A Comparative Analysis of the United States Supreme Court's Doctrine of Selective Incorporation and Corporate Constitutional Rights Jurisprudence

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A COMPARATIVE ANALYSIS OF THE UNITED STATES SUPREME COURT'S DOCTRINE OF SELECTIVE INCORPORATION AND CORPORATE CONSTITUTIONAL RIGHTS JURISPRUDENCE

by

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ABSTRACT

With recent and contentious Supreme Court cases dealing with corporate constitutional rights, such as *Citizens United v. Federal Election Commission* (2010), as well as with the appointment of a new justice, the time is particularly ripe for evaluations of the Supreme Court's jurisprudence in this area, including predictions about the future of this line of cases. The purpose of this thesis is to establish a better understanding of the historical jurisprudential approach utilized by the Supreme Court to decide corporate constitutional rights by establishing the well-known doctrine of selective incorporation as an appropriate analogy. No other works attempt to frame the case history of corporate constitutional rights within a consistent doctrine, yet many works seek to evaluate and predict Court decisions in this area. This work will therefore create a new frame of reference for corporate constitutional rights, providing a new basis for interpretation and predictions.

This thesis begins by conducting a thorough overview of both lines of cases, focusing on the establishment of each doctrine over time as well as the reasoning behind the Court's use of this particular approach. Once a clear picture of both approaches has been ascertained, this thesis moves on to an overall comparison and evaluation of both approaches. In finding the process, intent, and overall effect of both jurisprudential approaches to be the same, the use of selective incorporation as an analogy for the Supreme Court's approach to corporate constitutional rights gives way to predictions about the future of corporate constitutional rights. Considering the relevant views expressed by the new justice, Neil Gorsuch, and the previous decisions of the Roberts Court, this analogy provides solid evidence for predicting continued expansion of corporate constitutional rights, including such areas as freedom of speech, freedom of religion,

and perhaps even rights of the accused. The comparative approach used in this thesis, as well as the analogy it establishes, can also be revisited as new Court decisions are made and as the makeup of the Court changes overtime.

DEDICATION

For my family and friends, who support my flights of fancy,

For my professors and mentors, who give them substance and direction,

And for the University of Central Florida, which has provided the platform from which I have launched this and many other dreams.

I believe in myself because you believed in me.

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INTRODUCTION

Arguably one of the most widely discussed and burgeoning issues within the field of modern constitutional law is the continued expansion of corporate constitutional rights. With several recent, highly contested, and publicly well-known cases in this area, much of the discussion has revolved around the arguments for and against the continued growth of constitutional rights for corporations. The underlying purpose of this thesis is not take a side in this debate, but rather to establish a better understanding of the jurisprudential approach the Supreme Court has utilized in deciding these cases. Specifically, the methodology employed in this thesis utilizes a comparative analysis to explain the Supreme Court's jurisprudential approach to corporate constitutional rights by comparing that approach with more established and better known doctrine of selective incorporation. The unique comparison of these two approaches establishes the important similarities between them, and in doing so supports the argument that the doctrine of selective incorporation may properly be employed as an analogy for the Court's approach to the evolution of corporate constitutional rights. Using this analogy, predictions for the future of corporate constitutional rights under modern Supreme Court jurisprudence are made, specifically whether the Court will continue to expand upon the constitutional protections afforded to corporations in upcoming years, and if so, which rights and protections are most likely to be addressed next.

Many law review articles and other scholarly works have been written regarding both selective incorporation and the constitutional rights of corporations. Selective incorporation is, of course, in no way a new or cutting edge topic within the law, and discussions of it can be found in numerous articles, books, and judicial opinions. Although the Court's history with the topic

begins as far back as 1833,[1] and the use of this doctrine began formally in 1925,[2] selective incorporation is not a strictly historical or arcane jurisprudential doctrine; the Court utilized this process as recently as 2010 to apply the Second Amendment to the states,[3] and at the time of this writing, there are four provisions of the Bill or Rights that have yet to be incorporated.[4]

Corporate personhood (and the rights associated with this personhood), has also become a divisive topic, especially following the Supreme Court decisions in *Citizens United v. Federal Election Commission* and *Burwell v. Hobby Lobby*, in which the Supreme Court appeared to greatly expand corporate constitutional rights regarding both freedom of speech and freedom of religion, respectively. [5] Decided in relatively quick succession, these cases have led to a major increase in the interest in this topic, and there have been numerous articles published within the last ten years either defending or condemning these decisions. Many of these articles discuss the history of corporate personhood and its purpose within the legal field, as well as the intent of the original framers of the United States Constitution when debating and drafting the Constitution to argue for or against these developments. Regardless of one's opinion, however, it is clear that the Supreme Court of the United States has a long lineage of cases involving the legal personalities of corporations under constitutional law. Again, this thesis does not seek to address whether this

[1] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).

[2] *Gitlow v. New York* 268 US 652 (1925).

[3] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

[4] Ibid. See footnote 13.

[5] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

jurisprudential approach is valid, but rather evaluates the approach itself and utilizes a comparative legal analysis to predict the future of this line of case law. Therefore, the primary goal of this thesis is to establish a new line of study in corporate constitutional rights, and will not seek to weigh in on the issue of its constitutional, historical, or moral validity, nor will the author make a judgment as to the positive or negative effect of these decisions on our democratic system. Instead, the goal of this thesis will be to objectively evaluate the judicial approach that the Supreme Court has historically utilized in deciding what rights apply to corporations (if any), arguing that the doctrine of selective incorporation is at least a valid analogy for this process, and may even be considered an equivalent approach, just one with a different legal basis. With the recent developments in both areas, the time seems right for a fresh evaluation of the Court's approach; a comparison of these two seemingly distinct jurisprudential areas will foster better understanding of both.

To this end, this thesis engages in an in-depth comparison of the approach historically utilized by the Supreme Court in deciding constitutional rights of corporations with that of the doctrine of selective incorporation. It seeks to prove the similarities between these approaches, and in doing so gives a better framework of understanding for Supreme Court jurisprudence regarding corporate rights. This comparative analysis is undertaken by comparing those cases that are relevant to both selective incorporation as well as corporate rights, pointing out any overlap between these two topics in terms of their case history, and then investigating whether both lines of jurisprudence represent the same case-by-case, clause-by-clause approach to incorporating constitutional rights (either to the states or to corporations). By following the timeline of cases for each area, the works seeks to gain a better understanding of the

establishment of the doctrine of selective incorporation as well as prove that a consistent approach to corporate constitutional rights exists at the Supreme Court level. An evaluation as to why this case-by-case approach may have been chosen in each instance is also discussed. Finally, the novel mode of analysis employed herein brings not only a better frame of reference for the historical process of constitutional rights of corporations and adds to the body of knowledge in this area, but also facilitates better predictions for the actions of the Supreme Court in this area in the future. This work therefore concludes with several predictions on the future of Supreme Court case law in this area based on the analysis of the historical approach and a logical continuation of that trend. While predicting future Supreme Court decisions is often difficult and highly speculative, understanding the underlying rationale of the Court's decisions in particular thematic areas can provide valuable insight.

This thesis is organized into three sections. The first section discusses the relevant history of, and cases related to, selective incorporation. The second section discuss the relevant history and case law regarding alleged corporate constitutional rights. The third section of this thesis then turns to an evaluation and comparison of the two doctrines, before the final section lays out some predictions using those conclusions. This work achieves some natural symmetry by beginning with discussions on the importance of the Fourteenth Amendment for both selective incorporation as well as corporate constitutional rights. This is the obvious place to start for both topics, as the Fourteenth Amendment is the foundation for selective incorporation, and because

the first constitutional amendment explicitly found by the Supreme Court to be applicable to corporations was also the Fourteenth Amendment.[6]

To fully understand the historical basis for the evaluation of these two judicial approaches, a thorough review of the case history of each needs to be conducted. Each section will begin with a brief discussion of the Fourteenth Amendment and *The Slaughter-House Cases*[7] because of their importance to both areas of comparison. For selective incorporation, other major cases throughout the history of the process are discussed in depth, covering the process through to the most recent incorporation case (at the time of this writing), *McDonald v. Chicago*, in 2010.[8] Many of the other important incorporation cases in between are also examined to establish a better understanding of the approach utilized, specifically the clause-by-clause breakdown of constitutional rights, and the numerous cases needed to incorporate them all. This thesis then addresses those rights that have not been incorporated (either due to lack of a case, or because the Supreme Court has specifically found that they do not apply), with an emphasis on whether these decisions are still relevant in light of modern jurisprudence and what this implies for the doctrine at large. This section concludes with a discussion of the intentional choice behind the use of selective incorporation over other approaches (i.e. total incorporation) and attempts to shed some light on why the Court made this choice.

