal transactions. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 387-88, reh'g denied, 414 U.S. 881 (1973).

181. 447 U.S. at 557.

182. *Id*. at 589 (Rehnquist, J., dissenting).

183. Although the Court has permitted regulation of corporate commercial speech in recent years, it has always been in the context of the Hudson balancing test. See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 329 (1986) (upholding a regulation restricting the advertising of gambling casinos on the basis of the Hudson balancing test).

184. With Liberty and Justice (and free speech) For Some, N.Y. Times, Sept. 10, 1987, § A, at 31. Mobil Oil Corporation, whose "advertorials" are often an accurate barometer of Fortune Five Hundred opinions, has launched a campaign opposed to a cigarette advertising ban.

    See also Commercial Free Speech, The Argument for Our Side, DIRECT MARKETING, Feb. 1983; Crossen, Proliferation of 'Advertorials' Blurs Distinction Between News and Ads, Wall St. J., Apr. 21, 1988, § 2, at 33.

185. See, e.g., PUB. REL. J., Dec. 1979, at 20.

186. Hatano, Should Corporations Exercise Their Freedom of Speech Rights?, 22 A. BUS. L.J. 165 (1984); see also Barrett, The Unchartered Area -- Commercial Speech and the First Amendment, 13 U.C. DAVIS L. REV. 175, 185 (1980) (discussing the regulation of false advertising).

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

    See also T. B. CARTER, FREE SPEECH AND ADVERTISING -- WHO DRAWS THE LINE? (1987); R. REIMER, THE PROPOSED PROHIBITION ON ADVERTISING TOBACCO PRODUCTS: A CONSTITUTIONAL ANALYSIS, Jan. 16, 1986 (prepared for the Congressional Research Service); G. Will, The Civil Libertarians Are Blowing Smoke, Washington Post, Jul. 24, 1986, § A, at 23; J. Tye, Cigarette Ads Reveal a History of Deceit, Wall St. J., Aug. 5, 1986, at 30; M. Mintz, Judge Says Tobacco Industry Hid Risks, Washington Post, April 22, 1988, at 1.

188. Washington Post, Dec. 20, 1987, § K, at 2. Also enclosed in the packet was a book of essays from a Phillip Morris Magazine Essay competition, soliciting essays that specifically contained the words "Smoking and the First Amendment." See AMERICAN VOICES: PRIZE WINNING ESSAYS ON FREEDOM OF SPEECH, CENSORSHIP & ADVERTISING BANS (1987) ($ 81,000 in prize money awarded to authors for these essays).

189. Washington Post, Dec. 20, 1987, § K, at 3.

190. Tobacco use is one of the leading causes of death in the United States, responsible for 346,000 lives lost every year. (By comparison, approximately 50,000 Americans died in the Vietnam war; 4,000 die annually from heroin and 2,000 die annually from cocaine). Figures taken from "Learning and Unlearning Drug Abuse in the Real World" at 105

(1988) (research monograph of the National Institute on Drug Abuse) cited in THE UTNE READER 144 Jan./Feb. 1990).

191. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 359 N.E.2d 1262 (1977), rev'd sub nom. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978); see also Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (utilities enjoy the full panoply of first amendment protections for their direct comments on public issues), appeal dismissed, 475 U.S. 1114 (1985).

192. First Nat'l Bank of Boston, New England Merchants National Bank, Gillette Co., Digital Equipment Corp., and the Wyman-Gordon Corporation were plaintiffs in the action. Bellotti, 435 U.S. at 768 n.1.

193. The referendum, or ballot, involved in Bellotti, was a proposed amendment to the Massachusetts constitution allowing a progressive state income tax. See First Nat'l Bank v. Attorney Gen., 371 Mass. at 774-75, 359 N.E.2d at 1265. At the time, Massachusetts had a flat income tax; the proposed amendment authorized no new taxes, it only made the existing system progressive.

    After corporations overturned the Massachusetts statute proscribing corporate spending on the tax ballot, the ballot was defeated. Massachusetts still does not have a progressive income tax. Telephone interview with Dan Sullivan, Massachusetts Department of Campaign Financing (April 6, 1988). This was the second time corporations and their allies defeated a progressive income tax. First Nat'l, 371 Mass. at 778, 359 N.E.2d at 1266-67.

194. First Nat'l, 371 Mass. at 785-87, 359 N.E.2d at 1270-71.

195. Bellotti, 435 U.S. at 802.

196. *Id*. at 770 n.4.

197. H. SCHMERTZ, CORPORATIONS AND THE FIRST AMENDMENT 16 (1978) ("The Supreme Court decision is also important in that it diminishes the distinction that existed between individuals and corporations. The decision erases any doubt that first amendment rights inure to corporations, which have, in the eyes of the law, certain of the characteristics of 'natural persons.'").

198. *Id*. ("At the same time, when there are not bottom line considerations, it may make sense for a corporation to spend heavily on behalf of what it deems to be the national good.").

199. See Mastro, Costlow & Sanchez, Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It, 32 FED. COMM. L.J. 315 (1980); see also Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, 454 U.S. 290, 290-91 (1981) (White, J., dissenting) (city ordinances that placed $ 250 cap on contributions to committees formed to support ballot measures

contravened the first amendment); E. BARNOUW, THE SPONSOR (1981) (discussing the use of the media to influence referenda).

200. President Theodore Roosevelt, in his 1905 State of the Union address, recommended a total ban on corporate political activity, urging that "both the national and the several state legislatures forbid any officer of a corporation from using the money of the corporation in or about any election [or] in connection with any legislation." Quoted in J. Brebbia, First Amendment Rights and the Corporation, PUB. REL. J. 17 (Dec. 1979); see also 40 CONG. REC. 96 (1905) (Roosevelt message to Congress to the same effect). Reflecting this sentiment, the Tillman Act, ch. 420 Stat. 864, repealed by Act approved Mar. 4, 1909, ch. 321, 35 Stat. 1153, 1159, provided that no corporation could make direct contributions to campaigns involving Federal office. Since then Congress and the state legislatures have repeatedly limited or prohibited corporate contributions or expenditures. See Act approved Jan. 26, 1907, ch. 420, 34 Stat. 864.; Cort v. Ash, 422 U.S. 66, 81-82 (1975); Note, Corporate Democracy and the Corporate Political Contribution, 61 IOWA L. REV. 545 (1975) (authored by Michael D. Holt).

    See, e.g., Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397 (W.D. Mich. 1986) (denying a Michigan State Chamber of Commerce first amendment challenge to a state statute that makes it a felony for corporations to spend money on political candidates), rev'd on other grounds, 856 F.2d 783 (6th Cir. 1986).

201. 475 U.S. 1 (1986).

202. *Id*.

203. *Id*. at 22-25.

204. *Id*. at 5 n.3.

205. It is symbolic in the sense that property has become more like air in an envelope: intangible, ephemeral, and based on ideas.

