Notes

CORPORATIONS UNDER THE BILL OF ATTAINDER CLAUSE

HARRISON A. NEWMAN†

ABSTRACT

The Constitution's Bill of Attainder Clauses, found in Article I, Section 9 and Article I, Section 10, prohibit both Congress and state legislatures from passing targeted statutes imposing punishment on specified actors without trial. The Supreme Court has never decided whether the Clauses apply to corporations.

The Second Circuit is the only federal circuit to address the issue explicitly, holding in Consolidated Edison Co. of New York v. Pataki *that Article I, Section 10's Bill of Attainder Clause applies to corporations. Other circuits either have not faced the issue or have assumed, for the purposes of the specific cases before them and without officially deciding, that the Clauses apply to corporations. The Second Circuit's reasoning fails as a foundation upon which courts can rely in administering future corporate attainder challenges—drawing dubious inferences from inapplicable Supreme Court precedent and performing a partial merits analysis under the guise of deciding this threshold issue.*

This Note offers the first extended argument that the Bill of Attainder Clauses apply to corporations. While the Clauses' text is silent on the issue, this Note considers the history and precedent of the Bill of Attainder Clauses before exploring the Court's approach to corporate constitutional rights more generally. Assessing the theories of corporate personhood undergirding the Court's corporate constitutional rights cases and the purposes for which the attainder prohibition was adopted, this Note concludes that the Bill of Attainder Clauses, properly understood, apply to corporations.

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INTRODUCTION

On December 1, 2018, Canadian authorities detained Huawei CFO Meng Wanzhou—the daughter of company founder Ren Zhengfei—in cooperation with an extradition request by the United States.[1] The U.S. Attorney's Office for the Eastern District of New York charged both Huawei—the world's largest telecommunications equipment maker and second-largest smartphone vender[2]—and Meng with various crimes in what the Department of Justice characterized as "a long-running scheme by Huawei, its CFO, and other employees to deceive numerous global financial institutions and the U.S. government regarding Huawei's business activities in Iran."[3]

Meng's detention and subsequent prosecution inflamed the already strained relationship between Huawei and the United States. Hostility between the two parties had grown in the preceding months, as federal prosecutors circled Huawei for potential violations of export and sanctions laws[4] and a trade war between China and the United States grew increasingly hostile.[5] On August 13, 2018, Congress stepped in and passed the John S. McCain National Defense Authorization Act for Fiscal Year 2019 ("NDAA"), which, among other things, banned executive agencies, federal government contractors, and federal loan and grant recipients from using any "telecommunications equipment or services" made by Huawei and

1. Daisuke Wakabayashi & Alan Rappeport, *Huawei C.F.O. is Arrested in Canada for Extradition to the U.S.*, N.Y. TIMES (Dec. 5, 2018), https://www.nytimes.com/2018/12/05/business/huawei-cfo-arrest-canada-extradition.html [https://perma.cc/WM42-YC8M].

2. Dan Strumpf, *Bigger Sales Than Apple? China's Huawei Doesn't Need the U.S.*, WALL ST. J. (Aug. 3, 2018, 7:36 AM), https://www.wsj.com/articles/bigger-sales-than-apple-chinas-huawei-doesnt-need-the-u-s-1533296175 [https://perma.cc/4B8U-TUCZ].

3. Press Release, U.S. Dep't of Justice, Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial [https://perma.cc/5FTX-HJTC]. Meng was charged with bank fraud, wire fraud, and their accompanying conspiracies. Superseding Indictment at 10–20, United States v. Huawei Techs. Co., No. 1:18-CR-00457 (E.D.N Y. filed Jan. 24, 2019).

4. Karen Freifeld & Eric Auchard, *U.S. Probing Huawei for Possible Iran Sanctions Violations: Sources*, REUTERS (Apr. 25, 2018, 10:23 AM), https://www.reuters.com/article/us-usa-huawei-doj/us-probing-huawei-for-possible-iran-sanctions-violations-wsj-idUSKBN1HW1YG [https://perma.cc/LU3X-NTPQ].

5. For a timeline of major developments in U.S.–China trade dispute in 2018, see *U.S.-China Trade War Truce: What's Happened and What's Next*, BLOOMBERG (Dec. 2, 2018, 2:22 AM), https://www.bloomberg.com/news/articles/2018-12-02/u-s-china-trade-war-truce-what-s-happened-and-what-s-next [https://perma.cc/F7KE-CFA8].

four additional Chinese tech companies.[6] Congress enacted the "Huawei ban" amid longstanding suspicions that the company was spying on Americans at the behest of the Chinese government.[7] Huawei has repeatedly denied these allegations, asserting its independence from Beijing.[8] A few months after Meng's detention, Huawei filed suit against the United States in the U.S. District Court for the Eastern District of Texas,[9] challenging the NDAA's ban as an unconstitutional bill of attainder.[10] That court has yet to rule on Huawei's challenge.

The Constitution contains two Bill of Attainder Clauses, which together proscribe bills of attainder at the federal and state levels.[11] Because the Supreme Court has treated its precedents for each of the Clauses as controlling its analysis of the other, this Note refers to them together as "the Bill of Attainder Clause" or "the Clause."[12] The Bill of Attainder Clause prohibits both Congress and state legislatures

6. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018). The additional Chinese tech companies covered by the ban were ZTE, Hytera, Hikvision, and Dahua. *Id.* § 889(f)(3)(A)–(B).

7. *See, e.g.*, Michael S. Schmidt, Keith Bradsher & Christine Hauser, *U.S. Panel Cites Risks in Chinese Equipment*, N.Y. TIMES (Oct. 8, 2012), https://www.nytimes.com/2012/10/09/us/us-panel-calls-huawei-and-zte-national-security-threat.html?module=inline [https://perma.cc/93TZ-BVTV] (noting a 2012 House Intelligence Committee report concluding that Huawei and ZTE present national security threats).

8. *See, e.g.*, Li Tao, *Huawei Fights Back Against Claim in Research Paper That It Is Government Funded and Controlled*, S. CHINA MORNING POST (Apr. 25, 2019, 4:09 PM), https://www.scmp.com/tech/big-tech/article/3007649/huawei-fights-back-against-claim-research-paper-it-government-funded [https://perma.cc/7TFL-VPWJ] ("Huawei Technologies . . . defended its independence on Thursday after a recent research paper questioned the company's claim to be employee-owned . . . .").

9. Steven Overly, *Huawei Sues U.S. as Legal War Intensifies*, POLITICO (Mar. 6, 2019, 10:14 PM), https://www.politico.com/story/2019/03/06/huawei-sues-us-government-1209093 [https://perma.cc/M3LU-77E3]. Huawei's American headquarters is located in Plano, Texas. *Id.*

10. Complaint at 10, Huawei Techs. USA, Inc. v. United States, No. 4:19-cv-00159 (E.D. Tex. filed Mar. 6, 2019). The suit also alleged that the law violated the Fifth Amendment Due Process Clause and the Vesting Clauses and resulting separation of powers. *Id.*

11. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

12. *Compare* Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867) (analyzing Article I, Section 10), *with* United States v. Brown, 381 U.S. 437, 447–48 (1965) (distinguishing *Cummings* in its analysis of Article I, Section 9), *and Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (same); *compare id.* (analyzing Article I, Section 10), *with* Garner v. Bd. of Pub. Works, 341 U.S. 716, 723 (1951) (distinguishing *Garland* in its analysis of Article I, Section 9), *and* Dent v. West Virginia, 129 U.S. 114, 128 (1889) (same).

from singling out specified actors for punishment.[13] The text of the Clause, however, makes no mention of which actors its prohibition protects: "No Bill of Attainder . . . shall be passed"[14]; "[n]o State shall . . . pass any Bill of Attainder."[15] The Supreme Court has never determined whether the Bill of Attainder Clause extends to corporations. As for Huawei's pending case, the U.S. Court of Appeals for the Fifth Circuit has once previously assumed that the Clause covers corporations: "Even assuming that the Bill of Attainder Clause applies to corporations,"[16] the court wrote, before dropping into a footnote, "[w]hich does seem likely."[17] The federal courts of appeals have repeatedly employed this assume-without-deciding approach in the limited number of corporate bill of attainder cases because the constitutional challenges in those cases almost always failed on the merits;[18] the issue ultimately had no bearing on the outcome of unsuccessful challenges.

The Second Circuit is the sole federal circuit to determine whether the Clause extends to corporations, finding that it does in *Consolidated Edison Co. of New York v. Pataki* ("*ConEdison*").[19] Despite addressing the issue directly, the court's analysis in *ConEdison* is misleading and ultimately incomplete. Altogether, the opinion fails to recognize a sound doctrinal basis for subsequent corporate bill of attainder challenges.[20] As courts continue to punt by assuming without

13. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 643 (2d ed. 1988) ("The essence of the bill of attainder ban is that it proscribes legislative punishment of specified persons—not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance.").

14. U.S. CONST. art. I, § 9, cl. 3.

15. *Id.* art. I, § 10, cl. 1.

16. SBC Commc'ns., Inc. v. FCC, 154 F.3d 226, 234 (5th Cir. 1998).

17. *Id.* at 234 n.11. The court based its conclusion on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995) (indicating that the Clause applies to laws that punish "a single individual or *firm*" (emphasis added)). The Fifth Circuit's reading of the *Plaut* footnote is deeply misleading, as this Note will show in Part III.A. *See infra* text accompanying notes 178–96.

