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## ARTICLE

# JUSTICE BRANDEIS' DILEMMA REVISITED: THE PRIVILEGED POSITION OF CORPORATE POWER IN AMERICAN DEMOCRACY

DAVID SCHULTZ\*

Former U.S. Supreme Court Justice Louis Brandeis once posed a political-economic dilemma for the United States when he reportedly declared: “We must make our choice. . . . We may have democracy, or we may have wealth concentrated in the hands of a few, but we can’t have both.”<sup>1</sup> This statement captured a thought shared by Progressives at the beginning of the twentieth century that America was rapidly approaching a point where the gap between the rich and poor would reach then historic levels, not to be surpassed again until the beginning of the twenty-first century.

But while Brandeis saw wealth concentrating, he and other Progressives such as President Roosevelt saw another threat to American democracy—the emergence of large trusts and corporations wielding tremendous political and economic power.<sup>2</sup> In *Other People’s Money*, Brandeis indicted banks and other financial institutions as threats to America because of their ability to manage and control credit, money, and thereby commandeer the economy due to their sheer bigness.<sup>3</sup> The Sherman Anti-Trust Act,<sup>4</sup> the Clayton Anti-Trust Act,<sup>5</sup> and the Tillman Act<sup>6</sup> were but three pieces of

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1. Raymond Lonergan, *Labor, Organ of the 15 Recognized Standard Railroad Labor Organizations*, in MR. JUSTICE BRANDEIS, *GREAT AMERICAN* 42 (Irving Dilliard ed., 1941).

2. See Andrew Glass, *Theodore Roosevelt Assails Monologies*, Dec. 3, 1901, POLITICO (Dec. 3, 2018, 12:00 AM EST), <https://www.politico.com/story/2018/12/03/this-day-in-politics-december-3-1027800>.

3. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 188 (1914).

4. 2 DUMAS MALONE & BASIL RAUCH, *EMPIRE FOR LIBERTY: THE GENESIS AND GROWTH OF THE UNITED STATES OF AMERICA* 143–44 (1960).

5. See Martin J. Sklar, *The Corporation Reconstruction of American Capitalism, 1890–1916*, at 330–31 (1989).

legislation aimed at breaking up the concentration of corporate power in American politics.

Yet this legislation did not work. In 1977, the fear of corporate power prompted political scientist Charles Lindblom to an examination of the “privileged position of business” in America, leading him to exclaim in the final two sentences of the book that the “large private corporation fits oddly into democratic theory and vision. Indeed, it does not fit.”<sup>7</sup> The book was a damning critique of corporate power in America, especially coming from someone who was a mainstream political scientist who had previously defended the democratic character of the United States in books such as *The Intelligence of Democracy*.<sup>8</sup>

Now, in the third decade of the twenty-first century, we again need to wonder about corporate power in the United States. Efforts by President Biden and the Congress in 2021 to increase corporate income tax rates were yet again thwarted,<sup>9</sup> perhaps due in part to lobbying pressure by corporations. Similarly, demands to regulate social media<sup>10</sup> and the price of drugs are facing doubtful passage.<sup>11</sup> It becomes difficult to explain the pattern of policy-making in Congress on major pieces of legislation without recognizing the impact that corporate lobbying has had. It also may not be a coincidence that corporate political expenditures have dramatically increased after *Citizens United v. FEC*<sup>12</sup> and political candidates are unlikely to support policies not supported by corporations.<sup>13</sup> It may not be a coincidence that the percentage of the U.S. labor force that is collectively bargained has gone down just at the same time that corporate political activity has increased. Perhaps nearly 50 years after Charles Lindblom and more than 100 years after Louis Brandeis wrote, corporations retain their privileged position in American politics.

6. DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* 230 (2014).

7. CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* 356 (1977).

8. See generally CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT* (1965).

9. See Jenny Leonard & Josh Wingrove, *Biden Says He Doesn't See Votes to Raise Tax Rates in Deal*, BLOOMBERG (Oct. 21, 2021, 7:18 PM CDT), <https://www.bloomberg.com/news/articles/2021-10-22/biden-says-he-expects-deal-on-economic-agenda-as-policies-shrink>.

10. See Lauren Feiner, *Facebook Spent More on Lobbying than Any Other Big Tech Company in 2020*, CNBC (Jan. 22, 2021, 11:03 AM EST), <https://www.cnbc.com/2021/01/22/facebook-spent-more-on-lobbying-than-any-other-big-tech-company-in-2020.html>; see also Dean DeChiaro, *Partisan Bickering Could Doom Efforts to Regulate Social Media Companies*, ROLL CALL (Dec. 7, 2021, 6:00 AM), <https://www.rollcall.com/2021/12/07/partisan-bickering-could-doom-efforts-to-regulate-social-media-companies/>.

11. See Margot Sanger-Katz, *Democrats' Stumble on Drug Prices Shows Power of Industry*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/15/upshot/democrats-stumble-drug-prices.html>.

12. *Citizens United v. FEC*, 588 U.S. 310 (2010).

13. See Tim Lau, *Citizens United Explained*, BRENNAN CTR. FOR JUST. (Dec. 12, 2019), <https://www.brennancenter.org/our-work/research-reports/citizens-united-explained>.

This article examines the role of corporate power in American politics. What it shall argue is that private corporations persist as an anomaly in American politics and democratic theory. They do so because of both the internal authority they have over the people who work within them, but also, they are an external threat to the democratic governance and decision-making in the way they are permitted to convert their economic resources and use their corporate structure in ways inconsistent with the principles of American democracy. To make this claim, the first section of the article provides a brief overview of the main elements of American democratic theory, indicating that the major goal of it was to limit concentrations of power. Second, the article will discuss the elements of the privileged powers that corporations exercise within the United States. Third, the article will suggest that the jurisprudence of the U.S. Supreme Court has enabled this aggrandizement of corporate power. Finally, the article concludes by contending that the basic principles of American democratic theory compel the extension of numerous checks on corporations in order to contain their influence.