206. Labaton, Speech Rights of Companies, N.Y. Times, Oct. 19 1987, at D2, col. 1.

207. Hale v. Henkel, 201 U.S. 43 (1906).

208. The court granted the protection of the fifth amendment takings clause to corporations in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

209. Fong Foo v. United States, 369 U.S. 141 (1962). The business press also follows fifth amendment evolution to some degree. See Corporate Officer Can't Use Fifth Amendment to Withhold Corporate Records, PRACTICAL ACCT., Aug. 1986, at 12; Supreme Court Interpretation of Fifth Amendment Protection Against the Compelled Production of Business Documents, ARMA REC. MNGT. Q., Oct. 1986, at 3.

210. 369 U.S. at 143; see United States v. Security Nat'l Bank, 546 F.2d 492 (2d Cir. 1976); see also United States v. Martin Linen Supply Co, 430 U.S. 564 (1977) (the fifth amendment bars retrial of a textile corporation that was acquitted under Rule 29(c) of the Federal Rules of Criminal Procedure of violating an antitrust consent decree); United States v. Armco Steel Co. 252 F. Supp. 364, 368 (S.D. Cal. 1966) (Ruling "beyond doubt . . . that the constitutional jeopardy extended to 'persons' includes corporations." The court relied on the definition of persons used by federal statutes, such as the antitrust laws, and included corporations as persons.); Comment, The Applicability of the Double Jeopardy Right to Corporations, 1977 DUKE L.J. 726 (1977) (authored by David L. Kane) (denial of double jeopardy protection to corporations does not advance public interest).

211. 631 F.2d 953 (D.C. Cir. 1980), reversing sub. nom. Old Dominion Dairy Prods., Inc. v. Brown 471 F. Supp. 300 (D.D.C. 1979).

212. *Id*. at 957-58.

213. *Id*. at 962-64.

214. *Id*. at 962-63. In the fight against Modern Regulation corporations have also received some sixth and seventh amendment protections. Although never specifically extending the right, the Court heard the claim of a corporate defendant that it was denied sixth amendment safeguards. In 1907, in Armour Packing Co. v. United States, 209 U.S. 56, 76-77 (1907), a company, convicted for failure to pay specific rates of shipment for goods as required by federal law, was assumed to be an "accused" for sixth amendment purposes.

    Recently lower courts have specifically extended sixth amendment rights to corporations. One court noted "the fundamental principle that corporations enjoy the same rights as individuals to trial by jury." United States v. R. L. Polk & Co., 438 F.2d 377, 379 (6th Cir. 1971).

    In United States v. Rad-O-Lite, 612 F.2d 740 (3d Cir. 1979), the Third Circuit heard a corporation's appeal, along with its principal officer, of conviction for conspiracy to engage in racketeering activities. The corporation claimed it was denied its sixth amendment right to counsel, because the same attorney represented both the corporation and its principal officer. The court, following the mode of analysis used in Bellotti, noted that

    [t]he Supreme Court generally has considered issues of the application of constitutional rights in negative terms: asking whether corporate status should defeat an otherwise valid claim of right. The sixth amendment describes the class of persons protected by its terms with the word 'accused.' This language does not suggest that the protection of sixth amendment rights is restricted to individual defendants.

    Furthermore, an accused has no less of a need for effective assistance due to the fact that it is a corporation. The purpose of the guarantee is to ensure that the accused will not suffer an adverse judgment or lose the benefit of procedural protections because of ignorance of

the law. . . . A corporation would face the same dangers unless the agent representing it in Court is a competent lawyer.

Id. at 743; see also United States v. Crosby, 24 F.R.D. 15 (1959) (corporation may only appear in a court through an attorney in a criminal case); In re Las Colina Dev. Corp., 585 F.2d 7 (1st Cir. 1978), cert. denied, 440 U.S. 937 (1979); see also United States v. Winnie Mae Mfg. Co., 451 F. Supp. 642 (C.D. Cal. 1978) (corporations entitled to sixth amendment right to present a defense, and to fifth amendment due process right, when charged with harboring illegal aliens).

The Supreme Court has not directly granted seventh amendment rights to corporations, although it has intimated that a corporation's right to sue implies the right to trial by jury. In Ross v. Bernhard, 396 U.S. 531, 532 (1970), the Court held that plaintiffs in a stockholders derivative suit are entitled to trial by jury when the corporation, suing in its own right, would be permitted a jury trial.

At least one court has suggested that corporations have a general right of privacy, derived from the penumbra of Bill of Rights protections accorded them. Roberts v. Gulf Oil Corp., 147 Cal. App. 3d 770, 795-97, 195 Cal. Rptr. 393, 410-12 (1983).

215. In the 1960s courts and commentators worried that government could intimidate individuals, and impinge on their liberty, by threatening to withhold government largess (like welfare checks). Old Dominion is an example of how this concern applies with less force to corporations -- the more size and resources a corporation has, the more it is willing to fight to retain government largess. See supra notes 135-43.

216. The language of the document never mentions corporations. See supra note 8.

217. See supra note 26 and accompanying text.

218. 201 U.S. 43 (1906).

219. Unlike with the fourth amendment, the Court never deviated from its conclusion that corporations may not invoke the fifth amendment privilege. In Wilson v. United States, 221 U.S. 361 (1911), the Court held that corporate officers in possession of corporate records must produce them in response to a subpoena, even if the records might incriminate them personally.

A companion case to Wilson, Dreier v. United States, 221 U.S. 394, 399-400 (1911), indicated that the result would be the same whether the subpoena was directed to the corporation or to an officer of the corporation, as long as it sought corporate records. See also Shapiro v. United States, 335 U.S. 1, 16-19 (1948) (no privilege as to records required by law); Grant v. United States, 227 U.S. 74 (1913) (no privilege as to corporate records in possession of attorney of former sole shareholder).

220. There may be little practical significance to Hale's fifth amendment holding. First, a corporation can never take the stand to use the privilege orally -- its chief value is to individuals. Second, when the individual uses the privilege for documents, it is usually circumvented and the documents are obtained by other means. See generally Comment, Fifth Amendment Protection and the Production of Corporate Documents, 135 U. PA. L. REV. 747 (1987) (authored by Shauna J. Sullivan).

221. Hale, 201 U.S. at 75.

222. Saltzburg, The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination, 53 U. CHI. L. REV. 6, 36-38 (1986).

223. 338 U.S. 632 (1950).

224. 201 U.S. at 44-45.

225. *Id*. at 46.

226. *Id*. at 70-72.

227. *Id*. at 78-79.

228. *Id*. at 74.

229. *Id*. at 74-75.

230. *Id*.

> The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to criminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the laws of the land long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. . . . He owes nothing to the public so long as he does not trespass upon their rights. . . . Upon the other hand, the 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 would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporte books and papers for that purpose.
>
> *Id*.

231. *Id*. at 75.

> It is true that the corporation in this case was chartered under the laws of New Jersey, and that it receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress. It is not intended to intimate, however, that it has a general visitatorial power over state corporations.
>
> *Id*.

232. See Bellis v. United States, 417 U.S. 85, 89-90 (1984); Fisher v. United States, 425 U.S. 391, 408 (1976); Fifth Amendment Limitations on Compelled Production of Evidence, 22 AM. CRIM. L. REV. 559, 559-60 (1984). But see comment, Fifth Amendment Privilege and Compelled Production of Corporate Papers After Fisher and Doe, 54 FORDHAM L. REV. 935 (1986) (authored by Arthur Y. D. Ong) (arguing that Fisher can be construed to create a fifth amendment privilege for custodians of corporate papers).