18. *See* SeaRiver Mar. Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 668 n.3 (9th Cir. 2002) ("We assume, without deciding, that the Bill of Attainder Clause applies to corporations."); Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2000) ("[W]e may assume without having to decide . . . that corporations as well as individuals are protected by the constitutional prohibition."); BellSouth Corp. v. FCC, 144 F.3d 58, 63 (D.C. Cir. 1998) ("We assume, as do the parties, that the Bill of Attainder Clause protects corporations as well as individuals.").

19. Consol. Edison Co. of New York v. Pataki, 292 F.3d 338 (2d Cir. 2002).

20. A contemporaneous student note takes a more optimistic view of *ConEdison*'s analysis. *See generally* Seth A. Rice, Note, Consolidated Edison Co. of New York v. Pataki, 24 ENERGY L.J. 131 (2003) (reviewing the case in detail and assessing the court's treatment of corporate bill of attainder protection favorably).

deciding,[21] the ultimate question of the Bill of Attainder Clause's protection of corporations lingers without an authoritative answer. Not only will future meritorious challenges require such a determination, but a clear elucidation of the rationale for why the Clause does or does not cover corporations will also shape the ways in which courts understand the substance of corporate attainder challenges before them.

This Note offers the first extended argument that the Bill of Attainder Clause extends to corporations, seeking to situate the corporate constitutional right against bills of attainder within both the Clause's established understandings and general theories of corporate constitutional rights. Following the Court's practice, this Note considers corporations generally and does not make distinctions between the various corporate forms.[22] This Note proceeds in three parts. Part I examines the Bill of Attainder Clause at length, tracing the history from attainders in English common law through the drafting of the Clause at the Constitutional Convention and assessing the Supreme Court's bill of attainder precedent. Part II briefly explores corporate constitutional rights at large, surveying the major theories of corporate personhood and the Court's ad hoc approach to determining corporate constitutional rights. Part III evaluates the Second Circuit's defective analysis in *ConEdison* before demonstrating that the Bill of Attainder Clause, properly understood, extends to corporations under the leading theories of corporate personhood and a Clause-specific purposive analysis.

I. THE CONSTITUTIONAL PROHIBITION ON BILLS OF ATTAINDER

Adopted without debate,[23] the constitutional prohibition on bills of attainder establishes a right against "legislative acts . . . that apply

21. *See, e.g.*, Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 909 F.3d 446, 454 (D.C. Cir. 2018) ("Acknowledging that the question remains open, the government does not argue here that the Clause protects individuals only. Therefore, absent an argument to the contrary and as in our previous cases, we shall continue to assume that the Bill of Attainder Clause extends to corporations." (citation omitted)).

22. Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 600 (2016) [hereinafter Pollman, *Line Drawing*].

23. *See* JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 449 (Gaillard Hunt & James Brown Scott eds., 1920) (observing one brief statement of support for the proposed prohibition on bills of attainder and no statements of dissent); *see also* ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 95 (1956) ("At Philadelphia the prohibition of bills of attainder was accepted without question.").

either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[24] As Justice Black observed, "[h]ostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government."[25] English and colonial historical practices explain the Framers' revulsion to such laws, and case law reveals the ways in which American legislatures have also attempted to single out disfavored actors for punishment throughout the nation's existence.

A. English Common Law and Early American Practice

Although historical accounts differ regarding the precise date of the first bill of attainder, a consensus of scholars agree that the fifteenth century marked the onset of the practice.[26] In his *Commentaries on the Constitution of the United States*, Justice Story described bills of attainder as "special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings."[27] Traditional bills of attainder also required the attainted individual to forfeit property,[28] extending beyond all personal and real property to the denial of inheritance both to and from the individual—a practice known as the corruption of blood.[29]

Similar in spirit though far less severe, bills of pains and penalties were "legislative convictions which imposed punishments less than that of death."[30] Such punishments included "imprisonment, banishment, and the punitive confiscation of property by the sovereign."[31] The

24. United States v. Lovett, 328 U.S. 303, 315 (1946).

25. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 876 (1960).

26. *See, e.g.*, CHAFEE, *supra* note 23, at 98 (pointing to a bill enacted in 1450 as an imprecise historical "starting-point"); HAROLD POTTER, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 100 (A.K.R. Kiralfy ed., 5th ed. 1958) ("The first Act of Attainder seems to have been that of the Duke of Clarence in 1477."); J.R. Lander, *Attainder and Forfeiture, 1453 to 1509*, 4 HIST. J. 119, 120 (1961) ("During the fifteenth century the penalty of attainder was for the first time imposed by act of Parliament.")

27. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 27 (2d ed. 1851).

28. THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 284 (1880) [hereinafter COOLEY, GENERAL PRINCIPLES].

29. 4 WILLIAM BLACKSTONE, COMMENTARIES *388.

30. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 261 (1868) [hereinafter COOLEY, TREATISE].

31. Nixon v. Adm'r of Gen. Servs., 433 U.S. 474 (1977) (footnotes omitted).

practice died out over the next century and a half, with the eventual passage of the final bills of attainder in 1798[32] and pains and penalties in 1820.[33]

By their very definition, traditional bills of attainder could not be imposed on corporations. William Blackstone expressly observed that a corporation was not "capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood."[34] Parliament did pass punitive bills directed at municipalities structured as corporations,[35] but it is unclear if English commentators considered these acts to be true bills of pains and penalties. Blackstone commented briefly on the practice, noting that a corporation may "itself be dissolved in several ways, which dissolution is the civil death of the corporation,"[36] with one way being "[b]y act of parliament, which is boundless in its operations."[37]

The legislatures of the fledgling United States also enacted comparable bills. In the immediate aftermath of the American Revolution, "every state in the Union appears to have enacted bills of pains and penalties of greater or less severity."[38] Such bills were commonplace against remaining Loyalists,[39] enacted indiscriminately to address both small ills as well as "cases involving danger to the commonwealth for which they were supposed to be reserved."[40]

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32. CHAFEE, *supra* note 23, at 136.

33. *Id.*

34. 1 BLACKSTONE, *supra* note 29, at *476–77.

35. *See, e.g.*, Disfranchisement of Grampound Act 1821, 1 & 2 Geo. 4 c. 47 (Eng.) (disfranchising a borough of its two Members of Parliament after finding bribery and corruption); Cricklade Act 1782, 22 Geo. 3 c. 31, § 1 (Eng.) (changing the qualifications for voting in a borough after finding bribery and corruption).

36. 1 BLACKSTONE, *supra* note 29, at *484.

37. *Id.* at *484–85.

38. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 515 (1925); *see also* CLAUDE HALSTEAD VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 268–85 (1902) (providing a detailed account of the various bills passed against remaining Loyalists after the Revolution).

39. *See, e.g.*, COOLEY, GENERAL PRINCIPLES, *supra* note 28, at 284–85 (noting bills of pains and penalties imposed on Loyalists after the American Revolution); COOLEY, TREATISE, *supra* note 30, at 262 (describing legislative punishments of British and Loyalist residents of the states during the Revolutionary period).

40. Roscoe Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 8 (1914).

B. Supreme Court Precedent

The Constitution's ratification breathed new significance into "bill of attainder" as an American legal term. The Supreme Court first considered the term's meaning in 1798 in *Calder v. Bull*.[41] There, in a seriatim opinion, Justice Chase wrote of "the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less, punishment."[42] Sometimes, these acts "inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence."[43] Commentators have since debated whether Justice Chase was suggesting a constitutional distinction between the two types of bills.[44]

The Court next considered the Bill of Attainder Clause's meaning in 1810 in *Fletcher v. Peck*,[45] which featured an influential dictum about Article I, Section 10, which includes the Bill of Attainder Clause, Ex Post Facto Clause, and Contracts Clause, among others.[46] Chief Justice Marshall noted that "the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment."[47] In adopting the Constitution, "the people of the United States . . . manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[48] Chief Justice Marshall went on to assert that "[t]he restrictions on the legislative power of the states are obviously founded in this sentiment," as he deemed Article I, Section 10 "a bill of rights

41. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

42. *Id.* at 389 (opinion of Chase, J.) (emphases omitted).

43. *Id.* (emphases and footnotes omitted). Justice Iredell also made a brief note about majoritarian will and attainders, writing that "[r]ival factions, in their efforts to crush each other, have superseded all the forms, and suppressed all the sentiments, of justice; while attainders, on the principle of retaliation and proscription, have marked all the vicissitudes of party triumph." *Id.* at 399–400 (opinion of Iredell, J).

44. *Compare* Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 370 (1978) (arguing that Justice Chase's *Calder* opinion recognized a distinction between bills of attainder and bills of pains and penalties), *with* Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1187–88 (2011) (arguing that Justice Chase's *Calder* opinion suggested a blurred line between the two).

45. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

46. U.S. CONST. art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .").

47. *Fletcher*, 10 U.S. (6 Cranch) at 137–38.

48. *Id.*

for the people of each state."[49] He concluded with a loose definition: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."[50] With this statement, Chief Justice Marshall espoused a clear view that for constitutional purposes, bills of attainder include bills of pains and penalties.

1. *The Confederate-Sympathizer Era: Developing Doctrine*. The Court faced its first Bill of Attainder Clause challenges in 1866, when it decided The Test Oath Cases[51]: *Cummings v. Missouri*[52] and *Ex parte Garland*.[53] In these cases, the Court struck down state oaths that imposed punitive measures on suspected Confederate sympathizers—in *Cummings*, forbidding them from serving as priests,[54] and in *Garland*, forbidding them from practicing law.[55]

In *Cummings*, the Court unequivocally reaffirmed Chief Justice Marshall's understanding of bills of attainder from *Fletcher*: "Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."[56] The challenged Missouri constitutional amendment imposed a wide-ranging oath of allegiance on public officials, corporate directors, professors, teachers, and clergymen entering those professions.[57] Although the oath did not expressly declare the guilt of those who refused to take it and instead adjudged punishment subsequently only upon such refusal, the difference was "one of form only, and not of substance."[58] *Garland* featured a similar test oath, this one passed by Congress and applying to attorneys practicing in the federal courts.[59] Relying on *Cummings*, the Court found that the Congressional oath similarly "operate[d] as a legislative decree of perpetual exclusion," which constituted punishment.[60]

The final years of the century saw two unsuccessful bill of attainder challenges against professional-qualification requirements in

49. *Id.*

50. *Id.*

51. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 411 (Edmund H. Bennett ed., 10th ed. 1888).

52. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

53. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

54. *Cummings*, 71 U.S. (4 Wall.) at 316–17.

55. *Garland*, 71 U.S. (4 Wall.) at 374–75.

56. *Cummings*, 71 U.S. (4 Wall.) at 323.

57. *Id.* at 316–17.

58. *Id.* at 325.

59. *Garland*, 71 U.S. (4 Wall.) at 374.

60. *Id.* at 377.

Dent v. West Virginia[61] in 1889 and in *Hawker v. New York*[62] in 1898. In *Dent*, the Court upheld a state law requiring physicians to obtain a degree from an accredited medical school in order to secure a medical license because it was a bona fide judgment of requisite professional qualifications.[63] And in *Hawker*, the Court followed the same rationale in upholding a state law prohibiting convicted felons from practicing medicine.[64]

2. *The* Lovett *Bellwether and Justice Frankfurter's Historicism*. The Court heard its next bill of attainder challenge in 1946 in *United States v. Lovett*.[65] *Lovett* was a challenge to a section of an appropriations bill that prohibited three named federal employees from being paid unless they were confirmed by the Senate.[66] In holding that the section was a bill of attainder,[67] the Court looked to the bill's legislative history to determine the section's purpose, finding a punitive legislative motive.[68] The Court then reviewed the Test Oath Cases, reading them to "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."[69]

Justice Frankfurter wrote an influential concurrence in *Lovett*, arguing that the Bill of Attainder Clause was defined by the historical grievances that motivated the Framers to draft it.[70] According to

61. Dent v. West Virginia, 129 U.S. 114 (1889).

62. Hawker v. New York, 170 U.S. 189 (1898).

63. *Dent*, 129 U.S. at 127–28. In contrast, the Test Oath Cases did not impose legitimate qualification requirements. *Id.* at 128.

64. *Hawker*, 170 U.S. at 195, 200.

65. United States v. Lovett, 328 U.S. 303 (1946). Noting the substantial time gap between bill of attainder cases, Professor John Hart Ely remarked that "[t]he term 'bill of attainder' must therefore have seemed archaic when applied to World War II legislation. No member of the Court of the early forties had so much as mouthed the words; it was far from clear that they ever would." John Hart Ely, United States v. Lovett*: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 15 (1975).

66. *Lovett*, 328 U.S. at 304–05.

67. *Id.* at 315.

68. *Id.* at 308–14.

69. *Id.* at 315.

70. *Id.* at 321 (Frankfurter, J., concurring); Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 485 (1984) ("Justice Frankfurter's historical approach to the bill of attainder clause commanded a Supreme Court majority for roughly twenty years after *Lovett*." (footnote omitted)).

Justice Frankfurter, the Constitution did not define bill of attainder because its "meaning was so settled by history that definition was superfluous."[71] History had defined bill of attainder to mean "the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence."[72] Justice Frankfurter's narrow view guided the Court in a sequence of four cases—*American Communications Association v. Douds*[73] in 1950, *Garner v. Board of Public Works*[74] in 1951, *Flemming v. Nestor*[75] in 1960, and *Communist Party of the United States v. Subversive Activities Control Board*[76] in 1961—before the Court offered its current attainder doctrine.

3. Brown*'s Foundation and Beyond: Contemporary Doctrine*. Although the 1946 *Lovett* decision served as a preview of the Court's contemporary bill of attainder jurisprudence, the Court did not revisit its broader doctrine until *United States v. Brown*[77] in 1965. In *Brown*, the Court struck down a federal bill of attainder making "it a crime for a member of the Communist Party to serve as an officer or (except in clerical or custodial positions) as an employee of a labor union."[78]

The Court began its analysis with the "logical starting place" of the Bill of Attainder Clause's historical background[79] before considering "the reasons for [the Clause's] inclusion in the Constitution, and the evils it was designed to eliminate."[80] The Court asserted that "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[81]

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71. *Lovett*, 328 U.S. at 321.

72. *Id.* at 321–22.

73. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382 (1950).

74. Garner v. Bd. of Pub. Works, 341 U.S. 716 (1951).

75. Flemming v. Nestor, 363 U.S. 603 (1960).

76. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

77. United States v. Brown, 381 U.S. 437 (1965).

78. *Id.* at 438, 461–62.

79. *Id.* at 441.

80. *Id.* at 442.

81. *Id.* Ely served as a law clerk to *Brown*'s author, Chief Justice Warren, when *Brown* was decided, *see* JOHN HART ELY, ON CONSTITUTIONAL GROUND 188 (1996), and he had written an unsigned student comment making this very argument just three years earlier. *See generally* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder*

Beyond implementing the proper separation of powers among the legislative and judicial branches, the Clause "also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."[82] Seeking to guard against the will of the excitable majority, the Clause properly "limit[ed] legislatures to the task of rule-making."[83]

The Court's analysis ultimately turned on specificity and punishment. *Brown* noted that Congress singled out "members of the Communist Party" in the challenged section, which demonstrated that "it plainly is not the case that Congress has merely substituted a convenient shorthand term for a list of the characteristics it was trying to reach"—in this case, individuals likely to provoke political labor strikes.[84] Rejecting as "archaic" a limiting definition of punishment solely as retribution, the Court went on to find that the legislation "inflict[ed] 'punishment' within the meaning of the Bill of Attainder Clause" through a broad understanding encompassing retribution, rehabilitation, deterrence, and prevention.[85] The Court's opinion concluded with an overarching message: "Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied."[86]

Since *Brown*, the Court has heard only two bill of attainder cases: *Nixon v. Administrator of General Services*[87] in 1977 and *Selective Service System v. Minnesota Public Interest Research Group*[88] in 1984. In *Nixon*, the Court upheld the Presidential Recordings and Materials Preservation Act in the face of a bill of attainder challenge.[89] The Act ordered an executive branch official "to take custody of the Presidential papers and tape recordings of . . . former President

Clause, 72 YALE L.J. 330 (1962) [hereinafter Ely, Comment]. Ely acknowledged having written this comment. John Hart Ely, *The Limits of Logic: Syntactic Ambiguity in Article One of the U.S. Constitution*, 4 M.U.L.L.: MOD. USES LOGIC L. 117, 117 n.1 (1963).

82. *Brown*, 381 U.S. at 445.

83. *Id.* at 446.

84. *Id.* at 456.

85. *Id.* at 458.

86. *Id.* at 461.

87. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).

88. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841 (1984).

89. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. at 484.

Richard M. Nixon" and to promulgate corresponding regulations.[90] Emphasizing that the Bill of Attainder Clause does not limit "Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all,"[91] the Court noted that the Act's specificity in referencing only Nixon "does not automatically offend the Bill of Attainder Clause" and "can be fairly and rationally understood" because Nixon was the only president whose effects were not yet under congressional control—Nixon "constituted a legitimate class of one."[92]

In addition to the new "legitimate class of one" language, *Nixon* is notable for its tripartite analysis of punishment, composed of historical, functional, and motivational tests.[93] The historical test looks to "the substantial experience of both England and the United States" for "a ready checklist of deprivations and disabilities" that "would be immediately constitutionally suspect."[94] The functional test analyzes "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[95] Specifically, "[w]here such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."[96] Finally, the motivational test considers "whether the legislative record evinces a congressional intent to punish."[97] The results of these tests are balanced to determine the legislation's constitutionality, and a challenged statute need not fail each test to be an unconstitutional bill of attainder.[98]

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90. *Id.* at 429.

91. *Id.* at 471.

92. *Id.* at 472.

93. *Id.* at 473–83.

94. *Id.* at 473.

95. *Id.* at 475–76.

96. *Id.* at 476.

97. *Id.* at 478.

98. *See, e.g.*, Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 350 (2d Cir. 2002) ("*Nixon* makes it clear that a statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim."); *see also* Foretich v. United States, 351 F.3d 1198, 1218 (D.C. Cir. 2003) ("The Court has applied each of these criteria as an independent – though not necessarily decisive – indicator of punitiveness. . . . Our cases have noted, however, that the second factor – the so-called 'functional test' – invariably appears to be the most important of the three." (quotations omitted)).

In 1984, the Court in *Selective Service System* rejected a bill of attainder challenge to a section of the Military Selective Service Act, "which denie[d] federal financial assistance under Title IV of the Higher Education Act of 1965 to male students who fail to register for the draft."[99] The Court noted that the challenged section did not single out nonregistrants because it allowed them to seek Title IV's financial assistance if they registered for selective service belatedly upon receiving notice of their unregistered status.[100] Applying the three tests for punishment from *Nixon*, the Court found that the section did not impose punishment either.[101] The Court has not subsequently heard any bill of attainder cases.

II. CORPORATE CONSTITUTIONAL RIGHTS

"It is often said that corporations have no souls."[102] True enough. But, of course, our law's protection is not limited to natural persons: corporations have long enjoyed constitutional rights. The Supreme Court first considered whether a constitutional provision extended to corporations in 1809 in *Bank of the United States v. Deveaux*,[103] in which it held that the Bank was a citizen for the purposes of diversity jurisdiction under Article III and the Judiciary Act of 1789.[104] While the Court has since denied corporations various constitutional protections,[105] it has proceeded on a case-by-case basis to recognize a broad swath of corporate constitutional rights.[106]

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99. Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 843 (1984).