## I. A BRIEF EXPLANATION OF AMERICAN DEMOCRATIC THEORY

### A. *An Overview of Democratic Theory*

The ontology of a democracy is what distinguishes it from other types of political regimes. By ontology it is meant that a democracy has its own unique values, institutions, and structures.<sup>14</sup> It defines who has a voice in political affairs and over what types of subjects. Democracies, more specifically, have a set of values they seek to enable, with specific institutions and processes set up to enable those values. Traditionally democracies have been thought of as limited to the political governance of a society, specifically to the type of regime. Many books, more than those that could be cited here, have been written that seek to define what a democracy is. Yet according to Robert Dahl, one of the preeminent thinkers about American democracy, polyarchies—the term he prefers to use in lieu of democracy—are too characterized by a distinct set of values.<sup>15</sup> What are they?

Robert Dahl lists five of what he calls criteria or values for a democracy.<sup>16</sup> These five are voting equality, effective participation, enlightened understanding, control of the agenda, and inclusion. Dahl's criteria are simi-

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14. David Schultz, *The Phenomenology of Democracy: Putnam, Pluralism, and Voluntary Associations*, in *SOCIAL CAPITAL* 74 (Scott L. McLean et al., eds., 2002).

15. See generally ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956) [hereinafter DAHL, *PREFACE TO DEMOCRATIC THEORY*]; see also ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1972) [hereinafter DAHL, *POLYARCHY*].

16. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 222 tbl.15.1 (1989).

lar to what other democratic theorists have described as the requisites or values central to describing what a democracy is.<sup>17</sup>

If democracy means anything, it seems to include an idea of some sort of equality.<sup>18</sup> Now there are significant debates regarding what type of equality is demanded of a democratic society. Dahl himself argues for both a procedural or formal sense of equality before the law as well as some type of substantive equality in terms of economic resources.<sup>19</sup> Others, too, have described various meanings of equality as essential to democracy.<sup>20</sup> Theorists such as John Rawls have rendered similar claims, contending that a liberal democracy adhering to his two principles of justice—equal liberty for all consistent with like liberty for others, and the structuring of economic inequalities so that they are of benefit to the least advantaged representative person in society—demand something approaching equality both in terms of economic conditions and before the law.<sup>21</sup> It may not be important to articulate the exact notion of equality but, simply stated, perhaps it is that each voice in the political process, but as Jeremy Bentham and other nineteenth century philosophers would declare, each person should count as one and no more than one.<sup>22</sup> Democracies mean that each person has an equal voice, and the equal freedom to act upon that voice. Thus, Rawls may be correct in describing the first principle of justice as perhaps also the first rule of a democracy: that each person is entitled to “the most extensive basic liberty compatible with a similar liberty for others.”<sup>23</sup>

The second criteria or value of a democracy is effective participation. This flows from the first principle, equality. What does effective participation mean? Here, Dahl describes this requirement as giving citizens a way to express their views on the final outcome of a choice, and that includes time to place questions on the agenda and the chance to opt for one out-

17. See J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* (1979), and GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* (1987), for general discussions of democratic theories and criteria used to evaluate regimes.

18. See, e.g., PENNOCK, *supra* note 17, at 35; see also SARTORI, *supra* note 17, at 58–59, 342–44.

19. See generally ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1985); see also DAHL, *supra* note 16, at 83.

20. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269, 304, 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 96 (Maurice Cranston trans., Penguin Books 1977); JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 48–50 (Prometheus Books, 1986); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

21. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter *THEORY OF JUSTICE*]; see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993). For a more general discussion of the role of equality in modern western political thought, see JOHN RAWLS, *LECTURES ON THE HISTORY OF POLITICAL PHILOSOPHY* (2007).

22. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1948); see also ELIE HALÉVY, *THE GROWTH OF PHILOSOPHICAL RADICALISM* 139, 147 (Mary Morris trans., 1955).

23. *THEORY OF JUSTICE*, *supra* note 21, at 60.

come over another.<sup>24</sup> It also includes giving voters the choice at the decisive points in the decision-making process.<sup>25</sup>

A third value that Dahl describes as essential for a democracy is enlightened understanding.<sup>26</sup> It would be naïve to say that one has a right to vote or make choices but that one has no right to gather the information necessary to make informed choices. At some point along the way, there is a belief or need for citizens to gather information, talk to others, share ideas, or even work together if the idea of effective participation is to mean anything. James Madison would claim in *The Federalist Nos. 47 and 49* that “all government rests on opinion.”<sup>27</sup>

The fourth requisite according to Dahl for a democracy is control of the agenda.<sup>28</sup> This value has already been spoken of above. Control of the agenda means the people get to decide what will be decided. They get to make the choices over who the elected leaders are and with that, what the major issues, and perhaps ideas, are that they want pursued in furtherance of their concept of the good.

Buried within this idea of control of the agenda is the concept of majority rule. Again, this idea seems to come from John Locke.<sup>29</sup> But majority rule suggests that the decision-making system that defines what will be on the agenda is also determined by the majority. This speaks to the notion that there must be some mechanism of deciding what to do when everyone does not agree.

A final value or criteria for a polyarchy according to Dahl is the principle of inclusion.<sup>30</sup> The principle of inclusion asks who gets to have a voice in the affairs of the government and what constitutes a voice. Is a voice simply voting? Is it participating in political debates? Does it include more? These are important questions, but certainly a privilege of democratic citizenship is a right to participate and make decisions affecting one's role in the community.

Robert Dahl's five values are perhaps not the sum of those essential to defining those which are critical or requisites for a democracy. One, overall, needs to think about the goals of a democratic system, what one is trying to achieve, and then to ask what types of institutions can best be fashioned or implemented to secure these goals. Thus, institutions matter. For Dahl, each of the five criteria he articulates comes with specific institutions that must

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24. DAHL, *supra* note 16, at 89.

25. DAHL, *supra* note 16, at 109.

26. DAHL, *supra* note 16, at 111–12.

27. THE FEDERALIST NO. 49, at 345 (James Madison) (Tudor Publishing Co., 1937); *see also* THE FEDERALIST NO. 47, *supra*, at 329–337 (James Madison).

28. DAHL, *supra* note 16, at 112–14.

29. *See* LOCKE, *supra* note 20, at 362; *see generally* WILLMOORE KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE (1965).

30. DAHL, *supra* note 16, at 119–121.

be in operation.<sup>31</sup> Democratic values necessitate parallel institutions to put them into practice.

