

## NOTES

### CORPORATE CAPACITY FOR CRIME AND POLITICS: DEFINING CORPORATE PERSONHOOD AT THE TURN OF THE TWENTIETH CENTURY

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#### INTRODUCTION

IN 1905, the Armstrong Committee of the New York legislature investigated the state's insurance company giants, shedding light on the Great Wall Street Scandal.<sup>1</sup> The investigation brought the force of public opinion to bear upon a series of questionable corporate practices. As the investigation progressed, the public was indignant to discover that, among other misuses of company funds, the insurance giants had been diverting money from company coffers into political campaigns.<sup>2</sup> In the wake of the investigation, legal

<sup>1</sup> The legislative investigation underlying the Great Wall Street Scandal centered on "managerial self-dealing by insurance executives." Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 *Geo. L.J.* 871, 887 (2004). The Armstrong Committee's investigation of the insurance giants "was one of the most spectacular of its genre. Never before had a legislative committee subjected a group of major corporations to such thorough and searching scrutiny." Morton Keller, *The Life Insurance Enterprise, 1885-1910: A Study in the Limits of Corporate Power* 245 (1963).

<sup>2</sup> Keller, *supra* note 1, at 254 ("Popular interest in the investigation was intense, and its revelations stirred a massive and widespread indignation."); Winkler, *supra* note 1, at 891 ("The discoveries of the Armstrong Committee that drew the most public attention were those uncovering the large campaign contributions made by insurance company executives with company funds."). Winkler provides an excellent account of

and political communities considered various remedies to address what they perceived to be misuses of corporate funds.<sup>3</sup> Even before the investigations began, political donations were presumed to be *ultra vires*, or beyond the corporate purpose.<sup>4</sup> After the investigation, Congress and state legislatures acted to reinforce this presumption by enacting a series of statutes that barred corporate political expenditures and fined both corporations and corporate officers for violating the prohibitions.<sup>5</sup>

In the decades preceding and following the Armstrong Committee's investigation, another dispute was heating up in the legal and academic communities regarding the equity of convicting corporations for criminal acts. Under the common law, criminal acts were thought to be beyond the corporate purpose and therefore unattributable to the corporate group. In the late nineteenth and early twentieth centuries, however, Congress and state legislatures enacted statutes that made corporations criminally liable for violating certain statutory provisions, while at the same time courts became increasingly amenable to the idea of corporate criminal intent.<sup>6</sup> This development in criminal law sparked numerous debates

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how the Wall Street insurance scandal changed the face of corporate law. See also *infra* notes 42–51 and accompanying text.

<sup>3</sup> For remedies considered in the political communities, see Keller, *supra* note 1, at 257 (“[A]fter the Armstrong investigation, the pressure for reform could not be resisted. In a couple of months the legislature passed . . . bills . . . regulating lobbying and forbidding campaign contributions . . .”); *id.* at 258 (“[L]egislatures turned their attention to corporate political activity, company control, and marketing matters. Everywhere, campaign contributions were forbidden and lobbying was regulated.”). For remedies considered in New York’s legal community, see Winkler, *supra* note 1, at 914 (“In a preliminary report on the insurance scandal, the New York Attorney General determined that all the funds paid by the insurers to campaign committees were illegal and clearly recoverable.”); *id.* at 915 (noting that the New York Court of Appeals “agreed that there had been a ‘misappropriation’ of policyholders’ funds”).

<sup>4</sup> See *infra* notes 36–37 and accompanying text (citing a Montana Supreme Court decision that predates the Armstrong Committee investigations by a matter of months).

<sup>5</sup> See, e.g., Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907) (making it illegal for any “national bank, or any corporation” to donate money to political parties, and providing that “[e]very corporation which shall make any contribution in violation of the foregoing provisions shall be subject to a fine not exceeding five thousand dollars,” and that every officer or director “who shall consent to any contribution by the corporation” would be fined and possibly imprisoned); see also Keller, *supra* note 1, at 258 (“Everywhere, campaign contributions were forbidden and lobbying was regulated.”).

<sup>6</sup> See, e.g., An Act to Regulate the Immigration of Aliens into the United States, ch. 1134, 34 Stat. 898, 900 (1907) (making it illegal for businesses to solicit the immigra-

over whether corporations could have criminal intent and whether convicting the corporate group would deprive innocent shareholders of due process.

It is no accident that questions of corporate criminality and political activity emerged contemporaneously as important topics in American law. By the end of the nineteenth century, corporations were the “dominant form of economic enterprise” in the United States,<sup>7</sup> and consumed the intellectual energies of the judicial community.<sup>8</sup> The expanded influence of the corporate enterprise required jurists to translate the language of individual rights into an unfamiliar corporate dialect. As noted in 1897 by Ernst Freund, a prominent law professor and legal scholar of the early twentieth century, the law of corporations involved a departure from the principle that the “rights of an individual [were] subject to his disposition and . . . no one else.”<sup>9</sup> Corporate law mandated “representative action not resting upon express delegation,” and thus threatened to undermine individual autonomy.<sup>10</sup> Accordingly, as the reach of the corporate enterprise expanded, the effect of this “collectivist legal institution[]” on individual rights garnered considerable attention among American legal theorists.<sup>11</sup> In 1932, Adolf Berle and Gardiner Means, whose work contributed to matters of corporate governance and securities law, reflected on the previous three decades of corporate law concluding that the “corporate de-

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tion of aliens); Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907); An Act to Further Regulate Commerce with Foreign Nations and Among the States, ch. 708, 32 Stat. 847 (1903); *United States v. Alaska Packers’ Ass’n*, 1 Alaska 217, 219 (D. Alaska 1901); *Grant Bros. Constr. Co. v. United States*, 114 P. 955, 957 (Ariz. 1911); *State v. Passaic Cnty. Agric. Soc’y*, 23 A. 680, 681 (N.J. 1892); *State v. Ice & Fuel Co.*, 81 S.E. 737, 738 (N.C. 1914); *State v. E. Coal Co.*, 70 A. 1, 7 (R.I. 1908); see generally George F. Canfield, *Corporate Responsibility for Crime*, 14 Colum. L. Rev. 469 (1914); Note, *Criminal Liability of Corporations*, 14 Colum. L. Rev. 241 (1914).

<sup>7</sup> Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 71 (1992).

<sup>8</sup> In 1900, thirty-three percent of the cases in the U.S. Supreme Court involved corporations; in 1917, that figure rose to fifty-seven percent. James Treat Carter, *The Nature of the Corporation as a Legal Entity* 26 (1919).

<sup>9</sup> Ernst Freund, *The Legal Nature of Corporations* 47 (1897).

<sup>10</sup> *Id.*

<sup>11</sup> Horwitz, *supra* note 7, at 70–72.

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velopment [was] a far greater approach toward communist modalities than appear[ed] anywhere else in our system.”<sup>12</sup>

The issues of corporate political and criminal activity, the primary subjects of this Note, went to the heart of the dispute over corporate personhood and individual autonomy.<sup>13</sup> The legal community ultimately arrived at different and seemingly conflicting conclusions about the nature of corporate personhood and its capacity for criminal and political activity. Legal scholars often refer to two competing theories of corporate personhood—artificial entity theory and real entity theory—when tracing developments in corporate law at the turn of the twentieth century. Artificial entity theory viewed the corporation as nothing more than a creature of the law, whose rights consisted only of those conferred by the state.<sup>14</sup> Real entity theory, by contrast, posited that the corporation was a naturally occurring being, independent of the law and separate from its individual shareholders.<sup>15</sup> The corporation, according to this theory, possessed both free will and morality and could claim and assert rights, as would a natural person.<sup>16</sup>

Some leading historical studies of corporate theory at the turn of the twentieth century assert that developments in corporate law were driven by these competing visions of corporate personhood. For example, influential legal historian Morton Horwitz argues that “the rise of a natural entity theory of the corporation was a

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<sup>12</sup> Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property* 245 (rev. ed. 1968).

<sup>13</sup> See, e.g., *People ex rel. Perkins v. Moss*, 100 N.Y.S. 427, 433 (Sup. Ct. 1906) (“The right of suffrage is exclusively accorded natural persons . . . .”); N.C. Collier, *Impolicy of Modern Decision and Statute Making Corporations Indictable and the Confusion in Morals Thus Created*, 71 *Cent. L.J.* 421, 427 (1910) (fearing an erosion of social morality if the corporate entity is held criminally liable instead of the individual).

<sup>14</sup> Artificial entity theory was most famously expressed by Chief Justice John Marshall: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819). Gregory Mark has written, “At the heart of the assertion that corporations were artificial were the twin beliefs that private property was an individual right and that an individual would not manage the property of others with the same interest with which he cared for his own.” Gregory Mark, *The Personification of the Business Corporation in American Law*, 54 *U. Chi. L. Rev.* 1441, 1448 (1987).

<sup>15</sup> Freund, *supra* note 9, at 13.

<sup>16</sup> Mark, *supra* note 14, at 1472–73.

major factor in legitimating big business and that none of the other theoretical alternatives could provide as much sustenance to newly organized [corporations].”<sup>17</sup> He explains that the triumph of real entity theory over artificial entity theory justified corporate expansion by dismantling any unique foundation for regulation of the corporation that depended upon its creation by state law.<sup>18</sup> Gregory Mark, a corporate legal historian, similarly posits that the real entity theory’s personification of the corporation served to legitimize the corporate enterprise and expand its presence.<sup>19</sup> More recently, Naomi Lamoreaux, citing Horwitz and Mark, writes that the real entity, or “personification,” movement of the early twentieth century allowed for a massive expansion of corporate activity.<sup>20</sup> In order to constrain corporate power and justify governmental restraints upon the corporation, argues Lamoreaux, state officials were forced to appeal to the artificial entity theory.<sup>21</sup>

The prevailing narrative of corporate law in the early 1900s as a progression from artificial entity to real entity theory, however, fails to account for what proved to be divergent judicial treatment of corporate political and criminal activity in the decades preceding and following the turn of the century. On the one hand, as examined in Part I, courts and legislatures fortified the common law doctrine that political expenditures were beyond the corporate purpose, or *ultra vires*. Such a view, as noted by Professor Adam Winkler, tended to resonate with the artificial entity theory.<sup>22</sup> On the other hand, as explored in Part II, courts and legislatures read-

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<sup>17</sup> Horwitz, *supra* note 7, at 68.

<sup>18</sup> *Id.* at 104.

<sup>19</sup> Mark, *supra* note 14, at 1477–78.

<sup>20</sup> Naomi R. Lamoreaux, Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture, *in* *Constructing Corporate America* 29, 43–48 (Kenneth Lipartito & David B. Sicilia eds., 2004); see also Kurt Hohenstein, *Coining Corruption* 69 (2007) (arguing that the demand for regulation of corporate electoral influence was animated by the idea that “the corporation was an artificial entity created and accorded rights by the state [and that] . . . [t]he state could thus lawfully regulate corporate electoral activities”).

<sup>21</sup> Lamoreaux, *supra* note 20, at 47–48.

<sup>22</sup> Winkler, *supra* note 1, at 937–38. Winkler argues that bans on political contributions were motivated in part by a desire to protect dissenting shareholders. This led Winkler to conclude that, at least in the field of election law, the real entity theory of the corporation “was rejected in favor of a view of the corporation owing much more to partnership than to individualism.” *Id.* at 938. The partnership theory of the corporation was a derivative of the artificial entity theory.

ily abandoned the common law doctrine that corporations could not possess criminal intent, thus ultimately concluding that collective criminal intent could be attributed to the officers and shareholders of the corporate entity. This conception of corporate personhood was vigorously defended by real entity theorists, and just as vigorously challenged by artificial entity theorists.<sup>23</sup> In addition, as Parts I and II demonstrate, even when courts did invoke particular theories of corporate personhood, they often did so in a selective and occasionally inconsistent manner. This application of competing and shifting theories of corporate personhood suggests that the real entity and artificial entity theories, contrary to the belief of leading legal historians, were not actually foundational doctrines.<sup>24</sup>

Part III of this Note explores an alternative doctrinal basis and argues that corporate personhood was not a manifestation of a single coherent theory of corporate existence. Rather, it was an outgrowth of both the property interests (or lack thereof) bound up in the corporate entity and the public interest in constraining (or expanding) corporate personhood. These interests influenced courts to uphold the constitutionality of legislative proscriptions of corporate political activity. With personhood resting on a foundation of property interests, corporations had no freestanding political rights, and they therefore had no independent entitlement to make political contributions or participate in the elective franchise. As for public policy, courts were highly attuned to the public benefit rationale underlying the ban on corporate political expenditures. Courts also similarly turned to the property interests bound up in the corporate entity and the public interest to uphold the criminalization of certain corporate activities. Judges and jurists perceived criminal activity to have a direct connection to the property interests of the corporate enterprise and regarded this link as a ground for holding the corporate group accountable for the criminal acts of its officers and directors. Furthermore, as to the public interest, courts were keenly aware that the failure to hold corporations criminally liable would create a public hazard by exempting the

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<sup>23</sup> See, e.g., Arthur W. Machen, Jr., *Responsibility for Crime by Corporations*, 1 *Proc. Acad. Pol. Sci. City N.Y.* 590, 593–94 (1911); Collier, *supra* note 13, at 426–27.

<sup>24</sup> See *supra* notes 17–21 and accompanying text.

most prevalent business entity from sharing in its societal obligations.

Finally, Part IV concludes by exploring the continued relevance of corporate entity theory in the recent and controversial Supreme Court case, *Citizens United v. Federal Election Commission*.<sup>25</sup> The 5-4 decision boils down to a debate over whether the Justices should consider the propertied foundations of the corporation to be a defining and limiting feature of corporate constitutional protection. This Note adds historical depth to that debate, and is particularly apposite in light of the palpable contest for historical legitimacy between the majority and the dissenting opinions. Despite the majority's claim to the contrary, this Note demonstrates that the outcome in *Citizens United* was neither doctrinally mandated nor historically inevitable.

