The Evolution of Corporate Legal Standing in U.S. and International Law: One View of the Doctrine of "Corporate Personality"

Michael Zara

Introduction

In the early 1980s a California consumer interest group called Toward Utility Rate Normalization (TURN) filed a complaint with the California Public Utilities Commission (PUC), a state oversight board. TURN, which represented a constituency of utility rate-payers, protested that the local utility, Pacific Gas & Electric (PG&E), regularly enclosed in its billing envelopes a newsletter that took specific positions on controversial political topics, such as nuclear power. Arguing that such material unfairly and one-sidedly propagandized a captive audience of utility customers on topics of direct financial and political interest to PG&E, TURN asked the PUC to forbid such enclosures.

Rather than restrict PG&E, the PUC held that TURN would be allowed, four times per year, to place its own inserts into the billing envelopes; the group could include whatever information it desired, in the interest of equal access, so long as it clearly indicated that its viewpoint was not that of PG&E, and the inserts added no greater cost to the mailing. PG&E sued the PUC. The US Supreme Court eventually ruled that the PUC had overstepped its power and could not force PG&E to include TURN's material. The Court's rationale offers us a view of an odd Anglo-American legal doctrine: the corporation as a "person."

The Court held that forcing PG&E to enclose TURN's inserts in its billing envelopes violated PG&E's freedom of speech. In so holding, the Court invoked what are known as "negative" speech rights, that is, the right *not* to speak, in addition to the right to speak out as one wishes. PG&E the Court noted, might be compelled on the basis of Turn's consumer advocacy to respond to the rate-payer group: first, to counter any TURN claims that PG&E might find objectionable, and, second, to dispel any idea that PG&E endorsed the opinion of TURN. Now while the latter point seems moot, given the PUC's insistence that TURN clearly indicate the PG&E in no way was associated with TURN positions, it is the argument as a whole - that the corporation, PG&E, has speech rights – that is most strange.

A corporation is a specific mode of organization that establishes a legal entity separate from its member(s). There are many formats for incorporation, and members or owners may range from merely one (a "corporation sole") to an infinite number

("corporations aggregate"). It is the most common form of business organization, its primary attributes include perpetuity (i.e., the corporation lives on beyond the life of any of its founding members), limited liability (limiting members' responsibility for the financial, legal, and moral debts of the company to the amount of their monetary investment), and, most importantly, the creation of a new "corporate person" which is considered the legal actor in all corporate affairs. It is, thus, a fictitious person, as opposed to a "natural", human person; existing only on paper and in concept, it cannot be injured, killed, imprisoned, etc., nor has it a mind, will, or soul.

Yet to this type of conceptual entity, the Supreme Court attributed not only the property and political rights commonly understood to be those of United States citizens, residents, and inhabitants- i.e., all the human beings within US jurisdiction – but also a capacity of mind to feel "compelled." In short, the corporation, the fictitious person, was seemingly also considered to be a *psychological* person, as well. How did such a construction come about?

This paper explores the development of that construction, albeit in a narrowly focused manner. The formation or evolution of a legal-political concept is a complex process, and to completely trace the lines of influence at all levels is certainly beyond the scope of the present work. The doctrine of the corporation as a person, however, has been most clearly and *functionally* articulated through the decisions of the US Supreme Court, in particular those concerning the economic and political rights of the corporation.[1]

Through its "judicial review" power, the Court passes judgment on whether state and federal laws challenged before it are in line with the parameters set forth by the US Constitution. These parameters include the personal property and political rights laid out in the text of the document proper, and in subsequent Amendments. In this role the Court has, since the early nineteenth century, debated and decided on the nature or the corporation, in cases brought before it by either corporations seeking to escape regulation, or by regulating branches of government seeking to enforce their power over the firms.

In fact, from the functional standpoint it may well be said that the doctrine of the corporate person emanates from the Supreme Court, while acknowledging that many lines of social, cultural, economic, and intellectual force have influenced the Court's direction. The Court has long occupied a position at once ideologically and structurally dominant. In the realm of legal scholarship the Court has unparalleled prestige, but its opinions do not achieve such status solely of their own intellectual merits (although they may, reflecting major or pioneering schools of legal thought). Rather, because the *decisions* – that is, the rulings and their accompanying rationales – have the force of federal policy, the opinions are structurally privileged in the legal/political community. They are a legal reality, which other developments and theory must take into account.

That the Court is backed by the full coercive force of the United States government is of no small importance. Furthermore, because the Court, as interpreter of the Constitution, the supreme law of the land, is subject only to a rare power of congress (through the unwieldy Amendment process—requiring a two-thirds majority of both houses, and ratification by three-fourths of the state governments) its rulings are powerful, governmental shapers of United States society. Accordingly, in its limited scope, this study will focus largely on an analysis of corporate personality doctrine as developed and disputed in certain of the Court's opinions.

It is important, however, to bear in mind that the Court – as but one of three structural elements in the United States' constitutional arrangement of powers – is, at various times, by degrees more or less influential in shaping governmental policy and practice (at the federal, state, and local levels), legal theory, and popular opinion. James Willard Hurst, the preeminent American legal historian of the 20th century, warns us of the tendency among both the public and the community of legal scholars to exaggerate the influence of courts, in general (1950:86-87). Certainly his *caveat* applies to the Supreme Court, which delivers the most widely publicized decisions, and which structurally *should* have been the most influential juridical body.

Similarly, sociologist David Sciulli emphasizes the restricted role that the Supreme Court in particular plays in the primary, quotidian regulations of corporations:

> Since the founding of the US Government, first state legislatures and then state courts—not the Supreme Court, Congress, or any regulatory agency—have overseen how corporations govern themselves and exercise their collective power in civil society. Today, the state courts of Delaware, California, New York, and New Jersey in particular comprise what legal scholars call the "corporate judiciary. [1999:1]

So, it must be noted at the outset that while the doctrine of the corporation-as-a-person may prove to have been instrumental and critical in the development of American corporate capitalism, it was probably of *marginal* rather than central effect, and powerful perhaps less due to its specific content than to its timing and position in the larger streams of US economic development and ideology. While the general trends of societal organization may prove to the reform-minded to be inertial and resistant, to those operating along those trends' vectors the effect would prove to be accelerative:

> We must not view the inertia of institutional cumulation simply as a source of resistance to directed effort. As in the case of general social drift, institutional inertia was a factor of ambiguous import for change or stability. Where directed effort ran counter to the cumulative drift

> of an institution, the problem of achieving purposed direction was largely one of overcoming resistance... But a determined and aggressive group could move policy far and fast toward its special objectives, if its effort moved along the cumulative institution drift. [Hurst 1972: 81]

Paradigms of Legal and Ideological Change

Hurst distinguishes *drift* from "direction" and "function" as a key element in "major social change or stability": "Drift and direction are in a measure polarities; but there is a sense in which drift is a prerequisite to direction. Function has some of the character of each of the other styles of cause . . . " (1972:63). Drift, for Hurst, means the tendency of institutions, groups, individuals, and society as a whole to move functionally and ideologically with the prevailing, cumulative trend of largely unpurposed activity. Rather than designing practice and institutions on the basis of an explicit societal *function,* or toward a specific and result (*direction*), people and their governing bodies tend to move incrementally along a path created by a myriad tiny, daily decisions, and large forces of techno-economic change, "We tend to exaggerate the relative importance of conflict or contrivance in United States legal history. Most of what happened in the growth of this country—as probably in all man's history—happened without plan or intent or purpose or desire or even awareness of what was in process of happening" (63). Indeed, consciously directed change is limited by cultural and ideological constraints, a certain "economics of creative effort" (68).

I will thus argue that the development of the "corporation-as-person" doctrine was largely a result of drift, and utilize the concept in analyzing several key doctrinal transitions. Hurst, again:

> Thus social institutions had influence partly by drift – because the represented values and procedures which men most of the time took on faith or habit – and partly by stimulating conscious decisions within the limited frames of reference provided by the perceived needs of operations. An institution was constituted both by inertia and by conscious direction. Law was such an institution in United States history. It was also an institution of peculiar interest because its structure put uncommon emphasis on direction. [77]

Such an understanding is at odds with the classic model introduced by the anthropologist Sir Henry Maine. A cultural evolutionist, in step with the mode of 19th century social science, Maine declared that legal systems transformed with society from a basis in status, to one of contract (1917:100). As societies evolved from "primitive" emphasis on kinship and clan structures toward a "civilized" notion of free individuals in association, so too did the legal system. Such a formulation fits nicely, as we shall see, with the prevailing liberal economic philosophies that are at

the root of corporate capitalism: freedom of the market, rational choice, and individuals in fair and open competition. In contrast, Hurst's model of drift suggests that the direction of legal evolution was contingent upon the particular setting of United States socio-economic change.

The development of corporate doctrine occurred in the dual contexts of (1) vast economic and technological growth, and (2) the cumulative effect of doctrinal precedent on subsequent development. As to the first, Hurst declares US economic evolution to be a field of "[C]ontinuing, open-ended, irreversible change [spelling] enormous force for drift rather than direction in this society because of the added effect of cumulation, context and pace" (1972:83). More specifically related to the subject of corporate doctrine, he also notes that by the 19th century, at least, *organization* itself was the key factor of production (83).

As to the second point, that of the cumulative effect of developing doctrine, it is important to recognize that—especially in a system such as the Anglo-American, in which legal/judicial precedent binds, or at least strongly influences subsequent decisions—concepts and legal fictions like the corporation-as-person may have the tendency to become self-perpetuating, and reified. Legal historian Robert Gordon notes that Hurst, rather than "thinking law achieves its capacity for control over social change from its distinctive forms . . . believes one of the common causes of 'drift' is mindless adherence to such forms" (1975:50). More specifically:

> For Hurst as for American Progressives generally, the most conspicuous example of 'drift' is the persistence through the late 19th and early 20th centuries of the habitual consciousness of private-market-and-business-oriented individualism. [47]

Methodology and Scope

This inquiry will be limited to the text of selected Supreme Court opinions, referring to the wider political and economic contexts only briefly, in order to provide a loose setting in which to understand the development of doctrine. As Robert Gordon has noted, there is a great danger inherent to such an approach: "The study of big decisions fundamentally misleads, since it is only by tracking long sequences that it is possible to sketch the dynamics of drift" (1975:52). This paper will therefore attempt to compensate for the fundamental misinterpretation associated with the case analysis method, by examining doctrine throughout almost the entire lifespan of the Court (and of the American republic, as well).

This paper seeks to isolate the Court as a site of study, in order to view its "judicial lawmaking" as a series of literary events. Through its opinions the Court rationalizes and disputes its interpretations and applications of the Constitution to new circumstances. In so doing it legitimates or marginalizes thought and action,

formulating both policy *and* ideology. Leaving for later discussion the question of on whose behalf the Court operates, it is worth noting here the relation of the Court's dual role to Gramsci's concept of the intellectuals—and recognizing that limited though the Court's influence may be (*pace* Hurst), it is nevertheless a powerful institution, and thus worthy of study in its own right.

Gramsci defines the intellectual not by his activity (thinking or writing) but by his *function* in the social structure (1997:12-13). This function is as the ideological specialization of the class to which the intellectual belongs, and to which he owes allegiance. Intellectuals are thus not an autonomous group, but as a part of the class in which they are embedded and whose interests they serve – as a social and political support for the economic and productive activity of the class. This expanded term effectively expresses the hegemonic function of the intellectuals. Intellectuals operate in both the private and public sectors--the arenas of "hegemony" and "direct domination," respectively (what Nader refers to as "cultural" versus "social" control (1997)).[2] Through cultural control and ideology they operate to effect *legitimization* of the order, while through coercive power as State functionaries they achieve *consent* and *administration*. As Bowman notes:

> . . . when law provides ideological justification of power relationships that are themselves sanctioned by law, one encounters the essential interrelationship between law, ideology, and power. In short, the coercive and ideological functions of law combine to enable and stabilize relationships of control. [1996:13]

Hurst observes that while the internal dimensions of corporate power—that is, issues of organization, stockholder rights, powers of the directors, etc.—were primarily defined by *legislative* activity, the external dimensions—involving third parties, the government, or society-at-large—were largely sculpted through a body of judge-made law (1971:125-127). He notes:

> [I]t was the existence of the Supreme Court which provided the means to define and enforce values of the corporate style of business which could be realized only through law above and beyond the sovereignty of any one state. [143]

We might add, in the *absence* of federal legislation that (even had Congress been willing to embrace the project of regulating corporations) dared not transgress that very state sovereignty. Furthermore, the Supreme Court provided a site in which individual litigants (human and corporate) could appeal to an ultimate policy-making authority, without having to generate a broad base of popular support fore their positions, as required to obtain legislative response (145).

The Court discharges these functions by issuing written opinions of three types. The *majority* opinion expresses the ruling and "will" of the Court and has the force of law. *Concurring* and *dissenting* opinions agree or disagree, respectively, with the majority opinion, and are written and/or signed on to by one or more Justices. The power of the majority opinion extends beyond the actual decision on the merits of the case, to the specific and general understanding of the nature of reality at issue, and how the Constitution bears upon it. For example, in the PG&E decision above, the strength of the ruling was not only in its holding that PG&E had the right not to be forced to include TURN's literature in its billings, but also in its explication of the corporation's negative right not to be compelled to speak.

These elements are important to an understanding of the Court because it is guided by its own precedent. Holding to the doctrine *stare decisis,* Justices claim to follow the logic and practice of previous decisions unless the principles of justice demand otherwise. While this is a flexible doctrine, it not only seems to hold generally true, but is explicitly referenced in the Court's opinions. That is, Justices consciously look to previous rulings for justification, and indeed much of any given opinion is often discussion, exegesis, and extension of earlier logic. Against such a self-consciously reflective and referential background, disputes and changes in the long-term must become more apparent.

The development of the corporate personality doctrine has taken three major phases; to these we must also add a current phase of development beyond the national realm and the jurisdiction of the US Supreme Court, as transnational corporations (many of them US giants) vie for power in a global arena. First, from the early years of the nineteenth century to about 1880, was a period of finding corporate personhood in the nature of the corporation as an aggregate of individuals, deriving its rights to property and access to justice from those of its members. In this period the question of whether as a person the corporation was also a citizen was highly contested, as a part of a larger determination of just which attributes of personhood were to be imbued to the corporation by its human elements.