A similar methodology is then followed in the section on corporate constitutional rights, with an analysis of several case involving the progressive application of constitutional

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[6] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 395 (1886).

[7] *Slaughter-House Cases*, 83 U.S. 36 (1872).

[8] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

protections to corporate entities and the establishment of a consistent approach. Of course special attention will also be paid to the more recent and controversial issues of whether freedom of speech and freedom of religion are applicable to corporations under Supreme Court case law.[9] Here, too, some attention will be paid to those rights that have been found not to apply to corporations, but the discussion will focus more on the arguments that the Court has used against applying these rights to corporation, and whether they represent a deviation from the purported approach, or simply a different interpretation of its results based on various other factors, such as individual justices' interpretation of corporate personhood. As with selective incorporation, this section will conclude with some discussion about the rationale behind the Court's choice of this approach over others. Cases within each section are organized primarily chronologically to allow for better historical context and analysis.

With the recent decisions in *Citizens United*[10] and *Hobby Lobby*[11], many are eager to speculate about what is to come for corporate constitutional rights. However, without a proper understanding of the history of this topic and the Court's methodology in deciding these cases, such predictions hold little meaning. This work will therefore be unique not only in its methodology by comparing these two jurisprudential approaches, but also in its ability to make predictions based on this new understanding of the Court's approach. Of course, as the makeup of the Court changes and justices holding different views of corporate legal personality take the

[9] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[10] Ibid.

[11] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

bench, these predictions may change, because each new justice brings to the Court his or her own jurisprudential philosophies. As of the time of this writing, the vacant seat left by Justice Scalia's death makes any predictions particularly difficult, especially when one considers that recent corporate rights cases have been decided on a five-to-four basis, mostly along ideological lines. The views of the new justice regarding corporate legal personality and corporate constitutional rights may completely change the Court's direction, and these developments will be discussed below, and taken into consideration when making predictions later on.

SELECTIVE INCORPORATION

History of Incorporation of the Bill of Rights to the States

Selective incorporation is the process by which the Supreme Court of the United States has applied various provisions and protections of the Bill of Rights as binding on the states (and their political subdivisions). These first ten amendments to the United States Constitution were created to ensure individual rights and freedoms against the federal government.[12] Not originally included in the Constitution, these protections represented a compromise to garner support for ratification of the Constitution.[13] Although many of the framers considered such a listing of rights as unnecessary, these ten amendments were none-the-less adopted within a few years of ratification. The question soon became whether these amendments, and the protections they afforded, were applicable to state and local governments as well.

It is interesting to note that Madison, the primary drafter of the Bill of Rights, set forth an amendment that would have specifically protected the "right of conscience, freedom of the press, or trial by jury in criminal cases" from state infringement.[14] The amendment could not garner significant congressional support, however, and was therefore never sent to the states for consideration.[15]

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[12] Erwin Chemerinsky, *Constitutional Law* (New York: Wolters Kluwer Law and Business, 2013), 379-380.

[13] Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, (Los Angeles: CQ Press, 2016), 67.

[14] Ibid.

[15] Ibid.

From their ratification in 1791 through 1833, the Bill of Rights remained inapplicable to states, although there was no official ruling on the matter. [16] In the 1833 case *Barron v. Baltimore*, however, the Supreme Court definitively stated that the Bill of Rights did not apply to state governments.[17] Four decades later, in the *Slaughter-House Cases*, the Court once again rejected attempts to apply the Bill of Rights to the States by rejecting the use of the Privileges and Immunities clause (found in Article IV, Section 2 of the Constitution) as a basis for application.[18] Following these decisions, however, judicial opinions on the issue began to change, and, starting in 1925, the selective incorporation process formally began with the case *Gitlow v. New York*, in which the Supreme Court ruled for first time that a provision of the Bill of Rights (the First Amendment's freedom of speech guarantee) applied to the states via the Fourteenth Amendment's Due Process clause.[19] In *Gitlow*, the Court held that the "liberty guarantee" protected from infringement by the states in the Due Process clause of the Fourteenth Amendment includes freedom of speech, and failure to protect this freedom constituted an infringement on the part of the state of the protection against deprivation of liberty without due process of law.[20] This same reasoning was used in the following nine decades to apply nearly every clause and protection of the Bill of Rights to the states, with a few notable exceptions, discussed below.

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[16] Chemerinsky, *Constitutional Law*, 380-381.

[17] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).

[18] Chemerinsky, *Constitutional Law*, 382-390.

[19] Chemerinsky, *Constitutional Law*, 393.

[20] *Gitlow v. New York*, 268 U.S. 652 (1925).

The term selective incorporation is explanatory of the specific approach used, as clauses were applied to the states on a case-by-case basis, rather than all at once. Such an approach was, and in some ways still is, contested, with disagreements about whether the Privileges and Immunities Clause would have been better textual basis for incorporation than the Fourteenth Amendment, as well as whether incorporation of First through the Eighth Amendments should have occurred all at once (a process known as total incorporation).[21] A short discussion of this debate is important to fully understand selective incorporation as a judicial approach, and to develop an understanding of the potential motives on the part of the Court for choosing this particular one. This will also be helpful to the reader in better understanding how this process applies to the evolution of the treatment of corporate constitutional rights.

Beginning with *Slaughter-House*, the Court's majority opinions have continuously rejected the proposal that the Privileges and Immunities Clause should be applied to state citizenship as well as national citizenship. The underlying argument in favor of its use is that if this clause was applied to state citizenship, then the logical consequence would be a finding that the states, like the federal government, must abide by the provisions of the Bill of Rights. Although many scholars suggest the Privileges and Immunities Clause would have been the more appropriate methodology for incorporating the Bill of Rights to the States (including Justice Hugo Black),[22] no other majority opinion following the *Slaughter-House Cases* attempted

[21] Chemerinsky, *Constitutional Law,* 382-390.

[22] *Adamson v. California*, 332 U.S. 46 (1947). See dissenting opinion. See also Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 30 N.M.L.

to use the clause in this way. Instead, those justices in favor of incorporation utilized a new basis to avoid the need to either overturn or distinguish from *Slaughter-House*. The Fourteenth Amendment Due Process Clause and the "liberty guarantee" contained therein thus became the new textual basis for incorporation. Some debate remains regarding the potential use of the Privileges and Immunities Clause by the Supreme Court, with some indication in the most recent incorporation case that its future use is still possible.[23]

Beyond the argument over the textual basis for incorporation of the Bill of Rights to the states explored above, there was also some substantial disagreement, even within the Supreme Court itself, about the judicial approach to be utilized. In particular, an argument waged over whether the Court should continue on a selective, incremental basis, incorporating clauses as they came up, case-by-case, or if the Court should sweepingly incorporate the entirety of the first eight amendments of the Bill of Rights via "total incorporation." This argument has become largely academic now that the majority of the Bill of Rights has been incorporated, but it still

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Rev. 195 (2009), and Brief for Constitutional Law Professors as Amici Curiae Supporting Petitioners at 33, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099504.

[23] *McDonald v. City of Chicago*, 561 U.S. 742 (2010). See Justice Thomas's concurring opinion, in which he argues for the use of the Privileges and Immunities Clause. Stating that this clause is both a more straightforward path and is more faithful to the text and history of the Fourteenth Amendment, Thomas maintains that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause." Although this stance is not utilized by the majority, it is not directly argued against, either.

holds important insight into the Court's approach, and it may still be relevant to the discussion of whether "total incorporation" has applicability to corporations.

Justice Hugo Black was highly in favor of the doctrine of total incorporation of the first eight amendments. He stated this view clearly in his concurring opinion in *Duncan v. Louisiana,* writing, "the words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States."[24] This approach was ultimately rejected in favor of the more incrementalist approach advocated by Justice Frankfurter, at least in part due to the rejection of the Privileges and Immunities Clause, upon which Justice Black based his argument, as the textual basis for incorporation. Under the Due Process clause, rights were incorporated on the basis that they were found to be included in the liberty protected under the Fourteenth Amendment from state intervention.[25] The Court, under this jurisprudential approach, likely felt obligated to argue the merits of each clause of the Bill of Rights separately as to whether it should in fact be included in this liberty protection. Although ultimately the Supreme Court has found all but a few of the clauses of the Bill of Rights are in fact required under the Due Process clause, this approach none the less leaves open the possibility of finding that certain clauses are not required and therefore do not apply to the states. This would not have been possible under a Privileges and Immunities total incorporation strategy. Further exploration of the Court's reasoning for adopting the selective approach, as well

[24] *Duncan v. Louisiana,* 391 U.S. 145 (1968).