100. *Id.* at 849–50.

101. *Id.* at 851–56.

102. Thomas Thacher, *Incorporation*, 9 YALE L.J. 82, 84 (1899).

103. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), *overruled in part by* Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

104. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between *Citizens* of different States . . . ." (emphasis added)); Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 ("[O]r the suit is between a citizen of the State where the suit is brought, and a citizen of another State.").

105. *See, e.g.*, Hale v Henkel, 201 U.S. 43, 74–75 (1906) (Fifth Amendment right against self-incrimination); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 177 (1868) (Privileges and Immunities Clause).

106. *See, e.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936) (Free Press Clause); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (Takings Clause); Cty. of Santa Clara v. S. Pac. R.R., 118 U.S. 394, 396 (1886) (Equal Protection Clause); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 590 (1819) (Contracts Clause). For a concise yet complete history of the Court's corporate constitutional rights jurisprudence, see generally Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of*

In more than two centuries of cases, the Court has offered no clear or consistent test under which to analyze corporate constitutional rights.[107] Two primary analytical frameworks offer distinct approaches to the issue. One option comes from the Court's differing conceptions of corporate personhood, a doctrine recognizing that "[o]ne of the fundamental defining characteristics of the corporation is that it constitutes a separate legal person with rights and obligations distinct from those of its owners."[108] A second option lies in a footnote in *First National Bank of Boston v. Bellotti*,[109] which sets out the closest thing the Court has formulated to a test for corporate constitutional rights.[110] This Part will address these two frameworks in turn.

A. Corporate Personhood

Since the very creation of the corporate form, jurists have struggled to craft a blanket definition of the corporation.[111] One reasonable starting point is to observe that "[i]n the United States, the technical, albeit tautological, answer is that it is an entity recognized by state law as a 'corporation.'"[112] Tautology offers descriptive precision

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Evolution and Controversy, *in* CORPORATIONS AND AMERICAN DEMOCRACY 245 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

107. *See, e.g.*, Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 98 (2014) ("What theory explains why corporations have some constitutional rights and not others? The Supreme Court has not offered a general theory."); Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909 (2011) ("The Court's approach has left us with a broken and disjointed jurisprudence, a string cite rather than a doctrine."); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1348 (1979) ("Missing from the Court's various decisions involving corporations is any expressly enunciated common rationale. Many cases appear to involve an ad hoc determination rather than the development or application of a general principle."); Elizabeth Pollman, *A Corporate Right to Privacy*, 99 MINN. L. REV. 27, 50 (2014) [hereinafter Pollman, *A Corporate Right*] ("In all of this time, [the Court] has failed to articulate a test or standard approach for its rulings.").

108. Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 884 (2012).

109. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

110. *See, e.g.*, Pollman, *A Corporate Right*, *supra* note 107, at 52 ("Perhaps the closest the Court has come to providing a corporate rights test was in a footnote in *First National Bank of Boston v. Bellotti* . . . .").

111. *See, e.g.*, Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 201 (2006) ("The inability of legal theory to account for the character of the corporation is a longstanding problem.").

112. Elisabeth de Fontenay, *Individual Autonomy in Corporate Law*, 8 HARV. BUS. L. REV. 183, 184 (2018).

here, as corporations truly are defined by state law.[113] Yet when courts consider whether corporations possess certain constitutional rights, a thorough reading of the Delaware General Corporation Law, for example, does little work.

Rather than agonize over the substance of state law, theories of corporate personhood engage more directly with questions about legal entitlements. Deeply misunderstood,[114] corporate personhood is, at its core, the idea of "corporations as right[s] holders."[115] In other words, "a corporation has its own independent identity in the eyes of the law, wholly separate from the people who comprise it."[116] Corporate personhood has undergirded the Court's piecemeal consideration of the Constitution's application to corporations since the process began in 1809 in *Deveaux*. There, the Court understood the corporation to be "a mere creature of the law, invisible, intangible, and incorporeal,"[117] although "this invisible, incorporeal creature of the law may be considered as having corporeal qualities."[118]

Even as the Court has not espoused a unified understanding of corporate personhood in its corporate constitutional rights cases,[119] three primary theories of corporate personhood—the artificial entity theory, the real entity theory, and the aggregation theory—have largely persisted since the creation of the corporate form in Roman law more than two thousand years ago.[120] And the Court has endorsed each theory at various points in its corporate constitutional rights cases.

1. *Artificial Entity Theory.* The artificial entity theory predominated the Court's corporate constitutional right cases through

113. *See, e.g.*, DEL. CODE ANN. tit. 8, § 101(a) (2016) (allowing any person or entity to incorporate in Delaware by filing "a certificate of incorporation which shall be executed, acknowledged and filed in accordance with [statutory requirements]").

114. *See, e.g.*, Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1640 (1988) ("The idea that a corporation is a 'person' for legal purposes is one of the most misunderstood doctrines in American legal history.").

115. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1629. [hereinafter Pollman, *Reconceiving Corporate Personhood*].

116. Adam Winkler, Essay, *What Rights Should Corporations Have?*, WALL ST. J. (Mar. 1, 2018, 10:50 AM), https://www.wsj.com/articles/what-rights-should-corporations-have-1519919444 [https://perma.cc/2VRW-V8MA].

117. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 88 (1809), *overruled in part by* Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

118. *Id.* at 89.

119. Pollman, *Reconceiving Corporate Personhood*, *supra* note 115, at 1657.

120. Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WISC. L. REV. 999, 1000–01.

roughly 1850,[121] understanding "the corporation as an entity existing separately from its shareholders and other participants."[122] Under this view, the corporation was artificial because it "owed its existence to the positive law of the state rather than to the private initiative of individual incorporators."[123] In other words, the corporation was "a state-created reification."[124] At the time of the Founding, state legislatures retained the power to grant corporate charters.[125] This era predated the onset of general state incorporation laws; instead, the formation of each individual corporation required a special legislative act.[126] On this basis, if the corporation were simply a fictional creation—a concession or grant[127]—of the state, the government ought to be able to regulate it, rendering it a partial rather than complete authorization to operate in the corporate form.[128] In 1819, Chief Justice Marshall described the corporation in *Trustees of Dartmouth College v. Woodward*,[129] the "seminal Supreme Court case adopting the artificial entity theory,"[130] as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[131] In our current era, however, the artificial entity theory

121. William W. Bratton Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1483–85 (1989).

122. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–06.

123. *Id.* at 206.

124. Bratton, *supra* note 121, at 1484.

125. Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 404 (1982).

126. Millon, *supra* note 122, at 206.

127. Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985) ("'[G]rant' or 'concession' theory . . . treated the act of incorporation as a special privilege conferred by the state for the pursuit of public purposes. Under the grant theory, the business corporation was regarded as an artifical [*sic*] being created by the state with powers strictly limited by its charter of incorporation." (footnote and quotations omitted)).

128. Pollman, *Reconceiving Corporate Personhood*, *supra* note 115, at 1635.

129. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

130. Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 69 (2005).

131. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636. The Dartmouth College opinion did not expressly indicate that it extended beyond charitable corporations. *See, e.g.*, Robert Sprague Hall, *The* Dartmouth College *Case*, 20 GREEN BAG 244, 244 (1908) ("The most obvious feature of the decision is that it concerns, and is authoritative for, the charters of one class only of corporations, the class including those of the type of Dartmouth College, that is, private eleemosynary institutions."). But "the Court's ruling was understood as extending to all private corporations, including business corporations." Pollman, *Line Drawing*, *supra* note 22, at 604.

has fallen out of style.[132] But Chief Justice Marshall's conception of the artificial entity remains a favorite of judges today,[133] perhaps for its florid language.

2. *Real Entity Theory*. As the number of corporations grew from the 1850s through the 1880s, the accompanying legal conception moved "away from juridical constructs and toward the social reality of the business and the creative energy of the individuals conducting it."[134] In this era, states shifted from issuing individual corporate concessions to enacting largely standardized general corporation laws with "provisions respecting corporate purposes, directors' powers, capital structure, dividends, amendments, and mergers."[135]

Against this backdrop, the ascendant real entity or natural entity theory "conceived of the corporation as the creation of private initiative rather than state power."[136] Central to the real entity theory was the belief "that a corporation is a being with attributes not found among the humans who are its components."[137] Under this conception, the corporation was viewed not as a mere legal fiction of "sovereign grace" but instead with a focus on "the social reality of the business and the creative energy of the individuals conducting it."[138] In a natural outgrowth of this view of the corporation, many states eliminated regulations on corporate activity, viewing it as fundamentally analogous to individual business activity—which was not subject to such extensive public-welfare regulation.[139]

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132. *See, e.g.*, Miller, *supra* note 107, at 920 ("In sum, the artificial entity theory is enervated, but it is not extinct.").

133. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 752 (2014) (Ginsburg, J., dissenting) (quoting *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 636); Wichita Ctr. for Graduate Med. Educ., Inc. v. United States, 917 F.3d 1221, 1224 (10th Cir. 2019) (same); Prairie Capital III, L.P. v. Double E Holding Corp., 132 A.3d 35, 59 (Del. Ch. 2015) (same).

134. Bratton, *supra* note 121, at 1486.

135. *Id.* at 1485.

136. Millon, *supra* note 122, at 211.

137. Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068 (1994).

138. Bratton, *supra* note 121, at 1486. For representative examples of the real entity theory from the early twentieth century, see generally George F. Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 COLUM. L. REV. 128 (1917); George F. Deiser, *The Juristic Person* (Pts. 1–3), 57 U. PA. L. REV. 131 (1908–1909); Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); and Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253 (1911).