Finally, while Dahl's earlier works on American democracy looked at the operations of the government, later on, he described democracy and democratic theory as evolving across three waves from first, direct democracy, to representative democracy, and into the future, economic democracy.<sup>32</sup> In both his *A Preface to Economic Democracy* and *Democracy and its Critics*, he asks how individual liberty and equality can be reconciled with high concentrations of power in the hands of corporations, which largely are immune from the five criteria of democracy he articulates.<sup>33</sup> Decentralizing power into relatively autonomous business enterprises does not create a self-regulating economic or political order, and such a system also denies both workers and the public the capacity to make choices over a major fact of their lives.<sup>34</sup> Current conceptions of democracy only go so far, failing to place within public control many of the most important decisions and institutions that impact the people.<sup>35</sup> In effect, the next wave of democracy needs to encompass the economy if human autonomy is to be respected.<sup>36</sup>

### B. *Madisonian Democracy and the Problem of Politics*

American democratic theory is indebted to a cluster of political or founding values that helped define it. These are values that are similar to what Robert Dahl and others noted above have discussed. These values came together in the drafting of the U.S. Constitution as a framework for structuring how the American political system is supposed to operate. While some may challenge the notion that the United States is or was designed to be a democracy, even a representative version of one, at least for the sake of argument, let us assume that the American Constitutional Founders were seeking to create some sort of popular government. What did they try to achieve?

Central to the Framers' vision was fear.<sup>37</sup> By that, the desire to seek independence from England in 1776 was a fear of monarchical power and its potential abuses. The Declaration of Independence literally provides a list of indictments against King George regarding his misuse of authority in

31. DAHL, *supra* note 16.

32. See DAHL, PREFACE TO DEMOCRATIC THEORY, *supra* note 15; DAHL, *supra* note 16.

33. See DAHL, *supra* note 19, at 89; see also DAHL *supra* note 16.

34. See DAHL, *supra* note 19.

35. See DAHL, *supra* note 19, at 55–66.

36. See ROBIN ARCHER, ECONOMIC DEMOCRACY: THE POLITICS OF FEASIBLE SOCIALISM 38–60 (1991).

37. See JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 15–21 (1981); 1 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 82–85 (1991); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 472–75 (1972).

ways that the Founders came to think, first, were incompatible with their rights as British citizens, and then eventually, with their natural rights as individuals. What they then produced was the country's first constitution, the Articles of Confederation, which placed significant limits on national power.

Yet fear was also a problem with the Articles' government. Its weak structure, including, over the regulation of commerce among states, a lack of national judiciary, and an independent president, led some to push for reforms to the Articles of Confederation. Shays' Rebellion also prompted some to fear the national government was too weak.

The Constitutional Convention of 1787 was pervaded by multiple fears. Fear of creating a government too powerful or one too weak. But there were also other fears.<sup>38</sup> The slave and free states each feared that constitutional reforms might weaken them or strengthen the other side.<sup>39</sup> The more and less populous states also feared being losers, as did northern versus southern states. Fear produced many compromises and mechanisms to prevent others from securing too much power and potentially abusing it.

*The Federalist Papers*, as penned by Alexander Hamilton, James Madison, and John Jay capture this fear, keying in on human nature and popular government as inherent threats to liberty and freedom.

In *The Federalist No. 49*, Madison claims that "all government rests on opinion."<sup>40</sup> Public opinion is composed of the sentiments and passions of the majority of people organized together for particular purposes. Arguably, the strength of republican government is that it rests upon public opinion, drawing its democratic impulse and authority from the consent of the government. Public opinion is both popular sentiment and popular sovereignty. The sentiment of public opinion is the ruler in a popular democracy, yet this sentiment is not firm and stable but unstable, subject to frequent changes and to fits of passion and excess. For Madison it is unwise for a government to make frequent appeals to popular sentiment and public opinion in order to decide political issues.<sup>41</sup> The reason for this is grounded in human nature.

In *The Federalist No. 6*, Hamilton states that: "[M]en are ambitious, vindictive, and rapacious."<sup>42</sup> Individuals are not always virtuous, but prone to self-interest, desire, and the passions. Yet these sentiments are not good for politics. Passion should not decide public issues. Instead, some mechanism is needed to calm or repress these passions and filter them out so that more rational and calm individuals can reach public choices. Madison further describes this view of human nature and the problem of the passions in

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38. See RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 3–21 (1973).

39. See generally KELLY ET AL., *supra* note 37; MALONE & RAUCH, *supra* note 4, at 227–36.

40. THE FEDERALIST NO. 49, *supra* note 27, at 345 (James Madison).

41. See THE FEDERALIST NO. 47, *supra* note 27, at 329 (James Madison).

42. THE FEDERALIST NO. 6, *supra* note 27, at 35 (Alexander Hamilton).



both *The Federalist Nos. 10* and *51*. In a popular government resting on opinion, passion will usually rule because men (and presumably women) will band together in groups that Madison called factions.<sup>43</sup>

What is a faction for Madison and how do factions relate to speech and public opinion? According to Madison:

By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.<sup>44</sup>

Factions are politically dangerous, threatening the public good and rights of others. But ridding a society of factions is impossible. For Madison, “[t]he latent causes of faction are thus sown in the nature of man.”<sup>45</sup> In *The Federalist No. 51* he similarly states: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”<sup>46</sup> Humans, whether as government officials or citizens, or both, are human, prone to misjudgments, passion, and the errors that characterize us all as imperfect beings.

If the causes of faction cannot be eliminated, the goal then needs to be to control their effects. Madison asserts that minority factions, those constituting less than 50 percent of the population, can be controlled by the power of voting. But what do we do with a majority faction? As stated by James Madison:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.<sup>47</sup>

The issue is, then, checking majority faction, protecting the public and minority from them. The problem of American politics for the Constitutional Framers is checking majority power and its abuses. The solution? It is

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43. See generally THE FEDERALIST NOS. 10, 51, *supra* note 27 (James Madison).