#### I. CORPORATIONS ARE NOT REPOSITORIES OF POLITICAL MORALITY

Even before the Armstrong Committee shocked the public's conscience in 1905 by exposing the Wall Street insurance scandal, courts and practitioners doubted that political donations were proper corporate expenditures. This is not to say that judges and other legal thinkers believed that the corporate person was incapable of political expression. Instead, jurists argued that corporations were not authorized by their shareholders to engage in political activity. Political expenditures, therefore, were *ultra vires* and an infringement of the rights of dissenting shareholders.<sup>26</sup> Following the Armstrong Committee's investigation, legislatures fortified the *ultra vires* doctrine by banning corporate political donations.<sup>27</sup> The few courts that entertained challenges to the bans clearly approved

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<sup>25</sup> 130 S. Ct. 876 (2010).

<sup>26</sup> The *ultra vires* doctrine stood for the principle that actions beyond the legal acting authority of a corporation were void under the law. As explained by Justice Horace Gray in 1897, the doctrine rested upon the following three premises:

The obligation of any one [sic] contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.

McCormick v. Mkt. Nat'l Bank, 165 U.S. 538, 550 (1897).

<sup>27</sup> See *infra* notes 45-46 and accompanying text.



the legislation, alternately invoking artificial entity theory and the *ultra vires* nature of corporate political expenditures in support of the regulations.

#### A. Ultra Vires Acts: A Matter of Private Right

Courts considered corporate political expenditures to be *ultra vires* before lawmakers outlawed political uses of corporate funds. The *ultra vires* nature of such expenditures, however, did not derive from an abstract philosophy of corporate personhood, but instead stemmed from the scope of corporate purpose authorized by the shareholders.

For example, in the wake of the Armstrong Committee's investigation, the state of New York charged the treasurer of the New York Life Insurance Company with larceny for contributing nearly \$50,000 to the Republican Party. On appeal in *People ex rel. Perkins v. Moss*, the New York Court of Appeals dismissed the charges on the grounds that the misuse of corporate funds was a private but not a public harm.<sup>28</sup> Although some of the judges were divided on the question of the treasurer's larcenous intent, the court unanimously agreed that, even if the act was not criminal, the contribution was "absolutely beyond the purposes for which that corporation existed."<sup>29</sup> The lower court judge in the *Perkins* case articulated a similar conclusion, asserting that insurance corporations were "not the repositories of the political opinions or consciences of the policy holders."<sup>30</sup>

The *ultra vires* label assigned to corporate political expenditures did not derive from a perceived inability of the corporate entity to engage in political activity. To the contrary, corporations were widely assumed to have the capacity to engage in political expression if shareholders so authorized. As explained by Ernst Freund in *The Legal Nature of Corporations*, although a group of shareholders might theoretically have had the psychological capacity to agree to particular expressions of corporate opinion, if the shareholders did not delegate that element of their collective acting capacity to

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<sup>28</sup> 80 N.E. 383, 387 (N.Y. 1907). At the time of the contribution, there was as of yet no statute prohibiting corporate political contributions. *Id.* at 386.

<sup>29</sup> *Id.* at 388.

<sup>30</sup> *People ex rel. Perkins v. Moss*, 100 N.Y.S. 427, 433 (Sup. Ct. 1906).

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the corporation, such an act was *ultra vires*.<sup>31</sup> A 1913 Michigan statute alluded to this theoretical corporate capacity by mandating that no “person, acting for any corporation . . . *except corporations formed for political purposes*, shall pay, give or lend” money to a political entity.<sup>32</sup> The Michigan legislature apparently accepted that corporations could engage in political activity, but only if they were organized for such a purpose. Similarly, Chief Judge Cullen of New York’s high court, dissenting in *Perkins*, declared that “the universal assent of the policyholders [was] the only thing which could have justified, even *morally* (not legally), the payment . . . .”<sup>33</sup> Cullen’s statement, although defiant in tone, highlights the proposition that in the absence of express authorization in the corporate charter to engage in political activity,<sup>34</sup> the *ultra vires* expenditure could nonetheless be “made good by the assent of the stockholders.”<sup>35</sup>

Other courts in the early 1900s arrived at similar conclusions. For example, the Supreme Court of Montana, in a decision that predated the Armstrong Committee’s investigation by a matter of months, held that an expense for lobbying a bill through the state legislature was “a diversion . . . of money from the purposes of the corporation to a purposes wholly outside of the range of its legiti-

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<sup>31</sup> Freund, *supra* note 9, at 60–61.

<sup>32</sup> *People v. Gansley*, 158 N.W. 195, 197 (Mich. 1916) (emphasis added).

<sup>33</sup> *Perkins*, 80 N.E. at 393 (Cullen, J., dissenting) (emphasis added). Cullen added that such universal assent “could never be obtained, [because] at all times a substantial minority [of shareholders] would be opposed to such payment.” *Id.*

<sup>34</sup> Seymour Thompson highlighted the significance of the corporate charter:

The fact that the enumerated objects of the corporation in the governing statute and the articles of incorporation do not include [political expenditures]—to take no account of the larger question of public policy involved—would stamp the transaction as *ultra vires* the corporation and manifestly unfair to stockholders of opposite political beliefs.

Seymour D. Thompson, 3 *Commentaries on the Law of Private Corporations* § 2819 (2d ed. 1909).

<sup>35</sup> *Kent v. Quicksilver Mining Co.*, 78 N.Y. 159, 159 (1879); see also Henry O. Taylor, *Law of Private Corporations Having Capital Stock* § 270 (1884) (“[I]f all the shareholders ratify the contract, or impliedly assent to it by not dissenting after they know of it, no shareholder can object, or claim that the contract . . . does not bind the corporate funds . . .”). Shareholder approval could thus expand the corporate purpose, or the corporation’s acting authority. But, “[w]hen the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail.” *Kent*, 78 N.Y. at 185.

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mate purposes.”<sup>36</sup> The court then added: “This [political expense] should be charged to the directors, *unless it be shown that it was authorized by the stockholders.*”<sup>37</sup> In the absence of such authorization, “the stockholders who did not assent thereto are certainly entitled to have the directors account to the company for the same.”<sup>38</sup> Thus, the *ultra vires* nature of corporate political expenditures afforded shareholders some measure of protection against unauthorized uses of corporate funds.

*B. Protecting the Dissenting Shareholder: A Matter of Public and Private Concern*

The 1896 presidential election marked a sea change in corporate political participation “from an occasional and casual indulgence into a positive, organized expression of managerial policy.”<sup>39</sup> Historian Morton Keller explains that in the decade leading up to the 1896 election, companies periodically funded lobbying in order to protect their business practices from a growing regulatory framework.<sup>40</sup> The entrance of the progressive Democrat William Jennings Bryan into the 1896 campaign prompted large business interests to increase and regularize political participation to stave off the perceived radicalism of Bryan’s regulatory platform.<sup>41</sup> For the New York insurance company giants, as well as other business firms, this entailed contributions totaling over \$70,000 to the McKinley campaign in the 1896 election.<sup>42</sup> This increased level of political influence remained steady until 1905, when the Armstrong Committee, with future Supreme Court Chief Justice Charles Evan

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<sup>36</sup> *McConnell v. Combination Mining & Milling Co.*, 79 P. 248, 251 (Mont. 1905). The Montana court decided *McConnell* on January 21, 1905. *Id.* at 248. The New York legislature passed a resolution creating the Armstrong Committee on July 20, 1905, and the committee was formed on August 1, 1905. Armstrong Comm., Report of the Senate and Assembly of the State of New York Appointed to Investigate the Affairs of the Life Insurance Companies, Doc. No. 41, at 7 (1906) [hereinafter Report of the Committee].

<sup>37</sup> *McConnell*, 79 P. at 251 (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> Keller, *supra* note 1, at 228.

<sup>40</sup> See, e.g., *id.* at 214–15 (detailing many instances of political contributions by corporations and directors to obtain tax reductions and favorable treatment from the New York legislature).

<sup>41</sup> *Id.* at 228.

<sup>42</sup> *Id.* at 228–29.

Hughes serving as lead counsel, put the practice of corporate political expenditures on trial in the court of public opinion through a series of legislative investigations.<sup>43</sup> The Armstrong Committee conducted its hearings through fifty-seven public sessions, while the press covered the affair extensively.<sup>44</sup> In the wake of the investigation's revelations, there was a deluge of legislation at the state and federal level banning corporate political contributions,<sup>45</sup> including the Tillman Act of 1907.<sup>46</sup> This wave of legislation reinforced the *ultra vires* nature of political contributions and protected the private rights of dissenting shareholders against unauthorized uses of their money. At another level, the legislation recognized corporate political contributions to be a matter of public concern.<sup>47</sup> Thus, the *ultra vires* doctrine underlying this legislation was also applied as a canon of public law to regulate the relationship between corporations and the state. In addressing the public law nature of the *ultra vires* doctrine, the New York Court of Appeals explained in 1879, "When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail."<sup>48</sup>

As Professor Adam Winkler has recently observed, the ban on corporate political expenditures was intended in part to protect the private rights of shareholders from unauthorized and coercive uses of their investments.<sup>49</sup> For example, as Congress debated passage of the Tillman Act of 1907, President Theodore Roosevelt wrote to the Senate to pronounce that "directors should not be permitted to

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<sup>43</sup> Id. at 245–47.

<sup>44</sup> Winkler, *supra* note 1, at 888.

<sup>45</sup> See George L. Fox, *Corrupt Practices and Elections Laws in the United States Since 1890*, 2 Proc. Am. Pol. Sci. Ass'n 171 (1906); Keller, *supra* note 1, at 257–58.

<sup>46</sup> Tillman Act, ch. 420, 34 Stat. 864–65 (1907).

<sup>47</sup> Without a statute prohibiting corporate political contributions, such contributions were only a matter of private concern, and therefore beyond the reach of the criminal law. See, e.g., *People ex rel. Perkins v. Moss*, 80 N.E. 383, 386–87 (N.Y. 1907).

<sup>48</sup> *Kent v. Quicksilver Mining Co.*, 78 N.Y. 159, 185 (1879); see also Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 Bus. Hist. Rev. 304, 305 & n.4 (1979) (explaining that states could bring *quo warranto* actions to dissolve corporations that exceeded their acting authority).

<sup>49</sup> See Winkler, *supra* note 1, at 887.

use stockholders' money for [political contributions]."<sup>50</sup> The political and legal communities likewise expressed discontent over the "compelled political association" of shareholders with diverse political beliefs.<sup>51</sup> Along these lines, the Armstrong Committee opined in its report to the New York legislature that "executive officers have sought to impose their political views upon a constituency of divergent convictions."<sup>52</sup> In *Perkins*, the court at the trial level declared: "It is safe to say that many thousands of the policy holders of the company in question differed radically from the [corporate officials] in the belief that the best interests of the country would be served by the success of the Republican Party."<sup>53</sup>

Despite clear motivation to protect the private rights of dissenting shareholders, the wave of legislation reinforcing the *ultra vires* doctrine against corporate political expenditures was also motivated by a perceived public interest. Judges and legislators believed that corporate political activity corrupted the political process,<sup>54</sup> infringed upon the rights of voters, and posed a challenge to the state.<sup>55</sup> The public demand for uncorrupted elections was closely related to the private rights of dissenting shareholders. In arguing for increased transparency in corporate expenditures, Perry Belmont, a former Democratic Congressman, explained in 1905:

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<sup>50</sup> President's Annual Message, 40 Cong. Rec. 96 (1906).

<sup>51</sup> Winkler, *supra* note 1, at 887; see also Kurt Hohenstein, *Coining Corruption* 68 (2007) ("The public felt that the campaign contributions represented the corporate misuse of the policyholder money. The political interests of the insurance companies, many argued, were not necessarily the same interests as those of the policyholders.").

<sup>52</sup> Report of the Committee, *supra* note 36, at 300.

<sup>53</sup> *People ex rel. Perkins v. Moss*, 100 N.Y.S. 427, 433 (Sup. Ct. 1906).

<sup>54</sup> See *People v. Gansley*, 158 N.W. 195, 202 (Mich. 1916); Hohenstein, *supra* note 20, at 69–70.

<sup>55</sup> See *Perkins*, 100 N.Y.S. at 434 ("To permit an artificial creature of the state, unless it be a corporation expressly permitted by law to engage in political matters, by the unauthorized use of its corporate funds, to become an active force in a political contest, would . . . be to sanction an infringement upon the rights of the voters . . . . To encourage the unauthorized use of corporate funds to political purposes might result in the creatures of the state becoming its masters."); see also Hohenstein, *supra* note 20, at 70 ("[R]eform-minded legislators called for a return to the past to purify politics with a heady dose of republicanism and egalitarianism by eliminating the coercion of individual voters through the power of aggregate wealth.").

It is true that nothing need be added to the present legal rights of the stockholder, a single stockholder having already a complete right of action in case of expenditure of any portion of corporate funds for political purposes. Owing in part to the present difficulties of obtaining necessary information, individual stockholders have rarely been disposed to vindicate their rights. The enforcement of publicity by Federal and State laws will assist in bringing stockholders' suits.<sup>56</sup>

When Belmont wrote that stockholders did not require an additional private right of action, he referred to the entitlement of shareholders to demand reimbursement of corporate funds allocated to *ultra vires* purposes. He believed, however, that the government should reify that existing right by increasing shareholders' access to information on corporate expenditures. This in turn would facilitate private actions by shareholders to restrain corporate political activities, thereby diminishing the pernicious effects of corporate contributions on the political process.<sup>57</sup>

Historians have identified limited opposition to the flood of legislation that constrained corporate political expenditures following the Armstrong Committee investigation.<sup>58</sup> That the legislation went largely uncontested is likely due, at least in part, to the fact that the restraints against corporate political expenditures reflected the American public's belief that "corporations themselves did not necessarily reflect the views of individual stockholders" and therefore should be prohibited from making political donations.<sup>59</sup>

### *C. The Role of Corporate Theory in Judicial Constraint of Political Expenditures*

In the few legal challenges to bans on corporate political expenditures, courts invariably upheld the limitations placed upon using

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<sup>56</sup> Perry Belmont, *Publicity of Election Expenditures*, 180 N. Am. Rev. 166, 167 (1905).