Second was a period of consolidation of members' attributes into a "natural entity" concept which effectively reified the fiction into legal fact. This phase began effectively with the passage in 1868 of the Fourteenth Amendment, which extended to the state level some of the civil rights provided against the federal government in the Constitution. Established to provide protection from continued state-level persecution of freed black slaves, the Amendment soon was pressed into service by ambitious business attorneys seeking the due process and equal protection safeguards property takings, for their commercial clients. As Horwitz (1985) points out, however, not until the turn of the century did contested notions of the corporation-as-aggregate-person give way to a serious acceptance of the corporation as an entity in, and of, itself. While the first decades of this phase saw the solidification of corporate personality, there was considerable debate to be had in the subsequent years, and then a long

period of ferment, when the controversy seemed to disappear.

When explicit discussions of corporate personality re-surfaced in Court opinions of the 1960s, it was in what became a broad assertion of corporate political rights. Where early corporations sought protection of property the corporations of the late twentieth century seemed, as we shall see, to seek assurance and legitimization of their ability to participate in the US political process. By this stage, so corporatized had the economy become, and so naturalized the concept of the corporation as individual person, that, with notable exceptions, there was little debate on the Court regarding the *nature* of corporate personality and political rights. Most of the opinions rather focus on practical considerations of just how far the government was to be permitted to limit rights of speech, protection from unreasonable search, protection form self-incrimination, etc., that were understood to belong as naturally to corporate persons as to human ones. This was a far cry from the common law roots of Anglo-American corporate theory, which as one Justice noted in disapproval of a critical corporate speech rights case, "was generally interpreted as prohibiting corporate political participation" (*First National Bank of Boston v. Bellotti,* at 819; White, J. dissenting).

Finally, it is important to acknowledge that corporate power is no longer a primarily national concern. Large business concerns have long been international in character—whether the colonial trading firms or the latter-day transnational/multinational corporations (TNCs/MNCs)—but to the extent that any authority could contain them, such companies were controlled by the nation-states of their origin or operation. Absent a supra-national authority, there could be neither a coordinated effort to regulate international corporate activity, nor a direct channel for corporate relief from national oversight. This is changing, however, with the acceptance of global free trade doctrine and the concomitant rise of regional and global trade/investment treaties and adjudicatory bodies.

For the first time, TNCs are being offered legal standing equivalent to nation-states in international law. How corporate doctrine is adapting to the contours and exigencies of the transnational economy will be the focus of the penultimate chapter. An exploration of similarities between the US experience with corporate power emergent in a network of federalized "sovereign" states, and international efforts to regulate/empower corporations in at the global level, will provide a speculative but well-grounded discussion of the continuing transformation of corporate guise.

Corporate Citizens: Aggregates of Individuals

On April 20, 1807, Thomas Robertson, a Georgia state official acting under the orders of his superior, Peter Deveaux, entered the Savannah branch of the Bank of the United States, and carried off gold and silver worth some $2000. Under a statute passed by the state legislature in 1805, Georgia claimed the right to tax the corporate

Bank. The Bank refused to pay, so Deveaux had Robertson physically take the taxes due. The Bank sued Deveaux and Robertson in federal court, but the pair argued that the Bank, as a corporation, had no right to bring an action in federal court. The success of the Bank's suit hinged on its ability to sue at the federal level, because otherwise it would have to file in Georgia state court, and the State of Georgia was rather involved as a party to the case.

The United States Constitution strictly limits the original jurisdiction (that other than appellate) of the federal judiciary in this realm to cases involving suits between *citizens* of different states (Art. III, Sec. 2).[3] The judiciary is not granted the power to judge cases brought against any state's citizens by those who are not citizens of another state. Deveaux and Robertson insisted that the Bank, as a corporation, was *not* a citizen of any state, nor could it be, and that therefore the federal court had no jurisdiction. They sought dismissal of the case.

The argument of these defendants provides a good summary of the period's understanding of corporate nature. Deveaux's attorney argues:

> [A] corporation aggregate is an artificial, invisible body, existing only in contemplation of law. It has no analogy to a natural person. It has no organ but its seal. It cannot sue or be sued for any personal injury. It cannot be outlawed. It is not subject to an attachment of contempt. It never dies. It cannot be a citizen of any state because it cannot owe allegiance. It cannot commit treason nor felony. It can have no residence because it is an artificial, invisible, intangible body. It cannot appear in person, but must appear by attorney. [Deveaux 1890:73]

The Bank's retort took two distinct lines, one more strictly legal, the other pragmatic. First, the Bank challenged the notion that the corporation as such, was required to be a "citizen"; rather, it held, the necessary citizenship(s) were already held by the corporation's *members.* For if otherwise, the Bank claimed, was it not unjust that merely, by acting through a corporation, members of the corporation would lose rights secured to them by the constitution: "The question," asked the Bank's attorneys, "is not whether a corporation can be a citizen in its corporate capacity. But whether, by becoming members of the corporation, the individuals who compose it lose, in their corporate affairs, those privileges which as individuals they possessed before" (79).

The Bank was advocating a lifting of the "corporate veil," the putting aside of the nature of the corporation as *entity* in favor of its nature as *collectivity,* and an examination of that collectivity so as to determine a new facet of the character of the entity. The defendants strongly denied the legitimacy of such sleight-of-hand. But it is worth taking note of just how the plaintiff Bank set out the argument. Referring to the

traditions of English law, which at this early stage in the American republics constituted the primary precedent, the Bank's attorney notes:

> [T]he rule seems to be, not that the individuals confer their private privileges on the body corporate, but that as often as justice or convenience require that the corporation should be considered as composed of natural persons, the individuals are disclosed and their character becomes the subject of legal contemplation. [67]

Or again, generally:

> [T]he corporation is a fiction of law; the individual members are the real parties. But fictions of law are introduced for the benefit of the real parties, not for their injury; and they are to be so molded as to answer the purpose" (82). "If you cannot inquire who are the members of a corporation, whenever a right depends upon the question of citizenship, that right cannot be enjoyed by the corporation. [69]

The Bank was constructing a second argument that pivoted on the issue of convenience, in this case to the corporation, the business. Indeed, its attorneys declared that, "[T]he argument from *inconvenience* is strong" (69, emphasis added). Among the reasons why the Court should seek citizenship status behind the corporate veil, in the membership's citizenship, was that to do otherwise would not only deprive that membership of its individual rights, but would also work to the detriment of corporate enterprise and smooth corporate jurisprudence. For example, in this instance the Bank would be subject to a probably unfavorable ruling in the tax issue, because it could not escape Georgia's jurisdiction. Other problems that the Bank's lawyers foresaw were the inability of states or citizens to *sue* corporations such as the Bank in federal court, or to sue foreign corporation in those courts (seemingly undermining the constitution's granting of jurisdiction over foreigners to the federal judiciary) (69).

The weakness of this argument is underscored by a similar tack the plaintiffs took on another aspect of failure to lift the corporate veil. Equally problematic was their contention that were a corporation *not* to be judged on the basis of its membership, the law would be near powerless to prevent the existence of corporations whose members were felons, treasonous, or otherwise undesirable. As true as it might be, it was not a serious concern. And Deveaux's attorneys argued this point in support of ignoring the character of the corporation's membership:

> [N]o corporation aggregate can derive aid from the personal character of its members; nor does it incur an disability from the disabilities of the individuals who compose the society. Neither the infancy, coverture, or outlawry of the individuals can affect the body

corporate. [75]

Indeed, such a limited correspondence between corporation and membership was one of the purposes and attractive elements of the corporate form from the outset. Christopher Stone notes that the roots of the business corporation were in mercantilist England of the seventeenth century. As major shipping companies found their capital investments in voyages rising sharply, they transformed their organizations from loose confederations of investors toward vesting of power in central bodies that managed risk and pursued the membership's interests. Born of maritime pursuits, this early form of business corporation inherited from its shipping forbears the model of limited liability, by which a ship's investors were liable only up to the amount of their investment in the voyage (1975:12-17).[4]

Out of the arguments in *Bank of the United States v. Deveaux* can be drawn four issues that will surface throughout the development of corporate doctrine and which make an analysis of the case worthwhile towards an understanding of the corporation as a person. First is the dichotomy between a concept of the corporation as having a distinct existence apart from its membership and a concept of it as a mere aggregates of individuals. This dichotomy we have already termed that of *entity versus collectivity.* Bound up in this opposition is the second recurring theme: competing notions of how the corporation is to be treated under law, and whether privileges and liabilities should accrue to the corporation itself, or be distributed to the membership.

A third implication flows from this philosophical tension, and a fourth from its social setting. The notion that a corporation should enjoy the rights and privileges of is members, in the face of important limitations to the analogy between corporate and "natural" persons (such as the formers' perpetuity, incorporeality, lack of mind or soul, inability to be imprisoned, limited liability, etc.), seems a definite step away from the concept of corporations as creatures of the law (as expressed in their charters), and toward a conflation of corporations and persons.

These transitions occurred, however, in a particular setting and toward a general goal. The "argument from [in]convenience" is important in its brief (and perhaps unwittingly prescient) formulation of the goals of corporation law: to operate to the favor of corporate enterprises at a time when the organizational form was becoming increasingly popular and critical for the growth of industry. This fourth implication of *Deveaux* is crucial to an understanding of the development of corporate personhood.

This paper argues that the trends of economic and legal growth are recursively related to economic and legal ideologies that shaped the development of the doctrine of the corporation as a person. The arguments and oppositions laid out in *Deveaux* return, modified, in later cases. The tendency of the decisions in these cases is to

increasingly merge the seemingly opposed notions and properties of entity and collectivity, creating a synthesized corporate form that combines the benefits of personal existence with those of corporate status.

Six years after *Deveaux*, in *Terrett v. Taylor* (1815), the Court underscored the property right it had found for the corporation in *Deveaux*, drawing somewhat closer the rights of the corporation and those of its members. The State of Virginia had incorporated the Episcopal Church and granted it *post bellum* lands that it had possessed prior to the War of Revolution. The State later repealed the charter of incorporation, while re-confirming to the Church its grant of lands. Subsequently, the Alexandria portion of Virginia was separated from the state in the formation of the national capital, The District of Columbia (DC).

Episcopal officials wished to sell certain of their real estate holdings in Alexandria, but DC authorities claimed the lands for the poor under a statute annexing unincorporated church properties. In response to the Episcopal Church's suit, the Supreme Court struck down the DC annexation, ruling that Virginia's repeal of the Church's corporate charter had been an unconstitutional abridgement of property rights. Writing for the Court, Justice Story allowed that while private corporations might lose their franchises for "mis-user" or "non-user," and *public* corporations (such as counties and towns) might have their charters altered by the legislature so long as the property was secured of the corporation's members (the public), nevertheless, absent such showing of cause, *private* corporations charters were an inviolable bestowal of property. Justice Story asserts:

> But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing on the principles of natural justice, upon the fundamental laws of every free government, upon the sprit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine. [Terrett: 52).

Leaving aside Story's invocation of "natural law" property rights, there are three important elements to his declaration.[5] In the latter portion of the above passage, he continues the line of thought from *Deveaux* that ties the rights of the corporation and its voice to those of the corporators or members. Additionally, he underscores the identification of the corporate grant itself as property and edges thus toward a notion of the corporation as an entity that once generated cannot be destroyed. The dichotomous understanding of corporate nature—as between entity and aggregate of

individuals—is evident here, as is the critical distinction between private and public corporations and their susceptibility to state power.

These concepts receive full attention in a case recognized as a landmark in corporate theory (Bowman 1996, Lustig 1982): *Dartmouth College v. Woodward* (1918). In August of 1816, the college, which had been incorporated in the colonial era by special charter of King George III, fired one William Woodward from his post as secretary and treasurer. In December of that same year the New Hampshire legislature amended Dartmouth's charter, which it had confirmed after the War of Revolution. Among the provisions of the new charter were a name change (from "Dartmouth College" to "Dartmouth University"), an increase in the numbers of trustees (directors) from twelve to twenty-one, and the establishment of a new board of overseers—with most of the new trustees and overseers to be appointed by the state.

In February of 1817, Woodward, who had kept possession of the College's account and record books, was appointed secretary and treasurer of the University, picking up where he had left off the previous August. The twelve Trustees of Dartmouth College filed suit against Woodward for recovery of the books (or their value), claiming that the amended University charter and its controlling legislation were invalid, having deprived them of their property in the original College charter. The Trustees, invoking the contract clause of the Constitution, argue:

> [I]f we have satisfied the court that its charter must be regarded as a contract and such a contract as is protected by the constitution of the United States, it will hardly be seriously denied that the acts of the legislature of New Hampshire impair this contract. They impair the rights of the corporation as an aggregate body and the rights and privileges of individual members. [623][6]

The Court was satisfied and agreed that the original charter, as confirmed, was a contract and thus a grant of property, between first the original donors/founders of the College and later the corporation itself. Following *Terrett,* the Court established that the charter of Dartmouth College as a private corporation was not subject to amendment or repeal by the state; the charter was protected by the contract clause. Justice Story writes:

> [I]n respect to corporate franchisees, they are properly speaking legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation but powers coupled with an interest. The property of the corporation vests upon the possession of its franchises; and whatever may be thought as to the corporators, it cannot be denied that the corporation itself has a legal interest in them. [700, concurring]

Interestingly, Story took pains to distinguish the corporation as an entity proper, from the corporators themselves, differentiating the rights of the aggregate body and the individuals. Elsewhere in the opinion he elaborates:

> [I]t [the corporation] is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, thought they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. [667, concurring]

The entity/aggregate dichotomy is not resolved here, for the opinions clearly base the corporate property rights in those of the individual members. But the Court does provide a fuller understanding of the nature of the corporation as, as the majority opinion demonstrates. Chief Justice Marshall describes, for the Court, the donors/founders in this way:

> ... represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.... Their potential rights... were as completely out of the donors at the instant of their being vested in the corporation... as at present. [642]

Marshall, therefore, concludes:

> ... that in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest and completely representing the donors, has rights which are protected by the constitution. [654]

The gross effect of the decision was to remove non-public corporations from much of the traditional state control, originally accepted as the sovereign's right and power over its own creation. The net effect proved to be much less, as Bowman points out, because in considering the grant of a special corporate charter the state had ultimate authority over what it would endow upon the corporation, and which it would reserve to itself—including, often subsequent to *Dartmouth*, the express right to amend the charter (1996:45). This was after all, a matter of contract.