233. Hale, 201 U.S. at 76; see Gulf Colorado & Santa Fe R.R. Co. v. Ellis, 165 U.S. 150, 154 (1897).

234. Hale, 201 U.S. at 76.

235. *Id*. at 76-77. The search was found unreasonable because it required the production of so many corporate documents. In dicta, the Court noted that if Congress exercised its powers over interstate commerce to examine a corporation's books, this would not constitute an unreasonable search. *Id*. at 77.

236. *Id*. at 78-79 (Harlan, J., concurring). Harlan warned of the grave restrictions that the majority's ruling would have on the government's regulatory powers.

> [T]he power of the Government by its representatives to look into the books, records and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed. If a corporation, when its affairs are under examination by a grand jury proceeding in its work under the orders of the court, can plead the immunity given by the fourth amendment against unreasonable searches and seizures, may it not equally rely upon that amendment to protect it even against a statute authorizing or directing the examination by the agents of the Government creating it, its papers, documents and records, unless they specify the particular papers, documents, and records to be examined?

Id.

Justice McKenna argued in his concurrence that Congress, by virtue of the Commerce clause, has dominion over corporations engaged in that commerce and is not subject to the limits of the fourth amendment. *Id*. at 82 (McKenna, J., concurring).

237. Shades of Harlan and artificial entity theory emerged in later years as the government acquired increased power over corporate documents. In Wilson v. United States, 221 U.S. 361, 368 (1910), the Court held constitutional a broad subpoena that asked for all letters and telegrams relating to an alleged fraud and conspiracy violation. The subpoena required the production of letters and telegrams "signed or purporting to be signed by the President of said company during the month [sic] of May and June 1909 in regard to an alleged violation of the statutes of the United States by C. C. Wilson." *Id*. at 375. The Wilson Court did not develop any reasons for its narrow construction of fourth amendment rights, and it was not until the 1940s that the Court granted the government broader powers to search for corporate documents and reconsidered a theory of corporate personality. See infra notes 239-42 and accompanying text.

238. 327 U.S. 186 (1946).

239. *Id*. at 204.

240. *Id*. at 204-05. The Court relied on Wilson, where a government request for documents had been held valid despite its broad scope, as support for its narrow interpretation of corporate fourth amendment rights; see also Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943) (subpoena for business records including payroll records, held invalid); Fleming v. Montgomery Ward & Co., 114 F.2d 384, 388-89 (7th Cir. 1940) (held that a corporation is not protected by immunity against self-incrimination, which is guaranteed by the fifth amendment, but is entitled to protection against unreasonable searches and seizures under the fourth amendment), cert. denied, 311 U.S. 690 (1940).

241. 338 U.S. 632, 641 (1950).

242. *Id*. at 652.

243. See also California Bankers Ass'n v. Shultz, 416 U.S. 21, 65, 67 (1974), citing Morton Salt for the proposition that "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Id*. at 67. The Court upheld the constitutionality of the reporting requirement of the Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, 12 U.S.C. §§ 1730d, 1829b, and 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122. *Id*. at 67.

244. See supra notes 191-95.

245. 297 U.S. 233, 242-43 (1936).

246. *Id*. at 244.

247. 203 U.S. 243 (1906).

248. *Id*. at 255. The Court employed a strong version of the artificial entity theory that accords states sweeping power to regulate corporate conduct.

> Such a restriction as that founded in the Missouri statute, if embodied in the original charter of a life insurance corporation, would, of course, be binding upon it in the State granting such charter. . . . If, however, no such restriction was imposed by its charter, it could yet be imposed by subsequent legislation. . . . The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good that the State creating the insurance corporations . . . may, without transcending the limits of legislative power, regulate their affairs, so far, at least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions. . . . If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is its privilege to cease doing business.

Id. at 254-55.

249. Compare Western Turf Ass'n v. Greenburg, 204 U.S. 359 (1907) (concurring with Riggs that the fourteenth amendment due process clause protects only the property, and not the liberty, interests of corporations) with First Nat'l Bank v. Bellotti, 435 U.S. 765, 778-79 (1978) (disapproving the lower court's argument, as an "artificial mode of analysis," that corporations cannot claim fourteenth amendment protection of liberty).

250. 307 U.S. 496 (1939).

251. *Id*. at 527 (citing Northwestern Nat'l Life Insurance Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907)).

252. Almost thirty years later the Court reversed itself again and permitted a corporation to assert a due process liberty right. In NAACP v. Button, 371 U.S. 415 (1963), the Court invalidated a Virginia statute that forbid the solicitation of legal business by any organization, when the organization is not itself a party in the case. The NAACP had violated the statute by representing schoolchildren's parents in desegregation suits. The Court relied, not on corporate theory, but on the purpose of the Statute. "We think petitioner may assert this right on its own behalf because, though a corporation, it is directly engaged in those activities claimed to be constitutionally protected which the statute would curtail." *Id*. at 428. Although it cited Grosjean, the Court did not discuss Riggs or Hague.

254. See overruled Frank v. Maryland, 359 U.S. 360 (1959).

In the See dissent, Justices Clark, Harlan, and Stewart relied on Frank: "the power to inspect dwelling places . . . is of indispensable importance to the maintenance of community health; a power that would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts." See, 387 U.S. at 546 (Clark, J., dissenting) (quoting Frank, 359 U.S. at 372).

255. See, 387 U.S. at 544 n.5.

The See Court failed to note the actual holding of these cases: that the "reasonableness" of a search, and whether a corporation has any fourth amendment rights at all, depends upon a theory of corporate personality. Indeed, if an almost blanket request for corporate documents can be considered "reasonable," as it was in Morton Salt, the corporation comes very close to having no fourth amendment rights.

256. *Id*. at 545 ("Given the analogous investigative functions performed by administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a 'constructive search,' Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 202, is subject to fourth amendment limitations which do not apply to actual searches and inspections of commercial premises.").

257. 397 U.S. 72 (1970).

258. *Id*. at 75. (Congress, following the English parliament, imposed excise taxes when the fourth amendment was ratified, and had a history of regulating the liquor industry.).

259. *Id*. at 77.

The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. . . . We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue, not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector.

Id. at 74.

260. 406 U.S. 311 (1972).

261. *Id*. at 316.

262. 436 U.S. 307 (1977).

263. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

264. Marshall, 436 U.S. at 311-12.

The Warrant Clause of the fourth amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that amendment, and the American colonial experience. . . . The general warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. . . . Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Id. at 311.

265. *Id*. at 313-14. In his dissent, Justice Stevens, joined by Justices Blackmun and Rehnquist, contended that the warrant clause was not the proper clause for the Court's decision. Instead, they believed the ultimate question was whether the category of warrantless searches authorized by the OSHA statute is "unreasonable" within the meaning of the first clause. *Id*. at 327.

The dissenters also disputed the majority's interpretation of history, arguing that "[f]idelity to the original understanding of the Fourth Amendment, therefore, leads to the conclusion that the Warrant Clause has no application to routine, regulatory inspections of commercial premises." *Id*.