<sup>57</sup> *Id.* at 166–67; see also Louis D. Brandeis, *Other People's Money: And How the Bankers Use It* 92 (1914).

<sup>58</sup> To the extent that historians have identified opposition to restrictions on corporate political expenditures in the first two decades of the twentieth century, it has related to opposition to the federal government interfering with state election laws. See Hohenstein, *supra* note 20, at 71; Winkler, *supra* note 1, at 921–22.

<sup>59</sup> Hohenstein, *supra* note 20, at 69.

corporate funds for political purposes. The courts generally invoked different theories of corporate personhood, depending upon whether the restriction originated in the relationship between the corporation and the state, or between the corporation and its shareholders.

In challenges to statutory prohibitions of corporate political expenditures, courts appealed to artificial entity theory to justify the restrictions. For example, the Supreme Court of Michigan and a federal district court in Pennsylvania rejected constitutional challenges to bans on corporate political expenditures by citing a central tenet of artificial entity theory—that corporations were artificial persons with no rights beyond those conferred by the state.<sup>60</sup> Used in this fashion, artificial entity theory was a medium for withholding rights from corporations that would otherwise be enjoyed by legal persons. However, when the dispute over political expenditures was between the corporation and a private party, courts like the Supreme Court of Montana and the New York Court of Appeals logically invoked the private rights slant of the *ultra vires* doctrine.<sup>61</sup> By appealing to the constraints that shareholders place on corporate authority through the corporate charter, courts moved away from the language of withholding rights towards a quasi-contractual foundation of corporate personhood.

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<sup>60</sup> In a challenge to the state's ban on corporate political expenditures, the Michigan court reasoned that "powers of such corporations have been considered and strictly construed . . . and it has been held that the powers are simply such as the statute confers." *People v. Gansley*, 158 N.W. 195, 200 (Mich. 1916). In the same year, a federal district judge in Pennsylvania upheld the Tillman Act, explaining that "the government has thought best that certain artificial bodies should be created with certain fixed and definite powers; and acting within certain prescribed limitations." *United States v. U.S. Brewers' Ass'n*, 239 F. 163, 168 (W.D. Penn. 1916). And, in the wake of the Armstrong Committee investigation, a New York trial court invoked artificial entity theory to find that corporate political contributions created a public harm because the corporation had usurped power from the shareholders that had not been conferred on it. *People ex rel. Perkins v. Moss*, 100 N.Y.S. 427, 433–34 (Sup. Ct. 1906).

<sup>61</sup> *McConnell v. Combination Mining & Milling Co.*, 79 P. 248, 251 (Mont. 1905) ("[T]his was paid out as the company's portion of the expense of lobbying a bill through the Legislature—a purpose wholly foreign to those of a mining corporation . . ."); *People ex rel. Perkins v. Moss*, 80 N.E. 383, 387 (N.Y. 1907) ("There are a great many things which those intrusted [sic] with the management of corporate properties are known to do and which they ought not to do . . . because they are not within the scope of the chartered powers.").

Of course, in both types of cases the outcome was the same: corporations were prohibited from directing their funds toward political activities. Thus, to the extent that a theme governed the judicial disapproval of corporate political expenditures, it was that corporations were entities of limited acting authority. The degree to which a philosophical concept of corporate personhood underlay this theme, however, should not be exaggerated. The invocation of the public-right artificial entity theory in one instance, and the private-right *ultra vires* doctrine in another, suggests that corporate personhood played a functional, but not a foundational role in defining the permissibility of corporate political expenditures. In any event, it suffices to note for now that the traditional doctrine that political expenditures were beyond the corporation's acting authority was reinforced in the first decade of the twentieth century.

## II. CORPORATIONS AS REPOSITORIES OF CRIMINAL MORALITY

Under the prevailing common law, corporate criminal acts, like corporate political expenditures, were considered to be *ultra vires*. Instead of enforcing this common law presumption, however, lawmakers displaced the doctrine in favor of corporate criminal liability in the late nineteenth and early twentieth centuries. There is little doubt that legislatures were under political pressure to constrain corporate power and punish corporate abuses. In light of this pressure, coupled with the increasing dominance of the corporation as the preferred business form in the late nineteenth and early twentieth centuries,<sup>62</sup> it follows that legislatures had a clear motivation to regulate their activities in order to guard the public against corporate excesses. In many cases, legislatures endeavored to achieve this objective by crafting laws that would hold an entire corporation criminally liable, instead of merely targeting the responsible corporate officers for fines or incarceration.

As with statutory prohibitions on political expenditures, courts reacted favorably to this new wave of criminal legislation aimed at corporations. In academic circles, real entity theorists were enthusiastic advocates of these laws and sought to provide the courts with the theoretical foundations necessary to uphold corporate

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<sup>62</sup> Horwitz, *supra* note 7, at 71–72 (referring to the increasing dominance of the corporate form of business).



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criminality.<sup>63</sup> Yet, the ultimate role of the real entity theory in legal opinions from the turn of the twentieth century remains somewhat ambiguous. While judges accepted the general proposition of the real entity theory that corporations could possess certain types of immoral or criminal intent, they often stopped short of vesting corporations with the full moral capacity of natural persons.<sup>64</sup>

*A. Corporate Crime Under the Common Law: The Innocent Shareholder*

The common law rejected the notion that corporations could possess immoral or criminal intent.<sup>65</sup> As a leading treatise writer on corporate law from the late nineteenth explained, moral culpability could not be attributed to the corporate group for criminal acts involving intent as an element of the crime, because “the malice would be that of the several members of the company and not actually one malicious intention of the whole company.”<sup>66</sup> Echoing this principle in 1897, Ernst Freund explained that “in so far as crime involves moral delinquency or turpitude, the idea of [corporate] representation would run counter to the principle, that moral responsibility must be direct . . . .”<sup>67</sup>

As legislatures and courts began to recognize corporate crimes requiring specific intent, opponents to corporate criminality clung desperately to the common law doctrine and appealed to two principle arguments. First, they invoked a quasi-contractual theory claiming that the corporation was authorized by its shareholders to “perform only legal acts”; therefore, “any crimes committed in its name [were] *ultra vires* and non-corporate.”<sup>68</sup> Second, opponents appealed to artificial entity theory, and argued that a corporation, “as an artificial personality existing only in contemplation of law and having no soul except the souls of the individuals by whom its

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<sup>63</sup> See *infra* notes 73–88 and accompanying text.

<sup>64</sup> See *infra* note 99 and accompanying text.

<sup>65</sup> See, e.g., *State v. Morris & Essex R.R. Co.*, 23 N.J.L. 360, 364 (1852) (“[I]t is conceded that a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving *malus animus* in its commission . . . .”).

<sup>66</sup> Victor Morawetz, 2 *A Treatise on the Law of Private Corporations* 702 (2d ed. 1886).

<sup>67</sup> Freund, *supra* note 9, at 69.

<sup>68</sup> Note, *Criminal Liability of Corporations*, 14 *Colum. L. Rev.* 241, 242 (1914).

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corporate acts [were] committed,” could not possess criminal intent.<sup>69</sup> Under both arguments, opponents concluded that dissenting, innocent shareholders were unjustly held accountable for the acts of a “guilty majority,”<sup>70</sup> or the acts of guilty “corporate officials through whom and by whom [the corporation] necessarily acts in any violation of law.”<sup>71</sup>

*B. Displacing the Ultra Vires Doctrine and Criminalizing the Innocent Shareholder*

In the decades preceding and following the turn of the twentieth century, instead of reinforcing the common law presumption against corporate crime, lawmakers supplanted that element of the *ultra vires* doctrine with statutes that made corporations criminally liable for certain activities.<sup>72</sup> At the metaphysical forefront of this movement were the real entity theorists, who stood out as some of the more ardent proponents of corporate criminality.

Broadly speaking, real entity theory posed a challenge to the rigidity of the *ultra vires* doctrine.<sup>73</sup> This was no less true in the area of criminal law. For instance, in 1916, Professor Harold Laski invoked the real entity theory to undercut the notion that corporate crime was *ultra vires*. The *ultra vires* doctrine was illogical, Laski reasoned, because it resulted in the contradictory conclusion “that a class of acts may be performed by the corporation which are not corporate acts.”<sup>74</sup> In reality, according to Laski, corporate acting capacity was unlimited: “[A] person, whether a group person or a human being, acts as his personality warrants.”<sup>75</sup> He admitted that the law might deny legal recognition of certain corporate acts, “but in that event it is only so much the worse for legal theory.”<sup>76</sup> Having championed unlimited acting capacity for the corporate group, it was a small step toward recognizing corporate capacity for criminal

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<sup>69</sup> Frederick N. Judson, *The Control of Corporations*, 18 *Green Bag* 662, 662 (1906).

<sup>70</sup> Collier, *supra* note 13, at 422.

<sup>71</sup> Judson, *supra* note 69, at 664.

<sup>72</sup> See generally *supra* note 6.

<sup>73</sup> See, e.g., McCurdy, *supra* note 48, at 307 (noting that rejection of the “fictional concept of the corporation” also “relaxed structural restraints” imposed by the states on the corporation); see also Horwitz, *supra* note 7, at 78.

<sup>74</sup> Harold J. Laski, *The Personality of Associations*, 29 *Harv. L. Rev.* 404, 413 (1916).

<sup>75</sup> *Id.* at 412.

<sup>76</sup> *Id.*

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intent. Laski acknowledged that mens rea proved to be a “stumbling block[]” for the courts, but he predicted that “the reality of corporate crime will pass into the current coin of legally accepted doctrine.”<sup>77</sup>

Real entity theory also challenged the notion of the innocent shareholder. For example, in 1908, George Deiser, an author of a series of articles on corporate personhood, took issue with Freund’s claim that corporate representation was incompatible with a principle of moral responsibility for corporate criminal acts. Deiser argued that corporate acts were expressions of the will of all shareholders, either by virtue of the acquiescence or departure of dissenting shareholders from the corporation.<sup>78</sup> When faced with a disagreeable corporate act, dissenting shareholders could acquiesce in the act, take legal recourse against the corporation, or divest their shares. If dissenters failed to take legal recourse or divest from the company, argued Deiser, then they effectively acquiesced, thus rendering them morally complicit in the outcome.<sup>79</sup> If they left the corporation, then the majority would become a coherent whole. In any event, the corporation remained an aggregation of shareholders who were morally responsible for all corporate acts.<sup>80</sup> In other words, in the framework presented by Deiser, there was no such thing as an innocent shareholder.

Echoing Deiser’s position in 1919, James T. Carter, a doctoral candidate at the University of Maryland, wrote that corporations were not artificial creatures of law, but were real entities that came into existence at the same time that the members of the corporate group joined together.<sup>81</sup> “We cannot, therefore, conclude with Freund,” wrote Carter, “that the moral capacity of the aggregate body is generally speaking and for strictly legal purposes an irrelevant factor . . . .”<sup>82</sup> Carter asserted that the “narrow interpretation” of a corporation as a mere fiction of the law failed to recognize the existence of “a real corporate entity endowed with an undoubtedly

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<sup>77</sup> Id. at 409.

<sup>78</sup> George F. Deiser, *The Juristic Person*, II, 57 U. Pa. L. Rev. 216, 225–26 (1908).

<sup>79</sup> Id. at 226.

<sup>80</sup> Id. at 225.

<sup>81</sup> Carter, *supra* note 8, at 240.

<sup>82</sup> Id. at 72.

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real group will,” and that this real entity had the moral capacity to commit crimes.<sup>83</sup>

In the prevailing historical narrative, real entity theorists are the proponents of unrestricted corporate power, and artificial entity theorists are the guardians of the public interest.<sup>84</sup> Yet, these roles were actually reversed in the context of corporate crime. Although real entity theorists advocated nearly unlimited corporate acting authority, they also strived for consistency in the application of their doctrine of corporate personality.<sup>85</sup> This meant that while corporations were thought to have unrestricted acting authority, they could also be held liable for fraud, malice, and other specific intent crimes, and could even be subject to functional imprisonment through sanctions that temporarily denied their legal authority to act.<sup>86</sup> Real entity theory carried the potential to offer courts the philosophical foundation necessary to hold corporations criminally liable. Reflecting this confidence in real entity theory, Professor Arthur Machen wrote: “The real criminal is the juristic person, the group-person. . . . Advocates of this theory of corporate existence pride themselves upon the justification which their theory thus affords for the subjection of corporations to the rigors of the penal law.”<sup>87</sup> Although the philosophical underpinnings of real entity theory clearly supported corporate criminality, the influence of real entity theory on the courts is more ambiguous.

### *C. Real Entity Theory: Triumphant in the Courts?*

While judges generally accepted the proposition that corporations possessed the moral capacity and authority to commit certain

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<sup>83</sup> *Id.* at 75.

<sup>84</sup> See, e.g., Lamoreaux, *supra* note 20, at 47–50 (discussing statutory changes, based in real entity theory, that removed previous restrictions on corporate growth and activities, and the subsequent reaction to those changes in the form of new statutes and rulings, animated by artificial entity theory, that sought to restrain corporate accumulation of power due to perceived dangers to the public).

<sup>85</sup> Arthur W. Machen, Jr., *Corporate Personality*, 24 *Harv. L. Rev.* 253, 353–54 (1911).

<sup>86</sup> Carter, *supra* note 8, at 76; Machen, *supra* note 85, at 348–49. One jurist suggested that in lieu of physical imprisonment, corporations could have their charters temporarily or permanently revoked, effectively denying the corporation legal acting capacity. Note, *Criminal Liability of Corporations*, 18 *Yale L.J.* 625, 626 (1909).

<sup>87</sup> Machen, *supra* note 23, at 593–94.

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crimes, they consistently avoided the full logical implications of real entity theory by declaring that certain types of crime were still *ultra vires*. Thus, as explored below, courts equivocated on treating corporations as the autonomous moral persons that real entity theorists purported them to be.