[25] Chemerinsky, *Constitutional Law,* 391.

as those provisions that the Court has failed to incorporate, are discussed below. But first, a more in depth understanding of the case history and the progression of the approach overtime is critical.

Timeline of Cases – The Establishment of a Doctrine

As the name suggests, selective incorporation was a gradual process, spanning almost a century, during which the Court selected certain protections within the Bill of Rights within the confines of cases in front of the Court for decisions and, by arguing that they were critical to maintaining due process as guaranteed by the Fourteenth Amendment, made them applicable to the states. Although this process is now widely accepted, its history is long and, at times, contentious. In this section, this thesis seeks to construct a clear picture of the evolution of this doctrine and explain to the reader why the Court turned to this particular approach in lieu of the others offered by legal scholars and jurists (and at times, in dissenting or concurring opinions in Supreme Court decisions themselves). To better understand this process, a chronological overview of relevant cases will be presented, including relevant holdings and *dicta*.

Beginning in 1833 with *Barron v. Baltimore,* the Supreme Court definitively ruled that the Bill of Rights only limited the powers of the Federal government, not the states.[26] In *Barron*, the Court specifically rejected the idea that the owner of a business (in this case a wharf) could sue the city of Baltimore for compensation under the Takings Clause of the Fifth Amendment.[27]

[26] *Barron ex rel. Tiernan v. Mayor of Baltimore* 32 U.S. 243 (1833).

[27] Ibid.

Writing for the majority, Chief Justice Marshall asserted that if the framers of the Constitution had intended the rights and protections of the Bill of Rights to apply to the states, they would have indicated this in their language.[28] Stated plainly, the first ten "amendments contain no expression indicating an intention to apply them to the State governments. This Court cannot so apply them."[29] Furthermore, Marshall reasoned that state constitutions existed specifically to fill this gap and to limit state power or ensure individual rights were protected against state encroachment.[30] This logic was apparently so obvious to the justices at the time that the unanimous decision was handed down before the city even presented its arguments.[31] Whether this was a firm stance favoring state's rights, or merely a reading of the Bill of Rights as nothing more than a concessionary measure on the part of the federalists to get the constitution ratified is interesting but not relevant to this thesis.

This interpretation remained unquestioned for nearly four decades, until the ratification of the Fourteenth Amendment, which was passed in large part over concerns about the treatment of freed slaves in the former confederate states.[32] Its phrasing, explicitly directed at limiting state actions, brought a new opportunity to argue for constitutional protections against state governments. Eventually, in the Twentieth Century, the Fourteenth Amendment became the

[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, (Los Angeles: CQ Press, 2016), 67.

[32] Chemerinsky, *Constitutional Law*, 383-390.

foundation for the doctrine of selective incorporation and, I will argue later, also formed the basis for the Court's gradual and ongoing process of applying the Bill of Rights to corporations.

The Slaughter-House Cases (1872) was the first opportunity for the Court to interpret this new amendment.[33] This case is extremely important in understanding why the Court may have chosen to utilize the Due Process Clause and the selective approach rather than the Privileges and Immunities Clause and the total incorporation approach, as described above. In *Slaughter-House*, the Court once again refused to find the Bill of Rights to be applicable to the states, this time rejecting the argument that the Privileges and Immunities Clause of the Fourteenth Amendment should be read as effectively incorporating all protections of the Bill of Rights.[34] This is important because although a few justices and legal scholars continued to argue in favor of a wider interpretation of the Privileges and Immunities Clause that would have incorporated the entirety of the first eight amendments, no other majority opinion has attempted to utilize this clause in this way; to do so, the Court would have been forced to overturn *Slaughter-House*. Whether the commitment to this interpretation is attributable solely to deference to *stare decisis* or can be traced to other concerns will be addressed later.

Interestingly, this case can also be seen as an early rejection of corporate constitutional rights, as the suit was brought by businesses (although not corporations, per se) seeking redress. The Court's narrow interpretation of the Amendment, focusing solely on its purpose to prevent laws which discriminated against newly freed slaves, seemed an early blow to the possibility of

[33] *Slaughter-House Cases*, 83 U.S. 36 (1872).

[34] *Slaughter-House Cases*, 83 U.S. 36 (1872).

expanding its protections to apply to other entities as well to the states. This will be more fully explored in the section on corporate constitutional rights.

The next major incorporation case to come before the Court was *Hurtado v. California* (1884).[35] In this case, a criminal defendant attempted to argue that the state of California infringed upon his right to indictment by a grand jury.[36] Importantly, the argument Hurtado set forth centered on whether this qualified as an infringement of his due process rights under the Fourteenth Amendment, rather than arguing that the Fifth Amendment protections should be directly applicable to the states, as had been argued in *Barron*. The Court interpreted the question before them as whether the right to a grand jury indictment was "essential to that 'due process of law'," a similar test to the one later Supreme Courts used over time in determining what provisions should be incorporated.[37] Although the Court ruled against Hurtado, failing to find the grand jury indictment to be essential to due process, the Court did not reject the idea that *some* protection in the Bill of Rights could be considered essential to due process.[38] This left open the possibility of finding other protections to be applicable to the states via the due process guarantee of the Fourteenth Amendment. Total incorporation, however, was once again rejected. Justice Matthews made a very strong argument; because the Fifth Amendment Due Process Clause is just *one part* of the Bill of Rights, the Due Process Clause of neither the Fifth Amendment nor

[35] *Hurtado v. California*, 110 U.S. 516, (1884).

[36] Ibid.

[37] Ibid.

[38] Ibid.

the Fourteenth Amendment could be considered the equivalent of the entire Bill of Rights.[39] This argument relies on the assumption that it would not have been included if it was merely a redundancy. The Court had clearly laid out that any attempt at incorporating rights using the Due Process clause would therefore need to be a selective, incremental one.

Following *Hurtado*, however, the Court remained unclear on its stance regarding incorporation. In *Chicago, Burlington & Quincy Railroad Company v. Chicago* (1897), e.[40] This case is also of interest because the entity requesting relief is a company, not an individual. This apparently caused no contention within the Court, as this is not specifically addressed in the decision. Further discussion of this case within the timeline and perspective of corporate constitutional rights will take place in the following section.

But while *Chicago Railroad* may have seemed to signal that the Court was prepared to begin incorporating other rights, it did not address the apparent contradiction with its own argument and that of *Hurtado*. What distinction had the Court made between the right to a grand jury indictment and the guarantee of just compensation that warranted incorporating one but not the other? The next important case in this timeline, *Maxwell v. Dow* (1900) failed to give any further clarity. Here, the Court again refused to incorporate the right to a grand jury indictment, in addition to the Sixth Amendment right to a jury trial, offering little explanation for this apparent reversal from *Chicago Railroad* and essentially ignoring the incorporation argument entirely.[41]

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[39] Ibid.

[40] *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

[41] *Maxwell v. Dow*, 176 U.S. 581 (1900).

It was not until *Twining v. New Jersey* (1908) that a clear doctrine was formed. Although the Court failed to incorporate the Fifth Amendment right against self-incrimination, Justice Moody finally articulated a clear approach for determining whether a protection should be incorporated or not. According to him, the question the Court should ask itself is whether a right "is … a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of a such a government."[42] If so, then that right or protection should be considered part of the due process guarantee of the Fourteenth Amendment. Importantly, Moody also provided a solid argument for the specific use of the Fourteenth Amendment Due Process Clause and a case-by-case approach, rather than total incorporation. Regarding the notion of incorporation via the Privileges and Immunities Clause (which would have supported total incorporation), the majority opinion cites the *Slaughter-House Cases* as evidence against this interpretation.[43] Regarding the Due Process Clause, however, Moody wrote,

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, *it is not because those rights are enumerated in the first eight Amendments*, but because they are of such a nature that they are included in the conception of due process of law.[44] [Emphasis added]

In clarifying this point that a right should be applied to the states not simply because it is mentioned in the Bill of Rights but rather because without it the concept of due process

[42] *Twining v. New Jersey*, 211 U.S. 78 (1908).