266. In Donovan v. Dewey, 452 U.S. 594 (1981), the Court confronted another statute -- the Federal Mine Safety and Health Act of 1977 (MSHA) -- that required warrantless inspections. In Donovan, a federal mine inspector was denied access to the premises of the Waukesha Lime and Stone Company. The corporation charged that the warrantless inspection provisions of MSHA violated the fourth amendment. The Supreme Court disagreed. Although the Court did not use a theory of corporate personality to reach this result, it distinguished between the privacy accorded commercial property and the sanctity of an individual's home. *Id*. at 598-99.

Marshall made clear that most warrantless searches were unreasonable, except in the narrowly defined exceptions of Colonnade and Biswell involving pervasively regulated industries with a long tradition of regulation. Marshall, 436 U.S. at 313-14. These exceptions were based on the historical purposes of the fourth amendment, and on a theory of implied consent.

But in Donovan, the Court focused on the fact that commercial property enjoys a lesser privacy interest, and is only free from unreasonable intrusions by government agents.

Donovan, 452 U.S. at 598-99. The Court found the intrusion in Donovan to be a reasonable inspection program carefully designed to fit a pervasively regulated industry like mining. *Id*. at 603. The Court seemed to ignore the Colonnade and Biswell requirement that only pervasively regulated industries, with a long tradition of regulation, are subject to warrantless searches. *Id*. at 611-13 (Stewart, J., dissenting). It was enough that an industry be pervasively regulated, even if the regulation was enacted ex poste as was the case with the MSHA.

The Court would not, however, overrule Marshall and suggested that Congress' power over interstate commerce justified warrantless searches only in certain narrow cases like Biswell, Colonnade, and the careful regulation of mining. In Donovan, the Court downplayed the history of government regulation as a factor, because this would exempt dangerous modern industries from warrantless searches. The Court specifically noted:

[I]f the length of regulation were the only criterion, absurd results would occur . . . new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

Id. at 606; see also Collins & Hurd, supra note 171; Comment, The Fourth Amendment and Administrative Inspections, 16 HOUS. L. REV. 399 (1979) (authored by George T. Perry Jr.) (examination of Barlow's in light of prior administrative inspection decisions).

The Court did not explain how the logic of implied consent -- relied on in Colonnade and Marshall -- could apply if a regulatory scheme or warrantless searches were applied after a business was operating.

267. See supra notes 161-76 and accompanying text.

268. Katz v. United States, 389 U.S. 347 (1967). In Dow Chemical, Justice Powell's partial dissent concluded that the majority had not reconciled Katz's pronouncement that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id*. at 351-52, quoted in Dow Chemical, 476 U.S. at 239.

269. First Nat'l Bank v. Attorney Gen., 371 Mass. 773, 359 N.E.2d 1262 (1977), rev'd sub nom. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

270. *Id*.

271. Bellotti, 435 U.S. at 779. If this is an artificial mode of analysis, any opinion, including Santa Clara, employing corporate personhood theory suffers from the same defect, and should be overruled.

272. *Id*. at 775-76.

273. Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, reh'g den., 475 U.S. 1133 (1986).

274. *Id*. at 7-8 (citing Bellotti, 435 U.S. at 783).

275. *Id*. at 16-18.

276. 447 U.S. 557 (1980).

277. *Id*. at 557.

278. Bellotti, 435 U.S. at 779 n.14 ("Whether or not particular guarantee . . . is unavailable to corporations . . . depends on the nature, history, and purpose of the particular constitutional provision.").

279. *Id*.

280. The Court granted the protection of the takings clause to corporations in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

281. 369 U.S. 141 (1962).

282. See United States v. Security Nat'l Bank, 546 F.2d 422 (2d Cir. 1976) (the corporation is entitled to protections of the double jeopardy clause; Fong Foo so held, despite the absence of any reasoning to the contrary); see also Comment, supra note 210, at 217.

283. 430 U.S. 564 (1977).

284. *Id*. at 568 (citing United States v. Wilson, 420 U.S. 332, 339 (1975)).

285. *Id*. at 569.

> At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the Government with a potent instrument of oppression. . . . [S]ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.
>
> See also Comment, supra note 210, at 745-50 (the clause protects corporate interests such as reputation and the expense of undergoing a second trial).

286. Neither have lower Courts applied a theory of corporate personality in according fifth amendment liberty interests in reputation. See Old Dominion Diary Products, Inc. v.

Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980), reversing sub. nom. Old Dominion Dairy Products, Inc. v. Brown, 471 F. Supp. 300 (D.D.C. 1979). The D.C. Court of Appeals ruled that the Department infringed the corporation's liberty interest in reputation but did not employ a theory of corporate personality to reach its conclusion.

See also Comment, Corporate Liberty Rights in Reputation: Old Dominion Dairy Products, Inc. v. Secretary of Defense, 61 B.U. L. REV. 1271 (1981) (authored by Catherine A. Olsen) (the interest extended in Old Dominion was in accord with Bellotti and merely extended the reasoning of Paul v. Davis, 424 U.S. 693 (1976), and Board of Regents v. Roth, 408 U.S. 564 (1972)).

But see Hague v. CIO, 307 U.S. 496, 527 (1939) (Stone, J., concurring) (corporation cannot assert free speech and assembly rights because it cannot claim liberty rights); Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 88-90 (1938) (corporations do not have a fourteenth amendment liberty right). These cases, decided in an earlier era, employed a theory of the firm.

287. Neither have the courts employed a theory of corporate personality in granting sixth or seventh amendment rights to corporations.

In United States v. Rad-O-Lite, the Third Circuit granted corporations the sixth amendment right to counsel based on the underlying purpose of the amendment. In following Bellotti's mode of analysis, the Court noted:

The Supreme Court generally has considered issues of the application of constitutional rights in negative terms: asking whether corporate status should defeat an otherwise valid claim of right. The sixth amendment describes the class of persons protected by its terms with the word 'accused.' This language does not suggest that the protection of sixth amendment rights is restricted to individual defendants.

612 F.2d 740, 743 (3d Cir. 1979) (citation omitted).

The Supreme Court has not directly granted seventh amendment rights to corporations, although it has intimated that a corporation's right to sue implies the right to trial by jury. In Ross v. Bernhard, 396 U.S. 531 (1970), the Court appeared to grant corporations seventh amendment guarantees of trial by jury and found the history of the seventh amendment dispositive:

[A] corporation, although an artificial being, was commonly entitled to sue and be sued in the usual forms of action, at least in its own State. . . . Whether the corporation was viewed as an entity separate from its stockholders or as a device permitting its stockholders to carry on their business and sue and be sued, a corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh amendment was adopted. [W]e think the Seventh amendment preserves to the parties in a stockholder's suit the same right to a jury trial that historically belonged to the corporation and to those against whom the corporation pressed its legal claims.

Id. at 542.

Lower courts have placed limits on the right to trial by jury in complex civil cases. This limit will likely have the greatest effect on corporate litigants. See In re Japanese Elec. Products Antitrust Litig., 631 F.2d 1069, 1079-80 (3d Cir. 1980) (in complex lawsuits, the fifth amendment's requirement of due process requires greater weight than the seventh amendment's jury trial guarantee). But see In re United States Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979) (no complexity exception to the seventh amendment right to trial by jury).