44. THE FEDERALIST NO. 10, *supra* note 27, at 63 (James Madison).

45. THE FEDERALIST NO. 10, *supra* note 27, at 64 (James Madison).

46. THE FEDERALIST NO. 51, *supra* note 27, at 354 (James Madison).

47. THE FEDERALIST NO. 10, *supra* note 27, at 66 (James Madison).

the complex process of creating a large and diverse society to make it hard for factions to form. But it is also the use of representatives to check the passions of the people, and then the use of separation of powers, checks and balances, bicameralism, and federalism. Think of these six constitutional or institutional fears as mechanisms to break up and check political power. It is the idea that no one person, agency, institution, branch, or level of government can or should have too much power for fear that it can abuse it. The U.S. Constitution, and then eventually the addition of the Bill of Rights, is simply a mechanism to check and constrain the abuse of power.

Now, one can argue that the model articulated here has its flaws or that it was not truly democratic. Additionally, one can argue that the Framers either did not see or underestimated some matters, such as the power or authority of minority factions to adversely impact the political process. But if we argue that the main thrust of the Constitution and aim of the Framers was to constrain abuses of power in order to protect political liberty and equality, we can then apply this logic to corporations.

### C. *Democracy and Capitalism*

There is a long debate over the historic, if not the conceptual or political, compatibility of democracy and capitalism. One argument starts first with Max Weber who argued that the ethos or spirit of capitalism, as he called it, began with Protestant, specifically Calvinistic, searches for assurances of divine salvation with earthly proof of it residing in material or financial success.<sup>48</sup> Thus, the proverbial Protestant work ethic is at the root of the capitalist ethos. While some challenge the connections between Protestantism and capitalism,<sup>49</sup> others see a connection between spiritual individualism, economic freedom, and eventually the political individualism at the heart of democracy.<sup>50</sup>

There is no question that from a historic perspective, democracy and what we refer to as capitalism arose during the same time periods beginning in the seventeenth century. Both democracy and capitalism relied, at this time, upon the emergence of limited governmental power, including that of the royalty. Both capitalism and democracy drew upon the support of a new class of merchants who demanded limits on the government.<sup>51</sup> Without weighing into a detailed debate on the historic connections between the

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48. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Claude Teweles, ed., Stephen King trans., Roxbury Publishing Co. 2002) (1930).

49. See generally ROBERT W. GREEN, *PROTESTANTISM AND CAPITALISM: THE WEBER THESIS AND ITS CRITICS* (D. C. Heath & Co., 1959).

50. See Samuel Mencher, *Individualism in Modern Western Culture*, 28 Sw. Soc. Sci. Q. 257 (1947).

51. See generally IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* (1979) (describing the historical evolution and structural characteristics of the capitalist world-economy); IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM* (1976) (describing the origins of the European world-economy in the sixteenth century).

two, it is certainly enough to say that at least at one time capitalism and democracy seemed to arise together and support one another, with political thinkers such as John Locke and Jeremy Bentham, among others, drawing upon similar arguments to support both.<sup>52</sup>

The question now is whether capitalism and democracy are inextricably connected. Milton Friedman would argue yes, especially taking the claim that democracy is only compatible with near laissez-faire capitalism but not with other forms such as welfare state variations.<sup>53</sup> Others such as John Maynard Keynes disagreed and described ways that welfare states could support democracy.<sup>54</sup> Further, Marxist or left critiques of capitalism contend that even if at some point capitalism and democracy were aligned,<sup>55</sup> at some point in the nineteenth century, perhaps with the 1848 revolutions, the two went down separate paths.<sup>56</sup> Through the nineteenth and twentieth centuries, the argument from the socialist or Marxist left was that capitalism and democracy were incompatible, and only socialism was capable of ushering in true democracy.<sup>57</sup>

Again, it would be impossible to resolve or cover this debate in any meaningful detail. The main point is that some would argue that capitalism's need to limit or capture the state so that capitalists and corporations can maximize profits is a sign that, often, private power or non-governmental entities exercise significant authority and constrain the capacity of people to express their will. While there may be something called a political democracy, it is limited by economic actors who can preempt the choices made by others in the political process.

#### D. Summary

Democracy, including that in the United States, evolved over time with the goal of limiting power. It was premised upon a fear of how the government could suppress individual rights, with the solution being to enable structures to break up and divide the use of authority. The hope was that such a complex system, especially the American variant of checks and bal-

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52. See HALÉVY, *supra* note 22, at 88–153 (describing the relationship between economic reasoning and democratic politics).

53. See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

54. See generally JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (2016).

55. See, e.g., WOLFGANG ABENDROTH, *A SHORT HISTORY OF THE EUROPEAN WORKING CLASS 22–24* (Nicholas Jacobs & Brian Trench trans., 1972) (describing the split between the bourgeoisie, capitalism, and democracy with the 1848 revolutions across Europe). See KARL MARX, *CLASS STRUGGLES IN FRANCE 1848–50* (Int'l Publishers 1964) (1934), and KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* (1963) for similar arguments.

56. ABENDROTH, *supra* note 55, at 51–69.

57. See KARL MARX, *CRITIQUE OF THE GOTHA PROGRAMME* (C.P. Dutt ed., Int'l Publishers Co. rev. trans. 1938); see also C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 6–12* (1977) (describing how the merger of capitalism and democracy has resulted in a suffocating or suppressing of essential human ethical powers and capabilities).

ances and separation of powers, would do that. At the time of the construction of the U.S. Constitution in 1787, capitalism was still in its infancy, and either it was not seen as something which was a threat to individual freedom that needed to be limited, or democracy and capitalism were at least seen as not incompatible. The point here is that the focus in 1787 was on creating a political democracy to limit governmental authority, and there was not as much attention on addressing the threats that economic actors, such as corporations, could have in terms of limiting democracy. Limiting democracy to the governmental structures could be seen as either an oversight or perhaps a design flaw, especially if we throw in the emergence of corporations.

## II. THE CORPORATION IN AMERICAN POLITICS

### A. *Corporations in Early American History to the New Deal*

The Framers were not obtuse when it came to thinking about the relationship of economic and political power. Among the political traditions that influenced the Framers and American political thought was Republicanism.<sup>58</sup> Writers such as James Harrington, in *Oceana*, described how political power was related to concentrations of wealth.<sup>59</sup> Therefore, there was a fear that wealthy individuals could use their resources to corrupt the political process. However, the focus of Republicanism was less on corporations and more on individuals and their wealth.