However, the decision also attached contract rights to the corporation itself as distinct from the corporators. This twist had two significant implications. First, it clearly supported (even against the Court's insistence that rights derived from those of the members) the concept that the artificial corporate entity had real protected rights. Granted, this support was only one more argument in a discourse the tension of which would not be functionally resolved until the twentieth century.

But more important, against the backdrop of US political philosophy of the time, was the notion that the corporation itself was an individual who had contracted with the State of New Hampshire, and therefore required protection from that State's depredations. The US had inherited from England (and developed a native strain of) a liberal economic theory that celebrated the individual entrepreneur:

> At its core classical liberalism contains an affirmation and defense of the freedom and rights of the individual whether they be political, religious, or pecuniary. It is the last of these for which liberalism offered the strongest defense and understandably so, since it sought to justify an economic system that was premised on contractual relations between individuals. To the classical liberal mind government is a necessary evil. [Bowman 1996:6]

This identification of the private corporation with the classical liberal individual would prove an essential tool of those who sought to expand the power of the business corporation, within the ideological limits of acceptability to the people of the nation. This identification also became, when reified, a force that seemed to *demand* such expansion. As Clifford Geertz notes, "...more than gloss, such beliefs are also a template. They do not merely interpret social and psychological processes in cosmic terms—in which case they would be philosophical, not religious—but they shape them" (1979:88).

Bowman connects the power of the corporation as individual entrepreneur to the "American Dream":

> [A] product of both Enlightenment and the Reformation, classical liberalism also contains a conception of history as material progress—a partly economic, partly religious view that identifies industry and acquisitiveness with the social good and heavenly rewards. . . Furthermore, American liberalism contains a version of material progress that is peculiarly its own—namely the doctrine of the open frontier, economic expansion, unlimited opportunity and upward mobility—in short, the American promise" (1996:7).[7]

Citizenship Revisited: Sovereignty *vs.* Economic Practicality

The power of the individual states to block corporations' making good on the American promise was still a critical issue, however, as were the rights and powers of states *versus* the federal government overall in the decades before the Civil War. The general mood and specific tension in the area of corporate rights against state power is evident in the argument of counsel for the defense in *Bank of Augusta v. Earle* – and the continued expanding recourse of corporations to federal courts mirrored on side of the growing schism between advocates of states' rights and those of federalism:

> A person, like a state, may do whatever is not prohibited. A corporation like this confederation [the federal government] can do only what is expressly allowed by charter. An American person is a sovereign, retrained by no fetters but of his own making. A corporation is this creature, bound by strict obligation. Persons may traffic everywhere, but why? Because they become subjects wherever they are. But corporations are amenable only to the state creating them. ...the reverse argument of corporation license is to be a citizen without being a subject, while all natural persons are subjects, even though not citizens. [557-58]

Augusta (1839) concerned a bill of exchange drawn by defendant Earle, in New Orleans, which was purchased by the Bank of Augusta, Georgia through a New Orleans intermediary. Earle defaulted on the bill, under a Louisiana statue that outlawed the operation of foreign banks in the state, and held any contracts of such firms to be void. The counsel for the bank asserted the following:

> [A] corporation is the creature of the law, and it is clothed with all the powers of a person. The position on the other side [Earle and the State of Louisiana] is that when it leaves the state which gave it existence by granting its charter, it loses its personal existence and has no existence whatsoever. [524]

The Court ruled in favor of the plaintiff Bank, invalidating Louisiana's statute and its ability to utterly exclude even independent intermediaries for foreign firms. Writing for the Court, Chief Justice Taney mused on the nature of the corporation's "personal existence." He writes:

> Now, natural persons, through the intervention of agents, are continually making contracts in countries in which they do not reside, and where they are not personally present when the contract is made; and nobody has ever doubted the validity of these agreements. And what greater objection can there be to the capacity of an artificial person, buy its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside; provided such contacts are permitted to be made by them by the laws of the place. [588-89]

In contrast to the protocol of *Deveaux,* which located the rights of the corporation in those of its constituent human members, Taney seemed drawn toward a more naturalized entity notion of the corporation, by recognition of the fundamental flaw in the logic of the previous case. Although the jurisdiction of the federal judiciary was established in *Augusta* by the same narrow and restricted determination of the corporate citizenship used in *Deveaux*, Taney urged caution. If, he wrote, the Court

were to look beyond the corporate entity to the individual members, in order to provide rights and privileges to the corporation further than the federal jurisdiction allowed by *Deveaux,* it risked undermining the essential nature of the corporate form itself. If the corporation were to receive the full protections due its individual members, then it must also assume their full liabilities (and *vice versa*) (586).

However, determining the citizenship of a corporation proved more complex than even Taney had foreseen. The 1844 case of *Louisville, Cincinnati and Charleston Railway v. Letson* led the Court to a determination of citizenship based wholly upon the corporation as an entity, quite apart from its membership. On appeal from a lower federal court, the Railway insisted that it was not subject to the Court's jurisdiction as it was not a citizen of *any* state, and therefore unable to be sued in federal court by Letson, of South Carolina. *Deveaux* had declared corporate citizenship to be a function of the citizenship of the individual members, by the Railway had discovered a loophole. Its membership was of disparate character and origin: many members and directors were citizens of Ohio, but there were members from other states, including South Carolina – even the State of South Carolina itself was a stockholder/member of the corporation. In addition, another corporation, chartered in New York, was also a stockholder/member. *Deveaux* seemed salvageable only through some sort of complex algorithm, and even then *some* members' rights would not inhere to the aggregate body.

Writing for the Court, Justice Wayne took another route to resolving the character of corporate citizenship, and thereby salvaging federal jurisdiction. He writes:

> . . . a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes to be a person, although an artificial person, an inhabitant of the same State, for the purposes of incorporation, capable of being treated as a citizen of that State, as much as a natural person. [507]

Wayne's appeal to the local character of the state-chartered corporate entity sidestepped both the dangers prophesied by Taney, and the complex nature of corporate membership in increasingly larger and interstate enterprises. However, the assertion of even limited citizenship due the corporation on its own personal merits carried risks, as well (see discussion of *Paul v. Virginia*, below), and certainly provided support for a conception of the corporation as entity, rather than aggregate. Indeed, Wayne's logic, in the context of Railway's denial of federal jurisdiction due to the multiple citizenships of its members, starkly argued against the notion of corporate character deriving from the character of the corporators.

For some members of the Court, such reification of what was, after all, merely an association of investors, exposed the absurdity of corporations' special and

amorphous status. The case, eight years later of *Rundle v. The Delaware and Raritan Canal co.* (1852) concerned the diversion of Delaware River water into a New Jersey canal, by grant of that state to the Canal Company. Rundle, of Pennsylvania, was left thus without power for his mill downstream and sued of relief in federal district court.

When the case reached the Supreme Court, Justice Daniel objected that the federal courts lacked jurisdiction, inasmuch as the Canal Company was *not* a citizen of *any* state. The majority, however, disagreed and the case was not dismissed for lack of jurisdiction. Justice Catron noted in the majority opinion that absent federal jurisdiction, citizens of other states in disputes with any given state's corporations would be ". . . in many cases compelled to submit their rights to judges and juries who are inhabitants of the cities where the suit must be tried and to contend with powerful corporations, where the chances of impartial justice would be greatly against them" (92).

Thus, in the power struggle between state and federal authority that would, in less than a decade, consume the nation, the status of corporate citizenship oscillated between moderate and minimalist positions. So too did the character of the corporation as aggregates *versus* entity. In 1853, the year after *Rundle,* the Court decided the case of *Marshall v. Baltimore & Ohio Railroad,* swinging from the naturalized entity conception of *Letson* back to a justification of citizenship-based jurisdiction derived from the nature of the corporate membership.

Bowman observes that in *Marshall* the Court finally concluded that for purposes of federal jurisdiction, corporations were to be considered *residents* of the several states, rather than citizens and thus able to sue and be sued in the national courts (1996:47). As it had in the previous cases, save primarily for *Rundle,* the Court based its characterization of the corporation on that of its members. Over the strenuous objections of Justices Daniel (who again bemoaned the abandoning of the Constitutional dictate that "citizens only, that is to say men, material, social moral, sentient beings, must be parties in order to give jurisdiction to the federal courts" (*Marshall v. Baltimore & Ohio R.R.,* at 339, dissenting)) and Campbell (who wondered "when the mischief will end" (ibid., at 353, dissenting)), Justice Grier reiterated why the Court found it necessary to preserve at almost any cost federal jurisdiction over corporations:

> A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen,' is a logical conclusion from the premise which cannot be denied . . . But a [human] citizen who has made a contract and has a 'controversy' with a corporation, may also say with equal truth that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an imaginary entity, but

> on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant persons. . . . The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation and have the faculty of contracting, suing and being sued in a factitious or collective name. But these important faculties, conferred on them by state legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by syllogism or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent. [327-28]

The mid-nineteenth century witnessed the beginnings of what would be massive growth of the corporate business sector with the railroads in the vanguard. It is in this light that the Court's insistence on exercising jurisdiction should be viewed and seen alongside attempts at other levels to negotiate co-existence with powerful commercial interests. The Grander and Populist movements were not so far removed in intent from Justice Grier's sentiments cited above. Like the citizens who subscribed to reformist political beliefs, the Court seemed concerned, at least sporadically, with the ability of society to maintain principles of fairness and justice during a time of radical economic and social reorganization.

The anti-monopolists of the period saw the primary threat from corporations as one of state-granted exclusivity and power and pushed for a liberalization of corporate chartering requirements (Bowman 1996, Hurst 1970). The demise of special legislative chartering and adoption by the 1880s of general incorporation acts, brought the anti-monopolist forces wishes to fruition, making incorporation a matter of right and relatively simple procedure, rather than a special grant of state power. Although in theory this liberalization did open the benefits of incorporation to the masses, it also weakened the state's claim to power over the corporation, which could no longer be construed strictly as a mere "creature of the state." In actual fact, general incorporation led in steps, but inexorably, to greater commercial concentration and dominance than had been known before.

Hurst notes several pressures from the business sector which (combined with the popular anti-monopoly sentiment) contributed to the widespread adoption of federal incorporation privileges and an increase in flexibility in terms of charter available. Such factors as the growth of financial markets (most notably *post bellum),* the expansion of the railroad empires, the rise of a consumer product industrial sector and the development of large-scale investment banking (1971:71-73), were the emergent realities of US society whose impact the Court sought, at times, to make bearable to the public.

In an era when competing notions of rights, morality and economic philosophy would destabilize and reconsolidate the republic, the Court was no less fractured than other institutions in a search for acceptable compromise. From the time of *Deveaux,* the Court had simultaneously sought to establish its power over corporations, without overly infringing on the sovereign right of individual states to control their creations. Even during Reconstruction, the Court tried to maintain this separation. In *Paul v. Virginia* (1868), Justice Field found it necessary to reiterate Marshall's declaration in *Deveaux*, that corporate "citizenship" – however justified – was extremely limited in its application.

At issue in *Paul* was a Virginia statute which prohibited foreign insurance companies from operating in the state without obtaining a license and posting a bond deposit and also provided a penalty for individual agents of such companies who transacted business in violation of the law. So penalized, Paul sued for relief claiming that as an agent of a corporate "citizen" of another state, he was due the "privileges and immunities" granted to Virginians—in this case the right to sell insurance. In rejecting Paul's defense, Field wrote that although the corporation was considered a citizen for the purposes of bringing suit, its members in their corporate capacity were not entitled to enjoy the other privileges of state citizenship. The Court reporter tersely summarizes in the case headnotes:

> Special privileges enjoyed by citizens in their own states are not secured in other sates by this provision [the privileges and immunities clause], such as grants of corporate existence and power. [168]

Sovereign power was confirmed, but at the same time economic growth and the preservation of liberal individual rights were important values that clashed with such control. The emergent doctrine of business corporations as private persons, and at times citizens, provided the basis for a *laissez faire* framework within which to treat such firms, while the Court's exercise of its power to protect corporate property (*Terrett, Dartmouth*), and assert states' rights to regulate it (*Deveaux, Augusta*) achieved a delicate balance of interest between commercial, state and federal forces.[8]

The Civil War would, of course, challenge all such balances—one of which, slavery, eerily countered corporate personality in its denial to human, flesh-and-bone people any recognition of their status as persons, let alone citizens. The formal rectification of the freed slaves' depersonalization would occur with the adoption of the Fourteenth Amendment to the Constitution, and this statue would also prove to be pivotal in the development of corporate doctrine and corporate power.

The Corporation as Person

The 14th amendment was critical in the transition from a states' rights paradigm tone that presupposed a more active—some said intrusive—role for the

federal government in overseeing the internal affairs of state governments. In pertinent parts, the Amendment extended to the state level the Constitutional protections against arbitrary government deprivations, firmly establishing the rights of due process and equal protection.[9]

The attractiveness of these provisions to business lay in the fact that the Amendment extended such protections to all "persons." Corporate regulation had long been considered a prerogative of the state-level sovereignty and the new law offered hope of sharply limiting that control. Eventually, those hopes would be realized; but in the first major case that invoked the new rights, the Court applied a strict construction that fell far short.

In 1872, four years after the passage of the Fourteenth Amendment, the Court decided the *Slaughter-House Cases.* The state of Louisiana had granted to a corporation the exclusive rights in the city of New Orleans to provide facilities for livestock butchery and storage. Prior to the grant, individual butchers had housed and slaughtered stock on the premises of their own businesses and the trade was spread among a fair number of these small-scale slaughterhouses. Under the corporate monopoly grant however, while individual butchers were still free to practice their trade, they were required to do so on corporate property – and pay the firm for the privilege, virtually obliterating their narrow margin of profit.