288. Although the Court has never employed corporate theory in the modern era, it recently suggested in dicta that there are important differences, for constitutional purposes, in corporate form.

In Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), a majority suggested that it might uphold election regulations limiting corporate speech. In that case, the Court held that a provision of the Federal Election Campaign Act, 90 Stat. 490 (1976) (codified as amended at 2 U.S.C. 441b (1989)), which requires corporations to establish a segregated fund for political spending, violated the first amendment as applied to a non-profit, nonstock corporation. Federal Election Comm'n, 479 U.S. at 240.

The Court suggested that a for-profit, corporate speaker would trigger a different outcome. *Id*. at 259. Bellotti indicated in dicta that corporate spending in candidate elections -- as opposed to referenda -- may pose a greater threat of corruption and therefore justify regulation of corporate speech. The Court acknowledged "the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace, . . . and that [s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id*. at 263.

Matters are different for profit-making corporations:

Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258.

This difference in corporate personality, between the non-profit and the for- profit corporation, determined whether state election regulations violated the first amendment.

289. 435 U.S. at 822 (Rehnquist, J., dissenting). The fact that the Congress, and the legislatures of thirty states place restrictions on the political activities of business, according to Rehnquist, deserves great deference. *Id*.

290. *Id*. at 824-26.

291. Although the Court has, in recent years, permitted regulation of corporate commercial speech, it has always been in the context of the Central Hudson balancing test, not on the basis of corporate theory. See Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986) (upholding a regulation restricting the advertising of gambling casinos).

292. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 583-85 (1980). Rehnquist argued that state-created monopolies -- like utilities -- make an especially compelling case for adopting the artificial entity theory: "The consequences of this natural monopoly in my view justify much more wide-ranging supervision and control of a utility under the first amendment than this Court held in Bellotti to be permissible with regard to ordinary corporations." *Id*. at 587.

293. 643 F. Supp. 397 (W.D. Mich. 1986).

294. *Id*. at 403. The Court noted that any statute restricting individual contributions to elections is unconstitutional under Buckley v. Valeo, 424 U.S. 1, 39-51 (1976). In Buckley, the Supreme Court found no tendency on the part of individual spenders to corrupt the electoral process.

295. Austin, 643 F. Supp. at 403 (quoting United States v. Morton Salt Co., 338 U.S. 632, 652 (1950)).

296. Austin, 643 F. Supp. at 403 (citation omitted). Unlike in referenda on issues of general public interest, this atmosphere of distrust in the electorate may arise in political elections when corporate power through either independent expenditures or direct contributions becomes closely allied with the candidates. The Michigan legislature, as well as the United States Congress, long ago arrived at that conclusion and, accordingly, limited the role of corporations in the electoral process. *Id*. (footnote omitted).

297. Ironically, in an opinion authored by Justice Powell, the Court recently adopted the artificial entity theory of the corporation in the private corporate law context. The theory was invoked to uphold an Indiana anti-takeover statute. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987) (The Court noted that "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. . . . '[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . .'" (quoting Trustees of Dartmouth College v. Woodward, 4 U.S. (Wheat.) 518, 636, (1819); Bellotti, 435 U.S. at 822-24 (Rehnquist, J., dissenting)); see also Comment, The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America, 101 HARV. L. REV. 96 (1987) (authored by Donald C. Langevoort).

The use of the artificial entity theory in the private law context insulates current management from takeovers; its rejection in the Bill of Rights context permits managers to use the corporate form to promote their own views and political agenda.

The interesting question is why corporate theory has survived in the private corporate law context, but not in the constitutional law context. Writers who argue that corporate theory is available have not addressed this question. See Bratton, The New Economic Theory of the Firm: Critical Perspectives from History, 41 STAN. L. REV. 1472 (1989). Corporate theory is not used overtly in the constitutional law context because it raises problems of legitimacy.

298. See Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Fuller, American Legal Realism, 82 U. PA. L. REV. 429 (1934).

299. Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 669 (1926); see also Smith, Legal Personality, 37 YALE L.J. 283 (1928) (discussion of the purpose of legal personality as facilitating regulation of human conduct and how it relates to the corporation).

300. See Horwitz, supra note 15, at 14-18; see also Kitagawa, Some Reflections on the Corporate Theory -- Including a Japanese Perspective, 1960 DUKE L.J. 535 (development of corporate theories as reflections of state theory and state governmental structures).

301. See A. BERLE, JR., POWER WITHOUT PROPERTY (1959); J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967); A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); R. TUGWELL, THE INDUSTRIAL DISCIPLINE AND THE GOVERNMENTAL ARTS (1933); Berle, Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931). But see Dodd, For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932).

    The power of this theory has resonated at least until the 1980s. See E. HERMMAN, CORPORATE CONTROL: CORPORATE POWER (1981) (confirming the empirical validity of Berle's managerial power thesis).

302. Rostow, To Whom and for What Ends is Corporate Management Responsible, in THE CORPORATION IN MODERN SOCIETY 59 (E. Mason ed. 1959).

303. See generally J. GALBRAITH, ECONOMICS: A CRITICAL HISTORY (1987) (arguing that the "Is" is often justified as the "Ought" in economic thought).

304. See N. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY (1973); J. MCKIE, SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT (1974); M. MEAD, THE SOCIAL RESPONSIBILITY OF BUSINESS (1970); C. STONE, WHERE THE LAW ENDS (1975).

305. On the Stakeholder Model, see Wall St. J., Jan. 20, 1988, col. 1, 47 (NCR corporation's essay contest for stakeholders); see also Veasey, A Statute Was Needed to Stop Abuses, N. Y. Times, Feb. 7, 1988, at F2, col. 1; Silk, The Merger Rise: How Beneficial?, N.Y. Times, Mar. 10, 1988, D2, col. 1; Lipton, Why Takeovers are Taking Off Again, N.Y. Times, April 1, 1988, at 30, col. 1.

306. See, e.g., W. ADAMS & J. BROCK, DANGEROUS PURSUITS 153-61 (1989) (analyzing critically various calls for national direction of corporate affairs).

307. Drucker, The Coming of the New Organization, 88 HARV. BUS. REV. 45 (1988) (arguing that corporations will become "information based" with fewer levels of management).

308. See R. TRICKER, CORPORATE GOVERNANCE (1984) (reforms in the British corporate system); A. LEFEBVRE-TEILLARD, LA SOCIETE ANONYME AU XIXE SIECLE (1985) (a reappraisal of French corporation law based on nineteenth century legal history).

309. R. CYERT & J. MARCH, A BEHAVIORAL THEORY OF THE FIRM (1963); F. KAST & J. ROSENZWEIG, ORGANIZATION AND MANAGEMENT: SYSTEM APPROACH (1974).

310. See A. CHANDLER, THE VISIBLE HAND (1977) (describing the rationality of the old hierarchy); M. CROZIER, THE BUREAUCRATIC PHENOMENON (1964); J. GALBRAITH, THE NEW INDUSTRIAL STATE 71 (1967) (discussing a technostructure that runs corporations); H. SIMON, ADMINISTRATIVE BEHAVIOR (3d ed. 1976); O. WILLIAMSON, CORPORATE CONTROL AND BUSINESS BEHAVIOR (1970).