139. Millon, *supra* note 122, at 213; *see also* Horwitz, *supra* note 127, at 182 ("The main effect of the natural entity theory of the business corporation was to legitimate large scale enterprise

Legal realist critiques, most notably John Dewey's influential 1926 *Yale Law Journal* essay, *The Historic Background of Corporate Legal Personality*,[140] played a strong role in effectuating the demise of the theory.[141] Dewey argued that corporate personhood itself was entirely indeterminate—"put roughly, 'person' signifies what law makes it signify"[142]—and that it was merely a malleable mechanism through which to assert the proponent's desired policy ends.[143] Dewey's critique largely ended discussions of corporate personhood, at least until the 1980s.[144]

3. *Aggregation Theory.* Aside from the shift from artificial to natural entity, a second debate took place as the nineteenth century came to a close about whether the corporation was an entity distinct from its component individuals or rather an aggregate of those individuals.[145] Early proponents of the aggregation theory posited the corporation as "an association formed by the agreement of its shareholders" and argued that "the existence of a corporation as an entity, independent[ ] of its members, is a fiction."[146] The "aggregation" in the theory's name referred to the notion of the corporation as "an aggregation composed of shareholders and management, the latter confined to labor for the interests of shareholders by standard principles of property and trust law."[147] Adherents to this view argued that "the fact that private individuals had chosen to do business as a

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and to destroy any special basis for state regulation of the corporation that derived from its creation by the state.").

140. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

141. *See, e.g.*, Bratton, *supra* note 121, at 1491 (presenting Dewey's essay as one in "a series of persuasive critiques" that "denied the existence of a real entity").

142. Dewey, *supra* note 140, at 655.

143. *Id.* at 669 ("Each theory has been used to serve the same ends, and each has been used to serve opposing ends.").

144. Horwitz, *supra* note 127, at 175 ("There are very few discussions of corporate personality after Dewey."); *see also* Bratton, *supra* note 121, at 1491 ("These critiques denied the existence of a real entity, putting forth a conclusive case for the reified corporation. After corporate realism disappeared, discussion of the nature of the firm in traditional legal terms nearly disappeared as well." (footnote omitted)).

145. Horwitz, *supra* note 127, at 182.

146. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS iii (1886).

147. Millon, *supra* note 122, at 222–23.

corporation should not be a basis for subjecting their financial interests to regulation that otherwise would not apply."[148]

Aggregation theory grounded the earlier application of the Fourteenth Amendment's Equal Protection and Due Process Clauses to corporations in the 1882 circuit court decision, *County of San Mateo v. Southern Pacific Railroad*[149] and the subsequent 1886 Supreme Court case, *County of Santa Clara v. Southern Pacific Railroad*.[150] Riding circuit, Justice Field wrote in *San Mateo*:

> Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business. . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. We cannot accept such a conclusion. . . . [T]he property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.[151]

Chief Justice Waite endorsed this understanding for the Court in *Santa Clara*,[152] although through a headnote written by the Supreme Court's reporter of decisions rather than a formal opinion.[153]

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148. *Id.* at 214.

149. Cty. of San Mateo v. S. Pac. R.R., 13 F. 722 (C.C.D. Cal. 1882) (*Railroad Tax Cases*). Justice Field also heard the companion *Santa Clara* case while riding circuit. *See* Cty. of Santa Clara v. S. Pac. R.R., 18 F. 385 (C.C.D. Cal. 1883) (Field, J.).

150. Cty. of Santa Clara v. S. Pac. R.R., 118 U.S. 394 (1886).

151. *Railroad Tax Cases*, 13 F. at 743–44, 747.

152. *See, e.g.*, O'Kelley, *supra* note 107, at 1353–56 (explaining the sequence of the two companion cases and arguing that in *Santa Clara*, 118 U.S. 394, the Supreme Court adopted the rationale of Justice Field's circuit opinions).

153. While preparing the United States Reports, Bancroft Davis, the Supreme Court Reporter of Decisions, wrote to Chief Justice Waite asking if he had "correctly caught" the comment before oral argument. HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 567 (2013) (quoting Letter from J. C. Bancroft Davis, Reporter of Decisions, Supreme Court of the U.S., to Morrison Waite, Chief Justice, Supreme Court of the U.S. (May 26, 1886)). Chief Justice Waite responded, "I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." *Id.* (quoting Letter from Morrison Waite, Chief Justice, Supreme Court of the U.S., to J. C. Bancroft Davis, Reporter of Decisions, Supreme Court of the U.S. (May 31, 1886)). Davis's headnote is the only statement on the matter, as "no formal opinions ever were rendered by the Supreme Court on the point of corporate personality when the circuit decisions were appealed, 1882-1886." Howard Jay

The Court's more recent corporate constitutional rights cases have not followed a uniform theory of corporate personhood.[154] The legal academy, however, has seen a renewed interest in the concept since the 1980s,[155] and various commentators have argued that the leading contemporary understanding of corporations fits within the aggregation theory.[156]

B. Bellotti*'s Ineffectual Test for Corporate Constitutional Rights*

The Court itself has given little explicit guidance on how to determine whether a corporation possesses a constitutional right. The closest it has come to formulating a test for corporate constitutional rights came in a footnote in *First National Bank of Boston v. Bellotti*[157] in 1978. Writing for the Court, Justice Powell offered the supposed test:

> Certain "purely personal" guarantees . . . are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. . . . Whether or not a particular guarantee is "purely personal" or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.[158]

Commentators have attacked the *Bellotti* framework on various grounds. For instance, Professor Darrell Miller calls it "superficially attractive but practically disappointing," arguing that the test fails to reflect the Court's actual practice of asserting corporate constitutional rights *ipse dixit*.[159] Miller further asserts that the test rebuffs the recognition of many of the pre-*Bellotti* rights, suggests a categorical

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Graham, *An Innocent Abroad: The Constitutional Corporate "Person*," 2 UCLA L. REV. 155, 159–60 (1955).

154. Pollman, *Reconceiving Corporate Personhood*, *supra* note 115, at 1657.

155. Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 474 (2013).

156. *See, e.g.*, William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993) ("The dominant legal academic view does not describe the corporation as a social institution. Rather, the corporation is seen as the market writ small, a web of ongoing contracts (explicit or implicit) between various real persons."); Ho, *supra* note 108, at 895 ("Since the rise of the law and economics movement, dominant thinking about the nature of the corporation has coalesced around an aggregate theory of the corporation that sees the corporation as a 'nexus of contracts.'"); Millon, *supra* note 122, at 229–31 (arguing that the post-1980 nexus of contracts understanding of the corporation is a form of the aggregation theory, with various classes of individuals whose inputs constitute the corporation).

157. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

158. *Id.* at 778 n.14 (quoting United States v. White, 322 U.S. 694, 698–701 (1944)).

159. Miller, *supra* note 107, at 912 & n.160.

binary between protecting corporations or not that cannot be found in existing doctrine, fails to engage with underlying understandings of corporate personhood, and perhaps unwittingly makes the finding of such rights a rebuttable presumption without clarifying how this presumption may be rebutted.[160] Professor Elizabeth Pollman observes that "[t]he Court has not consistently used [the *Bellotti*] approach or shown that it would be possible to do so in the context of corporations," arguing that the Court has neither clarified the meaning of a "purely personal" right nor regularly looked to the "historic function" of the right in question.[161] Moreover, Pollman contends that in practice, judicial analysis of history does not decisively settle the Founders' views of corporate rights.[162] Discussing *Bellotti* in the Bill of Rights context, Professor Mark Tushnet charges that "[s]orting the Amendments into the boxes 'available to corporations' and 'not available to corporations' appears to require some consideration of each Amendment's purposes"—a process which "is itself complex."[163] Criticism abounds.

III. CORPORATE PROTECTION UNDER THE BILL OF ATTAINDER CLAUSE

Having set out the history and precedent of the Bill of Attainder Clause, as well as the Court's practice of recognizing corporate constitutional rights, this Note now shifts to demonstrate that the Bill of Attainder Clause's protections extend to corporations under the existing doctrinal structures of corporate personhood and a purposive inquiry. This Part first reviews the Second Circuit's deficient analysis in the only federal circuit court holding that the Clause covers corporations. It then analyzes the corporate constitutional right against bills of attainder under theories of corporate personhood, observing that the contemporary theories support the Clause's extension to corporations, before finally discussing how the Clause's purposes also implicate corporations.

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160. *Id.* at 912–13.

161. Pollman, *A Corporate Right*, *supra* note 107, at 53.

162. *Id.* In her line of attack on the practical value of historical inquiry, Pollman contrasts Justice Kennedy's majority opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010) with Justice Scalia's concurrence and Justice Stevens's dissent. Pollman, *A Corporate Right*, *supra* note 107, at 53 n.110.