The butchers filed suit protesting that the grant of exclusivity to the corporation deprived them of their right to earn a living without due process of law (generally understood as a function of *judicial* review), as provided for in the new Amendment. Justice Field, in a dissenting opinion, agreed, arguing for the property right to one's livelihood. But the majority, through Justice Miller, refused to extend the due process protection beyond the "Negro race," for whose benefit, Miller noted, the Amendment had been drafted. The monopoly grant was recognized as a legitimate, if regrettable, exercise of the police power of the state.

Similarly restricted was the Court's 1876 decision in *Munn v. Illinois*, a suit brought by Chicago grain elevator operators against an Illinois statute that regulated their prices. The legislature had set rate schedules for elevators in the larger cities, but not the smaller ones; the operators pleaded that they were not receiving the equal protection of the laws mandated at the state level by the Fourteenth Amendment. Again, the Court refused to extend the Amendment's protection, and again Field dissented, declaring the statue in violation of private property rights.

But only a decade later, in a California tax case against a railroad, the Court announced an abrupt reversal, without offering or accepting arguments as to its merits. Chief Justice Waite states, before an 1886 ruling that struck down Santa Clara County's tax:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of the opinion that it does. [*Santa Clara v. Southern Pacific Railroad,* 394]

The decision in favor of the railroad corporation in *Santa Clara* marked a new era of empowerment of the corporation, although the actual status of the corporation as person was still contested, hovering as before between notions of aggregate and entity. While in practical terms the extension of civil rights to the corporation at the state and local level was a fundamental reordering of the traditional relationship between firms and the sovereignties that created and legitimated them, the philosophical embrace of the corporation was not yet much altered. As Horwitz has pointed out, the natural entity theory did not reach full flower until after the turn of the century (1985).

Nevertheless, there was little fundamental difference—however divergent were conceptions—in the treatment afforded natural and corporate persons. *Minneapolis & S.L.R. v. Beckwith* illustrates that equality of treatment before the law could translate into an erosion of those few reforms enacted to protect natural individuals from the increasing and cavalier power of, for example, the railroad corporations. Decided in 1888, the case concerned an Iowa statue that provided for awards of double damages against corporations that were not only negligent, but failed to pay claims in a timely manner. Three of Beckwith's hogs were killed along a stretch of track that the railroad was required to fence off, and in response to the corporation's refusal to pay his claim, an Iowa court awarded Beckwith the double damages.

The railroad protested the award under the equal protection clause of the Fourteenth Amendment and the Supreme Court reversed the lower court's award. In fact, many of the seminal corporate cases under the Amendment concerned the railroads as they were the dominant businesses of the era (Bowman 1996, Lustig 1982).

Legal historian Harry Scheiber notes that while, "at first, the corporate form was chiefly used for banks, turnpike, bridge and canal companies . . . by the 1830s manufacturing enterprises and by the 1850s railroads had assumed central importance" (1975:90). Scheiber emphasizes that the intense competition between states to attract businesses not only resulted in a competition to reduce deregulation and oversight, but also prevented any meaningful inter-state collaboration on existing controls. What is more, the emergence of the railroads as America's first huge forms exacerbated the importance of what state-level will existed for regulation in the public interest:

> Organized across nearly half a continent, aggregating millions in capital, and controlling bureaucracies much larger than those of any state government, the giant fail road firms outdistance the objective capacity of the states—if, indeed, a political will was present—to exercise controls over them. [1975:99]

This growth both fueled and fed upon the destabilization of regulatory regimes, as Scheiber observes. Rather than "'uncertainties' that hampered orderly investment processes and vitiated the advantages of rational market operations," he concludes that "the public economic policies of the 19th century United States... favored private entrepreneurial interests, gave impetus to the growth and power of the large-scale private corporation and contributed to the dominance of the economy by giant firms which had firmly aligned themselves by the 1890s with investment-banking and financial interests" (1975:117).

This massive industrialization and corporatization significantly altered the nature, as well as the size and organizational character of the US and state economies as well. While 19th century economic law helped to reduce the costs and risks of doing business (Miller 1968:26), the US developed decisively from a relatively self-sufficiency-oriented, subsistence economy, to a market economy (Hurst 1950). A critical component of this alteration was the creation, as Nader has pointed out, of consumer dependency (1984:956). Not only were end users of products no longer self-sufficient for their basic needs, but the structure of production itself had changed, leaving first-order producers (such as farmers) increasingly reliant upon corporatized infrastructure and pre-market conditions (such as railroad transportation and costs).

Adding to the near-anarchy were the policies of the federal government, particularly the decisions of the Supreme Court, which was remarkably inventive in developing doctrine that effectively reduced state oversight authority. In 1890, for example, a Minnesota railroad commission was virtually stripped of any real power to regulate in the public interest, by a High Court ruling on the basis of "substantive" due process.

Also known as "liberty of contract" (Pound 1909), substantive due process involved an expansion of the concept of property to encompass intangibles; beyond the notion of an existing contract as property, the Court thus recognized a property right in the unencumbered ability or liberty to *make* a contract. In response to a complaint from state boards of trade, the Minnesota commission had determined that the prices the Chicago, Milwaukee railroad charged for the transport of milk were unreasonable and ordered a significant reduction. The Court ruled that by the action of the commission—performed absent a legitimate judicial finding of fact—the railroad had been deprived of its right to freely negotiate prices with the milk producers.

That because of the railroad's monopoly on distance transport the milk producers were in no position to freely negotiate *anything* with the corporation, did not concern the Court which declares:

> [I]f the company is deprived of the power of charging reasonable rates of the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus in substance and effort of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. [458]

The conception of the corporation employed by the Court, above, is not different from that which it employed previously, but I will argue that the extension of property rights to intangibles provides an important parallel to the development of corporate personality itself. In the same way that the fiction of corporate personality would come to demand concessions from the law (indeed, such was the effect of Conkling's argument, according to Boudin -- rather than allowing justice to be done without a radical alteration of the legal fabric -- liberty of contact doctrine also produced counterintuitive results). In point of historical fact, the very power of substantive due process in the emergent turn-of-the-century economy was that it privileged, by means of corporate personality doctrine, the ever-larger firms that arose.

And privilege it did, often restraining the corrective actions of government agents in the face of sometimes-obvious corporate wrongdoing. The 1892 case of *Union River Logging co. v. Noble* concerned a federal grant to a railroad of right-of-way through public lands. The Union River Logging Company received this grant under a Congressional statute that allowed for such bestowals upon "common carriers," engaged in the transport for the public of freight and/or passengers. Shortly after the grant, a newly appointed Secretary of the Interior—the cabinet official responsible for such grants, and whose predecessor had approved that of Union River—reviewed the railroad company's grant application and found it to be fraudulent. Specifically, he found that the railroad was not a common carrier, but in fact merely and adjunct to the loggings company's for-profit operations, intended to do no more than transport the company's logs, for the company's exclusive benefit. He withdrew the right-of-way grant, declaring it void due to the fraudulent application.

The Court, however, found the actions of the Secretary of the Interior to be invalid, because an unconstitutional deprivation of the *company's property*, without due (judicial) process of law. In a manner similar to that by which Dartmouth College had, upon incorporation, become immediately the repository of the donors' and

founders' property and rights, the Court declared that in so far as the right-of-way had been granted:

> [T]he railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right-of-way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained. A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property with out due process of law, and was, therefore, void. [176]

Due process, substantive due process and equal protection became the bulwarks of rapidly growing corporate scope and power. Before the end of the century the Court affirmed the latter two empowerments as well by pro-corporate rulings in *Allgeyer* (1896) and *Gulf* (1896)—which struck down state statutes that imposed restraints upon foreign and domestic corporations, respectively. The Court's opinion in *Gulf*, however, indicated just how little resolved the Justices were on the roots of corporate personality, hewing again to collectivity:

> . . . corporations are persons within the provisions of the Fourteenth Amendment to the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens. [154]

The Court was no more certain of the ontological status of the corporation than were the legal theorists of the period, those whom Horwitz describes as fiercely in dispute over notions of corporation-as-partnership and corporation-as-entity. He notes, "The argument between entity and contractual theorists during the 1880s and 1890s was, at bottom, a conflict over whether the individual or group was the appropriate unit of economic, political and legal analysis" (1985:220).

The Rise of the Natural Entity

Increasingly, the Court's rulings and rapid corporatization of the US economy were combining to make such theoretical concerns moot; the corporate group was becoming the *de facto* unit of analysis. But similar changes in the structure of corporations themselves demanded, Horwitz argues, resolution of the entity/partnership dichotomy. Beyond the wholesale adoption, by the turn of the

century, of general incorporation statutes that effectively declared the corporation a private concern—undermining the notion of state creation and right to regulate—there were several factors that urged that resolution in the direction of naturalizing the corporate entity:

> First, by 1900 it was no longer easy to conceive of shareholders as constituting the corporation. Changes in the conception of the shareholder from active "owner" to passive "investor" weakened the evocative power of partnership theory. Moreover, the entity theory was better able to justify the weakened position of the shareholders in internal corporate governance. . . . Second, the partnership theory represented a threat to the legitimacy of limited liability of shareholders. The entity theory, by contrast, emphasized the distinction between corporations and partnerships. . . . Third, while the partnership theory pushed in the direction of requiring shareholder unanimity for corporate mergers, the entity theory made the justification of majority rule possible. [Horwitz 1985:223]

Just as the nature of corporate and economic realities created pressure on the Court to legitimate already established circumstances, the conflation of group with individual that marked the doctrine of corporation as a person, seemed to itself demand concessions and evolution. In 1905 the Court denied to corporations the protections guaranteed persons under the Fourth and Fifth Amendments, but not unanimously. Called before a grand jury investigation of monopoly and restraint-of-trade under the Sherman Act, the secretary and treasurer of the MacAndrews and Forbes Co, which had entered into certain agreements with the American Tobacco Company, refused not only to produce the records and accounts demanded of him, but also to testify. He claimed as the corporation's agent its rights against unreasonable search/seizure[10] and against having to appear as a witness against oneself .[11]

The Court denied him these rights, as indeed it denied them to the corporation, invoking somewhat archaically the notion of the corporation as a "creature of the state... presumed to be incorporated for the benefit of the public" (*Hale v. Henkel* at 74), and the practical concerns that such interposition of corporate officers between the justice system and the intangible corporation would render impossible any regulation at all (ibid., at 74). Justice Brewer, however, dissented, arguing logically that "if the word 'person' in [the Fourteenth] amendment includes corporations, it also includes corporations when used in the 4th and 5th Amendments" (85, dissenting).

Brewer's application prefigured the bestowal of wide-ranging political rights on the corporation in the second half of the twentieth century, but did little to resolve the prevailing dichotomies. Over the course of the next half-century the Court wrestled with the implications of the corporate person, alternating, as it had in the

past, between recognition and restraint. On one hand the Court ruled that the notion of corporate legal personality was intended to be treated as if it were literally true (*Puerto Rico v. Russel & Co., International Shoe Co. v. Washington*), while on the other it reasserted the limitations of extending members' rights to the aggregate body (*Hemphill v. Orloff*), and the fact that there were legitimate divergences between natural and juristic persons:

> The inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions upon the right of nonresidents to do business in the state applicable to corporations alone. [*Crescent Cotton Oil Co. v. Mississippi*]

After the 1920s however, even the debate among legal theorists over the nature of the corporate person, disappeared (Horwitz 1985:175). Horwitz attributes this to the persuasion of the discipline by the Legal Realist school that the issue was largely moot, that both the entity and collectivity notions could be used to support either expansion or restriction of corporate power. Calling John Dewey's 1926 *Yale Law Journal* article "the last great analysis" of the issue, Horwitz quotes that legal philosopher as declaring the following:

> [Corporate personality] has been employed to make the state the Supreme and culminating personality in a hierarchy, to make it but *primus inter pares*, and to reduce it to merely one among many . . . Corporate groups less than the state have had real personality ascribed to them, both in order to make them more amenable to liability, as in the case of trade-unions, and to exalt their dignity and vital power against external control. . . . The group personality theory has been asserted both as a check upon what was regarded as anarchic and dissolving individualism, to set up something more abiding and worthful than a single human being and to increase the power and dignity of the single being as over against the state. [175]

Whether so convinced, the Supreme Court took up the debate in an altered, practical form in the 1930s and 1940s when the inclusion of the corporation within the meaning of the Fourteenth Amendment came under attack from within the Court itself. Dissenting in 1938s *Connecticut General* case—in which the Court struck down, on due process grounds a California statute that imposed a special tax on foreign insurance corporations' out-of-state premiums—Justice Black reviewed the history and language of the Fourteenth Amendment, concluding that the Court had been mistaken and bamboozled:

> A secret purpose on the part of the members of the [Amendment drafting] Committee, even if such be the fact however, would not be sufficient to justify any such construction. The history of the

> Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. . . . The language of the Amendment itself does not support the theory that it was passed for the benefit of corporations. . . . The first clause of § 1 of the Amendment reads: 'All *persons* born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.' Certainly a corporation cannot be naturalized and 'persons' here is not broad enough to include corporations. . . . The [second] clause of the second sentence reads: 'Nor shall any State deprive any *person* of life, liberty or property without due process of law...' It has not been decided that this clause prohibits a state from depriving a corporation of 'life.' This Court has expressly held that the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of *natural, not artificial persons.*' Thus, the words 'life' and 'liberty' do not apply to corporations and of course they could not have been so intended to apply. However, the decisions of this Court, which the majority follows, hold that corporations are included in this clause insofar as the world 'property' is concerned. In other words, this clause is construed to mean as follows: "Nor shall any State deprive any *human being* of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law." [*Connecticut General Life Insurance Co. v. Johnson,* 87-88, dissenting]

Black went on to note that no one had suggested that the section of the Amendment that apportioned representatives to Congress on the basis of the numbers of *persons* in each state would apply to corporations. Neither should anyone more widely construe the same word in the other sections of the Amendment, he argued -- closing with the mention that in the Court cases in the first fifty years of the law designed to protect the freed slaves, "less than on-half of one percent invoked it in protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations" (90, dissenting).