311. See generally G. ALLISON, ESSENCE OF DECISION 72-76 (1971); I. HOROWITZ, DECISION-MAKING AND THE THEORY OF THE FIRM (1970); R. MARRIS, THE ECONOMIC THEORY OF MANAGERIAL CAPITALISM (1964); O. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); W. BAUMOL, BUSINESS BEHAVIOR, VALUE AND GROWTH (1969) (describing the various goals of the corporation); D. MEIRCOHN, RIGHTS, PERSONS, AND ORGANIZATIONS 13-25 (1986); O. WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM (1964); Williamson, The Modern Corporation: Origins, Evolution, Attributes, 19 J. ECON. LIT. 1537 (1981).

312. See Post, Perfecting Capitalism: A Systems Perspective on Institutional Responsibility, in CORPORATIONS AND THE COMMON GOOD (R. Dickie & L. Rouner eds. 1987) (discussing institutional responsibility to society and five models of corporate-society relationships, including legal model; market-contract model; exploitation model; technostructure model; interpenetrating systems model; and stakeholder model).

This reconception of the corporation occurs at a time that social theorists are rethinking the boundaries between public and private realms in America. See AMERICAN SOCIETY:

PUBLIC AND PRIVATE RESPONSIBILITIES (W. Knowlton & R. Zeckhauser eds. 1986); see also D. BELL, THE END OF IDEOLOGY (1960) (discussing social change in America during the 1950s).

313. Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 33, reh'g den., 475 U.S. 1133 (1986).

314. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

315. See supra note 61 and accompanying text.

316. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'ns 447 U.S. 557, 589 (1980).

317. BUS. WK., May 15, 1978, at 27.

318. H. SCHMERTZ, CORPORATIONS AND THE FIRST AMENDMENT 40 (1978) "Management should take seriously the Supreme Court's admonition regarding the imminent danger to democratic electoral processes that might be perceived in a future case. The Court's dicta on this point should act as a restraint on management." *Id*. at 32.

319. Brebbia, First Amendment Rights and the Corporation, PUB. REL. J., Dec. 1979, at 20 ("One might ask why, after all these years, has there been a change of heart? Perhaps the answer is that the law is a living thing and the Justices are again reading the election returns. The Chrestensen decision was rendered during the Roosevelt age when the concept of economic regulation was in full bloom, and the Virginia State Board and Bates cases were decided in the age of deregulation.").

320. *Id*.

321. C. LINDBLOOM, supra note 139, at 26, 34-35.

322. See D. BARBER, THE AMERICAN CORPORATION (1970); C. LINDBLOOM, supra note 139; A. MILLER, THE MODERN CORPORATE STATE (1976); MINTZ & COHEN, AMERICA, INC. (1971); Miller & Solomon, Constitutional Chains for the Corporate Beast, 27 BUS. & SOC'Y REV. 15 (1978); Vogel, The New Political Science of Corporate Power, 87 PUB. INTEREST 63 (1987).

    The view of the corporation as a separate government receives legal expression in the idea of the corporation and corporate activity as "State Action." See Moskowitz, Constitutionalizing the Corporation, BUS. WK., Oct. 26, 1974, at 109; see also R. TUGWELL, A MODEL CONSTITUTION FOR A UNITED REPUBLICS OF AMERICA (1970) (discussing the corporation as a private state).

323. See supra notes 317-20.

324. See, e.g, Hatano, Should Corporations Exercise Their Freedom of Speech Rights?, 22 A. BUS. L.J. 165 (1984).

Lawyers now counsel managers either to exercise or forego their company's first amendment rights based on the nature and purpose of a corporation. This collective corporate soul searching also suggests the reverse: how Bill of Rights protections are exercised fundamentally may determine the character of a company.

The first model presented to managers is the Law and Economics paradigm. In this view the firm's only obligation is to shareholders and "managers should only speak out whenever the speech increases the firm's profit." *Id*. at 175. This position relies on Justice White's dissent in Bellotti to the effect that shareholders "do not share a common set of political or social causes. . . ." ID. (qouting Bellotti, 435 U.S. at 789). Management must avoid personal statements; advocacy advertising is not efficient.

The second model is the Social Responsibility model. "On the one hand . . . these managers feel it appropriate to avoid exercising their free speech rights to avoid perverting the political process. On the other hand, to fulfill their societal obligations these managers would feel the duty to speak whenever their viewpoints increased the flow of information to society." *Id*. at 180-81 (footnote omitted). Managers, under this view, should determine whether the political issue the corporation might address by exercising its first amendment rights is represented adequately on both sides. If yes, there is no need to speak. If no, the firm should present both sides of an issue "so the corporation's relevant information is presented without undermining the legitimacy of the laws controlling the corporation. In the commercial speech area, socially responsible managers strive to fulfill Virginia Pharmacy's goal of increasing information to consumers. *Id*. at 181. "A corporation devoted only to maximizing shareholder wealth would eschew comparative advertisements and only advertise to maintain market share. A socially responsible manager would encourage comparative advertising to increase the information available to consumers and permit them to make informed purchasing decisions." *Id*. at 182. But see Farber, Commercial Speech and the First Ammendment Theory, 74 NW. U.L. REV. 400 (1979). See also ALBION & FARRIS, THE ADVERTISING CONTROVERSY, EVIDENCE ON THE ECONOMIC EFFECTS OF ADVERTISING (1981).

In considering whether to invoke corporate free speech rights, corporate managers occasionally consider models of the corporation that are a hybrid of the two just discussed: the social responsibility model and the shareholder maximizing model. One hybrid suggests that although corporations should advance society's interests, managers should not make social decisions because they are unaccountable and lack expertise. To the extent corporate speech perverts the political process, managers should not exercise their speech rights. See Bellotti, 435 U.S. at 802 (White, J., dissenting); see also Patton & Bartlett, Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology, 3 WIS. L. REV. 494 (1981) (analysis of Bellotti and purportedly neutral principles underlying the doctrines of corporate free speech).

Another hybrid approach found in the business literature agrees that corporations should only maximize shareholder wealth, but argues that it is in the shareholders enlightened self-interest to diffuse hostile forces by anticipating social concerns. See also P. DRUCKER, MANAGING IN TURBULENT TIMES 216-21 (1980) (corporate management functioning in a political environment must learn to operate in interest of society as a whole). In commercial speech this school would suggest that corporations become aware of social trends, and incorporate them into advertising. The management literature now speaks of the "issue attention cycle" and managers could use early advertising to discuss concerns about caffeine and salt, for example. Gottschalk, Firms Hiring New Type of Manager to Study Issues, Emerging Trouble, Wall St. J., June 10, 1982, § 2, at 33, col. 4.

325. The more overt the Court is about imposing its economic view of what is a corporation, the more the Court engages in reading its own substantive content into the Bill of Rights, as in the Lochner era.