163. Mark Tushnet, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70, 72 (2013).

A. The Second Circuit's Deficient Analysis

The Second Circuit is the only federal circuit court to decide whether the Bill of Attainder Clause extends to corporations—holding in *ConEdison* that it does.[164] Although this Note argues that the Second Circuit's ultimate holding is correct, the court's reasoning is deeply flawed. The case arose out of a New York statute enacted in response to a power outage at a ConEdison nuclear facility that was partially responsible for providing power to New York City. In order to meet power demands during this roughly eleven-month outage, ConEdison needed to purchase external electricity from other sources.[165] Under existing New York law, ConEdison "would have been able to pass on to its customers approximately $250 million in increased costs," according to New York State Public Service Commission estimates.[166] Instead, the state legislature passed a law prohibiting ConEdison from "recovering from its ratepayers any costs associated with replacing the power from [the outage]."[167]

Writing for a unanimous panel, Judge Walker determined that the Bill of Attainder Clause does apply to corporations—striking down the New York law at issue as an unconstitutional bill of attainder against ConEdison.[168] The opinion began by quoting Chief Justice Marshall's artificial-entity conception of the corporation from *Dartmouth College*[169] before noting a range of recognized corporate constitutional rights.[170] The court then considered two statements from the Supreme Court, dubiously viewing each to signal that the Bill of Attainder Clause covers corporations.[171]

1. *Supreme Court Precedent.* First, the Second Circuit looked to *South Carolina v. Katzenbach*,[172] the 1966 Voting Rights Act case in which the Supreme Court considered whether the word "person" in the Fifth Amendment Due Process Clause encompassed states.[173] The Court, in an opinion written by Chief Justice Warren, firmly denied this

164. Consol. Edison Co. of New York v. Pataki (*ConEdison*), 292 F.3d 338, 349 (2d Cir. 2002).
165. *Id.* at 343.
166. *Id.* at 344–45.
167. *Id.* at 344 (quoting Act of Aug. 8, 2000, ch. 190, § 2, 2000 N.Y. Laws 2788).
168. *Id.* at 355.
169. *See supra* note 131 and accompanying text.
170. *ConEdison*, 292 F.3d at 346–47.
171. *Id.* at 347.
172. South Carolina v. Katzenbach, 383 U.S. 301 (1966).
173. *Id.* at 323–24.

possibility, viewing as analogous that "courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private *groups*, those who are peculiarly vulnerable to non-judicial determinations of guilt."[174] The opinion cited *Brown* and *Garland* for that proposition[175]—the former featuring a prohibition on Communist Party members from belonging to labor unions[176] and the latter addressing a loyalty oath requiring all attorneys practicing in federal court to affirm that they never served in the Confederate government.[177] In this context, "groups" most accurately refers to groups of individuals. *Katzenbach* itself and both *Brown* and *Garland* say nothing about corporations, and *Katzenbach* says nothing beyond a sole line about the Bill of Attainder Clause. It strains the imagination to understand *Katzenbach* as providing substantive support for the Clause's coverage of corporations.

In *ConEdison*, the Second Circuit then considered a footnote from *Plaut v. Spendthrift Farm*,[178] a 1995 case in which the Supreme Court held that Congress had violated the separation of powers in enacting a statute directing federal courts to reopen final judgments for a specified class of cases.[179] In *Plaut*, the judgment was against a corporation—Spendthrift Farm. Justice Scalia observed that the infringement upon the judicial power "consist[ed] *not* of the Legislature's acting in a particularized and hence . . . nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action."[180] In an intervening footnote, Justice Scalia added an ancillary remark about particularized legislation in general:

> The premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual *or firm* are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the

174. *Id.* at 324 (emphasis added).
175. *Id.*
176. *See supra* text accompanying note 78.
177. *See supra* text accompanying note 55.
178. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
179. *Id.* at 217–18.
180. *Id.* at 239 (footnote omitted).

> Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also *punishment*, and a case which says that Congress may legislate "a legitimate class of one."[181]

The *Plaut* footnote cannot plausibly be taken to signal a wholly novel constitutional understanding. The Court "does not hide elephants in mouseholes."[182] Naturally, Justice Scalia swept "firm[s]" into his discussion to ensure its applicability to Spendthrift Farm. He made no acknowledgement whatsoever about the never-before-announced protection of corporations by the Bill of Attainder Clause, nor did he cite any support for or acknowledge the potential gravity of his statement. The Second Circuit's single paragraph in *ConEdison* discussing *Katzenbach* and *Plaut* entirely failed to account for the contexts of those cases.[183]

2. Corporate Constitutional Rights Generally. After considering precedent, the Second Circuit then considered corporate constitutional rights more generally. It focused on the *Bellotti* footnote framework, concluding that bill of attainder protection is not a purely personal guarantee, meaning that it is a corporate constitutional right.[184] The court came to this conclusion for two reasons. First, it noted that "the 'historical function' of the Clause has been to ensure the procedural protections of the judicial process for the attribution of guilt and imposition of punishment," a constitutional guarantee "closely related to the right to procedural due process"[185] and enjoyed by corporations.[186] Second, it asserted that "the cases in which the Court has refused to apply constitutional rights to corporations have uniformly involved competing state interests in regulating corporate conduct and investigating corporate wrongdoing, which depend on a high degree of transparency."[187] In this case, the Second Circuit

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181. *Id.* at 239 n.9 (first emphasis added) (citations omitted) (first quoting United States v. Lovett, 328 U.S. 303, 328 (1946) (Frankfurter, J. concurring); then quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472 (1977)).

182. *Cf.* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (Scalia, J.) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

183. *See* Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 347 (2d Cir. 2002) (pulling quotes only selectively from these opinions and without context).

184. *Id.*

185. *Id.*

186. *Id.* at 348 (citing Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 413–19 (1984)).

187. *Id.*

observed that "[a]lthough New York unquestionably ha[d] an interest in investigating, regulating, and prosecuting the malfeasance of corporations within its borders, it ha[d] no interest in inflicting punishment for such malfeasance on the corporation's shareholders through the legislative process."[188] Instead, New York "ha[d] an existing administrative procedure to vindicate the interest in exploring utilities' wrongdoing: the [Public Service Commission's] prudence review process."[189]

The Second Circuit seemed to believe that the offensiveness of the statute under review should shape the contours of the Bill of Attainder Clause itself. Under the pretense of a generalized appraisal of the Bill of Attainder Clause's potential coverage of corporations, the court engaged in a partial merits analysis of the challenge before it. Employing the Second Circuit's approach, a less-objectionable statute would have weighed against recognizing the corporate constitutional right against bills of attainder—potentially enough for the court to have held that the Clause does not cover corporations, thereby foreclosing an entire constitutional protection simply because the first corporate attainder challenge decided by the court happened to be weak on the merits. The preliminary question of whether or not there is a corporate constitutional right is entirely distinct from the second question of whether or not the invocation of that right will succeed in light of the facts of the case. The court erred in considering the merits of the challenge at issue when deciding whether the Bill of Attainder Clause applies to corporations. Rather, it should have determined whether the constitutional right exists generally, without relying on the specific facts of the case. The existence of a constitutional right in the first place cannot hinge in any part on whether or not that right was violated.

Next, the Second Circuit analogized the Bill of Attainder Clause to the Takings Clause's protection of corporations, arguing that legislative punishment, similar to legislative takings, imposes economic injury. "For both . . . Clauses, if the protections did not extend to corporations, their protections would be significantly undermined for individuals" because "[w]hen a corporation suffers an economic injury, its shareholders suffer the same economic injury."[190] The court justified allowing corporations to challenge laws under the Clause "[i]n order to

188. *Id.*
189. *Id.*
190. *Id.*

protect shareholders from . . . economic injuries."[191] This explanation is startlingly incomplete. Might corporate bill of attainder challenges be levied *only* against those laws inflicting economic harm upon shareholders? The Second Circuit wholly failed to acknowledge, for example, punitive laws that restrict management's freedom to make decisions on behalf of the corporation but that do not harm shareholders financially.

3. *History*. Finally, the Second Circuit considered historical practice. The court forthrightly acknowledged that the parties and the court were "unable to unearth *any case* in which a corporation has ultimately prevailed [on the merits] in challenging legislation as a bill of attainder."[192] Yet it favorably noted that *ConEdison* cited "several English statutes that imposed disabilities on English boroughs, hardly natural persons,"[193] because they were structured as corporations.[194] Perhaps these statutes were perfectly acceptable, as the mere imposition of a *disability* is not the same thing as targeted legislative *punishment*: *Nixon* very clearly observed that "[f]orbidden legislative punishment is not involved merely because [an a]ct imposes burdensome consequences."[195] Disabilities in this context are simply burdensome consequences, while punishment requires a determination of *intent*.[196] *ConEdison* failed to acknowledge the distinction, offering no evidence that the cited English statutes were actually bills of pains and penalties.

* * *

As the only federal circuit court decision to hold whether or not the Bill of Attainder Clause covers corporations, *ConEdison* stands on unique ground to influence future corporate bill of attainder challenges. Indeed, other circuits have favorably cited the Second Circuit's opinion when assuming without deciding that the Clause extends to corporations.[197] With a misguided and inadequate

191. *Id.*

192. *Id.* (emphasis added).

193. *Id.* (citing Disfranchisement of Grampound Act 1821, 1 & 2 Geo. 4 c. 47 (Eng.)).

194. *See supra* text accompanying note 35.

195. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472 (1977).

196. *Nixon*'s functional test for punishment requires exactly this. *See id.* at 475–76 (requiring an inquiry into whether the legislature could have enacted the challenged law in pursuit of nonpunitive purposes).

197. *See, e.g.*, Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 909 F.3d 446, 453 (D.C. Cir. 2018) (citing *ConEdison* for "holding that corporations are 'individuals' protected by the Bill of Attainder Clause").

foundation, judicial administration of corporate bill of attainder challenges is bound to suffer. In *ConEdison*, the Second Circuit interpreted Supreme Court precedent in a dubious manner, assessed the merits of the specific challenge when attempting to construe the Clause's general meaning, and offered an incomplete understanding of historical practice. Rather than rely on *ConEdison*'s shaky analysis, the next Section establishes that future courts should engage directly with corporate personhood and the purposes of the Bill of Attainder Clause in order to determine whether the Clause does in fact extend to protect corporations.