Black's dissent was joined by the content-identical one of Justice Douglas a decade later in *Wheeling Steel Corporation v. Glander* (1948), in which the majority struck down as violative of equal protection an Ohio tax on the intangibles (e.g., notes and accounts receivable) of foreign corporations operating in the state. Wheeling was a Delaware-chartered, interstate corporation that nonetheless had four of its eight production plants in Ohio.[12] The tax statute, which did not apply to domestic corporations, was probably intended to ameliorate just such situations as those of Wheeling, whereby a firm doing substantial business in the state could protect a large

portion of its revenues from standard in-state assessment, through its legal-financial residence out-of-state.

For the Court, Justice Jackson responded to the dissents of Black and Douglas in an addendum to the majority opinion. His rebuttal, however, was of the weakest variety, merely invoking the Court's long tradition of finding corporations within the Fourteenth Amendment term "person," and noting that the dissenting justices had previously supported such construction without demur. Apparently, Justice Jackson's appeal to the inertia of drift—and an adherence to the developed, animistic entity conception of the corporation—secured his position. His opinion was that of the majority, and the dissenting opinion never gained enough popularity on the Court to prevail. The issue seemed largely settled and the corporation safely protected from the property regulations of the state.

The Political Rights of the Corporation

The corporation had been long regarded as an instrument of property holding and the expansion of corporate personality that occurred in the first century-and-a-half of US jurisprudence was largely intended to secure that property from government control. But, as can be seen in the utilization of the Fourteenth Amendment, and the bid in *Hale v. Henkel* to enlarge (with the support of Justice Brewer) the range of personal freedoms enjoyed by the corporation, the fiction tended to take on its own ontological life. Once accepted as legitimate, the metaphorical likening of the corporate entity to the human entity that was the object of political and legal contemplation and individualism, tended to obscure the differences between the two and require the enlargement of corporate rights to match those granted human persons.

That such reification was occurring is evident in the establishment of political rights to the corporation—most notably the right to freedom of speech, but also the right to petition. Where once Justice Black invoked the absurdity of such notions, exposing the selective logic in construing the Fourteenth Amendment "persons" to include corporations, the Court of the later twentieth century invoked a wider concept of "liberty" than had been before articulated. Where the invocation of personal property right on behalf of the corporation might have been justified on the basis of the corporation's essential function as a property-holding instrument, the application of personal political rights seems to have been clearly the result of unplanned implications of the animistic corporate model that had been developed. That is, the fiction of the corporation as a personal entity had come to be believed as naturally true: the metaphysical corporate *dignitas* was granted ritual value equivalent to that of human dignity, requiring the protections and taboos appropriate to that sacred status.

The First Amendment right of petition was called to corporate service against anti-trust actions that responded to corporations' (and groups of corporations') engagement in massive lobbying campaigns.[13] *Eastern Railroad Presidents'*

Conference v. Noerr Motor Freight (1961), *United Mine Workers v. Pennington* (1965), and *California Motor Transport v. Trucking Unlimited* (1972) all involved corporate activity to influence legislation and thereby ruin competing firms or industries. As much as individuals, the Court ruled repeatedly, corporations and their trade groups were entitled to inform lawmakers of their opinions and to do so even with the express goal of thereby harming someone else, so long as their methods were not themselves illegal.

Of course, such corporate "speech" consisted largely of money—contributions in support of candidates and causes—as what else could it be of an intangible person? In 1976 the Court addressed this fundamental distinction. While silent on the issue of the corporate personality—the legislation being challenged not specifically burdening corporations—the Court nevertheless expanded the concept of speech to include political expenditures; in short, "money is speech" (*Buckley v. Valeo*). Such a novel construction was consistent with the earlier creation of property rights in the liberty to make contracts via "substantive" due process and indeed the very naturalization of the corporate person fiction, itself.[14] And whereas theoretically, finances were not implicated in the exercise of speech by natural persons (able to vocalize, or sign, in utter penury), they were at the very heart of corporate existence. After Fuller, below, we may speculate that this new fiction, as all fictions are, was introduced to patch over a huge gap in the fabric of corporate doctrine (itself fictional), specifically, that no matter how naturalized the concept of the corporation as a person became, the immaterial and metaphysical corporate entity could never truly speak, or even have an opinion.

Six years later, in *First National Bank of Boston v. Bellotti* (1978), the Court turned to the explicit issue of corporate freedom of speech. Beyond the right to petition, and considering that "money talks" (Tushnet 1982:259), the Court expanded the rights of corporations to "speak" by sending money to influence elections. A consortium of bank associations and other business corporations had challenged the constitutionality of a Massachusetts statute that forbade political expenditures by those types of firms, on issues, referenda, or legislation that did not "materially affect" the business' interests. In particular, the law prohibited such spending in relation to any proposed individual income tax measures, and the case at bar concerned expressly such expenditures.

By an intriguing logic, the Court determined that the speech rights of corporations were thus violated. Sidestepping the direct question of whether corporations by their nature were entitled to freedom of speech, the Court allowed that they were by virtue of their *capacity* to speak—through camping expenditures, money talking—and the nature of *speech itself* was protected. In this construction, the freedom of speech/money itself imbued the corporation with the right to express it. Justice Powell wrote for the Court:

> [T]he [federal appeals] court below framed the principal question in this case as whether and to what extent corporations have first Amendment rights. We believe that the court posed the wrong questions. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests.[15] The proper question therefore in not whether corporations 'have' First Amendment rights and, if so, whether they are co-extensive with those of natural persons. Instead the question must be whether [the Massachusetts statute] abridges expression that the First Amendment was meant to protect. We hold that it does. . . . If the speakers here were not corporations, no one would suggest that the State could *silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because he speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its soured, whether corporation, association, union or individual.* [775-77, italics added].[16]

"The common law" wrote Justices White, Brennan, and Marshall, in dissent, "was generally interpreted as prohibiting corporate political participation" (819, dissenting). Justice Rehnquist likewise rejected the Court's logic in finding corporate speech rights derived from the speech itself. Arguing for a state's right to regulate its creation, he also noted that the corporation's interest in protecting its property need not be enabled by expansive political rights, so long as the state and federal judicial machinery were in place (826, dissenting).

That the corporate form was a special grant of privilege and protection had been downplayed, certainly since *Dartmouth* and especially in the wake of nation-wide adoption of liberal statutes of general incorporation. But the protections Rehnquist noted—perpetuity, limited liability and others such as the ability to hold property and sue corporately—were still endowed by the state and backed by its police power. In the face of what Horwitz has called "a conception of property as existing prior to the state" (1985: 220-21), Rehnquist's dissent in *Bellotti* argued for a recognition that at least some forms of property and existence were a function of the state; they therefore re-asserted in the realm of political activity the sovereign right *not* to expand those grants of privilege. Accordingly, Rehnquist disposed of the question of to what extent the existence of a corporation implied wider rights necessary for it to exist. Referring toe the oft-cited example of a newspaper corporation, which would seem to of necessity possess substantial speech rights, he wrote:

> It does not necessarily follow that such a corporation would be entitled to all the rights of free expression enjoyed by natural persons. Although a newspaper corporation must necessarily have the liberty

> to endorse a political candidate in its editorial columns, it need have no greater right than any other corporation to contribute money to that candidate's campaign. Such a right is no more 'incidental to its very existence' than it is to any other business corporation. [825, dissenting, note 4]

Similarly, Rehnquist was aware that the state-endowed special powers of the corporation might put it at an unfair advantage in the "marketplace of ideas":

> [A] state grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. [825-26, dissenting]

This awareness, however, collided with the Court's warning in *Buckley* that the government had no business correcting such imbalances, at least not by attempting to "restrict the speech of some elements of our society in order to enhance the relative voice of others" (48-49).

By the 1970s, however, it had become clear that the power of big business in politics was often drowning out the voices of any citizens and consumer-interest groups. Where public utilities exercised unfair power, attempts to rectify the imbalance were led by the actions of state oversight commissions—sometimes through more novel means than merely restricting the voice of the more powerful party. But such efforts roundly met with defeat in the Supreme Court and led to expanded notions of corporate speech rights. This phenomenon was by no means limited to utilities regulation however, but extended throughout society:

> Just as the new wave of social regulation reached its peak in the late 1970s, the Supreme Court conferred First Amendment political rights on corporations. On balance, this development in constitutional law might have done more to enhance corporate autonomy than all the new social regulations might have done to decrease it. [Bowman 1996:141]

In the winter of 1973, the New York State Public Service Commission (PSC) ordered utilities to stop advertising that promoted electricity usage, due to a fuel shortage. After three years the shortage ended, but the PSC extended the ban, in support of its new energy conservation programs. The Central Hudson Gas & Electric Co.—which was free under the terms of the ban to continue any informational advertising that did not promote consumption—sued the PSC, claiming a violation of is First Amendment speech rights. The Court, in striking down the PSC ban, did not bother to re-articulate its earlier derivation of corporate speech rights from the speech itself, but simply

asserted that Central Hudson's rights had been violated.[17]

Rehnquist's dissent was starker than it had been in *Bellotti*, perhaps because in *Central Hudson*, the public utility, possessing a state-sanctioned monopoly, hewed closer to the old model of special chartering that any contemporary private firm. ". . . I disagree," he wrote, "with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment" (584, dissenting).

The Court struck down another PSC decision the same year, in a case that was a mirror image of *PG&E*. In *Consolidated Edison v. Public Service Commission,* the Court found wanting a PSC ban on ConEd's insertion of politically controversial material into its billing envelopes. Responding to a 1976 ConEd insert that argued for the efficacy and expansion of nuclear power, the Natural Resources Defense Council (NRDC) had requested that ConEd include with its bills NRDC's rebuttal piece. ConEd refused and the PSC, on appeal from NRDC, barred all utilities from abusing the privacy of their captive ratepayer audience by inserting flyers on controversial public policy. Over Rehnquist's assertion of the state's right to regulate a monopoly power of its own creation, the Court again struck down a PSC ban.

It was the reverse scenario that was explored in *PG&E*. Recall that in that 1986 case the Court invalidated a California Public Utilities Commission order that Pacific Gas & Electric include in their billing envelope a consumer-interest insert from a local rate-payer group; the order was held to violate PG&Es right not to speak. Two elements of *PG&E* are worth noting. First, unlike *Consolidated Edison* (in which the oversight commission sought to equalize the relative voices of the utility and reform group by restricting that of the utility) the PUC in *PG&E* attempted to balance the power differential by allowing for "equal time," so as not to violate the principle set forth in *Buckley.*

But this resulted in the Court's finding of a novel and expanded speech right for the corporation. As opposed to the "hearer-centered" approach explicated in *Bigelow* and *Virginia State Board of Pharmacy, PG&E* developed a "speaker-centered" approach that included the right not to speak or be involuntarily associated with the speech of others, and imbued the corporation with the capacity of mind to feel so "compelled" (Bowman 1996:158). Not surprisingly, Rehnquist dissented. In addition to his noting that PG&E, as a public monopoly, should not be subject to the regulation its state grantor saw fit, wrote:

> This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; and individual's right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.... Extension of the individual

> freedom of conscience decisions to business corporations strains the rationale of those [precedent-setting] cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality. [The Court in *Bellotti* and *Consolidated Edison*] recognized that corporate free speech rights do not arise because corporations, like individuals, have an interest in self-expression.... It held instead that such fights are recognized as an instrumental means of furthering the First Amendment purposes of fostering a broad forum of information to facilitate self-government. [32-33, dissenting][18]

Metaphor did indeed seem to have been substituted for reality. From the time of *Deveaux*, the corporation had been transformed from an artificial creature of the state to a rights-bearing entity requiring, in Rehnquist's words, "freedom of conscience"—if not entirely possessing the conscience itself. By no means did the Court of the 1980s and 1990s strike down every infringement upon corporate speech; in *Federal Election Commission v. National Right to Work Committee* (1982) and *Austin v. Michigan Chamber of Commerce* (1990), respectively, the Court upheld federal and state campaign finance laws, somewhat curtailing the ability of corporate money to talk (but not coincidentally generating and legitimating the political action committee (PAC) regime of campaign finance).

It is important to note however, that these rulings were justified as legitimate restrictions upon the established corporate freedom of speech, given a critical and narrowly tailored state interest. In *Austin*, for example, those who dissented did so out of conviction that the state's rational was neither not nearly so compelling— nor its corrective measures specific enough— to warrant approval. Justice Scalia, covering all possibilities, declared that "[T]he categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need" (680, dissenting)—and it was clear that he was not so compelled.[19] "The very nature of the debate, however, indicates the extent to which corporate political activity has been legitimized. The issue is not whether corporations should have political rights (they do), but under what circumstances and to what extent they should be restricted" (Bowman 1996:155).

Beyond the US: the Global Economy

To a certain, practical degree, the very issue of restricting corporate power is moot. "Fifty-one percent of the world's top on hundred economies are individual corporations," according to Barlow and Clarke (1998:2), and Bowman (1996:288), who base their figures on company sales and gross national products. In 1970, General Motors, for example, ranked twenty-fourth on that list; by 1978, GM had risen to twenty-third, in 1993, the firm had sales of $133 billion, assets of $188 billion and employed 711,000 people in 112 US cities and 42 nations (Bowman 1996:288).

Barlow and Clarke elaborate that:

> Mitsubishi is richer than Indonesia, the fourth most populous country on earth. General Motors has more money than Denmark. Ford trumps South Africa; Toyota is bigger than Norway; Philip Morris beats New Zealand. Wal-Mart is actually larger than 161 countries, including Poland, Israel and Greece. Moreover, the combined sales of the top two hundred corporations in the world outstrip the combined economies of 182 countries. In other words, there are only nine countries left in the world, including the United States, with sufficient economic clout to checkmate these global giants. [1998:2-3]

The economic clout of these transnational companies (TNCs)—and the commodity and financial markets that they dominate—translates into effective power, whether defined as sheer capability, or the practice of affecting outcomes (Strange 1996). Indeed, as political economist Susan Strange notes, "[W]here once states were the masters of markets, now it is the markets which, on many crucial issues, are the master over the governments of states" (1996: 4). Other researchers also detailed the power global markets, capital and corporations exercise over the world's governments, economies and populations (Barnet and Müller 1974; Palast 1978; Sassen 1993, 1996). Such power seeks consolidation and legitimate status, an official, sanctioned recognition of its *de facto* authority:

> The problem of legitimization emerges from what is claimed to be the existence of a third legal system between state law and public international law. The privatization of the unification of laws and the complete development of paralegal law, a 'non-national private law' that goes with it, results in an avoidance of national legislatures and their traditional processes, which includes procedural safeguards and check and balances. [Berger 1997:956]

This "problem of legitimization" is long that which the corporation has had to ameliorate. The above detailed history of US corporate doctrine has been, above all, the story of the increasing power of the corporate form and of the corporation's quest for legitimacy. That the arena of corporate activity has widened to a global economy matters little in the framing of the essential components: questions of citizenship, regulation, protection, accountability—of the balance between rights and responsibilities. The immense structural power of the transnational corporate sector must yet be consolidated through politics and ideology, just as that of the emergent national firms have been.