[43] Ibid.

[44] Ibid.

would be meaningless, yet another nail was placed in the coffin of total incorporation. It also helped to resolve the apparent conflict in earlier decisions that had applied certain protections but not others; some were apparently implicit in or fundamental to the concept of due process, and some were not.

With this new doctrine came other questions, however. If all rights and protections in the Bill of Rights were not implicit in due process, how was the Court to determine which were? While Justice Moody in *Twining* declined on precedent to attempt to define due process, he did suggest some "settled" conclusions as to the matter. According to him, a process of law might be considered fundamental to due process if it has settled usage both in the United States and in England prior to our independence, but this was not *sufficient* cause to find a right to be essential to due process.[45] This implies certain a reliance on historical precedence. Yet, Moody also suggested that these "fundamental principles" should "be ascertained from time to time by judicial action," implying an understanding that opinions may change over time.[46]

The history of the Court's interpretation of the right against self-incrimination, rejected by Moody in *Twining*, is a good example of this transformation over time. In *Adamson v. California* (1947), the issue was again brought before the Court. The decision in *Twining* was reaffirmed, although by that time the doctrine of selective incorporation had been well established and many other rights had already been incorporated.[47] The

[45] Ibid.

[46] Ibid.

[47] *Adamson v. California*, 332 U.S. 46 (1947).

issue arose again less than twenty years later in *Malloy v. Hogan* (1964). This time, the Court did find this protection to be fundamental to due process rights and applied it to the states.[48] Opinions (of the justices, at least) had apparently changed in relatively little time. Ultimately, this selective, due process based approach became sufficiently accepted, and sufficiently broad, to encompass almost every provision of the Bill or Rights. Justice Moody may have intended the doctrine to allow for certain (or even the majority of) provisions to remain unincorporated, but it has not been used in this way.

It was not until *Gitlow v. New York* (1925), however, that the Court finally used Justice Moody's due process test to incorporate a clause of the Bill of Rights. A relatively short part of a case otherwise concerned with what qualifies as protected speech, Justice Sanford, writing for the majority, simply stated, "we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States."[49] Just like that, the Court explicitly found that the First Amendment protection of freedom of speech and press was applicable to the states via the Due Process Clause of the Fourteenth Amendment.

In retrospect, the First Amendment seems a reasonable first choice. If, after all, the doctrine the Court had adopted stated that only those provisions of the Bill of Rights

[48] *Malloy v. Hogan*, 378 U.S. 1 (1964).

[49] *Gitlow v. New York* 268 US 652 (1925).

which are necessary to ensure due process will be incorporated, starting with those rights which are the least contested is a good way to lay a foundation, which could be built upon later in more controversial cases. Most state constitutions already included some language alluding to freedom speech, and most of the American public feels strongly about the importance of this right for our democracy. The Court's choice, therefore, ensured a greater likelihood of a favorable decision in this particular case, as well as a lesser likelihood of future Courts seeking to overturn it. Following this line of reasoning, it is not surprising that many of the subsequent provisions incorporated throughout the next few decades were also rights relating to freedom of expression, and often decided with equally little argument.[50]

With some exceptions, the process of selective incorporation rolled forward smoothly after *Gitlow*, gradually applying more and more provisions, still on a case-by-case, at times line-by-line, basis. The 1960s and the Warren Court saw another large wave of incorporation cases, this time regarding more controversial issues – the rights of the accused. Issues such as the right to publicly provided counsel[51] and the Miranda warning[52] famously arose from these decisions. These rights were often more contentious because their incorporation would require many states to make fundamental and

[50] *Fiske v. Kansas*, 274 U.S. 380 (1927) (freedom of speech), *Near v. Minnesota*, 283 U.S. 697 (1931) (free press), *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934) (religious freedom), *DeJonge. v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly and right to petition).

[51] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[52] *Miranda v. Arizona*, 384 U.S. 436 (1966).

comprehensive changes to their criminal justice systems. Nevertheless, with a more solid foundation for the doctrine now laid, the Court revisited several provisions of the Bill of Rights that they had previously ruled were not necessary to due process and therefore should not be applied to states. In *Malloy v. Hogan* (1964), for example, the Court overturned the decision in *Twining*, ruling that the Fifth Amendment protection against self-incrimination is inherent to the concept of due process and therefore is binding upon the states.[53] *Palko v. Connecticut* (1937), a decision made after Gitlow had clearly established the doctrine, was also overturned by the Warren Court in *Benton v. Maryland* (1969), which incorporated the right against double jeopardy.[54] The Court continued incorporating various provisions of the Bill of Rights all the way up to the most recent case of *McDonald v. City of Chicago* (2010), which incorporated the Second Amendment right to bear arms.[55]

It is interesting to note, of course, that while total incorporation was rejected as a judicial strategy, selective incorporation has nonetheless applied all but a few provisions of the Bill of Rights to the states. If the initial goal of selective incorporation as a judicial approach was to leave open the possibility of finding some provisions not to be binding on the states, this strategy has been essentially abandoned. Before turning to a more complete discussion of the (evolving) rationale behind the use of selective incorporation,

[53] *Malloy v. Hogan*, 378 U.S. 1 (1964).

[54] *Palko v. Connecticut*, 302 U.S. 319 (1937); *Benton v. Maryland*, 395 U.S. 784 (1969).

[55] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

it is worthwhile to identify the specific protections of the Bill of Rights that have not yet been incorporated and seek to explain why it is the Court has not done so.

Unincorporated Provisions of the Bill of Rights

Although the process took decades, there are only four provisions of the Bill of Rights that are not currently incorporated. Justice Alito, writing for the majority in the most recent incorporation case, *McDonald v. City of Chicago* (2010), took the opportunity to specifically address those provisions remaining to be incorporated. Here, he lists the Third Amendment protection against quartering of soldiers, the Fifth Amendment's requirement of grand jury indictment, the Seventh Amendment right to a jury trial in civil cases, and the Eighth Amendment's prohibition against excessive fines as the only rights that remain to be incorporated. [56] I will address each of these individually.

First, the Third Amendment protection against quartering of troops has never been brought before the Supreme Court for any such decision to be made. This is probably because no related issue has arisen in modern history for the Courts to adjudicate. Therefore, the Court has not so much failed to incorporate this provision as the issue has failed to appear before the Court for decision.[57] The Eighth Amendment protection against excessive fines has also has never

[56] Ibid. See footnote 13.

[57] It is relevant to note that although a case has never reached Supreme Court, there have been several federal court cases dealing with the issue. For example, in *Engblom v. Carey* (2d Cir. 1982), the circuit court found that national guardsmen qualify as soldiers, and ruled that the Third Amendment is applicable to the states.

technically been ruled on by the Court, although a case was once presented. In *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* (1989), the issue was raised, but the Court declined to decide whether the protection applied to states.[58] It cannot be said for sure that either of these provisions would be incorporated if presented before the Court, but there is sufficient precedent to suggest that they would be.

As for the Fifth Amendment grand jury requirement and the Seventh Amendment right to jury trial in civil cases, the Court has explicitly found that neither are inherent in due process and therefore are not applicable to the states. *Hurtado*, discussed above, remains controlling on the issue of grand jury requirements, although this case is now over 130 years old.[59] Two Supreme Court cases have held that the right to a jury trial in civil cases is not applicable to the states, but the most recent is from 1916, still over a hundred years old at this point.[60] As Justice Alito pointed out, this precedent is not just old, they "long predate the era of selective incorporation."[61] This observation, although written only in a footnote, indicates that there is reason to reconsider these decisions in light of modern understandings of the Bill of Rights and state responsibilities. While it cannot be said for sure, this may indicate a desire on the part of the Court to retry these

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More recently, in *Mitchell v. City of Henderson, Nevada* a district court found dismissed a case alleging state violation of the Third Amendment by ruling that police do not qualify as soldiers.

[58] *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989)

[59] *Hurtado v. California*, 110 U.S. 516, (1884).

[60] *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916); *Pearson v. Yewdall*, 95 U.S. 294 (1877).

[61] *McDonald v. City of Chicago*, 561 U.S. 742 (2010). See footnote 13.

issues for the opportunity to overturn these decisions in favor of ones more consistent with the rest of the Court's jurisprudence in this area.