There are two truths when it comes to how the Constitutional Framers thought about corporations, if at all. One, circa 1787, corporations, at least as we think of them today, did not exist.<sup>60</sup> Two, they were not thought of as constitutional persons possessing any political rights or authority.<sup>61</sup>

Corporations, at least in terms of the type we think of today with thousands or more employees and hundreds of billions of dollars in assets, simply did not exist during the American colonial era or even into the early nineteenth century.<sup>62</sup> Yet corporations did exist, with many of them arising from royal charters, which the Framers did see as threats. While in some cases these corporations and their charters were seen as sources of material wealth, they were also seen as forms of unaccountable private power that were prone to abuses.<sup>63</sup> Efforts to trim back corporate charters trace back to

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58. See J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT* (1975) (describing the republican influence upon the American founding).

59. See generally JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (London, Printed for D. Pakeman 1656).

60. Naomi R. Lamoreaux & William J. Novak, *Corporations and American Democracy: An Introduction*, in NAOMI R. LAMOREAUX & WILLIAM J. NOVAK, *CORPORATIONS AND AMERICAN DEMOCRACY* 1, 3 (2017).

61. *Id.*

62. *Id.*

63. *Id.* at 2.

early American law, with cases such as *Dartmouth College v. Woodward*<sup>64</sup> and *Charles River Bridge v. Warren Bridge*<sup>65</sup> wrangling over the ability of states to change or regulate corporations.

Yet by the early nineteenth century, corporations began to emerge as the U.S. Industrial Revolution took off. Again, while others have told a more extensive story of this,<sup>66</sup> various industries such as banking<sup>67</sup> and railroads<sup>68</sup> emerged before the Civil War as major concerns because of their financial size and political clout. There were fears that corporations associated with these industries were corrupting the political process by seeking to bribe or influence state legislators.

Post-Civil War is really the era of the major growth of corporations in America. Businesses representing various industries, such as sugar, oil, steel, and other commodities formed trusts or conglomerates, that were feared for their ability to dictate prices and restrict competition.<sup>69</sup> Legislatively, the response to their growing power were efforts to break them up via the Sherman Anti-Trust Act, the Clayton Anti-Trust Act, and by the creation of the Interstate Commerce Commission. Pop culture books, such as those by Upton Sinclair<sup>70</sup> and Ida Tarbell,<sup>71</sup> depicted the abuses in the meat packing and oil industries. Henry Demarest Lloyd's *Wealth Against Commonwealth* described how Standard Oil co-opted the government to further its interests.<sup>72</sup> Additionally, as corporations flexed their political muscle, they increasingly spent more money to impact campaigns and elections. By 1907, this led to the passage of the Tillman Act as an effort to restrict their political activities by barring corporate contributions to federal candidates for office.<sup>73</sup> Subsequently, with the adoption of the Taft-Hartley Act in 1947 the ban was on any corporate expenditures to affect federal elections.<sup>74</sup> States enacted similar laws.

If all these laws were efforts to trim back on the external authority corporations had to affect politics and business competition, internally corporations were growing as powerful entities that controlled the lives of their employees. Working conditions were often awful, with long hours, low pay,

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

65. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

66. See SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE* (3d ed. 1993).

67. See, e.g., Sharon Ann Murphy, *Banks and Banking in the Early American Republic*, 10 HIST. COMPASS 409 (2012); RON CHERNOW, *THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE* (2001) (discussing the rise of banks and their power in American history).

68. See JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* (2001).

69. See CASHMAN, *supra* note 66.

70. See UPTON SINCLAIR, *THE JUNGLE* (1905).

71. See IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904).

72. HENRY DEMAREST LLOYD, *WEALTH AGAINST COMMONWEALTH* 14–28 (Thomas C. Cochran ed., 1963).

73. SCHULTZ, *supra* note 6, at 230.

74. SCHULTZ, *supra* note 6, at 230.

child labor, and unsafe employment conditions.<sup>75</sup> Workers responded with labor strikes that were often broken up with force as corporations hired private security such as the Pinkertons to do that.<sup>76</sup> By the time of the New Deal, labor unrest was so significant that several packages of legislation were adopted to place constraints on corporations.<sup>77</sup> These included the National Labor Relations Act that allowed for unionization and collective bargaining, as well as workplace safety laws and time and wage legislation.<sup>78</sup>

The point of this brief summary of the growth of corporations until the New Deal is to establish several points. One, while corporations have changed in their structure and size since the colonial era, they have always been viewed with suspicion because of the economic power they leverage, and their ability to translate such power into political leverage. Two, an alternative reading of American political and legal history could be recast as a story of how the federal and state governments passed laws to regulate corporations and the response by the Supreme Court that often thwarted such regulation.

### *B. The Supreme Court and the Creation of the Corporate Personality*

No one would argue that corporations are real human persons. Nor is there any indication that among the multiple usages or references to the word person in the Constitution, the Bill of Rights, or subsequent amendments, that corporations were considered to be persons and given the rights that real people have. Nonetheless, the Supreme Court, early on, generally gave protection to corporate power and rights. In *Dartmouth College v. Woodward*, the Court used the Contract Clause of the Constitution to limit state regulation of corporations.<sup>79</sup> In *United States v. Deveaux*, corporations were to be treated like citizens for the purposes of diversity suits.<sup>80</sup> In *Marshall v. Baltimore & Ohio Railroad*, shareholders of corporations were treated as citizens for diversity suits.<sup>81</sup> By the early nineteenth century, the Supreme Court was well on its way to using the “contract clause with a view of corporations as artificial legal entities” with rights.<sup>82</sup>

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75. See MELVYN DUBOFSKY, *INDUSTRIALISM AND THE AMERICAN WORKER 1865-1920* (2nd ed. 1996).

76. *Id.*

77. See, e.g., JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR 320-46* (1966) (describing the legislative compromise between union and businesses that resulted in the adoption of the National Labor Relations Act).

78. MALONE & RAUSCH, *supra* note 4, at 581-83.

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

80. See *United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy*, in *CORPORATIONS AND AMERICAN DEMOCRACY*, *supra* note 60, at 245, 249 (2017).