With *Deveaux*, we began to study corporate legitimacy from the standpoint of citizenship. Although the corporation is still not recognized by US *law* as a citizen" it is point of fact *treated* as one, just the same (save for certain important franchises such

as the vote). The development of "corporation-as-person" doctrine has been the struggle surrounding the terms of that treatment, and over contested definitions of citizenship. If the field of legitimacy and citizenship ahs been ripe and turbulent within the growth of a constitutionally-arranged political order such as that of the Untied States, how much more so must it be within the relatively unstructured and emergent global arena?

Both the similarity and difference of context make an exploration of corporate "standing" in global legal politics a necessity. First, as Bowman notes, there are parallels between the expansion and development of the transnational economy and the earlier growth of the US national economy, which rapidly and sometimes chaotically overran local and even state jurisdictions; so too is there convergence between a push for supra-national corporate autonomy and the previous struggle against state intervention in the US federal system (1996:297). This suggests that there might be further correspondence in an ideological adaptation of corporate image, one that would establish it as an equal and *legitimate* player in the international field (as the "corporation-as-person" doctrine did in the US national arena). Thus, an investigation of the corporate conception the global context would seem a natural extension of the earlier work.

Finally, because the global, transnational, or even international political orders are in the process of being constructed, they provide active sites for the examination of ideological and legal formation, in process. The global economy is novel, according to the scholars of the Deltec Research Project, published in an issue of the World Anthropology series:

> The multinational corporation (MNC) is a qualitatively new structural phenomenon in world capitalism. Industrialized Western countries, including the United States, are themselves subject to the forces of disequilibria that they MNC can cause in the Third World, such as technological displacement, inflation, currency fluctuations, trade deficits and capital outflows that lead to such well-known phenomena as rising unemployment, increasing prices, currency devaluations and falling real wages. [1978: 55; see also Palast, same volume]

While national economies are increasingly integrated, regulatory regimes are not While the sovereign nation-states of the international system are based nominally on popular consent and are territorially-based, the transnational corporations (TNCs) are mobile and derive their power from economics, as Barnet and Müller note, adding that on the international character of capital, Adam Smith and Karl Marx seem to agree (1974:76-77). Further, there is critical difference between the prevalent model of TNCs and their reality:

> The very advantages the global corporation enjoys over

> government—principally mobility and control of information—are creating a structural lag. Government is operating under a set of economic assumptions and legal theories which treat the corporation as if it were a private and national institution when it is in fact a social institution of global dimension" (Barnet and Müller 1974: 366).

Within the space created by this structural lag—and its occurrence in conjunction with an international system that is by nature anarchic (Strange 1996)—new structure and protocols of governance have been and are forming. As they have been in the development of US corporate doctrine, notions of "citizenship" will probably be central to the organization of transnational regimes of corporate legitimacy. In *Losing Control?*, her seminal exploration of national sovereignty in the global era, Saskia Sassen notes that:

> As an institution crucial to governing and accountability in national states, citizenship may also play a role in governing the global economy. It does so not simply to create order at the top but also to insure some sort of accountability through the electoral and judicial process, this begin one of the functions of citizenship in the national state. [1996:33]

Sassen further observes that "the history of modern citizenship shows the importance of underlying conditions in shaping it. Insofar as the global economy has created new conditions, it may spur another phase in the evolution of the institution of citizenship" (1996: 33):

> [W]e must consider the possibility that there exists a form of economic citizenship that empower and can demand accountability from governments. The evidence supports this notion but the so-called economic citizenship it identifies does not belong to citizens. It belongs to firms and markets -- specifically the global financial markets --and it is located not in individuals, not in citizens, but in mostly corporate economic factors. The act of being global gives these factors power of individual governments. [1996:xiv]

Such a characterization and locus of citizenship is hardly new to us, fresh from an examination of corporations' assumption of *de facto* citizenship within the US national system. Neither is the global economy, itself, entirely novel, although the scope of international and transnational economics may have widened, the magnitude increased and the specific mode of operation altered. Early on, Immanuel Wallerstein (1974) described the contours of the colonialist, mercantile "world system," and as economist Joseph Sachs has noted (1996), the more properly *capitalist* world economy has erupted before, at the end of the nineteenth century—only to be shattered by World War I (1996: 6-8).

Nor, as Mander informs us, is the logic—or rhetoric—of "globalization" particularly fresh:

> ... the deeper ideological principles of the global economy are not so new; they are only now being applied globally. These rules include the absolute primacy of exponential growth and an unregulated 'free market;' the need for free trade to stimulate the growth; the destruction of import substitution economic models (which promote economic self-sufficiency) in favor of export-oriented economies; accelerated privatization of public enterprises; and the aggressive promotion of consumerism, which combined with global development, faithfully reflects the Western corporate vision. [1996:10]

Under the influence of such a regime—as we have heard argued that all but nine national economies seem to be—not only do nation-states compete for "allies" among the larger TNCs (Strange 1996:9), and thus echo the race to deregulation of the US states' competition to attract companies to state residence by means of liberalized general incorporation acts—but TNCs maneuver to outflank the regulatory power of their original and host countries. "Best described as *corporate globalization*, the new economic model establishes supranational limitations of any nation's legal and practical ability to subordinate activity to the nation's goals" (Nader and Wallach (1996: 94).

The fulfillment of this goal is being attempted through the establishment of what law professor Klaus Berger, above, has referred to as the "third legal system between state law and public international law." Here is the point at which the question of citizenship, perhaps Sassen's "economic citizenship" becomes important. Traditional international relations and law are based upon the nation-state as primary actor. The sovereign power of the state is fully legitimized by the legal recognition of the state, and only the state, as having standing before the various international bodies—such as the United Nations (UN) or the World Trade Organization (WTO). International treaties are negotiated and binding upon nation-states, which are then considered the representatives (if any) of their various subject constituencies. For its part, international relations theory has been reluctant to modify its formulations to include non-state factors, such as markets or TNCs (Strange 1996: xv-xvi): the Institutionalist school views the state as a "black box" that needs no reductive analysis, but even the Realist school incorporates analyses of national sub-group activity only so as to better understand the choices of the larger unit (Unt 1997: 1053).

Ironically, though, according to some observers (Barlow and Clarke 1998, Mander 1996, Nader and Wallach 1996, Strange 1996, Sassen 1996), the agreements most recently negotiated by nation-states (or the *dominant* nation-states) have had the effect of adulterating, or at least altering the structure of, their power and control over

their economies, and the activities of business firms. Perhaps this trend is merely official recognition of the re-structuring that Strange has noted as already having occurred. Still, such legitimization consolidates changes and as we have seen from the US experience, invites further, deeper alterations.

An example may be found in the most recent version of the General Agreement on Tariffs and Trade (GATT), and the subsequent negotiations toward a Multilateral Agreement on Investment. The latest GATT (which took place in the nation of Uruguay, and takes its name: "Uruguay round") was a far-reaching treaty that sought, successfully, to clear the way within the international and national economies for expanded and less restricted trade. The Uruguay round also resulted in the establishment of the WTA as an adjudicatory, non-democratic body that would resolve disputes under GATT between signatory nations. Nader and Wallach caution that:

> [T]he Uruguay round puts into place comprehensive international rules about which policy objectives so-called independent countries are permitted to pursue and which means a country might use to pursue even GATT-legal objectives. In other words, GATT placed controls over national democracies. [1996:96]

Philip McMichael is even starker in warning:

> Colonialism historically involved episodes or combinations of expansion of nations (settler colonialism) and expansion of states, as in late nineteenth-century imperialism.... The objects of colonization were territories and peoples. However, in the late twentieth century *nation*-states, the regulators of territories and peoples, are being colonized. The colonization now is essentially by capital, under the banner of liberalization. [1995:37]

> Through the WTO, state and local powers to regulate environmental, produce and food safety can be overruled by un-elected trade bureaucrats with the power to require nations to 'take all necessary steps, where changes to domestic laws will be required to implement the provisions [GATT] ... to insure conformity of heir laws and these [GATT] Agreements. The GATT regime would complement and intensify the power of the multilateral agencies to discipline states and withdraw Third World special treatment (e.g., agricultural protection and technology transfer). [1995:48]

If what Strange calls the "retreat of the state" is indeed occurring, then as she suggests, the power void caused by that destabilization will be filled by new, multiple actors (1996). Deriving their structural power from aggregations of capital and

manipulations of markets, production and demand, these new "economic citizens" should be expected to seek legitimization of their authority and status, through law.

This seems to be the case. The Uruguay round took place in 1993-94. By 1995, the Organization for Economic Cooperation and Development (OECD)—a Paris-based group of ministers from the wealthiest Western nations—announced plans to negotiate a Multilateral Agreement on Investment (MAI). Upon the founding of the OECD, legal historian Arthur Miller observed that the organization had among its purposes "to contribute to the expansion of multilateral trade in accordance with international obligations" (1963: 84). In step with this purpose, the MAI is intended to do the following:

> . . . respond to the dramatic growth and transformation of foreign direct investment (FDI) which has been spurred by widespread liberalization and increasing competition for investment capital. Foreign investors still encounter investment barriers, discriminatory treatment and uncertainties. OECD governments and the European Communities, the business community and labor are urging new multilateral rules, which set high standards and a balanced and equitable framework for dealing with investment issues.... It would set clear consistent and transparent rules on liberalization and investor protection, with dispute settlement, thereby underpinning the continued removal of barriers to market access and encouraging economic growth. [OECD 1995:3][20]

Sassen has noted the central role that TNCs have taken on of providing much of this FDI. She observes that, "TNCs largely replaced banks. When all is said and done, TNCs are strategic organizers of the world economy" (1993: 64). Barlow and Clarke point out that:

> [T]he MAI is a global investment treaty designed to block countries from passing laws to limit the movement of capital and investments by transnational corporations, in the same way that NAFTA (the North American Free Trade Agreement) and the WTO (World Trade Organization) were designed to remove countries' regulation of traditional trade. [1998:1]

If the corporation has assumed a dominant role in the global economy and political economy, how is it represented, rhetorically and conceptually, in the emergent international and supra-national legal order? As before noted, *nation-states* have been the fundamental unit of analysis and legal action in the international realm, and this jurisprudential respect for sovereign legitimacy holds true even in the sovereignty-undermining embrace of GATT/WTO and NAFTA.

Transnational Corporations and the *Lex Mercatoria*

The MAI contains a major, important shift in the contemplation of the international order, however, in that it explicitly grants legal standing -- the ability to be heard by the recognized courts or tribunals as a party to suit or dispute -- to *private investors, individual and corporate*. This is a sea-change, but seems in the context of our study a logical expansion of corporate power through legitimizing conceptions.

Sassen has noted, above, that a fundamental aspect of economic citizenship is the ability to hold governments accountable. In this regard, the key provisions of the MAI are the intended dispute settlement rules:

> [M]ost investment disputes that might arise under the MAI should be settled in an amicable manner and procedures to encourage amicable solutions would be an important feature of the MAI's dispute settlement mechanism. However, binding state-state and *investor-state* arbitration would be available to ensure effective recourse in the event of breach of the agreement. [OECD 1997b:4; emphasis mine]

Whereas traditional international relations and trade treaties recognize only nation states, the MAI grants legal standing to non-state entities, providing for their direct action against national governments. Let us examine relevant provisions of the proposed MAI, from a recent (April 1998) "negotiating text." The MAI is based upon the concept of "investors," most *private* parties who, at least in so far as dispute resolution and deregulation are concerned, are set off against "Contracting Parties" -- which are the nation-states signing on to the Agreement. A section of the MAI titled "Scope and Application: Definitions" explains that:

> *Investor* means: (i) a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law; or (ii) a legal person or any other entity constituted or organized under the applicable law of a Contracting Party, whether or not for profit and whether private or government-owned or controlled and includes a corporation, trust, partnership, sole proprietorship, joint venture association or organization. [OECD 1998:11]

A corporation is thus an "investor"—a term which fits nicely into the old liberal market conception of free and fair competition among individuals.[21] The rights of the investor under this agreement are of immediate concern. "Rights" are attributes of citizenship; in one respect they represent the accountability and restraint the subject-citizen can claim of the sovereign power. Additionally, as I have argued above, rights are analogous to taboos, or the indication of the subject's ritual value; they establish boundaries in respect of a sacred dignity that social actors may not violate.

Investor rights under the MAI are broad, essentially and eventually restricting prohibiting all national and local-level regulation or appropriation but those in the most extreme public interest (Barlow and Clarke 1998; OECD 1995, 1997, 1998). Rooted in an overarching faith in global economic growth (Miller 1963; Barnet and Müller 1974; Palast 1978; Bowman 1996; Nader and Wallach 1996; Korten 1996a, 1996b; Mander 1997; OECD 1995, 1996, 1997, 1998), the sacred status of the corporation is impressive, the taboos surrounding it daunting.