Court Reasoning and Intent

The question we turn to now is why the Court chose the selective incorporation approach over a more sweeping total incorporation strategy. In hindsight, it can appear as though the selective approach was the obvious best choice, or the only real choice, but as discussed previously, there were those in the legal community, including sitting justices, who disagreed that this was the correct method. Consider that, even once the Court decided on the use of a selective approach, it could have chosen to incorporate whole amendments at a time, rather than a clause-by-clause approach. For example, once the Court found that freedom of speech should be applicable to the states via the Fourteenth Amendment, could they not have also held all other freedom of expression protections, so obviously interrelated, to apply as well? Why did they choose to make such narrow rulings? Considering how few provisions remain unincorporated today, it seems strange that the Court would spend the time adjudicating these issues on a case-by-case basis rather than finding all provisions of the Bill of Rights, by their very nature, could not rightly be abridged by state governments any more than by the federal government.

First, it is important to evaluate the impact *The Slaughter-House Cases* had on subsequent Court decisions. Was selective incorporation chosen solely out of a desire not to overturn *Slaughter-House*? This seems unlikely for several reasons. For one, although the case has never been directly overturned, its central argument regarding the purpose and appropriate use of the Fourteenth Amendment (as applicable only to freed slaves and their decedents) has

long been abandoned. This interpretation was controversial even at the time, considering the Congressman responsible for the first section of the Fourteenth Amendment clearly stated, on the record, that his intention was to make the protections of the Bill of Rights applicable to the states.[62] Furthermore, the Courts tendency to defer to precedent was not so strong as to prevent them from overturning many more cases throughout the decades of selective incorporation. While this may be a reflection of the change in the makeup of the Court, or a shift in general judicial ideologies overtime, commitment to *stare decisis* is nevertheless not a sufficient explanation for the adoption of selective incorporation as the Court's official doctrine.

Discussions of judicial activism versus restraint (the personal views of justices as to what the role of the Court is within the larger system) could also come into play. This reasoning focuses on the tendency of individual justices to favor total versus selective incorporation based on whether they think the Court has the right to make those sorts of sweeping decisions when a case can be decided on narrower grounds. Of course this is pertinent, and can be used to explain some of the underlying debate about selective versus total incorporation. Still, the Court had (and took) many opportunities to argue against total incorporation. Many different arguments were posited over time, including the proper (narrow) reading of the Privileges and Immunities clause as well as the nature of the Bill of Rights in regard to the Due Process clause (that the two were not synonymous). No justice, however, ever put forth an argument referring to a particular judicial philosophy, either activism or restraint, as reasoning for or against total incorporation.

[62] *Adamson v. California*, 332 U.S. 46 (1947). Citing Congressman Bingham and others in the legislative history of the Fourteenth Amendment.

As this argument is not infrequently used by the Court in other cases to avoid broad rulings, its absence here can be taken as an indication that even if it was a consideration, it was not of major concern to a majority of justices.

There is also, of course, the issue of the Supreme Court's own boundaries, which limit it to deciding only cases and controversies. Although not explicitly used as an argument against total incorporation, it is possible the Court considered it improper to decide any more than the issue at hand in any case. Keeping decisions narrowly tailored to the issue at hand may also account for why the Court did not decide to incorporate whole amendments at a time, for example incorporating freedom of religion at the same time as freedom of speech. Instead the justices may have felt it prudent to err on the side of caution and avoid sweeping decisions.

Another explanation for this judicial strategy is that the case-by-case nature of selective incorporation was necessary to allow for new opinions to be formed and for the doctrine to slowly gain traction; essentially that the selective, due process approach offered the best chance of success. To understand this argument, it is important to place early incorporation cases into context. For much of our history it was widely accepted that the Constitution was primarily a document for limiting the federal government; state governments were to be constrained by state constitutions, and people seeking redress against state encroachments should turn to state specific institutions. The problem of protecting freed slaves forced the country to face a deprivation of rights by the states on a massive scale. With the Fourteenth Amendment came a new understanding of the role of the Constitution regarding state power within the context of a new realization as to why such a change was necessary.

Still, many people, including Supreme Court justices, may have been hesitant to turn away from decades of deference to the states regarding these issues. Others may have been concerned about the logistics of implementing all of these provisions at once, especially considering the myriad of problems facing the country in the reconstruction era. Total incorporation at the point of *Slaughterhouse* may have proven to be an enforcement impossibility. As time went on, the importance of protecting citizens against the states gained traction, and by the early 1900s the Court began to signal it was willing to consider incorporating rights. The reliance on the Due Process clause at this point may have been in part because parties stopped attempting to use the Privileges and Immunities Clause after *Slaughterhouse*, but it is more likely that a majority of the justices actually preferred the incremental approach the Due Process cause offered.

As shown by many of the early incorporation cases (which signaled a willingness to adopt an incorporation doctrine but continued to reject the particular provisions brought before them) many justices at the time were still committed to maintaining the Bill of Rights as primarily federally focused; they did not think it necessary, or prudent, to require that all states meet the same standards as the federal government, particularly in the area of criminal justice. More importantly, though, even to those justices in favor of the opinion that the entirety of the Bill of Rights should be applicable to the states, selective incorporation probably seemed like a more successful strategy precisely because of its incremental nature.

Beginning, as the Court did, with less controversial provisions of the Bill of Rights (those that many state constitutions already protected, for example, and which therefore would have the least resistance) ensured favorable outcomes unlikely to be overturned. It is important to

remember that justices must concern themselves with the ideological makeup of future Courts; overturning a case, although uncommon, is always possible if the Court (and the public) feels strongly enough. Even if a majority of the justices at the time agreed on a total incorporation approach, or even a more sweeping selective approach, there was sufficient historical precedence on the issue to consider a reversal of opinions plausible. Importantly, the more sweeping the decision, the less cases would need to be overturned, the less relevant precedent to argue against, and the more likely there would be valid arguments against incorporating certain provisions. This selective approach therefore also ensured a series of opinions could be written, establishing the doctrine and affirming the precedent, making a future reversal far less likely. This concern for negative reactions is not exclusive to other justices, however - the Court likely wanted to maintain positive public opinion and avoid getting "too far ahead" of the American public, which could indirectly lead to a reversal of a case via congressional action.

Once the doctrine was well established, and a Court friendly to the idea arose, more 'controversial' provisions, such as protections of criminal defendants, could be incorporated. With much more precedent to rely on, and a country more accustomed to the idea of the Constitution being appropriately utilized to limit state power, these decisions found much firmer ground than they did a few decades earlier. Keeping in mind many of the Warren Court's selective incorporation decisions were decided on relatively narrow margins, even after decades of precedent in favor of the doctrine of incorporation as a whole, concerns about certain provisions being "less popular" as incorporation candidates were well founded.

Although it is difficult to know the intentions and logic of every justice's decision regarding these cases, there is sufficient evidence to suggest that the adoption of the selective

incorporation doctrine, utilizing the Due Process clause of the Fourteenth Amendment, was neither an accident nor merely an instance of deference to earlier rulings. Lack of evidence supporting judicial restraint as the primary goal also leads us to seek a better explanation. It is reasonable to suggest that those justices in favor of incorporation made thoughtful choices in their defining and utilization of the doctrine of selective incorporation. Specifically, they likely realized that a strong foundation of relatively uncontroversial cases was the best way to ensure a smooth and successful process of incorporation; this particular judicial approach was the best way to achieve that goal. As we turn to the approach being utilized by the Court to grant constitutional rights to corporations, the reasoning behind the adoption of the selective incorporation doctrine, as well as its technical consequences, are important to keep in mind.

CORPORATE CONSTITUTIONAL RIGHTS

History of Corporate Theory and Corporate Constitutional Rights

This section will briefly address the history of Supreme Court jurisprudence regarding corporate constitutional rights, including a brief discussion of important cases, an explanation of the evolution of corporate personality, and an account of corporate "pass through" theory and how it relates to the cases at hand. Before moving on, it is important to note that, for the purposes of this thesis, the distinction between corporations and other forms of businesses is largely inconsequential, as for the most part corporate structure is not significant in Court rulings (recent cases, particularly *Hobby Lobby*,[63] are exceptions). As such, the term "corporation" will here be used to refer to any type of collective business entity, unless the particular structure of the business is relevant to the decision at hand.