B. Corporate Personhood Analysis

Having considered the precedent and history of the Bill of Attainder Clause, this Note now considers corporate constitutional rights more generally. Lying beneath the Court's corporate constitutional rights jurisprudence is corporate personhood, with each of the three major theories giving rise to unique implications for a potential corporate constitutional right against bills of attainder. Although the Court continues to debate corporate personhood in its corporate constitutional rights decisions,[198] the influence and usage of the artificial entity theory has fallen significantly.[199] This Section argues that the bygone artificial entity theory should be rejected because it enables the subversion of the Clause's existing protections of individuals and that the real entity and aggregation theories provide strong support for a corporate right against bills of attainder.

1. *Artificial Entity Theory*. Today, the artificial entity theory is the least frequently employed of the three corporate personhood theories, with Professor Pollman observing that the "Supreme Court had largely shifted away from [the artificial entity] view by 1950, and the Court has since called it an 'extreme position.'"[200] Nevertheless, incorporation does still require government recognition, although it is a mere formality to obtain.[201] Modern proponents of the artificial entity theory

198. Martin Petrin, *Reconceptualizing the Theory of the Firm—from Nature to Function*, 118 PENN ST. L. REV. 1, 14 (2013).

199. *See, e.g.*, Avi-Yonah, *supra* note 120, at 1011–12 (observing the decline of the artificial entity theory with the rise of general incorporation statutes).

200. *See* Pollman, *A Corporate Right*, *supra* note 107, at 37 n.42 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)).

201. And incorporation itself remains necessary to achieve desired corporate functions unobtainable through private ordering. *See generally* Henry Hansmann & Reinier Kraakman, *The*

have interpreted the concept in different ways, with some arguing for a rebuttable presumption against corporate constitutional rights[202] and others arguing for unrestrained legislative power to deny such rights.[203]

Setting aside the artificial entity theory's fall from influence, the theory is deficient because it provides a potential means for legislatures to subvert the Bill of Attainder Clause. The state's power to grant a right—in this case, the legislature's authorization of corporate charter itself—does not itself give the state indiscriminate power to violate that right.[204] But the artificial entity theory could mean that because the legislature's technical permission to incorporate is what creates the corporation at all, the legislature can instead offer partial permission for the corporation to exist—perhaps reserving the power to punish. If the legislature can authorize a whole, unencumbered corporation, the thinking goes, it can also authorize a corporation with limitations.

Regardless, the individuals comprising the corporation possess a constitutional right against bills of attainder unaltered by an artificial entity conception of the corporation as a concession of the state. The Bill of Attainder Clause would be undermined if it were understood only to protect individuals when the attainder statute singled them out but not when a statute with identical effects and motivated by identical legislative intent were passed instead against the corporation comprised of those individuals. Imagine, for example, a bill of attainder punishing a group of corporate managers for professional misbehavior by prohibiting them from implementing certain management practices. Punishing the corporation instead, the legislature could pass an analogous statute singling out the corporation and having the very same effect. Because the artificial entity theory may provide a theoretical foundation enabling legislatures to evade the Bill of Attainder Clause's settled protection of individuals, the theory should be rejected as a basis for determining whether or not the Clause applies to corporations.

Essential Role of Organizational Law, 110 YALE L.J. 387 (2000) (arguing that organizational law creates an asset-partitioning pattern in corporate entities otherwise impossible through private contracting among owners, managers, and creditors).

202. *See generally* Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327 (2014) (arguing that artificial entity, or concession, theory is a viable means through which to secure greater regulation of corporations).

203. *See generally* Reza Dibadj, *(Mis)conceptions of the Corporation*, 29 GA. ST. U. L. REV. 731 (2013) (arguing that corporations deserve no constitutional rights beyond those expressly bestowed upon them by the legislature).

204. *Cf.* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

2. *Real Entity Theory*. The real entity theory, focusing on the inherent distinction between the corporation itself and the people whose energies combine to shape it, directly raises the question of whether corporations must be covered by the Bill of Attainder Clause in order to protect the interests of their human components.[205] The targeted legislative punishment of a corporation might very well inflict unchecked, indirect punishment on shareholders, managers, directors, or other employees.

Setting aside other constitutional claims, imagine a statute targeted at a specific corporation that strips shareholders of their rightful shares or directors of their rightful votes. Under *Nixon*'s tripartite punishment analysis, a challenged statute need fail only one or two of the three tests to be an unconstitutional bill of attainder.[206] Such a statute would clearly fail the historical test for punishment under the Bill of Attainder Clause, as it does not impose a death sentence. However, the law might satisfy the functional test because the burdens it imposes could be viewed to further only punitive purposes. Similarly, the law might also satisfy the motivational test if there were evidence of punitive legislative ambitions in the record.

Punitive legislation that only reduces the value of shareholders' stock produces a trickier example, as it would, of course, present a question of degree: how drastic must the effect on share price be to fail the functional test? Absent a damning legislative record that would emphatically satisfy the motivational test, courts might defer to legislative judgment. In this example, however, the existing protection of individuals under the Clause would fail to encompass the statute at issue because the statute would single out the corporation itself rather than the shareholders who, in effect, would receive the punishment—even though the statute would clearly inflict punishment on the corporation's human stakeholders. Consequently, the Bill of Attainder Clause would extend to corporations under the real entity theory

205. Margaret Blair and Elizabeth Pollman have traced the case law and proposed an overarching framework describing the Court's decision-making in its corporate constitutional rights cases. *See generally* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015). They argue that the Court employs an "unarticulated framework" in which it "has extended constitutional protections to corporations when it is a necessary or convenient way to protect the rights of the natural persons assumed to be represented by the corporation in question, at least with respect to the issue at stake." *Id.* at 1731.

206. *See supra* text accompanying notes 93–98.

because corporate coverage is necessary to protect the rights of the people behind the corporation.

3. *Aggregation Theory*. The aggregation theory begets the same result as the real entity theory: corporate protection from bills of attainder. The aggregation theory looks at the rights, duties, and expectations of a corporation's constituent natural persons and seeks to ensure a meaningful degree of equality between those and the legal entitlements the constituents would have had if they had not opted to utilize the corporate form to do business. A statute targeting a corporation that reduces the value of shareholders' rightful shares or strips directors of their rightful votes would, in effect, impose a penalty on those individuals for voluntarily incorporating rather than contracting in an ad hoc fashion. This outcome would be impermissible under the aggregation theory, as the corporation's stakeholders would enjoy fewer legal entitlements—in this case, constitutional rights—solely because they chose to incorporate. Under this theory, the Bill of Attainder Clause would extend to corporations as well.

C. The Purposes of the Bill of Attainder Clause

A complete analysis of the Bill of Attainder Clause's potential extension to corporations must also consider whether the Clause's purposes necessarily implicate corporations in similar ways to individuals, who unquestionably fall within the Clause's coverage. While some jurists have argued that the Bill of Attainder Clause's purpose was to prevent the legislature from enacting criminal punishments,[207] today the Clause extends beyond the criminal realm and into punishment more broadly.[208] Commentators have offered various views of the Bill of Attainder Clause's purpose over the decades,[209] and Professor Aaron Caplan has synthesized the most

207. *See, e.g.*, COOLEY, GENERAL PRINCIPLES, *supra* note 28, at 285 ("It is conceded on all sides, that the purpose of the constitutional inhibition is . . . in short, wholly to deprive the government of any power to inflict legislative punishment for criminal, or supposed criminal, conduct.").

208. The Court's entire sequence of bill of attainder cases supports this view. *See supra* Part I.B.

209. *See generally, e.g.*, Comment, *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 YALE L.J. 844 (1954) (arguing that the Clause's purpose is to secure the safeguards of judicial trial before the government may invade personal security and private rights); Ely, Comment, *supra* note 81 (arguing that the Clause's purpose is to implement the separation of powers by preventing "the legislature from exercising the judicial function" of determining "who comes within the purview of its general rules"); Charles H. Wilson, Jr.,

influential proposals into four key constitutional values served by the Clause: procedural fairness, separation of powers, equality, and the elimination of political persecution.[210]

1. *Procedural Fairness*. Professor Akhil Amar describes the procedural fairness element, observing that the Clause's purpose is partially "rooted in narrow ideas of adjudicative due process."[211] "In general," he stresses, "the legislature must prescribe penalties generally and prospectively, behind a suitably impersonal veil of ignorance."[212] The prohibition on bills of attainder prevents the legislature from "singl[ing] out its enemies—or the politically unpopular—and condemn[ing] them for who they are, or for what they have done in the past and can no longer change."[213] Instead, "[t]he Attainder Clause channels punishment into the courts which are governed by the many procedural protections of Article III and of the Fifth and Sixth Amendments."[214] Corporations, too, may suffer if punished without a fair process.

While the nature of legislative adjudication of corporate punishment differs from that directed toward natural persons,[215] it is subject to the same potential procedural abuses. In prohibiting the legislature from condemning specified actors for who they are or what they have previously done, the Bill of Attainder Clause's purpose of preserving procedural fairness implicates corporations.

Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212 (1966) (arguing that "the constitutional proscription of bills of attainder is a guarantee of procedural due process"); David Kairys, Note, *The Bill of Attainder Clauses and Legislative and Administrative Suppression of "Subversives*," 67 COLUM. L. REV. 1490 (1967) (arguing that "the principal evil the clauses were meant to combat" was "the use of legislative power to suppress political opposition"); Griffith, *supra* note 70 (arguing that the Clause's primary purpose is "shielding political activity protected by the first amendment from retroactive legislative sanctions").

210. Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1232–37.

211. Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 209 (1996).

212. *Id.* at 210.