Should the taboos be broken, the corporation's rights abrogated, the MAI contains strong medicine. In addition to nation-state to nation-state grievance procedures (OECD 1998: 63), the Agreement provides for dispute resolution between aggrieved investors and offending nation-states. Significantly, there are no provisions by which states can prosecute investors.[22] According to the MAI negotiating text, disputes between one contracting state and an investor of another contracting state may concern "an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.... Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, *the investor may choose to submit it for resolution.*" (1998:70, italics added). Such submission for resolution may be, *at the investor's option*, to either the national courts of the defendant contracting state, to an earlier-agreed upon dispute resolution forum, or to international commercial arbitration (ICA) under one of several, established conventions (70). The authority of the investor under this section is enabled by another entitled "Contracting Party Consent," by which signatory nation-states "unconditional[ly] consent to the submission of a dispute to international arbitration" (1998:71). And the MAI includes severe sanctions that may be enacted against contracting parties that fail to honor a settlement or decision (Barlow and Clarke 1998; OECD 1997, 1998).

The establishment of ICA as a forum (as opposed particularly to a United Nations or International Court of Justice venue, which might conceivably possess some democratic legitimacy) is significant. International legal scholars Yves Dezalay and Bryant Garth (1995) note that not only have mandatory arbitration clauses become increasingly common in commercial contact, but that ICA has become *the* primary method of resolving international and transnational commercial disputes. This is so, they observe, for several reasons: the avoidance of perhaps prejudicial national courts, the lack of an international *public law* regime and importantly, the tight secrecy attendant to private arbitration (1995: 27-30).

Nader has outlined a "user theory of law," that accounts for the form, content and direction of a given legal system by a recognition that the system will be shaped most fundamentally by its primary users (1994: 1995). She explains that:

> [A] user theory of law would embrace the view of law as being made and changed by the cumulative efforts of its users and would argue

> that the law is being moved in a particular direction by the dominant users. Such unconsciously generated cumulative movements may be considered as separate from and yet equally as important as any consciously created ones attributable to legal engineering. [1984:952]

ICA seems to have developed in this manner. Dezalay and Garth indicate that the growth of the international arbitration industry was driven by the growth and new directions of international trade in the 1970s coupled with the development and rapid expansion of the petro-dollar and Euro-dollar markets (1995:44)—the latter of which by its nature eschewed regulatory oversight and national controls. The benefits of private law, including secrecy and avoidance of national courts, well served the emergent transnational firms that patronized the ICA system.

The decades-long establishment of ICA has imbued it with an air of legitimacy as Nader's theory seems to predict. Such incremental growth of law was foreseen by Miller, as well, who suggested that "[T]hrough a process of slow accretion, these routine activities can in time create a corpus of 'living law' of multinational constitutionalism, the living law of custom upon which any lasting argument must be built" (1961: 89). With the proposal of the MAI however, a formal transnational constitutionalism seeks to incorporate the living law of ICA custom. By doing so, the MAI would take for itself a degree of legitimacy by association.

Nader distinguishes cumulative drift and conscious legal engineering, acknowledging (as does Hurst) that both operate in the development of law ways. It is clear enough that the MAI is a function of legal engineering (as well as a codification of the cumulative and incremental trend in transnational economics and politics); as well, the incorporation of the user-shaped ICA regime reflects a convergence of the two creative factors. However, the fact that OECD seeks not only to co-opt the ICA realm, but support it with the coercive force of MAI-established sanctions, deserves further analysis.

An important component of Nader's paradigm is the empirically-derived notion that "the weaker party looks for the law while the stronger party prefers to negotiate" (1996: 8; 1995). While the MAI dispute resolution procedures do call for negotiated settlements, if possible, the strength of the protocol is in its provisions for mandatory arbitration or adjudication and its threat of sanctions. In other words, by backing private international arbitration with public, coercive force the MAI seeks to establish itself as the law. That the Agreement includes no provision for MAI-level state proceedings against investors merely underscores the fact that the investors are, under MAI, "seeking the law."

For the TNCs that stand most to benefit from the MAI are arguably weaker and less legitimate than the dominant nation-states. In terms of military capability and democratic authority, of course, but also in sheer economic analysis even the largest

TNCs are not (yet) a true match for, say, the US or Germany. The legal structure of MAI would tend to make far less relevant the TNCs' sometime relative weaknesses, by backing or supplanting negotiation with enforceable arbitration. To the extent that the OECD representatives of the sovereign, contracting nation-states seem to favor the arrangements offered by the MAI, their collaboration testifies to the controlling power of global free trade ideology, and a willingness to undercut formal and practical sovereignty by increasing the status and standing of the corporation.

Conclusion

The development of the concept of the corporation as an economic, social and political person is a function of the adaptation of United States society, through law and fundamental rearrangement of the economic order, to industrialization and the cascading results of each increment of commercial corporate empowerment. Within the framework of an individualistic political ideology, the ascendance of gargantuan national and transnational firms continues to challenge both the ideal and practical relevance of sovereignty (personal and national) and democratic rule. Subsumed in a codification of corporate personality and equality of persons before the law is a stark differential of power that has, in contrast to traditional ideology, displace the natural individual in favor of autonomous collectivities.

If Hurst is correct in his assertion, above, that the specific contours of US corporate law were not themselves determinative of the course of economic development, then the implication remains that to a certain degree the law merely reflected and legitimated the emerging realities. This notion, coupled with the declaration of law professor Lawrence M. Friedman, that "corporations confronted the law at every point. They hired lawyers and created whole law firms," (Grossman and Adams 1996:376, 384) firmly invokes Nader's user theory of law. Bowman observes that:

> . . . the modern corporation , as a non-statist political institution, is the most powerful institution of modern society. Its power may be gauged by the fact that the leaders of approximately 200 industrial and 50 financial corporations exercise control over the means of production and consumption, over the development of military and industrial technology and over the nature and location of employment. Viewed from the standpoint of class analysis, the top executives of these institutions comprise the hierarchy of the dominant class. [1996:267]

Inasmuch as many of these giant firms, worldwide, began in the US, legal doctrine developed by the US Supreme Court has had global impact. But the Court did not so much seek out these cases, as have them brought before it by the agency of the users of the legal system. This paper's survey of cases indicates that the dominant users were corporate business concerns. The doctrine of the corporation as person is a legal

fiction -- a convenient one that apparently became reified in judicial thought of the twentieth-century, in as much as latter allocation of personal political rights to the corporation was justified by the Court less on pragmatic grounds for appeals to the individual membership of the corporate collectivity, then on an ideational logic that extended to the corporation such rights as its due as a person, as well as imbuing it with a capacity of "mind" previously unrecognized.

The creation and development of the "corporate personality" fiction not only exposed the complex field of power relations and interrelations in the socio-economic realm, but required transformations of the dominant political philosophy to fit, as it were, these new, "big persons." The American economy incorporated new methods of transportation and production, and industry asserted itself against a predominantly agrarian economic base; as, in the aggregate, Supreme Court decisions tended to favor the establishment and growth of corporate capital.

These changes have been above all institutional, but supported by legal and philosophical movement that legitimated the structural alterations. Although the coercive legal aspect may have been necessary to secure the immediate acceptance of each step in the growth of corporate power, the long-term establishment of stable order must also have been the result of a re-education of the public, and ideology that justified (indeed, as we have seen, valorized) the new system.

The development of corporate personality and functional citizenship, as an aspect of corporate power, progressed along lines dictated by its need to fit into the root American political "religion," that of liberal individualism—and related global ideology of free trade. Incorporating concepts of the individual as a basic unit of society, his (for it was "his" place alone until late in the development of the system) right to labor and the fruit of his labor, his right to contract and compete fairly in the market, these ideologies suggest that economic liberty is the best assurance of freedom and prosperity. But the ascendancy of corporate individuals in the social and economic sphere has come at the cost of displacing, dispossessing and disrupting large bodies of natural individuals. Movements in opposition to the growth and perceived abuse of corporate power have attempted to re-assert the primacy of—or, later, merely shield from the greatest predations—the natural individual, the human persons from whom, it was originally conceived, authority and legitimacy of the political order flow.

Bowman (1996) has documented how the Populist and anti-monopoly movements, the Progressives and trust-busters and the consumer/environmental movements ranged in focus from outright opposition to the realities of corporate power, to quests to limit and regulate it, to attempts to make it more responsive to society and ameliorate some of its worst tendencies. But the corporation proved elusive and adaptable, the corporate personality close to inviolable.

Reaction and counter-reaction manifested in state legislatures -- and in the streets and fields. From the Grangers and Populists, to the Progressives, to the environmental and consumer movements of the 1960s and 1970s, to the current critics of globalization, the question of corporate power has been central to the struggle over the direction of social change. Such large movements of protest have articulated the contours of each phase in what has been a corporatizing of society, a series of dislocations and re-subjectifications of economics and politics.

This wider perspective shows the development of the fiction of corporate personality as one element of a complex interaction. The evolution of US case doctrine and legislation, as well as of international commercial protocols, indicates that corporate law is an instrument of emergent power in times of social flux. To study it is to encounter a shaping of law by the dominant users and primary beneficiaries.

Cases Cited

Allgeyer V. Louisiana, 165 US 578 (1897)

Austin V. Michigan Chamber of Commerce, 494 US 652 (1990)

Bank of Augusta v. Earle, 13 Peters 519 (1839)

Bank of the United States v. Deveaux, 5 Cranch 61 (1809)

Bigelow v. Virginia, 421 US 809 (1975)

Buckley v. Valeo, 424 US 1 (1976)

California Motor Transport v. Trucking Unlimited, 404 US 508 (1972)

Central Hudson Gas & Electric v. Public Service Commission, 447 US 557 (1980)

Charles River Bridge v. Warren Bridge, 11 Peters 420 (1837)

Chicago, Milwaukee and St. Paul Railroad v. Minnesota, 1234 US 418 (1890)

Connecticut General Life Insurance Co. v. Johnson, 303 US 77 (1938)

Consolidated Edison v. Public Service Commission, 447 US 530 (1980)

Dartmouth College v. Woodward, 4 Wheaton 518 (1819)

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, 365 US 127 (1961)

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 US 238 (1986)

Federal Election Commission v. National Right to Work Committee, Inc., 459 US 197 (1982)

First National Bank of Boston v. Bellotti, 435 US 765 (1978)

Hale v. Henkel, 201 US 43 (1950)

Louisville, Cincinnati, and Charleston Railway v. Letson, 2 Howard 497 (1844)

Marshall v. Baltimore & Ohio Railroad, 16 Howard 314 (1853)

Minneapolis & S.L.R. v. Beckwith, 129 US 26 (1889)

Munn v. Illinois, 94 US 113 (1877)

Noble v. Union River Logging Railroad, 147 US 165 (1893)

Pacific Gas & Electric v. Public Utilities Commission, 475 US 1 (1986)

Rundle v. The Delaware and Raritan Canal Co., 14 Howard 80 (1852)

San Mateo County v. Southern Pacific Railroad Co., 116 US 138 (1882)

Santa Clara County v. Southern Pacific Railroad Co., 118 US 394 (1886)

Slaughterhouse Cases, 16 Wall 36 (1873)

Terrett v. Taylor, 9 Crunch, 34 (1815)

United Mine Workers v. Pennington, 381 US 657 (1965)

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 US 748 (1976)

Wheeling Steel Corp., v. Glander, 337 US 562 (1948)

Notes

[1] Also worthy of research but not herein addressed are the implications of corporate personality in the adaptations by the Court of the doctrines of personal jurisdiction and the attorney-client privilege to the corporation.

[2] In its limited reference to Gramsci, this paper considers the term "hegemony" to mean simply "intellectual and moral leadership" (Gramsci 1997:57, Kurtz 1996:103, 105). No further glossing of the term is necessary for the purposes of this study: the point is merely to provide a convenient understanding of the court's role in promulgating ideology.

[3] "The judicial power shall extend... to controversies between two or more States, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." By the time of Deveaux this section had been modified by Amendment XI (ratified 1798), which removed from the judicial power any suits against a state by citizens of another state, or by foreign nationals.

[4] Grossman and Adams point out that many early constitutions (and associated laws) of the several states, expressly prohibited the sort of limited liability arrangements derived from and prevalent in Europe. Often the state laws required that investors each be fully liable for the corporation's debts (1996: 379-380). Grossman and Adams' research indicate that, like much of the explosion of corporate rights, the acceptance of limited liability was due (at least in important part) to pressure from industrialists and bankers (1996:378). Hurst concurs noting that "[D]rags derived from the law's own inertias or abstractions did not last much past the point at which businessmen began to make common and large scale use of the corporate form" (1970:157).

[5] Property is of course a function of state power -- or of coercive force in the starkest analysis. Appeals to natural law conceptions of property rights are disingenuous: as Marx pointed out, there is no historical "state of nature" in which man has existed without social interdependence. Property, whether collective or private, is a creation of social understanding and arrangement; in modern industrial society it is created and secured through the agency of state power, which is thus implicate in even classic liberal protestations. See Giddens (1971:35) and Gramsci (1997:272).

[6] "No state shall... pass any... law impairing the obligation of contracts..." (Art. I, Sec. 10).

[7] It is worth noting the relation of this Weberian notion to the difficulty in the late twentieth century of criticizing corporate power as other than based on merit. Weber's observation that under Calvinism and post-Calvinism, worldly success was an indicator of spiritual superiority goes some of the way toward an understanding of why the public is often unreceptive to suggestions that something is wrong with a "mixed" economy that allows such tremendous concentrations of wealth, power and of control of markets.

[8] It is critical to recognize that laissez faire was an ideology, rather than a practice, on virtually every level other than that of preventing society from regulating business. Legal historian Harry Scheiber points out that, contrary to the received wisdom, state policy in the 18th and 19th centuries was instrumental and interventionist toward creating economic growth and rearranging older patterns of property in order to foster development and capital accumulation (1975:59,63).

[9] Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[10] Amendment IV: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . . "

[11] Amendment V: "No person... shall be compelled in any criminal case to be a witness against himself. . . ."

[12] The States of Delaware and New Jersey, in particular, led the nation in adopting highly liberal, deregulative corporate legal frameworks, beginning with the move to general acts of incorporation and including the lifting of restriction on size, purpose, capitalization and ownership of other corporations. See Bowman (1996), Lustig (1982) and especially Grossman and Adams (1996), and Hurst (1970).