Much like selective incorporation, the issue of applying constitutional provisions to corporations began early in U.S. Supreme Court history. As early as 1819, the Court began finding rights and protections of the Constitution to be applicable to private corporate entities.[64] As with selective incorporation, the *Slaughter-House Cases* represented an important impediment to the extension of rights. Its narrow reading of the Fourteenth Amendment as applicable only to recently released slaves and their decedents excluded the businesses seeking

[63] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[64] *Trustees of Dartmouth College v. Woodward*, 17 US 518 (1819). Found the New Hampshire legislature had unconstitutionally infringed on the private college's rights under the Contract Clause.

relief, representing a blow to the potential use of the amendment to ensure further protections for corporate entities.[65]

It did not take long for the Court to reverse their decision in *Slaughter-House*, however, and find that the both the Due Process clause and the Equal Protection clause of the Fourteenth Amendment, are applicable to corporations. The 1886 case, *Santa Clara County v. Southern Pacific Railroad Company,* is generally agreed to be the first Supreme Court case to apply provisions of the Bill or Rights specifically to a corporation.**[66]** Although this is not clearly stated in the opinion itself, this case has been repeatedly cited as evidence that the Supreme Court has already settled whether the corporations are considered "persons" for purposes of the Fourteenth Amendment Equal Protection and Due Process clauses.[67] Although this certainly left room for confusion, *Covington & L. Turnpike Road Co. v. Sandford*, decided in 1896, explicitly found that corporations have due process and equal protection rights under the Fourteenth Amendment, and cited *Santa Clara* as precedence.**[68]**

Aside from *Slaughter-House,* further overlap exists between cases of selective incorporation and corporate constitutional rights, as several cases within the selective incorporation case history actually involve corporations, not individuals, seeking relief. *Chicago, Burlington & Quincy Railroad Company v. Chicago* (1897), for example, was the first case to

[65] *Slaughter-House Cases*, 83 U.S. 36 (1872).

[66] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 395 (1886).

[67] Ibid. See official Court Syllabus in the United States Reports.

[68] *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896).

find a provision of the Bill of Rights to be applicable to the states.[69] Because the appellant in this case was also a corporation, the Court did not just find the Takings Clause to be applicable to the states; it also inherently found it to be applicable to entities other than individuals (corporations).[70] In some cases, as with *Chicago, B. & Q.R. Co.*, the issue of a corporate appellant or appellee rather than an individual was not cause for significant argument. In later cases, as with *Burwell v. Hobby Lobby,*[71] the status of a corporation, as this relates to the ability to claim constitutional protection, became much more contentious.

Like selective incorporation, further constitutional provisions continue to be applied to corporations on a case-by-case, clause-by-clause basis. The argument of this thesis is that the current jurisprudential approach being employed by the Supreme Court of the United States to apply constitutional rights to corporations is fundamentally the same process as that historically utilized by the Court to make the Bill of Rights applicable to the states (the doctrine known as selective incorporation). To that end, this section will focus on the important aspects of the corporate constitutional jurisprudential approach, with brief mentions of selective incorporation, while the following section will provide a more in depth comparison of the two.

The evolution of corporate personhood, the legal understanding of the status of corporations and their rights under the law, is long, complex, and somewhat meandering in its evolution. A general understanding of these evolving opinions is important for a proper

[69] *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

[70] Ibid.

[71] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

understanding of the Court's approach to corporate constitutional rights, and I will therefore begin here before moving onto an evaluation of the case history.

Legal scholar Yvette Ann Walker places the history of corporate personhood into three distinct theories, each representing a different stage of the legal status of corporations.[72] These stages evolve over time, but are not strictly linear, in that contemporary opinions at any given time may be a mix of the three. The first theory is known as the "concessionary theory," which imagines corporations as strictly "legal fictions" with only those rights given to them by the state (in their charter).[73] However, as statutes began to emerge that allowed corporations to form without a formal charter from the state legislature, and the relationship between the state and corporations began to decline, the process of incorporating a business became more of an individual venture.[74] With this change came a new conception of what the legal importance of a corporation was, the "real entity theory," which suggests that corporations are more than a legal fiction and hold significance outside of the strict parameters of legal documents. This theory began the establishment of a distinct personality for corporations and provides a legitimate basis for the sanctioning of this personality via special rights. At this same time, however, many scholars also began to argue the opposite view point, asserting that corporate personhood

[72] Yvette Ann Walker, *More Than Human: Modern Expansion of Corporate Personhood Rights In Hobby Lobby*, 24 S. Cal. Rev. L. & Social Justice 297 (2015).

[73] Ibid.

[74] Ibid.

language was “not a signal that firms had an independent presence.” [75] This argument continues, at least in essence, today.

The final stage of this evolution towards corporate personhood, according to Walker, came as corporations began unprecedented growth in both size and scope. This expansion lead to the “natural entity theory,” which suggests that corporations exercise an independent existence from both the state and the individuals who make it up, acting as separate entities in and of themselves.[76] The United States Congressional Dictionary Act of 1948 supports this interpretation that corporate personhood is separate and equivalent (at least in most ways) to natural personhood. In it, Congress states that in "any Act of Congress, unless the context indicates otherwise ... the words ‘person’ and ‘whoever’ include corporations."[77] Though not directly dealt with in this thesis, the evolution of corporate criminal responsibility also coincides with the progression of corporate personality, as courts began finding criminal liability for corporations themselves and not merely for the agents thereof.[78] This criminal liability for corporations has been found to include crimes beyond merely financial ones, including negligent and reckless homicide.[79] This too represents the changing view of the Courts as to the status of corporations and corporate personhood. As for modern corporate theory, Walker argues it is

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Frank Schmalleger, *Criminal Law Today* (New Jersey: Prentice Hall, 2002), 123-5.

[79] Thomas Gardner and Terry Anderson, *Criminal Law: Principles and Cases* (Belmont: Wadsworth, 2000), 103.

essentially of a mix of original "real entity" and "natural entity" theory. This modern corporate theory admits that corporations are artificial creations, but also asserts that they are "real and independent actor[s] with goals and actions separate from the individuals composing [them]."[80] The Supreme Court's interpretation of whether a corporation should be granted certain constitutional rights depends largely on what type of corporate personhood theory to which they subscribe to, so it is important to keep these theories in mind while discussing specific cases and the arguments set forth by individual justices.

Finally, before moving on, it is crucial to discuss the concept of corporate pass through theory. Although never explicitly used by the Supreme Court as an argument in favor of corporate constitutional rights, it has been used by federal circuit Courts to find more "personal" provisions of the Bill or Rights (e.g. freedom of speech) to apply to corporations.[81] As the name suggests, this theory rests on the foundation that certain rights should be granted to corporations because the rights of the individual(s) who own it "pass through" to the corporation itself.[82] Failure to articulate the use of this theory on the part of the Supreme Court, does not, however, suggest its logic is not still in use. The extent to which decisions of the Court nonetheless reflect this rationale will be discussed below.

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[80] Yvette Ann Walker, *More Than Human: Modern Expansion of Corporate Personhood Rights In Hobby Lobby*, 24 S. Cal. Rev. L. & Social Justice 297 (2015).

[81] *Equal Emp't Opportunity Comm'n v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 621 (1988); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009).

[82] Walker, *More Than Human*, (2015).

Timeline of Cases – The Establishment of a Doctrine

Much like selective incorporation of the Bill of Rights, corporate constitutional rights has a long and meandering case history, with some significant overlap between the two. As discussed above, several early cases hold importance for both lines of decisions, and the Fourteenth Amendment also plays an important role in the jurisprudence of both. This section will seek to establish the major cases within the history of the Court's corporate constitutional rights jurisprudence, with particular focus on determining whether a consistent judicial approach can be garnered, and if so what that approach is founded on. In doing so, a chronological review of important cases will be presented, including relevant holdings and *dicta*, with emphasis on those cases which have relevance to selective incorporation as well.

It is no coincidence or forced attempt at symmetry that leads us to begin, as we did in the section on selective incorporation, with a discussion of the Fourteenth Amendment. As mentioned in the section on selective incorporation, the passage of the Fourteenth Amendment represented a dramatic change in the understanding of the role of the Bill of Rights; there was now firm constitutional grounds for finding that the Bill of Rights had further reach than just the federal government. Although much of this expansion of rights is thought of in terms of protecting individuals from the states, this broadened reading of its precepts (post-*Slaughter-House*) was an important step in applying the Bill of Rights to other entities besides individuals, namely corporations, as well.