81. See *Marshall v. Baltimore & Ohio R.R.*, 57 U.S. (1 How.) 314 (1853).

82. Blair & Pollman, *supra* note 80, at 250-51.

After the Civil War is really when the Supreme Court gave significant expansion to the power of corporations, giving them constitutional protections.<sup>83</sup> In *Minneapolis & St. Louis Railroad Co. v. Beckwith*, corporations were allowed to invoke constitutional protections of property that human persons enjoy.<sup>84</sup> Then, in *County of Santa Clara v. Southern Pacific Railroad Co.*, and two years later in *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, corporations were given protection under the Privileges and Immunities Clause.<sup>85</sup>

Under many traditional stories of U.S. constitutional and legal history, the period from the Civil War, particularly from the 1880s on, until the New Deal, was the era of substantive due process and liberty of contract, or simply, the *Lochner* era.<sup>86</sup> During this period, the Court constructed corporate power at a time when corporations were growing in strength.<sup>87</sup> Railroads during the post-Civil War period expanded and states adopted many general incorporation laws.<sup>88</sup> From 1895 to the 1900s, the merger of corporations and consolidations produced the trusts or mega-corporations that the era became famous for.<sup>89</sup> Quoting Blair and Pollman: “David Bunting estimates that, as of 1898, only 300 corporations in the United States had a capitalization of more than \$1 million. By 1904, he says, some 3,000 corporations would have met this size test.”<sup>90</sup> By the early twentieth century, corporations came to be managed by entrenched bureaucracies with power independent or separated from shareholder ownership.<sup>91</sup> In this era, many came to see that the Supreme Court not only gave corporations inordinate rights and power and authority, but it essentially gave them a veto over economic policy. It is here where Justice Holmes’ dissent in *Lochner v. New York* captures it well when he declared: “This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”<sup>92</sup> The U.S. Constitution was not supposed to constitutionalize a specific economic theory, let alone privilege the position of corporations in American democracy. Yet it appears that it did.

83. See Blair & Pollman, *supra* note 80, at 253.

84. See *Minneapolis & St. Louis R.R. Co. v. Beckwith*, 129 U.S. 26 (1889).

85. See *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); see also Blair & Pollman, *supra* note 80, at 255.

86. See, e.g., HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993); BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 174–203 (1995); See KELLY, HARBISON & BELZ, *supra* note 37, at 398–408.

87. See, e.g., IDA TARBELL, *THE NATIONALIZING OF BUSINESS, 1878-1898* (1936); ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* (1921).

88. Blair & Pollman, *supra* note 80, at 260–62.

89. Blair & Pollman, *supra* note 80, at 266–67.

90. Blair & Pollman, *supra* note 80, at 269.

91. Blair & Pollman, *supra* note 80, at 270.

92. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

While the Supreme Court's *Lochner* era supposedly ended with the New Deal, this was not the end of the Supreme Court extending more constitutional rights to corporations. Over time, the Court continued to shape the rights of corporations. The Court has ruled that corporations can be criminally indicted and held responsible for its agents.<sup>93</sup> While corporations may not invoke Fifth Amendment self-incrimination rights,<sup>94</sup> the Court ruled in *Hale v. Henkel* that they may claim Fourth Amendment warrant and search and seizure protections.<sup>95</sup> In *Upjohn v. United States*, corporations were granted expansive attorney-client privilege rights.<sup>96</sup> The Court has also ruled in *Grosjean v. American Press Co.*, that a corporation is a person under the Equal Protection and Due Process Clauses,<sup>97</sup> and they are entitled to protections under the Contract Clause.<sup>98</sup> And beginning with *NAACP v. Alabama*,<sup>99</sup> and then in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>100</sup> corporations enjoyed various First Amendment association and speech rights. These decisions paved the way for corporations to engage in political speech and make expenditures for political purposes in *First National Bank of Boston v. Bellotti*.<sup>101</sup> This trend of affording free speech rights eventually led to *Citizens United v. FEC*, where the Court affirmatively declared that corporations have free speech rights and that efforts to limit their ability to make political expenditures was equivalent to censorship.<sup>102</sup> Finally, in *Burwell v. Hobby Lobby*, the Court recognized the religious rights of a corporation objecting to a birth control insurance mandate under federal law.<sup>103</sup> Overall, the Court has done much to construct a constitutional framework protecting corporations.

While the above cases have empowered corporations vis-a-vis externally, or in relationship to third parties or the government, the courts have also limited the ability of workers, consumers, and shareholders to leverage influence or control internally. In *Stoneridge Investment Partners v. Scientific-Atlanta Inc.*, the Court drew limits on the types of lawsuits that could be brought by shareholders.<sup>104</sup> In *Bristol-Myers Squibb Co. v. Superior Court of California*, the Court limited personal jurisdiction for consumers

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93. See *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 496 (1909), noted in Blair & Pollman, *supra* note 80, at 273.

94. See Blair & Pollman, *supra* note 80, at 274.

95. See *Hale v. Henkel*, 201 U.S. 43, 76 (1906), noted in Blair & Pollman, *supra* note 80, at 273-74.

96. See *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

97. See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

98. Blair & Pollman, *supra* note 80, at 277.

99. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

100. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

101. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978).

102. See *Citizens United v. FEC*, 558 U.S. 310, 355 (2010).

103. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014).

104. See *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 167 (2008).



regarding suits brought against corporations for defective products.<sup>105</sup> Finally, in cases such as *Janus v. AFSCME*, the Court limited the ability of unions to collect membership dues, thereby limiting their ability to organize and challenge management.<sup>106</sup>

Overall, it would be impossible in an article such as this to provide a fully detailed legal picture regarding how the Supreme Court and lower federal courts have constructed the rights of corporations. But simply put, the judiciary has done little to enable or promote shareholder or worker democracy within a corporation, while at the same time expanding the rights that corporations enjoy under the Constitution and within American society. In effect, out of tabula rasa, the Supreme Court has facilitated the creation of corporate personhood and endowed corporations with extraordinary powers, subject to minimal checks.