326. See E. PURCELL, JR., CRISES IN DEMOCRATIC THEORY 31-46 (1973).

327. See infra notes 334-41.

328. See, e.g., A. SCHLESINGER, THE CYCLES OF AMERICAN HISTORY (1987).

329. See M. PORTER, COMPETITIVE STRATEGY 13 (1980) (competitive strategy for business includes monitoring and reacting to government regulation).

330. See also N. WOLFSON, THE MODERN CORPORATION (1984); Wolfson, Use First Amendment To Call Off the SEC Censors, Wall St. J., Aug. 9, 1988, at 26, col. 3.

331. Corporate lawyers are adept at crafting unusual constitutional arguments. For example, when the Oakland Raiders were barred by the National Football League from travelling to Los Angeles, the corporation invoked a constitutional right to travel. See appendix II.

332. See E. HOCHSTEDLER, CORPORATIONS: THE TWENTIETH CENTURY CRIMINAL (1982); Anderson, Corporate Homicide: The Stark Realities of Artificial Beings and Legal Fictions, 8 PEPPERDINE L. REV. 367 (1981).

333. History is neither entirely predictive nor entirely irrelevant to the future of political economy or to future legal developments. See, e.g., J. GALBRAITH, ECONOMICS IN PERSPECTIVE 282 (1987) ("History does not end with the present; it extends on, changing without limit, into eternity. The difference is only that the historian does not accompany it there; his journey, however tempting the prospect, must end with the present. But not entirely. For as there is much of the past that is in the present, so also there is much of the present that will be in the future, including not a little that is yet to be evident.").

334. Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 YALE L.J. 235, 248 (1981); see also, O'Kelly, 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, 1373 (1979) (distinguishing between corporate communication and individual expression).

335. See Schneider, Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti, 59 S. CAL. L. REV. 1227, 1234 (1986).

336. *Id*. at 1271-72. See also Hart & Shore, Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti, 29 CASE W. RES. 808 (1979) (suggesting that political advertising by large corporations may threaten the electoral process); Note, Political Contributions -- First National Bank of Boston v. Bellotti -- Another Hurdle for Shareholder Protection, 4 J. CORP. L. 460 (1979) (authored by Daniel D. Dykstra) (suggesting that Bellotti was a setback); Chevigny, Philosophy of Language and Free Expression, 55 N.Y.U. L. REV. 157, 189-90 (1980) (criticizing the Bellotti majority); Fox, Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending, 67 KY. L.J. 75 (1978-1979) (arguing that Bellotti will preclude statutory restrictions posing substantial burdens upon corporate expression).

337. See Schneider, supra note 335, at 1288.

338. Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 YALE L.J. 235, 294 (1981); see also Note, The Corporation and the Constitution: Economic Due Process and Corporate Speech, 90 YALE L.J. 1833 (1981) (authored by David B. Keto); Patton & Bartlett, Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology, 1981 WIS. L. REV. 494; Note, Integrating the Right of Association with the Bellotti Right to Hear -- Federal Election Commission v. Massachusetts Citizens for Life, Inc., 72 CORNELL L. REV. 159 (1986) (authored by C. Eberhardt).

339. L. TRIBE, CONSTITUTIONAL CHOICES 202 (1985); see also Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 HASTINGS CONST. L.Q. 2 (1984) (analysis of constitutional protection of free speech according to its position on three tier model). Tribe also argues that the Court's reasoning in Central Hudson and Consolidated Edison was reminiscent of debates over economic efficiency in the Lochner era. TRIBE, supra, at 211-15.

Not all commentators oppose Bellotti. Some suggest the opinion is justified because a corporation, which is simply a personless organization, derives its right to speak from the rights of the individuals that comprise it. M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 102-113 (1986); see also Stewart, Organizational Jurisprudence (Book Review), 101 HARV. L. REV. 371, 384 n.41 (1987) (discussion of Dan Cohen's explanation and justification of Bellotti). On this view, "[s]peech, no less than cars or widgets, can be a corporate product." Corporate speech is viewed as a global organizational phenomenon, and information that sometimes can only be processed by computers should not be withheld from the public. Because organizational speech is collective, it is not simply reducible to the utterances of managers in their individual capacities. Nor does it

violate the rights of dissenting shareholders who are separate from the organization. M. DAN-COHEN, supra, at 107.

340. Sunstein, Redistributing Speech, 33 U. CHI. L. REV. 10 (1987).

341. This view, sometimes called Madisonian Republicanism, attempts to make political discourse more representative by ensuring that deliberation is not thwarted by interest group deals or somehow undermined by powerful private actors. See also Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984) (tracing the history of courts' prohibition on the distribution of opportunities to one group over another on the grounds of greater political power); Sunstein, Legal Interference With Private Preferences, 53 U. CHI. L. REV. 1129 (1986) (arguing in favor of government intervention to fix the problem of private preferences). This differs from an approach that would curb corporate first amendment rights as a way of ensuring, ex ante, not only that a temporary political process is not tainted, but that power relations become more equal.

    The Madisonian Republicanism view stems from a criticism of Lochner as enacting a certain economic vision. This differs from the conception of Lochner offered in this paper: that it represented an attack on government regulation, an attack made available to corporations through Santa Clara. See supra note 2.

342. See T. ARNOLD, THE FOLKLORE OF CAPITALISM 185-206 (1937); W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES, 1780-1970 (1970).

343. See supra text accompanying notes 269-79.

344. Related to the intuitive argument is the originalist argument. This Article merely raises, without presuming to answer, whether it is possible to be an originalist with respect to whether organizations deserve constitutional protection, but not with respect to whether other forms of life deserve constitutional protection.

345. H. SCHMERTZ, CORPORATIONS AND THE FIRST AMENDMENT 5 (1978).

346. *Id*. at 16 ("The Supreme Court decision is also important in that it diminishes the distinction that existed between individuals and corporations. The decision erases any doubt that first amendment rights inure to corporations, which have, in the eyes of the law, certain of the characteristics of 'natural persons.'").

347. *Id*. Bellotti itself is the best illustration of the use of the corporate form to enhance management's own power. The corporate political speech in Bellotti was deployed to defeat a referendum on amending the Massachusetts constitution to allow a progressive income tax. Undoubtedly, defeat of the referendum would benefit directly corporate managers, even though the Court accepted the proposition that the referendum would have no direct effect on the corporate plaintiffs. The referendum lost, despite the fact that it called for no new taxes; its defeat is attributed to the expenditure of corporate funds. Telephone

interview with Dan Sullivan, Massachusetts Department of Campaign Finance (Apr. 6, 1988).

348. See JOHN HART ELY, DEMOCRACY AND DISTRUST 87 (1980) (arguing for a "participation-oriented, representation-reinforcing approach to judicial review," which leaves the selection of substantive values to the political process); see also Sunstein, supra note 340, at 10. On this theory corporations are only entitled to first amendment rights if such an entitlement would improve the deliberative process.

349. See supra text accompanying notes 145-215.

350. See R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); D. MIER-COHN, supra note 311, at 164-65.

351. Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U.L. REV. 913 (1982).

352. Recent writing in the Law and Economics tradition suggests that the fifth amendment takings clause should be interpreted broadly to strike down much New Deal regulation. R. EPSTEIN, TAKINGS (1985) (arguing that private common law should "go public" and that the Constitution's takings clause invalidates most New Deal reforms: zoning, rent control, worker's compensation, transfer payments, and progressive taxation). Under this view, Lochner was decided rightly because it invalidated regulation that Epstein regards as harmful.