Ultimately, the Court had little difficulty in finding the protections of the Fourteenth Amendment to be applicable to corporations.[83] Indeed, there seemed to be far less contention over corporate rights in this area than in regard to individual rights being protected from the states. Although originally the assertion that the Fourteenth Amendment was applicable to corporations appeared only in a headnote issued by the Court Reporter, Chief Justice Waite was quoted (before arguments were made) as saying, "[t]he Court does not wish to hear arguments on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."[84] Comparing the long series of cases needed for the Court to reach agreement about whether selective incorporation via the Due Process clause was valid, and how it would be handled, to the almost perfunctory treatment of corporate constitutional protections yields a somewhat confusing conclusion. After all, it may be difficult to believe in the contemporary context, considering how well settled selective incorporation is as a doctrine, and how controversial corporate constitutional rights have become, that, at least at first, corporate constitutional rights had more judicial support than incorporation of the Bill of Rights to the states. However, once a solid groundwork had been laid, selective incorporation cases proceeded on course without significant problems. As this section will demonstrate, corporate constitutional rights has not proceeded as quickly or comprehensively as selective incorporation has over the same time span.

[83] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 395 (1886).

[84] Ibid.

Although the lack of *dicta* relating to this holding makes it difficult to establish a clear picture of the Court's approach in these cases, it is reasonable to assume that the Court considered the purpose of the Fourteenth Amendment to ensure equal protection and due process irrefutably included corporations. Whether this interpretation was based on a reading of corporations merely as groupings of individuals who retain their rights or whether the Court considered corporations to be separate entities endowed in and of themselves with equal protection is unclear, however.

It is also interesting to note how the confusion surrounding *Santa Clara* and *Covington & Lexington Tpk. Road Co.* regarding the Court's lack of formal *dicta* and the subsequent assumptions has contributed to the problem of establishing a consistent judicial approach for corporate constitutional rights. While selective incorporation's troubled beginnings led to a series of decisions laying out the specific approach to be utilized, including arguments in favor of that particular approach and against alternatives, corporate constitutional rights relatively easy beginnings leaves a bit of a gap in judicial reasoning. This is one reason why the comparison of the two judicial approaches is so important.

After the Fourteenth Amendment issue was settled, the Court turned to other constitutional provisions, specifically those in the Bill of Rights. *Chicago, B. & Q.R. Co. v. City of Chicago*, the first case of incorporation of a provision of the Bill of Rights to the states, is important here because in reaching this decision, the Court also found that corporations could find protection under the Takings clause. [85] With *Santa Clara* and *Covington & Lexington Tpk.*

[85] *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

Road Co. having firmly established the applicability of the Due Process and Equal Protection clauses of the Fourteenth Amendment to corporations, [86] the Court apparently felt no need to address the corporate status of the appellant in its decision other than to state that the owners of a property (whether a corporation or an individual) was inconsequential for purposes of the case.[87] Here, the nature of the provision in question was less controversial in regard to corporate claimants. For one, property owned by a business is still owned by individuals on some level. Two, property is essential to the functioning of most businesses, and therefore the protection is highly correlated to maintaining the individual interests of those involved with the business.

Following *Chicago, B. & Q.R. Co.*, the next major decision in the realm of corporate constitutional law was *Hale v. Henkel,* in which the Court held that the Fourth Amendment protection against unreasonable search and seizure was applicable to corporations, but that the Fifth Amendment protection against self-incrimination was not.[88] Just as seemingly contradictory decisions within early selective incorporation cases raised questions about what provisions were applicable to states and how the Court would make such determinations, this case presented a question of why some constitutional rights should be afforded to corporations and not others, and how the Court would go about making such distinctions. According to Justice Brown, who delivered the opinion of the Court, the protection against self-incrimination "is purely a personal privilege of the witness" and therefore could not be invoked by an individual

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[86] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 395 (1886); *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896).

[87] *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

[88] *Hale v. Henkel*, 201 U.S. 43, (1906).

acting as an agent for another person or entity (in this case a corporation).[89] The idea of certain rights being "purely personal" has been utilized and expanded upon in subsequent cases, and will be touched on later. In this case, though, Justice Brown emphasized the nature of corporations as fundamentally different from that of an individual, calling it a "creature of the state."[90] The case syllabus reads, "there is a clear distinction between an individual and a corporation, and the latter, being a creature of the State, has not the constitutional right to refuse to submit its books and papers for an examination at the suit of the State."[91] Importantly, however, the Court also found in this case that the Fourth Amendment protection against search and seizure was not "purely personal" and therefore was applicable to corporations.[92] In arguing this point, Justice Brown seems to turn away from the argument that a corporation is nothing more than a state created entity he used to reject the self-incrimination argument, and instead chooses to focus on the individuals behind the corporation. Here he argues, "a corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."[93] The corporation itself obviously had not change in terms of it actual makeup or status. The difference between these two decisions therefore must have been in the nature of each constitutional provision. And just as selective incorporation required a series of cases before a

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Ibid.

clear approach for determining what rights are implicit in due process arose, so too did corporate constitutional rights require time before it became clear what made a particular provision of the Constitution "purely personal" and therefore not applicable to corporations.

In the next several decades, several more constitutional provisions were found to be applicable to corporations, and the judicial understanding of corporate personhood evolved as well. In 1909, for example, the Court found that corporations (not the people who own or manage them) could be found guilty of crimes.[94] *Russian Fleet v. U.S.* reaffirmed corporate protection under the Takings clause,[95] while *G.M. Leasing Co v. U.S.* also reaffirmed corporate protection under the Fourth Amendment Search and Seizure clause.[96] In *U.S. v. Martin Linen and Supply Co.*, the Court found corporations, like individuals, were protected against double jeopardy.[97] This case is of interest because unlike the Takings clause, the *nature* of the provision at hand (dealing with the court process) is not obviously applicable to the everyday dealings of a business. However, similarly to the Search and Seizure clause, the *purpose* of the provision can be used to argue in favor of protecting a corporation. Because the purpose of both of these provisions, outside of just protecting individuals, is to ensure a fair and just judicial system, applying these protections to corporations can be reasonably seen as upholding this purpose. These decisions, taken together, also seemed to foretell of a Court more inclined to find in favor of corporate constitutional rights.

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[94] *New York Central R. Co. v. United States*, 212 U.S. 481 (1909).

[95] *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

[96] *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

[97] *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

Occurring amid these decisions is an interesting case worth addressing before moving on to more modern decisions. In *Gallagher v. Crown Kosher Supermarket*, the Court sought to answer whether a law requiring stores to close on Sundays violated equal protection and free exercise rights.[98] Although the Court ultimately found the laws were not a violation of free exercise rights, the case is of interest here because the Court failed to address in its arguments whether a corporation even had free exercise rights that could be violated (or, in the words of Justice Brown, whether such a right was "purely personal").[99] Although such silence could not be taken definitively, it does indicate how apparently unremarkable the Court found it that a business should be seeking constitutional protection in this area.

Seventeen years later, in one of the most important cases in corporate constitutional jurisprudence, the Court addressed this unanswered question. In *First National Bank of Boston v. Bellotti* the Court found that corporations *do* have freedom of speech, protected by the First Amendment.[100] At issue in this case was a Massachusetts law prohibiting corporations from making contributions or spending money to influence voting other than when the item to be voted on directly impacted the corporation.[101] The majority, focusing on a reading of the First Amendment as a vehicle for encouraging public debate, and not just as a safeguard for individual expression, found that the law in question was unconstitutional.[102] The Court focused on

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[98] *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 US 617 (1961).

[99] Ibid.

[100] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978).

[101] Ibid.

[102] Ibid.

"whether the law abridges expression that the First Amendment meant to protect," arguing that "the inherent worth of speech… does not depend upon the identity of its source."[103] The majority rejected the argument, utilized by the lower court, that corporate First Amendment rights must be based on property rights under the Fourteenth Amendment.[104] But the Court also stated that there was no need to "… address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment."[105] The Court here seems to indicate that corporations do *not* have rights fully equivalent to individuals under the First Amendment, and that their decision should not be interpreted as such. The question as to which rights were available to corporations and which are not had thus arisen again. This time, however, Justice Powell, writing for the majority, attempted to clarify the position:

> Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals. United States v. White, 322 U. S. 694, 322 U. S. 698-701 (1944). 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*.[106] [Emphasis added]

The Court had thus finally clarified what factors it took into consideration when determining whether a corporation had the right to claim protection under a particular provision of the Bill of Rights. There is much to say about the similarity of this analysis compared to that utilized by the Court in determining whether a right was implicit in due process and therefore

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Ibid. Footnote 14.

applicable to the states (the approach utilized in selective incorporation), but that will be addressed in the following section. It is sufficient at this point to understand what this approach meant in the context of corporate constitutional rights: there was no blanket statement to be made about which rights were applicable to corporations and which were not. The Court would have to decide on a case-by-case basis.