### III. CORPORATE POWER IN AMERICAN POLITICS

What power do corporations have in American society? The simple answer is, as Grant McConnell once argued, corporations possess public power yet held in private hands.<sup>107</sup> They are entities that have significant impact on the everyday lives of Americans, as employees, third parties, and citizens or residents of the United States. Yet they are not subject to the democratic control or checks and balances that are associated with parallel governmental agencies.

Perhaps the starting point in thinking about corporations is to think about power. What is it? Steven Lukes describes power across three dimensions: decision-making power, non-decision-making power, and ideological power.<sup>108</sup> Decision-making power is the ability to make or force choices through actual political action. Examples of this could include allocation of resources to affect political campaigns, ballot initiatives, or even the policy process by lobbying. Non-decision-making power would be the capacity to impact the political agenda to prevent certain issues from even being discussed legislatively. Examples of this could include the use of resources to prevent gun control legislation from being considered by Congress, the ability of the tobacco industry to disallow the regulation of its products for years, or the ability of the Pharma, or the lobbying group of the pharmaceutical industry, to foreclose the U.S. government from negotiating the price of drugs. Finally, ideological power is the ability to influence how people think about issues. Again, examples might include the ability to convince people that regulating guns is inconsistent with personal liberty or that taxing sugary drinks is also a violation of personal liberty.

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105. See *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017).

106. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018).

107. GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 340, 348 (Alfred A. Knopf, Inc., 1st ed., 1966).

108. See STEVEN LUKES, *POWER: A RADICAL VIEW* (1974).

Lukes' tripart distinction regarding power allows for its application to corporate political activity in the United States. Expanding upon Lukes, one can think of corporate power as encompassing not just overt political activity but also the use of its property and economic resources as a way to affect decisions or choices across the three dimensions noted above. Obviously, making political expenditures can impact politics, but think also about how other actions, such as business investment or disinvestment decisions can impact politics. Thus, think of political influence more broadly in terms of encompassing a variety of choices made by corporations that can affect the polity. Additionally, power should not just be thought of as the ability to directly impact political choices. Power is also the ability to direct and control people's lives. It is the ability to affect life choices of individuals such as where to live, what they can own, what to do with part of their day, and whom they come into contact with, among other facets of life.

Together, think of corporate power in an additional set of dimensions beyond what Lukes described. The corporation in terms of an employer who can influence the life choices of the people who work within it, and the external world or third parties who are outside of it but are still impacted by the decisions that corporations make.<sup>109</sup> In both situations, the corporation potentially has significant control over the lives of others and is able to impact choices. It does so not necessarily with the consent of those individuals, but often without it, and absent the criteria that Robert Dahl would label as democratic. In fact, as Adolph Berle and Gardiner Means pointed out back in the 1930s, the structure of the modern corporation has separated ownership from management, giving the latter far more authority to direct the activities of it than the former has.<sup>110</sup> In effect, shareholder democracy at best is a fiction, leaving decisions in most corporations in the hands of a few individuals who often are hardly accountable to either the owners or the employees.

According to Lindblom, many public functions or decisions are performed by private corporations.<sup>111</sup> These include the determination of when to invest or not, and the determination of employment, terms and conditions of work, supply and distribution of goods and services,<sup>112</sup> production, growth, and standard of living for most.<sup>113</sup> The choices companies make can affect local or national inflation and employment rates.<sup>114</sup> The decisions over benefits can impact whether workers have health or retirement bene-

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109. ADOLPH A. BERLE, JR., *POWER WITHOUT PROPERTY* 81 (1959).

110. *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933); *see also* BERLE, *supra* note 109, at 61, 70, 99-100 (1959) (noting the diminishing authority of stockholder value where political power has moved from property ownership to management and where such public power can be described as residing in private hands).

111. *See* LINDBLOM, *supra* note 7, at 172-75.

112. BERLE, *supra* note 109, at 94.

113. LINDBLOM, *supra* note 7, at 172.

114. LINDBLOM, *supra* note 7, at 172.

fits.<sup>115</sup> Decisions to close a business or relocate can severely impact the economic health of a community, forcing municipalities to expend resources to pay for consequences of such choices, including mental and physical health problems.<sup>116</sup> The decision by corporations to close a facility or plant largely leaves local governments outside the decision-making process and with little accountability for their decisions.<sup>117</sup> Corporations are able to play state and local governments off of one another to induce tax breaks and others' benefits to stay or relocate to their community. Conversely, governments have little direct ability to command corporations to act, such as to make business investment decisions.<sup>118</sup> In fact, perhaps the single most lethal weapon corporations have is the ability to make investment decisions, a choice capable of serving as a veto on government policy. Overall, governments have to adjust their public policies to accommodate business preferences, making the latter a rival to the government in terms of how the two contend for control and influence in a polity.<sup>119</sup>

Corporate power in America places public power in private hands, effectively privatizing public authority.<sup>120</sup> The strength of corporations is augmented by a federal system of public authority which splinters public authority,<sup>121</sup> making it difficult to amass a countervailing power to offset it.<sup>122</sup> Autonomous political elites, unaccountable to shareholders and to the larger demos, are able to make decisions that thwart majority rule.<sup>123</sup> If the pluralist vision of American politics is supposed to be one where the dispersal of power ensures democracy,<sup>124</sup> the reality instead is that the fragmentation is an uneven sharing of power that places authority in the hands of a few players who can make decisions that affect others, while excluding them from an ability to vote or express their opinion.<sup>125</sup> Corporations, as rivals for authority, undermine pluralist governance.<sup>126</sup>

Since the 1970s, businesses and corporations have spent increasingly greater amounts of money to lobby, which serves as one of their tools to augment their more overt efforts to leverage political influence.<sup>127</sup> Prior to

115. LINDBLOM, *supra* note 7, at 176.

116. See JOHN PORTZ, *THE POLITICS OF PLANT CLOSINGS* (1990).

117. *Id.* at 1–4.