    But this writing has no particular view of the corporation or justification for corporate constitutional rights. By suggesting that the "Ought" of the common law should become the "Is" of constitutional law, this theory overlooks the importance of Modern Regulation and Modern Property to the corporate community. To make a constitutional argument against regulation, Epstein must develop some theory of the corporation that would allow it to assert constitutional rights. He does not.

353. R. UNGER, POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY 395-570 (1987); see also M. TUSHNET, Corporations and Free Speech, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 260 (D. Kairys ed. 1982).

354. Corporations now employ automatic dialing machines for telephone solicitations. These machines are capable of tying up individual phone lines, sometimes with life threatening consequences in the event of emergency. The question of the corporations' first amendment rights to engage in this type of speech has important consequences.

355. See, e.g., Diamond v. Chakrabarty, 447 U.S. 303 (1980).

356. See, e.g., Solomon, How Unique Are the Price-Anderson Limitations on Nuclear Accident Liability?, 3 RISK ANALYSIS 51 (1983). See generally H. HENN, LAWS OF CORPORATIONS § 202 (3d ed. 1983); Easterbrook & Fischel, Limited Liability and the

Corporation, 52 U. CHI. L. REV. 89 (1985); Roe, Corporate Strategic Reaction to Mass Tort, 72 VA. L. REV. 1, 40 (1986) (corporate liability does not ordinarily reach the assets of its shareholders); R. REICH & J. DONAHUE, NEW DEALS 58-59 (1985) (how the bankruptcy laws allow firms to escape obligations); Note, The Bankruptcy Law's Effect on Collective Bargaining Agreements, 81 COLUM. L. REV. 391 (1981) (authored by Stephan E. Becker) (addressing the clash between bankruptcy laws and labor laws); Klein, Hazardous Waste Liability and the Bankruptcy Code, 10 HARV. ENV. L. REV. 533 (1986) (discussing corporate use of bankruptcy laws to escape hazardous waste liability); Baird & Jackson, Toxic Wastes in Bankruptcy, 36 STAN. L. REV. 1199 (1984) (suggesting that toxic waste liability should not be a "claim" in bankruptcy proceedings); Rosenberg, The Causal Connection in Mass Exposure Cases: A "Public law" Vision of the Tort System, 97 HARV. L. REV. 851 (1984) (arguing that traditional adjudication provides ineffective compensation to mass tort victims and little incentive for industry to prevent incidents); Note, Nuclear Power and the Price-Anderson Act: Promotion Over Public Protection, 30 STAN. L. REV. 393 (1978) (authored by Daniel W. Meek) (government protection for the nuclear power industry); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 HARV. L. REV. 497 (1967) (protections for the airline industry).

357. 43 U.S.C. §§ 161 et. seq. (1862), 12 stat. 392 (repealed 1976).

358. See Reich, supra note 35, at 787.

359. The corporation's utilization of Bill of Rights protections is only one branch of the study of constitutional theory and organizations. But this particularized problem demonstrates the central importance of history, political economy, the study of institutions, and a careful reading of the business press. See Epstein, The Social Consequences of Common Law Rules, 95 HARV. L. REV. 1717, 1723 (1982) (criticizing narrow focus on the common law; Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 YALE L.J. 1717, 1754-55 (1981).

360. This is not to say that corporations should have no legal rights or only the legal rights emanating from state enabling charters. Their charters, as Justice Rehnquist suggests, protect the corporation's property rights. See supra notes 363, 289-92. Moreover, statutes passed specifically with corporations in mind will give them further protection.

361. The general problem of corporate personality and the Bill of Rights has yet to be systematically considered by scholars. But three possible conceptions of the corporation, discussed in contemporary literature, offer possibilities.

    One commentator suggests that corporations should be regarded, not as persons, but as machines that can only derive rights from persons. This suggestion is meant to cover a wide variety of legal situations. But for many Bill of Rights purposes, corporations must be considered "persons" because the plain meaning of the language so requires. See D. MEIR-COHN, RIGHTS, PERSONS AND ORGANIZATIONS 41-123 (1986).

As Rehnquist's dissent suggests, a modernized version of the artificial entity theory has much to commend it in today's political economy. See Bellotti, 435 U.S. at 822; Central Hudson, 447 U.S. at 583; and supra notes 289-92. This theory may well be rediscovered as the legacy of Jacksonian opposition to the grant theory fades. First, historically, the original conception of the corporation in America is that it would serve a public purpose. Second, if corporations were denied constitutional protections under an artificial entity theory, this would serve a constitutional separation of powers function. To the extent the corporation acts like a private state, it is unaccountable and in need of greater regulation, not protection. Third, denying corporations intangible rights would uphold majoritarian will and elevate the rights of individuals over corporations. Fourth, and finally, the artificial entity theory still holds substantial descriptive power.

Another commentator suggests the Court adopt a realist view of the corporation as merely a complex web of social relations -- a set of competing interests -- and mediate between those interests. See Note, Constitutional Rights of the Corporate Person, 91 YALE L.J. 1641 (1982) (authored by George Ellard). But this begs the question of why the Court is the appropriate body to make these determinations. One reply is that the people, through a constitutional amendment, should make that determination.

362. D. BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 287-89 (1973).

363. S. WOLIN, POLITICS AND VISION 352-434 (1960).

364. It is virtually impossible to determine in how many cases corporations raised Bill of Rights claims. These claims may have been asserted in many different types of actions. But the Supreme Court has certainly heard, in recent years, many more Bill of Rights cases involving corporations than in the New Deal or Progressive era. See appendix I. Also, district courts have decided more Bill of Rights cases in recent years. See, e.g., Michigan State Chamber of Commerce v. Austin, 643 F. Supp 397, 403 (W.D. Mich. 1986), and cases cited therein.

365. The history of corporate constitutionalism is also a useful lens through which to refract questions of economic determinism. This history demonstrates a subtle interrelationship between economic change and constitutional thought. As America's political economy changed in the nineteenth century, so did corporate theory, reflecting the shift from a corporate charter system, to a general incorporation system. Corporations were considered less creatures of the state, than natural entities, much like humans. See supra notes 8-23 and accompanying text.

But once the natural entity theory took hold, this left the state with few tools to regulate corporate conduct that was increasingly vested in a managerial class, largely unaccountable to shareholders. This led to a reemergence of the artificial entity theory in the Progressive and New Deal eras as a tool to regulate corporations. Both theories of the corporation, artificial and natural, eventually became inadequate to describe changes in the political economy.

Economic change did not always drive political theory, nor did political theory drive economic change. The two interacted in subtle ways.

The history of corporate constitutionalism also offers lessons for gauging the social consequences of legal rules. Legal history has focused primarily on the common law. This approach has provoked some critics to suggest that the common law simply has limited social consequences, and is of limited use as a gauge for measuring social phenomenon. Whether this is true or not remains to be seen, but on a spectrum that regards legislation as the most socially distributive legal process, constitutional history is somewhere between legislation and the common law in importance.

Index Of Cited Cases