213. *Id.*

214. Caplan, *supra* note 210, at 1233.

215. *Compare* Act of Aug. 8, 2000, ch. 190, § 2, 2000 N.Y. Laws 2788, *invalidated by* Consol. Edison Co. of New York v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002) (effectively imposing a $250 million fine on an identified corporation), *with* 1778 Mass. Acts 912 (banning named individuals from returning to their home province).

2. *Separation of Powers*. Professor John Hart Ely offers the defining account of the Bill of Attainder Clause as an exercise of the separation of powers, arguing that the Clause "establishes that there are certain types of decision that are in varying degrees inappropriate for legislative resolution, although specific definition of those limitations . . . appears impossible."[216] Professor Laurence Tribe has also endorsed this view.[217] And the Court asserted in *Brown* that "the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[218] Indeed, "the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons."[219]

The legislature is no more equipped to mete out punishment to corporations than to individuals; nothing inherent in the corporate form distinguishes it from natural persons in this regard. Operating to preserve separation of powers, the Bill of Attainder Clause concerns corporations as well as individuals.

3. *Equality*. Professor Amar also observes the equality purpose of the Clause, as the legislature's properly drawn punitive laws—general and prospective in nature—afford "[t]hose who seek to avoid the noose . . . fair warning that they must refrain from [the outlawed] conduct."[220] Professor Roderick Hills refers to this as the Clause's "rule against closed classes," because while the Clause "do[es] not necessarily bar legal burdens based on status *per se*," it does bar such burdens imposed through "classifications based on 'irreversible' status—that is, on legally closed classifications with a membership that is, therefore, permanently fixed upon enactment."[221] This rule is designed to prevent the legislature from being able to "launch 'surgical strikes' against unpopular groups, confident that such burdens will not

216. Ely, Comment, *supra* note 81, at 343 (emphasis omitted).

217. *See* TRIBE, *supra* note 13, at 657 (describing three strands of separation of powers values served by the Clause).

218. United States v. Brown, 381 U.S. 437, 442 (1965).

219. *Id.* at 445.

220. Amar, *supra* note 211, at 210.

221. Roderick M. Hills, Jr., *Is Amendment 2 Really a Bill of Attainder? Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 241 (1996).

affect favored constituents upon whom the legislator depends."[222] And the rule itself emerges out of the "tradition of minimal impartiality," "a deep constitutional tradition that governmental decisions cannot rest on a mere desire to impose costs on one person or group for the benefit of another person or group; the identity of the burdened persons ought to be irrelevant to the purpose of the burden."[223] Without the rule against closed classes, it "is otherwise impossible to guarantee [a minimal degree of impartiality] in the legislative context through institutional design," unlike in the judicial context.[224]

When the legislature specifies the target of a bill of attainder, it imposes punishment based on the target's fixed identity. A corporation singled out on the basis of "who" it is can no less escape punishment than can individuals singled out on the basis of who they are. Maintaining the equality of the legislature's laws in their application, the Bill of Attainder Clause embraces corporations.

4. *Elimination of Political Persecution.* Caplan notes that the Bill of Attainder Clause "joins a cluster of constitutional provisions that seek to eliminate political persecution and show trials."[225] In his historical account of English bills of attainder, Professor Zechariah Chafee documented that most were used to remove high officials from office, either because the King himself sought the disposal of members of his administration who had grown too powerful or because Parliament needed a practical outlet to placate a populace unhappy with royal policies.[226] But the Constitution establishes impeachment as the only mechanism for the congressional removal of high officials.[227] The Bill of Attainder Clause, Caplan asserts, "serves to channel legislative discontent against ministers into the impeachment process where it belongs."[228]

Whether or not the political-persecution purpose implicates corporations depends on its level of abstraction. If the Clause is viewed

222. *Id.* at 242.

223. *Id.*

224. *Id.*

225. Caplan, *supra* note 210, at 1236. Caplan mentions the Bill of Attainder Clause alongside the Treason Clause. *Id.*

226. CHAFEE, *supra* note 23, at 103.

227. *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 198–204 (2005) (explaining the mechanics and rationale of the Article II Impeachment Clause and its differences from the English impeachment process).

228. Caplan, *supra* note 210, at 1237.

merely as a formal channeling mechanism into the impeachment process, the purposes of its protections do not implicate corporations. But if the Clause instead stands as a bulwark against the political passions of the majority, corporations are implicated in much the same way as individuals; legislators can foment anger against corporate enemies just as they rouse the citizenry against natural persons reputed to be antagonists.[229]

CONCLUSION

Politicians on both sides of the aisle are increasingly stoking populist resentment of corporate America,[230] while the concentration of wealth among the largest corporations continues to grow.[231] At the same time, the federal government has grown increasingly suspicious of a range of foreign corporations doing business in the United States, as it faces the prospect of heavy-handed nation-states leaning on their globally integrated corporate underlings to perform cyberespionage by

229. *Cf.* Alexandria Ocasio-Cortez (@AOC), TWITTER (Feb. 14, 2019, 1:42 PM), https://twitter.com/AOC/status/1096117499492478977?ref_src=twsrc%5Etfw%7Ctwcamp%5E [https://perma.cc/T4UZ-UEFC] ("Anything is possible: today was the day a group of dedicated, everyday New Yorkers & their neighbors defeated Amazon's corporate greed, its worker exploitation, and the power of the richest man in the world.").

230. *See, e.g.*, Matt Laslo, *Josh Hawley Says Tech Enables 'Some of the Worst of America,'* WIRED (Aug. 16, 2019, 8:00 AM), https://www.wired.com/story/josh-hawley-tech-enables-worst-of-america [https://perma.cc/XG2T-A4V5] ("[The dominant tech firms] are companies that are supposed to represent the best of America, but in the last couple of decades, I think they've given us some of the worst of America. We're dealing with pathologies that they have at the least contributed to."); Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/7PZC-ZD7D] ("Today's big tech companies have too much power — too much power over our economy, our society, and our democracy. They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation.").

231. *See, e.g.*, Antoine Gara, *Growing Wealth Inequality Hits America's Largest Corporations*, FORBES (May 20, 2016, 4:06 PM), https://www.forbes.com/sites/antoinegara/2016/05/20/growing-wealth-inequality-hits-americas-largest-corporations/#469f1e125eb8 [https://perma.cc/YCC6-78QD] ("The top 1%, measured by S&P as the 25 companies with the highest cash balances, controls 51% of the cash in Corporate America, up from 38% five years ago.").

proxy.[232] This is where Huawei, the target of a custom-fitting statute banning the federal use of its products, enters the picture.[233]

This Note seeks to guide the conversation about the Bill of Attainder Clause's potential protection of corporations. Huawei's lawsuit is already the second in as many years challenging a congressional ban on a foreign corporation's products.[234] Most recently, at a dispositive motion hearing in Huawei's case, the district court ordered supplemental briefing on whether, as a threshold matter, the Bill of Attainder Clause applies to corporations.[235] Huawei, however, is expected to lose the suit[236] as the government has a strong, nonpunitive national security rationale for the ban and an inoffensive legislative history on its side. But *ConEdison* shows that corporate bill of attainder challenges are not inherently doomed. Corporations may soon challenge punitive regulatory laws as bills of attainder with increased frequency. Legislators must understand the full extent of the Constitution if they are to act responsibly in enacting laws, and corporate litigants should understand the full extent of their constitutional rights when facing putative statutory punishments. The Bill of Attainder Clause raises earnest considerations for both camps.

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232. China and Russia, for example, are the two largest state sponsors of cyberattacks on the West. Charles Hymas, *China Is Ahead of Russia as 'Biggest State Sponsor of Cyber-Attacks on the West*,' TELEGRAPH (Oct. 9, 2018, 1:00 PM), https://www.telegraph.co.uk/technology/2018/10/09/china-ahead-russia-biggest-state-sponsor-cyber-attacks-west [https://perma.cc/RD3K-55DJ]. Each country is the home to countless corporations with American subsidiaries.

233. *See, e.g.*, Kate Fazzini, *Why the US Government Is So Suspicious of Huawei*, CNBC (Dec. 6, 2018, 7:04 PM), https://www.cnbc.com/2018/12/06/huaweis-difficult-history-with-us-government.html [https://perma.cc/7WQN-LD2E] ("Starting around 2010, U.S. intelligence officials began warning agencies, and then private companies, of what it said were clear-cut cases of [Huawei] serving as a proxy for espionage conducted by the Chinese government . . . .").

234. *See* Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec., 311 F. Supp. 3d 187, 223 (D.D.C.) (dismissing the bill of attainder challenge of the American subsidiary of a Russian corporation to a congressional ban on the federal use of its products), *aff'd*, 909 F.3d 446 (D.C. Cir. 2018).

235. Transcript of Oral Argument at 106, Huawei Techs. USA, Inc. v. United States (E.D. Tex. Sept. 19, 2019) (No. 4:19-cv-00159).

236. *See, e.g.*, Noah Feldman, Opinion, *Huawei's Lawsuit Against U.S. Won't Win in Court*, BLOOMBERG (Mar. 11, 2019, 9:19 PM), https://www.bloomberg.com/opinion/articles/2019-03-12/huawei-technologies-v-u-s-constitutional-argument-won-t-work [https://perma.cc/7N9A-FM5J] ("The bill of attainder argument is therefore exceedingly weak, and more or less guaranteed to fail."); *see also* Evan Zoldan, *The Hidden Issue in Huawei's Suit Against the United States*, JUST SECURITY (Mar. 28, 2019), https://www.justsecurity.org/63408/the-hidden-issue-in-huaweis-suit-against-the-united-states [https://perma.cc/QC2Q-488E] (acknowledging that Huawei is likely to lose in its bill of attainder claim).