In 1909, the debate over corporate criminality had its turn for review in the U.S. Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*.<sup>88</sup> Justice Day, writing for a nearly unanimous court, concluded that corporations could “be held [criminally] responsible for and charged with the knowledge and purposes of their agents.”<sup>89</sup> Despite the favorable holding in *New York Central* for proponents of corporate criminal capacity, real entity theory did not overwhelm the existing judicial doctrine. Justice Day acknowledged an exception to the scope of criminal liability, cautioning that there are “some crimes, which in their nature cannot be committed by corporations,” but he did not elaborate further.<sup>90</sup> His conclusion reflected the general position of American courts at the time. For the most part, courts were amenable to indicting corporations for statutory offenses that prohibited certain conduct, and they would impute the criminal intent of acting officers or directors to the corporation as a whole.<sup>91</sup> Yet courts often questioned whether corporations could be indicted for certain malicious specific intent crimes, disputing that corporations had either the capacity or authority to commit such crimes. For example, in 1909, the New York Court of Appeals addressed the matter of corporate criminal liability in *People v. Rochester Railway & Light Co.*<sup>92</sup> A corporation was indicted for second-degree man-

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<sup>88</sup> 212 U.S. 481, 494 (1909) (“In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him.”).

<sup>89</sup> *Id.* at 494–95.

<sup>90</sup> *Id.* at 494.

<sup>91</sup> See, e.g., *Grant Bros. Constr. Co. v. United States*, 114 P. 955, 957 (Ariz. 1911) (“[A] corporation, as well as an individual, is capable of forming a guilty intent and capable of having the knowledge necessary, provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent.”); *State v. Passaic Cnty. Agric. Soc’y*, 23 A. 680, 681 (N.J. 1892) (“That malice and evil intent may be imputed to corporations has been repeatedly adjudged.”); *State v. Ice & Fuel*, 81 S.E. 737, 737–39 (N.C. 1914) (upholding an indictment of a corporation for “intent to deceive”).

<sup>92</sup> 88 N.E. 22 (N.Y. 1909).

slaughter for negligently installing an apparatus that caused the death of an inmate.<sup>93</sup> The court granted judgment in favor of the corporation, but offered dicta supporting proponents of corporate criminal liability. Writing for the court, Judge Hiscock ruled that the statutory definition of manslaughter in New York contemplated the killing of one human being by another human being and it therefore excluded corporations.<sup>94</sup> Hiscock, however, added the following note: “At times courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, again with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical.”<sup>95</sup> As to the “certain limitations” to criminal liability, Hiscock referred to crimes involving “personal, malicious intent and acts so *ultra vires* that a corporation manifestly could not commit them.”<sup>96</sup>

A federal district court judge from Alaska, writing several years earlier, alluded to limitations similar to those cited by Judge Hiscock. In convicting a corporation for feloniously removing fish from the tidal waters of the territory of Alaska, the court in *United States v. Alaska Packers’ Ass’n* noted that “[s]ome have stumbled on the impossibility of the artificial and soulless [sic] being called a corporation having an evil mind or criminal intent.”<sup>97</sup> The judge found that this objection was unwarranted for “ordinary crimes,” but then added that “the intent essential to murder in the first degree . . . would palpably be so far *ultra vires* as to be beyond the competency of the corporation, even if it could be hanged in punishment.”<sup>98</sup> Thus, in both *Rochester Railway* and *Alaska Packers’ Ass’n*, the courts stopped short of fully endorsing real entity theory by denying the capacity of corporations to commit certain crimes. These opinions were by no means outliers; other jurisdictions similarly shied away from finding that corporations could be held re-

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<sup>93</sup> Id. at 22.

<sup>94</sup> Id. at 24.

<sup>95</sup> Id. at 23.

<sup>96</sup> Id.

<sup>97</sup> 1 Alaska 217, 220 (D. Alaska 1901).

<sup>98</sup> Id. at 220–21.

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sponsible for crimes involving personal violence, malicious intent, or moral depravity.<sup>99</sup>

At least one court, however, went further toward adopting the full implications of real entity theory, if only in dicta. In 1906, Judge Hough from the Southern District of New York held that a corporation did “knowingly conspire” to restrain interstate trade in violation of the Sherman Antitrust Act.<sup>100</sup> The defendant contended that corporations could not be “indicted for offenses which derive their criminality from evil intention.”<sup>101</sup> Hough scoffed at the artificial entity defense, stating that “to assert that the Legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not, in my opinion, bear discussion.”<sup>102</sup> He then drew upon the language of real entity theory in his explanation:

It seems to me as easy and logical to ascribe to a corporation an *evil mind* as it is to impute to it a sense of contractual obligation. . . . [T]here is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest.<sup>103</sup>

Judge Hough did not qualify this statement with the usual disclaimer that corporations could not be liable for crimes involving personal malice. As such, proponents of corporate criminal liability cited the decision for the proposition that corporations could be held liable to the full extent of the criminal law,<sup>104</sup> while detractors

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<sup>99</sup> See, e.g., *United States v. John Kelso Co.*, 86 F. 304, 306 (N.D. Cal. 1898) (“Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses . . .”); *State v. E. Coal Co.*, 70 A. 1, 7 (R.I. 1908) (“At the present time there seems to be very little doubt that corporations may be guilty of most of the common crimes, and that criminal intent will be imputed to the corporation from acts done by its agents. It is still held in some jurisdictions that corporations cannot be guilty of a felony, or crimes where personal violence is involved, but that is as far as any courts, it is believed, will now go in holding that they cannot be guilty of crime.”).

<sup>100</sup> *United States v. MacAndrews & Forbes Co.*, 149 F. 823, 829 (C.C.S.D.N.Y. 1906).

<sup>101</sup> *Id.* at 835 (quoting *Commonwealth v. Proprietors of New Bedford Bridge*, 68 Mass. (2 Gray) 339, 345 (Mass. 1854)).

<sup>102</sup> *Id.* at 836.

<sup>103</sup> *Id.* (emphasis added).

<sup>104</sup> Machen, *supra* note 23, at 591–92, 591 n.8 (citing *MacAndrews* as evidence of the trend toward unlimited corporate criminal liability); see also Casenote, *Corporations—Liability for Crime*, 30 *Yale L.J.* 415, 415 (1921) [hereinafter *Corporations*]

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of corporate criminal liability attacked the logic of the holding.<sup>105</sup> Despite the court's unqualified statement, a conviction under the Sherman Antitrust Act did not exactly shatter the mold of corporate criminality.

Thus, the real entity theory played an ambiguous role in the courts. One conclusion, however, remains certain—the American judiciary moved sharply away from the *ultra vires* hurdle to corporate criminality. In 1921, a casenote in the *Yale Law Journal* proclaimed that “no modern cases have been found where a defendant was freed solely on the ground that the crime was completely without the scope of the corporate powers.”<sup>106</sup> In other words, as a practical matter, *ultra vires* no longer served as a viable criminal defense to corporations. To the extent that the real entity theory played a role in the courts, it was in allowing judges to move away from a rigid interpretation of corporate acting authority. Nevertheless, it remains questionable whether real entity theory was the true impetus for this change. While courts were clearly responsive to pushing the boundaries of *ultra vires* acts in order to convict the corporate group, the judiciary generally resisted the full implications of the real entity doctrine.

### III. RESOLVING THE CONTRADICTION IN CORPORATE THEORY

As evidenced by their treatment of corporate political activity and corporate criminal activity, the American judiciary advanced deeply conflicted, if not schizophrenic, conceptions of corporate personhood. The law, as interpreted and applied by the courts, did not adhere to a single coherent axiom of corporate existence under either the real entity or artificial entity theories. When confronting political expenditures, courts vigorously restricted corporate acting authority by either enforcing the corporate charter or rejecting corporate rights, all the while celebrating the autonomy of the dissenting shareholder. When addressing crime, however, courts expanded corporate acting authority to the detriment of innocent

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(citing *MacAndrews* as evidence that courts will attribute specific intent to corporations).

<sup>105</sup> See, e.g., Canfield, *supra* note 6, at 476–77 (1914) (criticizing Judge Hough's logic for failing to highlight the differences between criminal intent and contractual capacity).

<sup>106</sup> Corporations, *supra* note 104, at 416.



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shareholders. In one instance, artificial entity theory was the most appealing concept of corporate personhood; yet in another, real entity theory was the best match. These disparate judicial philosophies call into question the traditional arguments that one theory or the other drove legal principles in the field of corporate law. Insofar as theories of corporate personhood did any work in the courts, they appeared to merely play a supporting role. The American judiciary, however, was not lacking in doctrinal foundation. The courts viewed corporate personhood as an extension of property interests. Corporations enjoyed the constitutional assurances of legal personhood to the extent that such protections were necessary to safeguard the property interests belonging to the corporation. The scope of these corporate property interests was generally defined with an eye toward the public interest. One of the most revealing ways to explore corporate property interests and the corresponding parameters of corporate personhood in the late nineteenth and early twentieth centuries is through the lens of the due process doctrine that defined the jurisprudence of American constitutional law in that era.

A. *Rochester Railway and the Perkins Case: Spotlighting the Contradiction*

In *People v. Rochester Railway & Light Co.*, the New York Court of Appeals concluded that corporations could possess certain types of criminal intent, and that corporate criminal conduct was not necessarily *ultra vires*.<sup>107</sup> Two years prior, the same court ruled in *People ex rel. Perkins v. Moss* that corporations were not aggregations of political morality, and that political expenditures were undeniably *ultra vires*.<sup>108</sup> When compared to each other these decisions spotlight a theoretical tension in judicial interpretations of corporate morality and personhood.

Judge Hiscock, author of the majority opinion in *Rochester Railway*, also penned a concurrence in *Perkins*. He asserted that the “contribution by the president of the New York Life Insurance Company from its funds . . . to a political campaign committee,

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<sup>107</sup> 88 N.E. 22, 23–24 (N.Y. 1909).

<sup>108</sup> 80 N.E. 383, 387 (1907) (“The company had not the right, under the law of its existence, to agree to make contributions for political campaigns . . .”).

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even in the absence of any statutory prohibition, was absolutely beyond the purposes for which that corporation existed, and was wholly unjustifiable and illegal.”<sup>109</sup> His language left little question as to the rigidity of the *ultra vires* doctrine as applied to corporate political expenditures. Only two years later, when Hiscock addressed the question of corporate crime, he introduced the legal issue by noting that the common law spurned the concept of corporate criminal intent.<sup>110</sup> He then cited, however, to a passage from Joel Prentiss Bishop’s influential treatise on criminal law,<sup>111</sup> which, in full, stated:

A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense *ultra vires* and contrary to its nature. But within the sphere of its corporate capacity, *and to an undefined extent beyond*, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act . . . as an individual man . . . .<sup>112</sup>

Thus, Judge Hiscock was willing to massage the formal limits of the *ultra vires* doctrine to “an undefined extent.”<sup>113</sup> It is particularly noteworthy that Hiscock felt compelled to move beyond this traditional boundary even without an express statutory mandate. Indeed, the holding in *Rochester Railway* was that New York’s manslaughter statute contemplated only the killing of one human being by another human being.<sup>114</sup> Nevertheless, Hiscock signaled clearly to the legislature that the *ultra vires* doctrine would not obstruct a statute making corporations indictable for manslaughter and that,

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<sup>109</sup> *Id.* at 388.

<sup>110</sup> *Rochester Ry.*, 88 N.E. at 22.

<sup>111</sup> *Id.* at 23.

<sup>112</sup> 1 Joel Prentiss Bishop, *New Commentaries on the Criminal Law upon a New System of Legal Exposition* § 417(2) (8th ed. 1892) (emphasis added). Bishop’s treatise was a central authority not only in the *Rochester Railway* case, but also in other judicial opinions holding that corporations could be held criminally liable. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492 (1909); *United States ex rel. S. Express Co. v. Memphis & Little Rock R.R. Co.*, 6 F. 237, 240 (C.C.W.D. Tenn. 1881); *United States v. Alaska Packers’ Ass’n*, 1 Alaska 217, 220 (D. Alaska 1901).

<sup>113</sup> Bishop, *supra* note 112, § 417(2).

<sup>114</sup> *Rochester Ry.*, 88 N.E. at 24.

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for the purposes of most crimes, corporations could possess the intent of a natural person.<sup>115</sup>

### *1. More than Morality*

These two opinions, taken as a representative sample of judicial treatment of corporate crime and politics, cast considerable doubt on the notion that courts had ascribed to an immutable concept of corporate personhood. In response, it might be argued that the seemingly inconsistent positions are the product of differentiated understandings of individual rather than corporate morality. For example, Judge Hiscock declared in *Rochester Railway* that since some crimes involved personal and malicious intent, they could not be imputed to the corporate group,<sup>116</sup> a belief echoed in other court decisions and legal texts.<sup>117</sup> Similarly, it might be argued that Judge Hiscock, although he never said as much in the *Perkins* case, believed that political morality was so intensely personal in nature that the political beliefs of a corporate officer could never be imputed to the corporate group. This explanation, however, breaks down upon a closer reading of his concurring opinion in the *Perkins* case. With regard to the corporate officer charged with improperly diverting funds to political activities, Hiscock doubted that the officer “had any personal or political end to serve by the contribution.”<sup>118</sup> Thus, he gave no indication that he thought the political donation in the *Perkins* case constituted a profound expression of individual morality. More significantly, it was widely held that corporations, barring public policy objections, could be organized by their shareholders for political purposes.<sup>119</sup> Accordingly, there was nothing inherently personal about political morality such that the political beliefs of the corporate officer could never be imputed to the shareholders.

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<sup>115</sup> *Id.* (“Within the principles thus and elsewhere declared, we have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and nonfeasance when resulting in homicide . . .”).

<sup>116</sup> *Id.* at 23.

<sup>117</sup> See *supra* note 99 and accompanying text.

<sup>118</sup> *People ex rel. Perkins v. Moss*, 80 N.E. 383, 389 (N.Y. 1907).

<sup>119</sup> See *supra* notes 33–35 and accompanying text.