118. See LINDBLOM, *supra* note 7, at 173–74.

119. See LINDBLOM, *supra* note 7, at 180, 190.

120. See McCONNELL, *supra* note 107, at 340, 348.

121. McCONNELL, *supra* note 107, at 349, 358, 363.

122. See generally JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* (Houghton Mifflin Company Boston 1952).

123. McCONNELL, *supra* note 107, at 339–49.

124. See ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (Book Crafters 1961).

125. McCONNELL, *supra* note 107, at 348.

126. BERLE, *supra* note 109, at 88.

127. DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 148–93* (Basic Books 1989).

the 1970s few corporations had lobbyists or made significant expenditures to lobby;<sup>128</sup> by 2010 it had reached \$3.55 billion per year.<sup>129</sup> According to Drutman, corporate lobbyists have created a self-perpetuating, growing cycle and dependence on lobbying, convincing business executives that they should have a political interest in an increasing number of decisions government makes.<sup>130</sup> American businesses use their associations to establish government relations to communicate their views and seek to influence how elected officials and the public views them.<sup>131</sup> Business interests are the most powerful interest group sector and often are able to impact or dictate the political agenda in opposition to citizen groups.<sup>132</sup> These associations are influential in setting product standards, labor standards, union rules and legislation, and other matters of relation to their business. Currying favorable relations with public officials is key to securing special consideration for their views.<sup>133</sup> In effect, both through lobbying and political expenditures, corporations are able to amass large economic resources in order to thwart the very regulations that are needed to control them.<sup>134</sup>

The majority opinion in *FEC v. National Right to Work Committee*, perhaps articulated it the best when it quoted the government defending a federal campaign finance law, stating that its purpose was “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’ which could be used to incur political debts from legislators who are aided by the contributions.”<sup>135</sup>

Finally, globally, corporations have lobbied for free trade legislation, making it possible for them to enhance capital mobility and move business operations across the globe.<sup>136</sup> They have been able to avoid taxes by shifting, on paper, headquarters from one state to another. In effect, global free trade enables corporations to veto or escape democratically made economic and tax policy by simply using their option to exit states, forcing the latter to alter these policies as well as those affecting the environment and working conditions.<sup>137</sup> Some, such as Robert Kuttner, contend that liberal de-

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128. LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* 218 (2015).

129. *Id.* at 222–23.

130. *Id.* at 219–22.

131. RICHARD LEHNE, *GOVERNMENT AND BUSINESS: AMERICAN POLITICAL ECONOMY IN COMPARATIVE PERSPECTIVE* 139 (CQ Press, 2d ed. 2006).

132. JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* 86 (Brookings Institution Press 1999).

133. NEIL J. MITCHELL, *THE CONSPICUOUS CORPORATION: BUSINESS, PUBLIC POLICY, AND REPRESENTATIVE DEMOCRACY* 167–74 (University of Michigan Press 1997).

134. ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS*, 359–68 (2018).

135. *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

136. ROBERT KUTTNER, *CAN DEMOCRACY SURVIVE GLOBAL CAPITALISM* 49–83 (2018).

137. LEHNE, *supra* note 131, at 89–107.

mocracy cannot survive within the context of the current version of global capitalism.<sup>138</sup> Democratic capitalism for him is a contradiction in terms.<sup>139</sup>

Overall, corporations, have fought hard to gain their civil rights. In return for the construction of these rights, they have been able to translate their economic resources into a variety of powers that allow them both to control the lives of those who work for them and to influence the political world in which they operate. It is a level of influence that allows them not simply a voice, but a voice that preempts the voices of others, while also being able to use corporate resources in a way that allows corporations the capacity to prevent their regulation and control, either by workers, shareholders, the people, or the government. Corporations have become de facto private governments, holding public authority in private hands.

### CONCLUSION

Justice Holmes' dissent in *Lochner v. New York* declared that the Constitution was not supposed to embody a specific economic theory. Yet it appears he was wrong, and it does. But it embodies not just market capitalism, but corporate capitalism where it reifies the ability of corporations to use their economic resources to make, and often preempt, political choices made by others.

Charles Lindblom contended that corporations have a privileged position in American politics. They ought not. Drawing upon the logic of the Constitution and specifically the Framers, had they been cognizant or prescient enough to see the way corporations have come to dominate American politics, they might have extended their concerns about checking political power to them. They might not have rested content with simple appeals to creating political democracy. They would have sought to address the problems of economic power as a threat corrupting the political process. Yet, even if the Framers would not have done that, the logic of American political and constitutional thinking is about confining and checking excess concentrations of power that threaten individual liberty, political equality, and popular sovereignty. Perhaps the only way to push American democratic theory to its logical conclusion is to do what Robert Dahl has argued for, i.e., extend the logic of constitutional theory to a third wave of democracy and enable economic democracy as a way to control corporate power. Only when corporations are subject to democratic control will it be possible to argue that the promise of American democracy has been realized.

It is beyond this Article to offer specific suggestions regarding how to control corporate power and create economic democracy. However, one step would be a new theory of constitutional incorporation. By that, in the same way that much of the Bill of Rights has come to be incorporated via

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138. KUTTNER, *supra* note 136, at 283.

139. KUTTNER, *supra* note 136, at 283.

the Due Process Clause of the Fourteenth Amendment to apply to the states, it should be applied also to corporations. Corporations should be subject to similar constitutional rules when it comes to how it treats individuals. But more significantly, rules regarding how it makes investment decisions should be subject to due process considerations. Additionally, Congress should mandate public rights to participate in many corporate decisions, or conversely, corporations should be required to do a notice and comment process and take public input into consideration when making certain decisions when it comes to opening, closing, or relocating a facility. Congress could consider requiring shareholder assent before corporate resources could be used for political or lobbying purposes. Congress could update its anti-trust laws or simply have the Justice Department actually enforce the ones on the books already. Congress could change its tax laws to control their wealth and fund social-welfare programs for the general population to a degree that it would empower people and tame corporate political influence. Congress could also ban corporate donations from businesses that are vendors with the government. Finally, limiting or banning corporate political contributions, or even taking a giant step in terms of requiring more public or worker ownership (even partial) of some corporations would improve the accountability of them to the public and workers.

Each of the above proposals could be the subject of a book about reforming corporate power, and developing them here is beyond what can be discussed in a conclusion. The point is that there are things that can be done, but it is going to take a rethinking of American constitutional law to do that. The first step is viewing the Constitution and the Constitutional Convention as an unfinished first step in creating an American democracy that includes both political and economic power, and both public and private authority.