[13] "Congress shall make no law abridging... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[14] The idea of "money as speech" seems to possess certain animistic—or certainly totemic—properties of its own. "Speech"—particularly "free speech"—is certainly valorized in American constitutional liberalism and is often granted a sacred dignity of its woe. This can be seen clearly in the opinion and discussion of Bellotti below, in which the Court determined that what is protected by the First Amendment is not so much the right to speak, but the speech itself—possession of which seems to cloak the speaker in its dignity. The endowment of this sacred status on money (itself differently symbolic) is an interesting transmigration perhaps on a par with that of the movement of the royal dignity to the corporation (Kantorowicz, Rabinow, above).

[15] Bigelow v. Virginia (1975) and Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council (1976) firmly established the concept (earlier propounded by Justice Homes) of the "marketplace of ideas," in which ideas competed for utility and acceptance as truth. Under such a regime, there existed a right within the freedom of speech, corollary to the right to speak, which was the right to hear what was said. This "listener/consumer-centered" aspect was critical in establishing protection for commercial speech, and political speech no matter what the source (e.g., corporations).

In keeping with the actual operations of the US markets—generally contrary to the espoused principles of free and fair trade, through control of market pre-conditions by large-scale (corporate) enterprise—the Court in Buckley had held that legislative action designed to ameliorate enormous differentials of power, wealth and access to media, was unconstitutional. " . . . The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of other is wholly foreign to the First Amendment, which was designed 'to secure' the widest possible dissemination of information from diverse and

antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (Buckley, at 48-49).

[16] As discussed above, the emphasized passage indicates the Court's emphasis on speech, itself, as the protected entity. It is the speech that may not be "silenced," rather than any speaker. Again, this seems an interesting conceptual embodiment, and is consistent with the Court's ideas on the "marketplace of ideas." and a ranking of protection due speech as either political, commercial, or unprotected (fighting words, "fire" in a crowded theater, etc.). Nevertheless, such a construction, focusing as its object an intangible speech (as an element of society) certainly differs from an understanding of political protections.

[17] Perhaps the Court did not re-argue the speech protection as rooted in the speech itself because, under the circumstances, the speech was offensive -- even for commercial speech. The New York fuel shortage was but a piece of the national energy crisis associated with the Arab oil embargo of the early 1970s and the latter produced a widespread awareness of the need to curtail energy consumption. The PSCs action was in line with many other initiatives that stemmed from the crisis, such as, for example, federal gasoline consumption standards for the automobile industry. It is somewhat ironic, given the contemporaneous push toward expanded nuclear energy production and the popular demonization of Arabs that accompanied OPEC's embargo, that the PSC ban was not hailed by the Court as a measure in the national interest, if not national security.

[18] Rehnquist did not take lightly state grants of monopoly power, or even the ordinary grant of special privilege that accompanied general incorporation. Although the Court generally drew a distinction between the rights of commercial corporations and those of non-profit corporations organized for political purposes, Rehnquist held that it was the legislature's right to restrict the freedom of even he latter type, if it so deemed necessary. His dissent in Federal Election Commission v. Massachusetts Citizens for Life, Inc. supported a provision of the Federal Election Campaign Act that the Court struck down. Rehnquist wrote that the provision, which prohibited corporations from spending general treasury funds in an election for public office, was a justifiable right of the Congress to legislate "prophylactically" against corruption.

[19] Note that here (and like the decision in PG&E, which identified the violated speech right to be that of the speaker, albeit a corporate one) Scalia rejects earlier-discussed notions of speech, itself, as the protected entity. Rather, and I believe more traditionally, he identifies the speech right as inherent to and emanating from the subject speaker.

[20] Since this paper was originally written, the MAI appears to have withered on the vine, perhaps in response to anti-globalization politicking that prefigured the notorious, larger-scale protests in Seattle (2000) and Genoa (2001). Nevertheless, the ideas put forth in the MAI are moving forward: similar provisions as those criticized here appear in, for example, leaked drafts of the agreement to form a "Free Trade Area of the Americas" (FTAA). In particular, the FTAA is rumored to incorporate language granting private entities and investors standing to challenge the actions, policies, and laws of sovereign nation-states.

[21] It is beyond the scope of this study, but certainly noteworthy, that the Agreement subsumes all forms of commercial organization -- from individual to transnational

conglomerate—into a single term. This seems, of course, not only a simple way to conceptualize these myriad actors, but also an attempt to gloss those varied entities as equivalent. "Free trade" ideology and the concomitant need to avoid structural issues of differential socio-economic power would seem to demand no less.

[22] Presumably, such disputes could be handled by the national agencies and courts of the victimized state. However, given that central elements of the MAI (as well as NAFTA, GATT, et al) are devoted to reduction, rollback and elimination of national laws that might "negatively effect" the productivity, growth and profit of investments (Barlow and Clarke 1998; Nader and Wallach 1996; OECD 1995, 1997, 1998), the range of charges a state might conceivably bring against a corporation or other investor, is narrow and intended to get narrower.

However, corporate wrongdoing is no small matter—and not nearly the rare occurrence that sporadic and sensationalistic media coverage would suggest: The Corporate Crime Reporter (Washington, DC: American Communications and Publishing Co.) regularly documents the criminal violations of US corporations—among which are some of the transnational heavyweights.

Corporate criminal liability is a field which has significant relevance to corporate citizenship and conceptions of the corporation as a person. It is legitimate to inquire whether, if corporations are to receive the apolitical benefits of human status, they should not also be subject to the criminal law's sanctions. See Elkins (1976) for a history of corporate criminal standing, and Stone (1975) and Grossman and Adams (1996) for novel approaches to prosecution and sentencing.

References Cited

Arnold, Thurman W.
1937 The Folklore of Capitalism. New Haven: Yale University Press

Baldi, Marino
1997 Dispute Settlement. The Multilateral Agreement on Investment State of Play as of February 1997, OECD Working Papers 5(18).

Barlow, Maude and Tony Clarke
1998 MAI: The Multilateral Agreement on Investment and the Threat to American Freedom. New York: Stoddart.

Barnet, Richard J. and Ronald E. Müller
1974 Global Reach: The Power of the Multinational Corporation. New York: Simon and Schuster.

Berger, Klaus Peter
1997 The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts. Law and Policy in International Business 28(4):943-990.

Bowman, Scott R.
1996 The Modern Corporation and American Political Thought: Law, Power and Ideology. University Park, Pennsylvania: Pennsylvania State University Press.

Boudin, Louis
1938 Truth and Fiction about the Fourteenth Amendment. New York University Law Quarterly Review 16:19-82.

Deltec Research Project
1978 The Multinational Corporation as a Stage in the Development of Capitalism. In The World as a Company Town. Ahamed Idris-Soven, Elizabeth Idris-Soven and Mary K. Vaughan, eds. The Hague: Mouton.

Dezalay, Yves and Bryant Garth
1995 Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business disputes. Law and Society Review 29(1):27-46.

Durkheim, Emile
1979 The Elementary Forms of the Religious Life. In Reader in Comparative Religion: An Anthropological Approach. 4th ed. William A. Lessa and Evon Z. Vogt, eds. New York: Harper Collins.

Elkins, James R.
1976 Corporations and the Criminal Law. Kentucky Law Journal 65(2):73-129.

Fuller, Lon L.
1967 Legal Fictions. Stanford, California: Stanford University Press.

Geertz, Clifford
1979 Religion as Cultural System. In Reader in Comparative Religion: An Anthropological Approach. 4th ed. William A. Lessa and Evon Z. Vogt, eds. New York: HarperCollins.

Giddens, Anthony
1971 Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Max Weber. Cambridge: Cambridge University Press.

Gordon, Robert W.
1975 Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography. Law and Society Review 10(1):9-56.

Graham, Howard Jay
1938 The Conspiracy Theory of the Fourteenth Amendment. Yale Law Journal 47: 371-403.

Gramsci, Antonio
1997 Selections from the Prison Notebooks. Quintin Hoare and Geoffrey Nowell Smith, eds. and trans. New York: International Publishers

Grossman, Richard L. and Frank T. Adams
1996 Exercising Power over Corporations through State Charters. In The Case against the Global Economy and Toward a Turn to the Local. Jerry Mander and Edward Goldsmith, eds. San Francisco: Sierra Club.

Horwitz, Morton J.
1985 Santa Clara Revisited: The Development of Corporate Theory. West Virginia Law Review 88:173-224.

Hurst, James Willard
1950 The Growth of American Law: The Law Makers. Boston: Little Brown.

1970 The Legitimacy of the Business Corporation in the Laws of the United States 1780-1970. Charlottesville, Virginia: The University Press of Virginia.

1972 Law and Social Process in United States History. New York: Di Capo Press.

Kantorowicz, Ernst H.
1957 The King's Two Bodies: A Study in Mediaeval Political Theology. Princeton: Princeton University Press.

Korten, David C.
1996a The Failures of Bretton Woods. In The Case against the Global Economy and Toward a Turn to the Local. Jerry Mander and Edward Goldsmith, eds. San Francisco: Sierra Club.

1996b The Mythic Victory of Market Capitalism. In The Case against the Global Economy and Toward a Turn to the Local. Jerry Mander and Edward Goldsmith, eds. San Francisco: Sierra Club.

Kurtz, Donald V.
1996 Hegemony and Anthropology: Gramsci, Exegeses, Reinterpretations. Critique of Anthropology 16(2):103-135.

Lustig, R. Jeffrey
1982 Corporate Liberalism: The Origins of Modern American Political Theory, 1890-1920. Berkeley, California: University of California Press.

Maine, Henry
1917 Ancient Law. New York: Dutton.

Malinowski, Bronislaw
1979 The Role of Magic and Religion. In Reader in Comparative Religion: An Anthropological Approach. 4th ed. William A. Lessa and Evon Z. Vogt, eds. New York: HarperCollins.

Mander, Jerry
1996 The Dark Side of Globalization: What the Media Are Missing. The Nation, July 15-22:9-14.

Marcus, George E. and Michael M.J. Fischer
1986 Anthropology as Cultural Critique: An Experimental Moment in the Human Sciences. Chicago: University of Chicago Press.

McMichael, Philip
1995 The New Colonialism: Global Regulation and the Restructuring of the Interstate System. In A New World Order?: Global Transformations in the Late Twentieth Century. David A. Smith and József Böröcz, eds. Westport, Connecticut: Praeger.

Miller, Arthur Selwyn
1963 The Organization for Economic Co-operation and Development. In The Year Book of World Affairs 1963. Vol. 17. London: Stevens.

1968 The Supreme Court and American Capitalism. New York: The Free Press.

Nader, Laura
1984 A User Theory of Law. Southwestern Law Journal 38(4):951-963.

1995 Civilization and Its Negotiations. In Understanding Disputes: The Politics of Argument. Pat Caplan, ed. Oxford: Berg.

1996 Coercive Harmony: The Political Economy of Legal Models. Kroeber Anthropological Society Papers 80:1-13.

1997 Controlling Processes: Tracing the Dynamic Components of Power. Current Anthropology 38(5):711-737.

Nader, Ralph and Lori Wallach
1996 GATT, NAFTA and the Subversion of the Democratic Process. In The Case against the Global Economy and Toward a Turn to the Local. Jerry Mander and Edward Goldsmith, eds. San Francisco: Sierra Club.

Nobel, David F.
1977 America by Design: Science, Technology and the Rise of Corporate Capitalism. Oxford: Oxford University Press.

Organization for Economic Cooperation and Development (OECD)
1995 A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CIME) and the

Committee on Capital Movements and Invisible Transactions (CMIT). OECD Working Papers 3(49).

1996 Multilateral Agreement on Investment Progress Report by the MAI Negotiating Group. OECD Working Papers 6(32).

1998 The MAI Negotiating Text (as of 24 April 1998). Directorate for Financial, Fiscal and Enterprise Affairs. http://www.oecd.org/daf/cmis/mai/negtext.htm (maitext.pdf); 12 May 1999.

Palast, Gregory
1978 Financial Colonies: Inflation, Recession, Debt and the Multinational Corporation. In The World as a Company Town. Ahamed Idris-Soven, Elizabeth Idris-Soven and Mary K. Vaughn, eds. The Hague: Mouton

Pound, Roscoe
1909 Liberty of Contract. Yale Law Journal 18:454-478.

Rabinow, Paul
1996 Essays on the Anthropology of Reason. Princeton, New Jersey: Princeton University Press.

Radcliffe-Brown, A.R.
1979 Taboo. In Reader in Comparative Religion: An Anthropological Approach. 4th ed. William A. Lessa and Evon Z. Vogt, eds. New York: Harper Collins.

Sachs, Jeffrey
1996 Economic Reform and the Process of Global Integration. 1996 Panglaykim Lecture, June 18. Jakarta: Panglaykim Foundation.

Said, Edward W.
1978 Orientalism. New York: Pantheon Books.

Sassen, Saskia
1993 Economic Globalization: A New Geography, Composition and Institutional Framework. In Global Visions: Beyond the New World Order. Jeremy Breecher, John Brown Childs and Jill Cutler, eds. Boston: South End Press.

1996 Losing Control?: Sovereignty in an Age of Globalization. New York: Columbia University Press.

Scheiber, Harry N.
1975 Federalism and the American Economic Order, 1789-1910. Law and Society Review 10(1):57-118.

Sciulli, David
1999 Corporations vs. the Court: Private Power, Public Interest. Boulder, Colorado: Lynne Reinner Publishers.

Stone, Christopher D.
1975 Where the Law Ends: The Social Control of Corporate Behavior. New York: Harper Torchbooks.

Strange, Susan
1996 The Retreat of the State: The Diffusion of Power in the New World Economy. Cambridge: Cambridge University Press.

Tushnet, Mark
1982 Corporations and Free Speech. In The Politics of Law: A Progressive Critique. New York: Pantheon Books.

Tylor, Edward B.
1979 Animism. In Reader in Comparative Religion: An Anthropological Approach. 4th ed. William A. Lessa and Evon Z. Vogt, eds. New York: Harper Collins.

Unt, Lore
1997 International Relations and International Insolvency Cooperation: Liberalism, Institutionalism and Transnational Legal Dialogue. Law and Policy in International Business 28(4):1037-1106.

Wallerstein, Immanuel Maurice
1974 The Modern World System. New York: Academic Press.

Weber, Max
1992 The Protestant Ethic and the Spirit of Capitalism. Talcott Parsons, trans. New York: Routledge.