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## 2. *More than Judicial Deference*

Judicial deference, at first blush, provides an attractively simple explanation to this apparent contradiction in corporate theory. In one instance, courts sustained legislative enactments banning political expenditures, and in another, they sustained statutes criminalizing certain corporate acts. Perhaps the judiciary did not require a doctrinal foundation and needed only craft a convincing argument of one sort or another in order to effectively defer to political will. This explanation, however, is inadequate for the following two reasons.

First, not all courts awaited express statutory authorization to displace the common law rule against corporate criminal liability.<sup>120</sup> At least one court used an ordinary libel statute to uphold indictment of a corporation,<sup>121</sup> while another relied upon the common law to hold a corporation in criminal contempt of court.<sup>122</sup> Along similar lines, Judge Hiscock all but invited the New York state legislature to displace the common law rule against corporate criminal liability, apparently having decided the propriety of corporate criminal convictions before the legislature acted. The same point can be made with regard to corporate political expenditures: courts did not await legislative enactments in order to find such uses of corporate resources illegitimate.<sup>123</sup>

Second, the early twentieth century is not an era known for its judicial deference to legislative exercises of police power. Courts in the *Lochner* era applied an exacting standard of review under the Due Process Clause to ensure that exercises of state regulation did not exceed rigidly imposed constitutional limits. This was especially true when the police power impinged upon private property inter-

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<sup>120</sup> *State v. Lehigh Valley R.R. Co.*, 111 A. 257, 259 (N.J. 1920) (Kalisch, J., dissenting) (objecting that the majority upheld the corporate indictment for manslaughter in the absence of an express legislative enactment). *Contra Commonwealth v. Ill. Cent. R.R. Co.*, 153 S.W. 459, 463 (Ky. 1913) (denying an indictment of a corporation in the absence of statutory authorization).

<sup>121</sup> *State v. Atchison*, 71 Tenn. 729, 730–31 (1879) (holding that a publishing company could be indicted under the state's libel statute).

<sup>122</sup> *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899) (holding that the *ultra vires* doctrine did not prevent a corporation from being convicted of contempt of court).

<sup>123</sup> See, e.g., *Mobile Gas Co. v. Patterson*, 293 F. 208, 226 (M.D. Ala. 1923); *McConnell v. Combination Mining & Milling Co.*, 79 P. 248, 251 (Mont. 1905).

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ests.<sup>124</sup> As Justice Peckham explained in the namesake case from the *Lochner* era, courts were obligated to guard against unjustified exercises of police power<sup>125</sup> and expose legislation that violated the principle of government neutrality by arbitrarily favoring one class of persons over another.<sup>126</sup> This is not to say that *Lochner* era jurisprudence was wholly defined by a reactionary and conservative judicial philosophy. Revisionist historians have effectively debunked that myth.<sup>127</sup> Instead, the modest claim here is that courts exercised an exacting standard of review to ensure that legislative deference was doctrinally appropriate under the circumstances.

Since corporate criminal liability would likely affect the investment of individual shareholders through fines, statutes criminalizing corporate conduct were perfect targets for due process challenges. Indeed, citing to *Lochner*, Arthur Machen expressed concern in 1911 that corporate criminality might be another casualty of the Court's due process doctrine.<sup>128</sup> Nevertheless, when directly faced with the question of whether a corporate criminal conviction deprived shareholders of the due process of law, the

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<sup>124</sup> See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding that a state law outlawing certain types of employee contracts was a violation of the liberty of contract of the employers under the Fourteenth Amendment); *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that a law regulating hours and working conditions in New York bakeries lacked a sufficient public health rationale, and therefore violated the liberty of contract implied under the Fourteenth Amendment); *Smyth v. Ames*, 169 U.S. 466, 547 (1898) (holding that a regulated company was entitled to "fair return" under legislative price regulations); *People v. Marcus*, 77 N.E. 1073, 1074-75 (N.Y. 1906) (holding that a law outlawing a ban on contracts requiring workers not to be union members was unconstitutional); *In re Jacobs*, 98 N.Y. 98, 115 (1885) (asserting that laws impinging upon liberty or property interests could not be enacted under the mere pretext of police power).

<sup>125</sup> *Lochner*, 198 U.S. at 56 ("In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State . . .").

<sup>126</sup> *Id.* at 63 ("[The law] gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare."); see also Howard Gillman, *The Constitution Besieged* 10 (1993) (arguing that *Lochner*-era substantive due process was about enforcing a principle of government neutrality and opposing class legislation that arbitrarily favored one class of persons over another).

<sup>127</sup> See, e.g., Gillman, *supra* note 126, at 6-9; Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. Rev. 881, 999 (2005) (defending government neutrality as a substantial doctrinal influence in the *Lochner* era).

<sup>128</sup> Machen, *supra* note 23, at 597.

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Supreme Court sided against the corporations.<sup>129</sup> Moreover, bans against corporate political donations often singularly targeted corporations and their officers, exempting other business associations and wealthy individuals.<sup>130</sup> Such a narrow application of the criminal law to corporations potentially violated the weighty principle of government neutrality. Yet, statutory bans against corporate political expenditures also survived constitutional challenges, as examined in Subsection III.B.2.<sup>131</sup>

These considerations lead to the irresistible conclusion that courts must have had an independent doctrinal foundation to reinforce their disparate treatment of corporate crime and political expenditures.

*B. Corporate Rights as Extensions of Property Interests and Public Interest*

To the extent that corporations enjoyed constitutional protections, such as personhood under the Fourteenth Amendment or freedom from unreasonable searches and seizures under the Fourth Amendment, these protections derived from their property interests. Thus, instead of rooting corporate personhood in abstract concepts of group personality or artificial entity theory, the courts grounded the corporate entity in the familiar category of property. This judicial interpretation of corporations as aggregations of property interests ultimately explains why courts were willing to

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<sup>129</sup> *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494–96 (1909). Numerous other courts simply upheld corporate convictions without discussion of due process issues. See generally *United States v. John Kelso Co.*, 86 F. 304 (N.D. Cal. 1898); *Grant Bros. Constr. Co. v. United States*, 114 P. 955 (Ariz. 1911); *State v. E. Coal Co.*, 70 A. 1 (R.I. 1908).

<sup>130</sup> A few congressional opponents to the Tillman Act thought it was unfair to single out corporate wealth. Hohenstein, *supra* note 20, at 71.

<sup>131</sup> While it cannot be stated with certainty that no corporation successfully challenged the constitutionality of a statute banning corporate political contributions, it is the case that courts upheld the constitutionality of such statutes in the reported decisions. See E.W.H., Annotation, Construction and Application of Provisions of Corrupt Practices Act Regarding Contributions by Corporations, 125 A.L.R. 1029 (1940); B.R., Annotation, Constitutionality of Corrupt Practices Acts, 69 A.L.R. 377 (1930); see also Hohenstein, *supra* note 20, at 72–73 (noting that it took ten years for a federal court to examine the constitutionality of the Tillman Act and that corporations did not “seriously challenge the constitutionality of the power of Congress to regulate corporate campaign spending” until 1943).

find corporate authority for criminal activity, while simultaneously denying a comparable authority for political action.

The due process doctrine that prevailed at the turn of twentieth century elucidates the scope and nature of the property interests represented in the corporate entity. Two elements of the doctrine are particularly relevant. First, courts considered whether a private property interest was affected by a particular state regulation and whether the regulation could be justified as relating to the “safety, health, morals and general welfare of the public.”<sup>132</sup> The second consideration, which was intertwined with, if not indistinguishable from, the first, addressed whether the deprivation of property violated the government neutrality principle by arbitrarily taking property from *A* merely to give it to *B*.<sup>133</sup> In order for a regulation to satisfy this second prong, courts had to find that the statute conferred a benefit on the public at large or protected the safety of a particularly vulnerable class.<sup>134</sup>

### *1. Corporate Constitutional Protections as Extensions of Property Rights*

*Santa Clara County v. Southern Pacific Railroad Co.* was the first Supreme Court decision to elevate corporations to the status of personhood under the Fourteenth Amendment.<sup>135</sup> Morton Horwitz convincingly argues that the 1886 decision aimed simply to protect the vested property rights of individual shareholders, but that it did not purport to fundamentally revolutionize the legal nature of the

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<sup>132</sup> *Lochner v. New York*, 198 U.S. 45, 53 (1905); see also *Bacon v. Walker*, 204 U.S. 311, 317 (1907); *Lottery Case*, 188 U.S. 321, 364–65 (1903); *Holden v. Hardy*, 169 U.S. 366, 383 (1898).

<sup>133</sup> See, e.g., *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (concluding that a regulation requiring a railroad to allow farmers to build a grain elevator over the railroad tracks was a taking of the private property of the railroad company for the private use of the farmers); see also *Adkins v. Children’s Hosp. of D.C.*, 261 U.S. 525, 557 (1923) (concluding that a minimum wage statute for women “takes account of the necessities of only one party to the contract”).

<sup>134</sup> See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (upholding hour limits for female factory employees as a proper police regulation because a “woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . .”); *Holden*, 169 U.S. at 396–98 (upholding hour limits on mining as a proper exercise of police power intended to protect the safety of workers in a dangerous profession).

<sup>135</sup> 118 U.S. 394, 396 (1886).

corporate entity.<sup>136</sup> To help understand this fact, he highlights *The Railroad Tax Cases*, which preceded *Santa Clara County* by four years.<sup>137</sup> While riding circuit in 1882, Justice Stephen Field declared that individual persons did not abandon their property rights when they became members of a corporation. Field wrote: “[W]henever a provision of the [C]onstitution, or of a law, guaranties [sic] to persons the enjoyment of property, or affords to them means for its protection . . . the benefits of the provision extend to corporations . . . .”<sup>138</sup> In other words, the corporation was an aggregate of the individual property rights of the shareholders and provided individuals with constitutional safeguards through its corporate personality. Essentially, the corporation was merely a placeholder for individual rights. So, when Justice Morrison Waite declared in one short paragraph in *Santa Clara County* that the Justices would not entertain the question of whether the Fourteenth Amendment afforded protections to corporations as persons,<sup>139</sup> he was relying upon the established proposition that corporate property was to be treated no differently than individual property.<sup>140</sup>

Horwitz goes on to argue that the corporate person in *Santa Clara County* was markedly different from the corporate person that would emerge through real entity theory in the 1890s.<sup>141</sup> Corporate personhood, according to Horwitz, eventually developed its own legal significance apart from the aggregate property interests embodied in the corporation.<sup>142</sup> This in turn established “dramatically new constitutional protections for corporations.”<sup>143</sup> Horwitz, however, exaggerates the extent to which courts departed from the property rights framework in the early twentieth century. It may be conceded that corporations were increasingly viewed as distinct legal entities from their individual shareholders and officers.<sup>144</sup> Nev-

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<sup>136</sup> Horwitz, *supra* note 7, at 69–70.

<sup>137</sup> *Id.* at 70.

<sup>138</sup> *The Railroad Tax Cases*, 13 F. 722, 744 (Field, Circuit Justice, C.C.D. Cal. 1882).

<sup>139</sup> *Santa Clara County*, 118 U.S. at 396 (“The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.”).

<sup>140</sup> Horwitz, *supra* note 7, at 70.

<sup>141</sup> *Id.* at 67.

<sup>142</sup> *Id.* at 100–01.

<sup>143</sup> *Id.* at 67.

<sup>144</sup> See Berle & Means, *supra* note 12, at 64–65.



ertheless, courts continued to view corporations as entities based on property rights, which informed subsequent extensions of constitutional protections to the corporation.

For example, in the 1906 case of *Hale v. Henkel*, the Supreme Court appealed to property interests when it held that corporations enjoyed freedom from unreasonable searches and seizures, but that corporations could not claim freedom from self-incrimination.<sup>145</sup> Writing for the majority, Justice Henry Billings Brown adjudged that a corporate officer could not assert Fifth Amendment self-incrimination privileges on behalf of the corporation with regard to the production of corporate documents.<sup>146</sup> In so ruling, Brown stated that the right against self-incrimination was a personal right and therefore could only be claimed by the witness—in this case, the corporation.<sup>147</sup> The Court, however, did conclude that corporations could claim Fourth Amendment protections against unreasonable searches and seizures. Using language similar to that found in Justice Field's opinion in the *Railroad Tax Cases*, Justice Brown remarked that a corporation was “an association of individuals under an assumed name”; therefore, by “organizing itself as a collective body it waives no constitutional immunities . . . . Its property cannot be taken without compensation.”<sup>148</sup> Furthermore, an unreasonable search could “completely put a stop to the business” of the corporation, thereby depriving it of property in violation of the due process of law.<sup>149</sup> Accordingly, Justice Brown concluded that Fourth Amendment protections against unreasonable searches applied to corporations.

The holding in *Hale v. Henkel* is important for two reasons. First, it demonstrates that twenty years after *Santa Clara County*, the Supreme Court continued to derive corporate constitutional rights from property interests. Second, it is important because a majority of the Court expressly avoided the issue of corporate personhood. In discussing freedom from self-incrimination, Justice Brown

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<sup>145</sup> 201 U.S. 43, 75–76 (1906).

<sup>146</sup> *Id.* at 69–70.

<sup>147</sup> *Id.* This effectively denied Fifth Amendment protections to corporations, given that the corporation logically required third persons to act on its behalf. Yet third persons could not invoke freedom from self-incrimination on behalf of the corporation.

<sup>148</sup> *Id.* at 76.

<sup>149</sup> *Id.* at 77.

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opined that the “question whether a corporation is a ‘person’ within the meaning of this Amendment really does not arise” given the personal nature of the right.<sup>150</sup> Thus, corporate personhood remained a functional label that the Court invoked only when necessary to protect a deserving interest.

Nearly two decades following *Hale v. Henkel*, the Supreme Court famously held in *Pierce v. Society of Sisters* that an Oregon act compelling parents to send their children to public schools instead of private schools violated the Constitution.<sup>151</sup> The Court’s opinion is remembered for its pluralist proposition that a state cannot “standardize its children by forcing them to accept instruction from public teachers only.”<sup>152</sup> The unconstitutionality of the statute did not, however, hinge on privacy or freedom of religion (the private school at issue in the case was a Catholic institution). The holding was actually rooted in the property rights of a corporation. Justice James McReynolds wrote for a unanimous Court:

[The schools] are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true . . . . But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which [the state is] exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.<sup>153</sup>

To support the proposition that the schools’ property interests warranted injunctive relief, McReynolds cited a series of now infamous *Lochner* era decisions,<sup>154</sup> including *Hitchman Coal & Coke Co. v. Mitchell*,<sup>155</sup> *Duplex Printing Press Co. v. Deer-*

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<sup>150</sup> *Id.* at 70.

<sup>151</sup> 268 U.S. 510, 534–36 (1925).

<sup>152</sup> *Id.* at 535.

<sup>153</sup> *Id.*; see also *id.* at 531 (“And without doubt enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees’ business and greatly diminish the value of their property.”).

<sup>154</sup> *Id.* at 536.

<sup>155</sup> 245 U.S. 229, 259–61 (1917) (enjoining union interference with “yellow dog” contracts).

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ing,<sup>156</sup> and *American Steel Foundries v. Tri-City Central Trades Council*.<sup>157</sup> Each of these opinions contemplated protection of a business's property rights against interference from labor activity. Accordingly, *Pierce v. Society of Sisters*, a case that purported to protect a constitutional right to private education, was firmly grounded in a corporation's property interests.

*The Railroad Tax Cases*, *Hale v. Henkel*, and *Pierce v. Society of Sisters* demonstrate that from 1882 until at least 1925, the extension of constitutional protections to corporations was consistently accomplished through a property rights framework. Contrary to Horwitz's claim, property rights remained the primary impetus for expanding (or denying) constitutional protections to corporations well into the twentieth century. This framework ultimately serves to explain the varying judicial treatment of corporate political and criminal activity.

## 2. *Property Rights and Public Interest in Political Expenditures*

The prevailing view among practitioners and courts in the first two decades of the twentieth century regarding corporate political expenditures was that the economic benefit of a political donation was too speculative to be declared a property right of the corporation. In 1908, Seymour Thompson captured this sentiment when he wrote that political contributions were *ultra vires* because “[s]uch contributions [could not] be justified on the ground that the success of any political party would contribute beneficially to the corporation. Such notions can lie only in the remotest fields of conjecture.”<sup>158</sup> Thus, corporate executives could not claim to have furthered the corporation's interest by making political donations or endeavoring to influence the electorate, so the courts had no basis for recognizing the expenditure as an extension of the acting authority embodied in the corporate charter. Moreover, in the absence of a property interest in political expenditures, the corporation could not claim deprivation of due process when the state

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<sup>156</sup> 254 U.S. 443, 478–79 (1921) (holding that secondary boycotts by unions unlawfully injured the property of employers).

<sup>157</sup> 257 U.S. 184, 212–13 (1921) (holding that the labor exemption in the Clayton Act did not apply when picketing non-employees threatened to injure the business of an employer).

<sup>158</sup> Thompson, *supra* note 34, § 2819.

proscribed such expenditures. And, as a final nail in the coffin of corporate political rights, courts wholly endorsed the public policy rationale for prohibiting corporate political activity.

*a. Surviving the Due Process Challenge*

Forbidding corporations from making political expenditures did not infringe upon a property interest of the corporation and therefore raised no due process issues. This is precisely what the Michigan Supreme Court concluded in the 1916 case of *People v. Gansley*, where the court upheld the conviction of Jacob Gansley, the manager of a brewing corporation, for channeling corporate funds toward political activities.<sup>159</sup> Gansley had challenged the constitutionality of a state law banning political contributions under the Due Process Clause of the Fourteenth Amendment.<sup>160</sup>

To buttress his position, Gansley cited *Smyth v. Ames*, an influential Supreme Court case that prohibited state legislatures from fixing industry rates below what would afford a business a “fair return” on its investment.<sup>161</sup> *Smyth* was central to the due process doctrine of the early twentieth century, insofar as it defined the constitutional scope of market regulation.<sup>162</sup> The Michigan Supreme Court, however, found *Smyth* to be inapplicable. Rate regulation, explained the court, “dealt directly with the property rights of the respective companies” and resulted in a “practical destruc-

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<sup>159</sup> 158 N.W. 195, 196, 201 (Mich. 1916).

<sup>160</sup> *Id.* at 195–96, 200–01.

<sup>161</sup> *Id.* at 199 (citing *Smyth v. Ames*, 169 U.S. 466, 546–47 (1898) (holding that regulations that failed to provide for a reasonable rate of return amounted to a taking of property in violation of the Due Process Clause)).

<sup>162</sup> See, e.g., *The Minnesota Rate Cases*, 230 U.S. 352, 355 (1913) (citing *Smyth* to support the proposition that corporations whose private property is invested in quasi-public uses are entitled to “just compensation”); *Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 17–19 (1909) (referring to *Smyth* and holding that it was uncertain whether the rate regulation allowed for a fair return); see also William J. Baron, *The Evolution of Smyth v. Ames: A Study of the Judicial Process*, 28 Va. L. Rev. 761, 762 (1942) (“[*Smyth v. Ames*] . . . climaxed two decades of decisions in which the court gradually took unto itself the power of reviewing the reasonableness of rate regulation.”); Robert L. Hale, *Does the Ghost of Smyth v. Ames Still Walk?*, 55 Harv. L. Rev. 1116, 1119–20 (1942) (“[T]he Supreme Court always wanted states to have power to reduce net earnings in some circumstances . . . [and] to preserve the value of the property unimpaired. To accomplish these two conflicting aims it resorted to . . . *Smyth v. Ames*.”).

tion” of those rights.<sup>163</sup> By contrast, the corporation in *Gansley* was created only to manufacture beer and not to use “its funds for the purpose of influencing public sentiment.”<sup>164</sup> Accordingly, the corporation did not have a property right “to participate in the elective franchise.”<sup>165</sup> As such, the law banning corporate political expenditures did not impair the value of the corporation’s property.<sup>166</sup>

At the turn of the century, American courts conceived of political, civil, and social rights as distinct and rigid categories.<sup>167</sup> With corporations envisioned as aggregations of property, it was easy to determine that they were not deprived of due process of law when banned from contributing to political issues because corporations had no political rights from the start. For example, in 1906, a New York court declared that “[t]he right of suffrage is exclusively accorded [to] natural persons . . . .”<sup>168</sup> Similarly, Jacob Gansley’s citation to *Smyth* in *People v. Gansley* is a testament to how rigidly the Michigan bar conceived of corporate interests.<sup>169</sup> In a case contemplating bans on political donations, there was no discussion of First Amendment rights, but only a restricted analysis of property interests. The Michigan legal community was not alone in this regard. In 1916, when the United States Brewers’ Association claimed in a federal district court that federal and state bans on corporate political donations violated the First Amendment, the judge seemed baffled by the argument. After dismissing the claim, he stated: “So far as I am aware, it has never been claimed that this general restriction upon political contributions was an infringement of the freedom of speech or of the press.”<sup>170</sup>

With the rights of corporations thus conceptualized, it is a small wonder that courts remained so resolute in their opposition to corporate political activity. Corporations could not claim deprivation of political rights because they had none. And they could not claim

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<sup>163</sup> *Gansley*, 158 N.W. at 200–01.

<sup>164</sup> *Id.* at 201.

<sup>165</sup> *Id.* at 200.

<sup>166</sup> *Id.*

<sup>167</sup> The paradigmatic expression of this rigid categorization is the Supreme Court’s holding in *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

<sup>168</sup> *Perkins v. Moss*, 100 N.Y.S. 427, 433 (N.Y. Sup. Ct. 1906).

<sup>169</sup> *Gansley*, 158 N.W. at 199–200.

<sup>170</sup> *United States v. U.S. Brewers’ Ass’n*, 239 F. 163, 169 (W.D. Penn. 1916).

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deprivation of property rights because of the purely speculative relationship between political contributions and economic benefit.

*b. Public Benefit*

Conceptions of the public interest also informed judicial resistance to corporate political undertakings. Those courts that did entertain constitutional challenges to the prohibition on corporate political expenditures were quick to highlight the widespread benefits of such exercises of police power. One of the few federal courts to entertain a constitutional challenge to the Tillman Act wrote that “the concerted use of money is one of the many dangerous agencies in corrupting the elector and debauching the election . . . .”<sup>171</sup> The court further stated that the government had a legitimate interest in “preserving the freedom of the voter and the purity of the ballot . . . .”<sup>172</sup> The Supreme Court of Michigan conveyed the same conclusion, noting that it was a reasonable exercise of police power to protect elections against undue influence and to “preserve the purity of the ballot box.”<sup>173</sup> Thus, the courts were largely in agreement with Congress that a substantial public interest motivated and justified the ban on political expenditures.<sup>174</sup>

*3. Property Interests in Corporate Crime*

In stark contrast to political expenditures, corporate criminal activity was perceived as intimately connected to the corporation’s property interests. In a paradoxical twist, the courts used this connection as justification to hold corporations criminally liable. To the extent that illegal corporate acts represented a potential financial boon to the shareholders, those acts, along with the correlating

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 168.

<sup>173</sup> *Gansley*, 158 N.W. at 199 (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 907 (7th ed. 1903)); see also *Perkins*, 100 N.Y.S. at 433–34 (explaining that for the corporation to use corporate funds without authorization, and become an “active force in a political contest . . . [would be] an infringement upon the rights of the voters, who alone, either as individuals or through political organizations, may elect, directly or indirectly, officials in advocacy of the principles for which they contend”).

<sup>174</sup> See S. Rep. No. 3056–59, at 2 (1906) (“[The Tillman Act] is in the interest of good government and calculated to promote purity in the selection of public officials.”).

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intent of corporate officers, were attributed to the corporate group as an extension of the business enterprise. The prospect of economic benefit convinced courts to manipulate the traditional boundaries of the *ultra vires* doctrine and recognize corporate criminal capacity. The relationship between criminal activity and property interests also allowed statutes criminalizing certain corporate acts to survive constitutional challenge.

*a. Origins in Corporate Tort*

The argument for limiting the *ultra vires* doctrine in order to recognize the capacity for corporate wrongdoing originated in corporate tort. In 1897, Ernst Freund explained that “[t]he real moral principle involved in corporate liability for tort is, that the risk and burden of acts incidental to an enterprise should fall upon those who benefit by the enterprise.”<sup>175</sup> Having already embraced this principle in 1852, the Supreme Court of New Jersey affirmed the conviction of a corporation for creating a public nuisance, reasoning that the court should look “to the corporation at whose instance and for whose benefit the wrong is perpetrated.”<sup>176</sup> This decision, building on other “modern cases,” was a departure from the *ultra vires* doctrine at the time.<sup>177</sup> Nevertheless, it was soon accepted by other courts that *ultra vires* was not a viable defense to corporate liability in tort.<sup>178</sup> For example, in 1860, the New York Court of Appeals rejected an *ultra vires* defense<sup>179</sup> by two railroad corporations, reasoning that, “[l]ike natural persons, [corporations] can overleap the legal and moral restraints imposed upon them: in other words, they are capable of doing wrong.”<sup>180</sup>

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<sup>175</sup> Freund, *supra* note 9, at 69.

<sup>176</sup> *State v. Morris & Essex R.R. Co.*, 23 N.J.L. 360, 369 (N.J. 1852).

<sup>177</sup> *Id.* at 368–69. The corporation was convicted for committing a positive act, when corporations were previously only liable for neglecting a duty to act. *Id.* at 365–66.

<sup>178</sup> McCurdy, *supra* note 48, at 318–19.

<sup>179</sup> *Bissell v. Mich. S. R.R. Co.*, 22 N.Y. 258, 280–81 (N.Y. 1860). The corporations, one chartered in Michigan and the other chartered in Indiana, had consolidated their businesses in violation of their corporate charters. As a defense, the corporations insisted that they had “transcended their own powers, and violated their own organic laws.” *Id.* at 261–62. Accordingly, the railroads claimed that the alleged negligent acts were beyond the acting capacity of the corporation and were therefore only the acts of natural persons. *Id.* at 263.

<sup>180</sup> *Id.* at 264.

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In 1892, the New Jersey Supreme Court once again expanded the limits of corporate acting authority, this time to recognize corporate crime as being *intra vires*.<sup>181</sup> The court spelled out the connection between corporate criminal and tortious conduct when it wrote: "It is difficult . . . to see how a corporation may be amenable to civil suit . . . and at the same time not be indictable for like offenses where the injury falls upon the public. That malice and evil intent may be imputed to corporations has been repeatedly adjudged."<sup>182</sup> Thus, the collapse of the *ultra vires* doctrine in the face of civil liability served as precedent for the collapse of the doctrine in criminal cases.

*b. Surviving the Due Process Challenge*

The evolution from corporate tort reinforced the concept of corporate crime as a legitimate risk of the business enterprise. Provided that corporate officers were broadly acting within their sphere of delegated authority, they were considered to be working in the financial interests of the corporation, and the intent of the officers could be imputed to the shareholders. It was this principle that allowed corporate criminality to survive its constitutional challenge in 1909 in *New York Central & Hudson River Railroad Co. v. United States*.<sup>183</sup>

A central objection of opponents to corporate criminal liability was that it deprived innocent shareholders of due process of law by dispossessing them of property without finding them personally guilty of an offense. One legal commentator quipped: "American courts, deeming that corporations were capturing the country, seem to have forgotten the due process of law principle and the giving one of his day in court before his property should be taken."<sup>184</sup> Yet the Supreme Court found the innocent shareholder argument to be a nonstarter in *New York Central*.<sup>185</sup> At issue was

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<sup>181</sup> *Intra vires* means within the acting authority of the corporation.

<sup>182</sup> *State v. Passaic Cnty. Agr. Soc.*, 23 A. 680, 681 (N.J. 1892); see also *Telegram Newspaper Co. v. Commonwealth*, 52 N.E. 445, 446 (Mass. 1899) ("There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.").

<sup>183</sup> 212 U.S. 481, 494–96 (1909).

<sup>184</sup> Collier, *supra* note 13, at 426; see also Judson, *supra* note 69, at 662–64.

<sup>185</sup> 212 U.S. at 492–96.



the prosecution of a railroad corporation under the Elkins Act, which made it a crime for railroads to undermine published interstate shipping rates by issuing rebates to customers.<sup>186</sup> The railroad company argued that “[p]unishment can only be visited upon the guilty”<sup>187</sup> and that to impute the criminal intent of the officers to the innocent shareholders of the corporation was to “deprive them of property without due process of law.”<sup>188</sup> The company further objected that the confessed utility of holding the corporation criminally liable, instead of its directors,<sup>189</sup> defeated the deterrent purpose of criminal law by “indiscriminately” punishing shareholders “regardless of their personal guilt or innocence.”<sup>190</sup>

The Court was not persuaded. Justice Day answered that so long as the agent of the corporation employed the “corporate powers actually authorized,” the courts could impute the purposes, motives, and intent of the agent to the shareholders, without depriving shareholders of the due process of law.<sup>191</sup> A nearly unanimous court<sup>192</sup> agreed that the corporation had entrusted authority to its officers to set the railroad’s rates and that a benefit would accrue to the shareholders from the setting of those rates.<sup>193</sup> Day further explained that the Court was merely “[a]pplying the principle governing civil liability, [and going] only a step farther” by holding that the failure of the corporate officers to comply with the law would be imputed to the shareholders.<sup>194</sup> As such, the Court saw “no valid objection in law, and every reason in public policy” to hold the corporation criminally liable.<sup>195</sup>

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<sup>186</sup> 32 Stat. 847, 847 (1903).

<sup>187</sup> Brief and Argument for the Plaintiff in Error at 34, *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481 (No. 57) (1909).

<sup>188</sup> *Id.* at 38.

<sup>189</sup> Reply Brief for the Plaintiff in Error at 9, *N.Y. Cent. & Hudson R.R. Co. v. United States*, 212 U.S. 481 (No. 57) (1909).

<sup>190</sup> *Id.* at 10 (“The purpose of the criminal law is punishment which cannot be visited upon a corporation as an abstract thing, and ceases to be punishment if visited indiscriminately upon the individuals who compose the corporation regardless of their personal guilt or innocence.”).

<sup>191</sup> *N.Y. Cent.*, 212 U.S. at 494.

<sup>192</sup> Justice Moody did not participate in the decision. *Id.* at 499.

<sup>193</sup> *Id.* at 495.

<sup>194</sup> *Id.* at 494.

<sup>195</sup> *Id.* at 495.

In 1927, Professor Henry Edgerton, future Chief Justice of the D.C. Circuit, elaborated upon the connection between corporate crime and shareholder property interests. Citing Justice Day's opinion, Edgerton wrote that if the corporation could be held criminally responsible through a fine or other impairment, the shareholder would have a financial incentive "to prevent crime by the exercise of his powers of investigation and restraint."<sup>196</sup> Edgerton envisioned the application of criminal law to corporations as a means of reinforcing shareholder ownership rights over their property interests, which in turn would benefit the public. Justice Day had alluded to a similar proposition in his *New York Central* opinion in which he explained that the act of the corporation "may be controlled, in the interest of public policy, by imputing" the act of the corporate officer to the corporation.<sup>197</sup> In this way, the decision to hold corporations criminally liable was seen as a means of reinforcing individual control over property interests at a time when ownership and control were increasingly separated.<sup>198</sup>

Justice Day and Professor Edgerton illustrate that the link between corporate criminal activity and property interests, although lacking in the case of political expenditures, was perceived to be strong. As such, there was nothing *ultra vires* about a corporation's criminal act that, absent criminal sanctions, would promise a financial return to shareholders. And there was no violation of due process to hold shareholders financially liable for the materialization of risks from which they stood to benefit. If this development in criminal law turned on a moral principle, it was as Freund said: "[T]he risk and burden of acts incidental to an enterprise should fall upon those who benefit by the enterprise."<sup>199</sup>

### *c. Limits of Corporate Criminal Liability*

Insofar as the link between corporate criminal activity and property interests explains the expansion of corporate criminal liability, it also serves to explain the limits placed on the scope of that liability. Courts in the early twentieth century refused to impute the

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<sup>196</sup> Henry W. Edgerton, *Corporate Criminal Responsibility*, 36 *Yale L.J.* 827, 835 (1927).

<sup>197</sup> *N.Y. Cent.*, 212 U.S. at 494.

<sup>198</sup> Berle & Means, *supra* note 12, at 128-31.

<sup>199</sup> Freund, *supra* note 9, at 69.

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criminal intent of corporate officers to the corporate group when the act was so far *ultra vires* that it did not even have an attenuated connection to the corporate purpose.<sup>200</sup> For example, Professor Edgerton wrote that “[i]f the business in which the crime is committed is ultra vires, it is reasonable to hold that neither the business nor anything in furtherance of it is done by the corporation unless the stockholders have authorized or acquiesced in the business.”<sup>201</sup> This precept bears resemblance to the principle governing the shareholder rights at issue in corporate political expenditures. As surmised by the Supreme Court of Montana, a corporate political expenditure violated the private rights of dissenting shareholders unless they expressly authorize it.<sup>202</sup> Analogously, shareholders could not be held liable for acts that they had not authorized as a proper extension of the corporate purpose. Thus, it is plausible that when Bishop wrote in his influential treatise that “the intent essential to murder in the first degree . . . would palpably be so far *ultra vires* as to be beyond the competency of the corporation,” he was contemplating the authorized scope of the corporate enterprise, or the risk that shareholders had willingly accepted and authorized.<sup>203</sup>

*d. Police Power and the Public Benefit*

Public interest also defined the scope of corporate personhood under the criminal law. As corporations became an increasingly pervasive business model in the late nineteenth and early twentieth

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<sup>200</sup> There is, admittedly, one problem with this explanation, which is that corporations could be held criminally liable for making political contributions under the Tillman Act, ch. 420, 34 Stat. 864, 864–65 (1907), even though the connection between political donation and profit was perceived to be too speculative for such donations to amount to legitimate costs of corporate business. This inconsistency might be explained by the fact that lawmakers wanted to incentivize shareholders to exercise their control to restrain corporations from making political contributions. See Perry Belmont, *Publicity of Election Expenditures*, 180 N. Am. Rev. 166, 167 (1905) (“Owing in part to the present difficulties of obtaining necessary information, individual stockholders have rarely been disposed to vindicate their rights. The enforcement of publicity by Federal and State laws will assist in bringing stockholder suits.”).

<sup>201</sup> Edgerton, *supra* note 196, at 839 (emphasis added).

<sup>202</sup> *McConnell v. Combination Mineral & Milling Co.*, 79 P. 248, 251 (Mont. 1905).

<sup>203</sup> Bishop, *supra* note 112, § 418. This principle was also cited by Judge Hiscock in *People v. Rochester Railway & Light Co.*, 88 N.E. 22, 23 (N.Y. 1909), and Justice Day in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494 (1909).

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centuries, judges justified corporate criminal liability both as means to protect the public against corporate abuse and as a way to achieve greater government neutrality.

In 1860, the New York Court of Appeals cautioned that failure to hold corporations liable in tort “would convert them practically into most mischievous monsters.”<sup>204</sup> Justice Day echoed this principle in *New York Central* when he explained that “statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law.”<sup>205</sup> Then, in a nod toward the ever-present principle of government neutrality, Day added:

While the law should have regard to the rights of all, *and to those of corporations no less than to those of individuals*, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and . . . to *give them immunity from all punishment* because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter . . . .<sup>206</sup>

In this one sentence, Day adroitly navigated the challenge to corporate criminality by referencing the pervasive position of the corporate enterprise in society and reasoning that to deny corporate criminal liability would also deny the public protection against corporate excesses. Related public policy rationales for holding corporations criminally liable emerged in other influential legal texts at the turn of the twentieth century. For example, in Joel Prentiss Bishop’s authoritative treatise on criminal law from 1892, he wrote that if a corporation “can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them,—it can intend to do it, and can act therein as well viciously as virtuously.”<sup>207</sup> Bishop’s text and Day’s opinion exemplify the belief that because corporate ac-

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<sup>204</sup> *Bissell v. Mich. S. R.R. Co.*, 22 N.Y. 258, 263–64 (N.Y. 1860).

<sup>205</sup> *N.Y. Cent.*, 212 U.S. at 495–96 (emphasis added).

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

<sup>207</sup> Bishop, *supra* note 112, § 417(4).

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tivity had become so pervasive in society, the criminal law had to subject corporations to the same standards as natural persons.<sup>208</sup>

These texts also contained the arguments necessary to refute the contention that corporate crime violated the principle of government neutrality by treating corporations differently than individuals or other business entities.<sup>209</sup> In addition to offering a public benefit, which alone might provide a sufficient constitutional basis for treating corporations differently, corporate crime imposed the attendant burdens of legal personhood. For example, in 1910, one political theorist lamented that “the corporation is a person, [but] the stockholders and directors of such a corporation do not appreciate that it is a moral person under a profound obligation to promote the social well-being.”<sup>210</sup> In other words, corporations enjoyed some of the benefits of legal personhood without suffering its burdens. In short, corporations were privileged entities under the law. Treating corporations as morally responsible beings under the criminal was seen as a means of reinforcing the obligations that corporations should assume in light of their newfound role in society, thereby affirming, instead of violating, a constitutional commitment to government neutrality.

#### IV. CONTEMPORARY RELEVANCE: *CITIZENS UNITED*

The recent high profile and controversial Supreme Court decision, *Citizens United v. Federal Election Commission*, in which the Court extended First Amendment protection to corporations, evidences the continued vitality and relevance of the nature of the

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<sup>208</sup> This position was also expressed in state courts, such the New Jersey Supreme Court, which declared that “when the great concerns of business are carried on chiefly through these artificial persons, it would be most oppressive to hold that they are not amenable to answer for such wrongs as subject natural persons to prosecution.” *State v. Passaic Cnty. Agr. Soc.*, 23 A. 680, 681 (N.J. 1892); see also *Commonwealth v. Ill. Cent. R.R. Co.*, 153 S.W. 459, 461 (Ky. 1913) (exempting corporations from criminal liability “would in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible . . .”).

<sup>209</sup> The government neutrality principle was a judicial doctrine that prohibited states from exercising police power to favor one class of citizens over another, unless that class was particularly vulnerable. See *supra* notes 126–28, 133–34 and accompanying text.

<sup>210</sup> Joseph B. Ross, *The Attitude of Private Conscience Toward Corporate Right*, 25 *Pol. Sci. Q.* 1, 17–18 (1910).

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corporate entity in American law.<sup>211</sup> Admittedly, corporate and constitutional law has changed considerably between the legal period examined by this Note, the turn of the twentieth century, and the *Citizens United* decision. At the very least, First Amendment jurisprudence, which was in its infancy in the early 1900s,<sup>212</sup> has become far more robust,<sup>213</sup> and corporate criminal and political law has become considerably more complex.<sup>214</sup> Despite these changes, at the heart of the legal debate in *Citizens United* is a disagreement over the constitutional implications of the property interests entangled in the corporate entity and a contest over competing claims to historical legitimacy.

*A. Rejecting the Property Rights Regime of Corporate Constitutional Rights*

In *Citizens United*, a nonprofit corporation sought declaratory and injunctive relief against provisions of the Bipartisan Campaign

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<sup>211</sup> 130 S. Ct. 876 (2010).

<sup>212</sup> Modern First Amendment doctrine, which emphasizes a public right to free speech, can be traced to a series of influential opinions by Justice Holmes and Justice Brandeis in the years following World War I. See generally David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. Chi. L. Rev. 1205 (1983).

<sup>213</sup> See, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding certain provisions of the McCain-Feingold Act relating to campaign expenditures); *Buckley v. Valeo*, 424 U.S. 1, 39–54 (1976) (striking down a provision of federal law that imposed limits upon political campaign expenditures by independent individuals and groups as a violation of the First Amendment); *Va. Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748 (1976) (holding that commercial speech—publishing prices and information about prescription drugs—was protected under the First Amendment); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (allowing publication of the classified Pentagon Papers without risk of government sanction); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (holding that broadcasters using government licenses could be compelled to present both sides of arguments relating to public issues); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding students could not be forced to salute American flag); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (holding that city ban on labor meetings by the CIO violated the First Amendment).

<sup>214</sup> See *United States v. Martin Linen Supply*, 430 U.S. 564 (1977) (implicitly granting corporations Fifth Amendment protections against double jeopardy); *Ross v. Bernhard*, 396 U.S. 531 (1970) (holding that Seventh Amendment right to jury trial applied to shareholder derivative suits against corporate officers); *Berle & Means*, *supra* note 12, at xvi (discussing changes in modern corporate regulatory system); *Winkler*, *supra* note 1, at 928 (discussing emergence of corporate political action committees).

Reform Act of 2002 (“BCRA”).<sup>215</sup> The act prohibited corporations from spending general treasury funds to finance televised political communications that refer to “a clearly identified candidate for Federal office” within thirty days of a primary election, or sixty days of a general election.<sup>216</sup> The appellant corporation, Citizens United, sought to distribute on cable television a documentary condemning presidential Democratic primary candidate, Hillary Clinton.<sup>217</sup> Justice Kennedy declined to rule on narrow grounds and concluded that the Court must address whether an “outright ban” on corporate speech in the months preceding an election violates the First Amendment.<sup>218</sup> Joined by a fractured majority, Kennedy found the prohibition to be unconstitutional.<sup>219</sup> Accordingly, Citizens United was entitled to fund political expression supporting a candidate in advance of an election. The decision carries the potential to fundamentally alter the role of corporations in American politics and election law.<sup>220</sup>

In contrast to the *Citizens United* opinion, courts in the early 1900s did not recognize a corporate right to political expenditures on the belief that the relationship between political activity and the corporation’s property interests was too attenuated. This principle resurfaced in *Citizens United*. Justice Kennedy acknowledged the contention, but held that First Amendment protections apply to corporate political expenditures even if the diversion of corporate funds do not have a “material effect on its business or property . . . .”<sup>221</sup> Kennedy also brushed aside the issue of the dissenting shareholder, declaring that the Constitution protects corporate speech “even if [the speech] was enabled by economic transactions

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<sup>215</sup> *Citizens United*, 130 S. Ct. at 887–88.

<sup>216</sup> 2 U.S.C. § 434(f)(3)(A) (2006).

<sup>217</sup> *Citizens United*, 130 S. Ct. at 881.

<sup>218</sup> *Id.* at 897. For possible narrower rulings that the Court could have adopted, but eschewed in favor of its broader ruling, see *id.* at 888–96.

<sup>219</sup> *Id.* at 917.

<sup>220</sup> Adam Liptak, Justices, 5-4, Reject Corporate Spending Limit, N.Y. Times, Jan. 21, 2010, at A1 (“The ruling represented a sharp doctrinal shift, and it will have major political and practical consequences.”); Jess Brevin, Court Kills Limits on Corporate Politicking, Wall St. J., Jan. 22, 2010, at A1 (“The ruling not only strikes down the federal requirement, it also calls into question similar provisions enacted by nearly half the states.”).

<sup>221</sup> *Citizens United*, 130 S. Ct. at 902 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

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with persons or entities who disagree with the speaker's ideas."<sup>222</sup> He explained that there is nothing unique about the shareholder who inadvertently funds corporate political activities, because all political speech depends upon "money amassed from the economic marketplace."<sup>223</sup> The opinion thus rejected two prongs of argument that were instrumental to the corporate property rights regime of the early twentieth century: first, that corporations could not claim rights beyond those necessary to protect their property interests; and second, that corporate political expenditures forced political affiliation upon dissenting shareholders.

*B. The (Recent) History Behind Citizens United*

Justice Kennedy found authority for his position in *First National Bank of Boston v. Bellotti*.<sup>224</sup> In 1978, the Court in *Bellotti* overturned a Massachusetts state law that generally criminalized corporate political contributions or expenditures seeking to influence issues submitted to voters in a referendum, except for referendum issues "materially affecting any of the property, business or assets of the corporation."<sup>225</sup> The statute would have likely passed constitutional muster under the property rights regime of corporate personhood of the early twentieth century. Indeed, the Massachusetts Supreme Judicial Court had upheld the law by reasoning that a corporation's right to free speech was merely incidental to its property rights.<sup>226</sup> Nevertheless, when the United States Supreme Court reviewed the case in 1978, Justice Powell, writing for a 5-4 majority, rejected the state court's rationale: "The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights."<sup>227</sup> Powell continued, "The proper question . . . is not whether corporations 'have' First Amendment rights . . . . Instead, the question must be whether [the law] abridges expression that the First Amendment

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<sup>222</sup> *Id.* at 905.

<sup>223</sup> *Id.*

<sup>224</sup> 435 U.S. 765 (1978).

<sup>225</sup> *Id.* at 768. The Massachusetts statute further provided that a referendum solely regarding taxation or property transactions of individuals would not materially affect a corporation's property, business, or assets, as a matter of law. *Id.*

<sup>226</sup> *First Nat'l Bank of Boston v. Att'y Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977).

<sup>227</sup> *Bellotti*, 434 U.S. at 775-76.



was meant to protect.”<sup>228</sup> Powell answered his question in the affirmative, finding that any speech concerning governmental affairs should be protected in order to afford “the public access to discussion, debate, and the dissemination of information and ideas.”<sup>229</sup> Justice Powell thus circumvented the problematic question of corporate personhood by arguing that free speech “does not depend upon the identity of its source.”<sup>230</sup>

The dissenting Justices in *Bellotti*, however, would not abandon the thorny question of whether political speech constituted a cognizable corporate interest. Justice White, joined by Justices Brennan and Marshall, argued that although some forms of corporate speech, such as commercial speech, fell under the umbrella of First Amendment protections, a corporation formed for the purpose of making a profit was not entitled to free speech protection if its speech was not integrally related to its business. White explained, “Shareholders in such entities . . . certainly have not invested their money for the purpose of advancing political or social causes.”<sup>231</sup> Similarly, Justice Rehnquist in his own dissenting opinion wrote, “It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes.”<sup>232</sup> Thus, the dissenting Justices in *Bellotti* perceived the corporation’s foundation in property rights to be a basis for limiting the scope of the First Amendment protections afforded to corporations.

*Bellotti* ultimately failed to settle the boundaries of corporate personhood. In fact, the question of whether corporate property interests could support robust First Amendment protections returned to the Court twelve years later in *Austin v. Michigan Chamber of Commerce*.<sup>233</sup> In *Austin*, the Court upheld a Michigan statute that proscribed the diversion of corporate treasury funds for “expenditures in support of, or in opposition to, any candidate in elections for state office,” but permitted political expenditures from segregated corporate funds used solely for political pur-

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<sup>228</sup> Id. at 776.

<sup>229</sup> Id. at 783.

<sup>230</sup> Id. at 777.

<sup>231</sup> Id. at 805 (White, J., dissenting).

<sup>232</sup> Id. at 825 (Rehnquist, J., dissenting).

<sup>233</sup> 494 U.S. 652 (1990). *Austin* was overturned in *Citizens United*, 130 S. Ct. at 913.

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poses.<sup>234</sup> Justice Marshall, writing for the 6-3 majority, concluded that corporate property interests had a limiting effect on corporate free speech rights.

A majority of the Court was now satisfied that the mere fact that the speaker was a corporation did not “remove its speech from the ambit of the First Amendment,” thus signaling a departure from the rigidity of the corporate property rights regime of the early 1900s.<sup>235</sup> Nevertheless, six Justices accepted that Michigan had a compelling interest in curtailing corporate political expenditures in order to prevent the distorting effects of large aggregations of wealth on the political process.<sup>236</sup> “The corporate form,” observed Marshall, has “little or no correlation to the public’s support for the corporation’s political ideas . . . . [The Michigan statute] ensures that expenditures reflect actual public support for the political ideas espoused by corporations.”<sup>237</sup> The compelling interest that Marshall identified is essentially a reiteration of the jurisprudence defining corporate personhood in the early twentieth century. Marshall’s compelling interest combined a public interest justification—the anti-distortion rationale—with the fact that corporations were aggregations of property interests, not deserving of the same political protection as natural persons. Thus, despite Powell’s evasion of the implications of corporate personality in *Bellotti*, a majority of the Court once again found property interests to be a defining and limiting feature of corporate personhood in *Austin*.

After *Bellotti* and *Austin*, in light of the uncertain impact of corporate property interests on corporate First Amendment protections, it is a small wonder that the question of corporate personality surfaced again in *Citizens United*. And as before, the Court divided over the issue. Justice Stevens and his fellow dissenters vigorously challenged Justice Kennedy and the majority by appealing to the difference between corporate property and corporate politics. Drawing language directly from Justice Marshall’s majority opinion in *Austin*, Stevens opined that limited liability and legal immortality allow corporations “to spend prodigious general treasury sums on campaign messages that have ‘little or no correlation’

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<sup>234</sup> *Austin*, 494 U.S. at 654.

<sup>235</sup> *Id.* at 657.

<sup>236</sup> *Id.* at 660.

<sup>237</sup> *Id.*

with the beliefs held by actual persons.”<sup>238</sup> In an appeal to the problem of the dissenting shareholder, Stevens added that the remedial mechanisms available in the procedures of corporate democracy are insufficient to protect “shareholders’ expressive rights.”<sup>239</sup> Underlying the dissent is the familiar proposition that corporations are, first and foremost, aggregations of property interests. Accordingly, corporate political interests “merit less protection” than the interests of natural persons.<sup>240</sup>

### C. *The Contest for Historical Legitimacy*

The Justices in *Citizens United* appear to agree that the corporate entity is an aggregation of property interests, yet they disagree as to whether this should have any bearing on corporate First Amendment protection. Rhetoric in the majority and dissenting opinions in *Citizens United*, as well as in *Bellotti* and *Austin*, reveals a contest for historical legitimacy with regard to this point of disagreement.<sup>241</sup> Indeed, Justice Kennedy suggested that the majority opinion in *Citizens United* was historically inevitable when he wrote, “[b]oth history and logic lead us to this conclusion.”<sup>242</sup>

While the more recent Court debates over corporate political expenditures have revealed considerable flux in the dimensions of corporate personhood since *Bellotti*, Part III of this Note suggests that Justice Kennedy’s claim to unequivocal historical authority is unsupported. The legal intuitions that helped to limit the scope of corporate personhood in the early twentieth century survived at least up through *Bellotti*. For example, the Massachusetts Supreme Judicial Court cited *Pierce v. Society of Sisters* to support the

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<sup>238</sup> *Citizens United*, 130 S. Ct. at 956 (Stevens, J., dissenting) (citing *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

<sup>239</sup> *Id.* at 978 (Stevens, J., dissenting).

<sup>240</sup> *Id.* at 979 (Stevens, J., dissenting).

<sup>241</sup> For example, in *Citizens United*, Justice Kennedy quipped that after *Bellotti*, “thus the law stood until *Austin*,” suggesting that the law regarding corporate political speech was settled. *Id.* at 903. Similarly, Justice Stevens lamented that the majority in *Citizens United* “rejects a century of history.” *Id.* at 930 (Stevens, J., dissenting). In *Austin*, Justice Kennedy declared that the Court upheld “a direct restriction on the independent expenditure of funds for political speech for the first time in its history.” 494 U.S. at 695 (Kennedy, J., dissenting). And in *Bellotti*, Justice Powell characterized the materially affecting standard as a “novel and restrictive gloss on the First Amendment.” 435 U.S. at 777 (Powell, J., dissenting).

<sup>242</sup> *Citizens United*, 130 S. Ct. at 899.

proposition that while a “corporation’s property and business interests are entitled to Fourteenth Amendment protections,” corporate speech was only entitled to such protections as “an incident” of corporate property interests.<sup>243</sup> Furthermore, as noted by Justice Rehnquist in his *Bellotti* dissent: “[T]he question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court.”<sup>244</sup> Rehnquist also observed that, at the time the Court decided *Bellotti*, Congress and legislatures from thirty-one states, including Massachusetts, had concluded that “restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible.”<sup>245</sup> Apparently, the notion that corporations were not entitled to the same political rights as natural persons was alive and well in the political community at the time that *Bellotti* was handed down. And that intuition was hardly eradicated in *Bellotti*, emerging again in *Austin* and in *Citizens United*.

Justice Stevens’ allegation in *Citizens United*, that the “Court today rejects a century of history,” although somewhat exaggerated, finds support in this Note.<sup>246</sup> Property interests, for better or for worse, were foundational and limiting components of the burgeoning corporate personality in the early twentieth century. And this limiting foundation carried through until the twenty-first century, albeit partly undermined by *Bellotti*.

The historical perspective this Note provides does not cast aspersions on the policy choices of the majority in *Citizens United*. Despite the foundations of corporate personhood in property interests, the Court could still determine that, as a matter of First Amendment policy, the “marketplace of ideas” and democracy are best served by unrestrained corporate political expenditures.<sup>247</sup> Moreover, the majority’s claim that shareholders can correct any corporate political abuses resulting from unrestrained expenditures

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<sup>243</sup> *First Nat’l Bank of Boston v. Att’y Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925)).

<sup>244</sup> *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

<sup>245</sup> *Id.* at 823 (Rehnquist, J., dissenting).

<sup>246</sup> *Citizens United*, 130 S. Ct. at 930.

<sup>247</sup> *Id.* at 896 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)); see *id.* at 904 (quoting *Bellotti*, 435 U.S. at 777).

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through the procedures of corporate democracy has a conceptual analog in the early twentieth century.<sup>248</sup>

This Note, however, calls into question the proposition that the outcome in *Citizens United* was historically destined or doctrinally mandated. The American judiciary in the early 1900s was satisfied that the propertied foundations of corporate personhood buttressed legislative enactments in two critical dimensions of corporate law: corporate criminality and corporate political activity. That the doctrinal intuitions that helped to define corporate personhood in the early 1900s survived to the present day underscores the doctrinal and policy choices of the modern Supreme Court. Although Justice Kennedy maintained that the Court in *Citizens United* was “confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker’s corporate identity and a post-*Austin* line that permits them,” he did not reveal that the Court could also have delved into pre-*Bellotti* doctrinal authority to support the proposition that a corporation’s propertied interests did not necessarily give rise to political protections.<sup>249</sup> It follows, therefore, that the majority made selective use of doctrinal authority to support its policy and doctrinal preferences.

#### CONCLUSION

The narrowest claim this Note presents is that conventional historical accounts of corporate law exaggerate both the coherence and influence of the real entity and artificial entity theories of corporate personhood in the late nineteenth and early twentieth centuries. While philosophies of corporate personhood may have fascinated American legal intellectuals of the era, these theories were not foundational concepts in American legal practice. As evidence of this fact, courts often invoked conflicting notions of corporate personhood when confronting two central tests of corporate personality—political and criminal activity.

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<sup>248</sup> Scholars in the early twentieth century theorized that disclosures of corporate expenditures and corporate criminal sanctions would facilitate shareholder responsibility for corporate activities. See generally Belmont, *supra* note 56; Ross, *supra* note 210.

<sup>249</sup> *Citizens United*, 130 S. Ct. at 903.

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This Note also makes the broader claim that corporate personhood at the turn of the twentieth century was a functional extension of the property interests entangled in the corporate entity and a product of public policy considerations. This explains why the American judiciary did not balk when lawmakers deprived corporations of the right to participate in the elective franchise through political expression. It also accounts for the judiciary's amenability to extending the burdens of corporate personhood when the corporation stood to benefit from particular criminal activities, despite the fact that innocent shareholders would suffer as a result.

Finally, this Note demonstrates that a judicial doctrine that developed over one hundred years ago continues to have relevance today. This, in turn, highlights the choices that the modern U.S. Supreme Court has made and suggests that the recent *Citizens United* outcome was due to a predisposition for a particular policy or doctrinal outcome and not a matter of historical necessity or consistency.