It is also important to note that *Bellotti* was a contested case, decided on a narrow five-to-four margin. The dissenting opinions focused much more attention on the status of the appellee as a corporation, not an individual, seeking to define the difference. Justice White emphasized the importance of the state's ability to balance corporations disproportionate economic power (which in turn could lead to a disproportionate power in the realm of political speech), as well as the fact that corporate funds, provided by individual shareholders, could be used against the interest of those individuals.[107] Justice Rehnquist, adhering to a more traditional view of corporations, asserted in his dissent that as artificial entities, corporations should not be granted the same rights as natural persons.[108] Gone, apparently, were the days of clear cut corporate rights; the Court had entered into more controversial territory.

The issue of corporate freedom of speech was far from settled, however. In 1990, with many of the justices who voted in the majority in *Bellotti* having left the Court, a new case ruled, six-to-three, that the Michigan Campaign Finance Act, which prohibited corporations (with the exception of media corporations) "from using general treasury funds for, inter alia, independent

[107] Ibid.

[108] Ibid.

expenditures in connection with state candidate elections" was constitutionally valid.[109] This suggested a reversal in opinion; now, it seemed, it was constitutional to limit free speech rights on the basis of corporate identity.

Yet twenty years later, once again with major changes to the makeup of the Court, *Austin* (along with portions of *McConnell v. FEC*, another case in favor of limiting speech based on corporate identity) was overturned.[110] In a highly contentious case, *Citizens United v. Federal Elections Commission*, the Court returned to the ideas set forth in the majority opinion in *Bellotti*, namely that the identity or status of the speaker does not make certain types of speech, particularly political speech, any less valuable, and therefore any less protected.[111] Justice Stevens' dissent mirrored that of Justice Rehnquist some thirty years prior, arguing that corporations were not members of society, and their status as corporations raise "legitimate concerns about their role in the electoral process."[112] The split between the justices was not just a matter of their conception of corporate personhood, however. It also hinged, as set forth in *Bellotti*, on different understandings of the purpose and history of the First Amendment and its protections. Considering the divide on the Court, and significant public disapproval of the decision, it is fair to say that the issue is far from settled.

[109] *Austin v. Michigan Chamber of Commerce*, 494 US 652 (1990).

[110] Ibid; *McConnell v. FEC*, 540 U.S. 93 (2003).

[111] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[112] Ibid.

An even more recent yet equally (if not more) controversial case regarding corporate constitutional rights is *Burwell v. Hobby Lobby Stores*.[113] In this case, the Court moved away from issues of freedom of speech, and instead to what some would argue is an even more personal right – freedom of religion. Although the many details of this case, whose majority opinion is close to one hundred pages long, are important, for the purposes of this work the significant outcome was an apparent ruling in favor of corporate rights under the Religious Freedom Restoration Act (RFRA).[114] Although the Court was quick to emphasize that corporations at hand in this case were "closely-held" (meaning they have a limited number of shareholders and while they do publicly trade their stocks it is not done on a regular basis), the decision still suggested that a publicly traded, for-profit corporation could be imbued with the religious beliefs of its owners, and that those beliefs are protected under the RFRA.[115] Although not dealing directly with a constitutional provision, but rather an act of Congress, the case none-the-less can be read as a favoring of corporate religious rights which could pave the way for finding corporations can be protected by the First Amendment's freedom of religion.

Among many other arguments, the dissenting opinion in this case, written by Justice Ginsburg, argued that for-profit corporations, by their very nature, could not be considered religious entities, and therefore were not protected under the RFRA or the Constitution.[116] Once

[113] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[114] Ibid.

[115] Ibid.

[116] Ibid.

again, the argument centered around differing views of corporate personality as well as the nature, history, and purpose of religious freedom and the RFRA.

Unlike selective incorporation, now mostly a settled doctrine, corporate constitutional rights stand today as one of the most controversial areas of Supreme Court jurisprudence. The close margin on which the two most recent decisions were decided, the active distain for them from political figures and private individuals alike, as well as the seat recently left open by Justice Scalia's death, make the issue of Supreme Court jurisprudence of corporate constitutional rights ripe for investigation. Before turning to the Court's reasoning and intent, I turn now to a brief discussion focusing more on those arguments the Court has set forth against corporate constitutional rights in order to establish a firmer understanding of the approach being utilized.

Arguments against Corporate Constitutional Rights

While the previous section focused more on those cases and arguments favoring constitutional rights, this section will seek to balance that. It is important to remember that while selective incorporation has left very few protections of the Bill of Rights unincorporated, the process of granting constitutional rights to corporations has progressed more slowly. Therefore, rather than addressing every provision of the Bill or Rights that has not yet been found to apply to corporations, as was done with selective incorporation, this section will focus on those arguments put forth against corporate constitutional rights by Supreme Court justices, whether they be in majority or dissenting opinions. This will help to establish a better understanding of the approach the Court is using and how.

Importantly, just as selective incorporation via the due process clause left open the option of finding certain rights *not* to be implicit in due process and therefore not applicable to the states, the use of the "purely personal" doctrine gave the Court leeway not only to find constitutional provisions to be outside of the reach of corporations, it also gives the Court the opportunity to reasonably change its mind as to the status of a particular right. Although not as common as with selective incorporation cases, this approach, which requires a great deal of semi-subjective interpretation as to the history, nature, and purpose of particular provisions of the Bill of Rights, leaves open the possibility of overturning previous cases as the makeup and ideology of the Court changes. Should the Court swing in favor of corporate constitutional rights, it is relatively easy to overturn a case by arguing that the previous opinion incorrectly interpreted the provision as "purely personal" and setting forth an alternative interpretation (or vice versa). The case law history of corporate freedom of expression rights is a good example of those changing ideologies affecting case decisions. Thus, the approach utilized by the Court in arguing against corporate constitutional rights is just as important as the approach used in granting them. It is therefore worth taking the time to establish that the judicial approach being utilized is consistent regardless of the position a particular justice is taking.

As mentioned above, the decision in *Hale v. Henkel* explicitly rejected the assertion that corporations (or individuals acting as agents of corporations) are protected under the Fifth Amendment protection against self-incrimination.[117] Although the Court had yet to clearly lay out what factors it considers in finding a protection to be applicable to corporations, Justice

[117] *Hale v. Henkel*, 201 U.S. 43, (1906).

Brown's decision in this case laid the groundwork for an approach based on an understanding of some rights being "purely personal" and therefore not applicable to corporations.[118] Unlike rights relating to contracts, for example, this right was not one which was reasonably within the natural realm of business for a corporation. Like the more contentious issues surrounding freedom of expression and freedom of religion, this case required the Court to ask itself two questions: one, whether a corporation, as an entity separate from the individuals that make it up, can assert the right for its own sake or, two, whether a corporation, as an entity run by and composed of individuals, is imbued with the rights afforded to those individuals (essentially, do those rights "pass through" to the corporation). Although not clearly articulated yet, this approach matches the test laid out by Justice Powell in B*ellotti*, which relies on the nature, history, and purpose of a particular constitutional provision.[119] The nature and purpose of the Fifth Amendment protection against self-incrimination, according to the Court, was to protect individuals from being forced to incriminate *themselves*, not to protect agents from incriminating the corporations for which they work. This understanding of what qualifies as a "purely personal" right was then expanded upon by Justice Powell in *Bellotti*, in which the Court laid out a set of characteristics it would look to in determining whether a right is inapplicable to corporations.[120]

[118] Ibid.

[119] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978).

[120] Ibid.

The dissenting opinions in *Bellotti*,[121] and later in *Citizens United*,[122] are also important examples of how the Court has argued against corporate constitutional rights. Notably, even when arguing against corporate constitutional rights, these justices have not rejected the approach utilized by the majority; although the may not state it explicitly, these dissents utilize the same approach just with different results. The consistency of this reasoning, and a lack of argument against its basic precepts indicates the Court has settled the issue of how to determine whether a right is applicable to corporations; they just don't always agree on the proper results.

As with selective incorporation, in which some justices, mostly early on, outright rejected the concept that the Bill of Rights should be applicable to the states, Justice Rehnquist and Justice Stevens' dissenting opinions in *Bellotti* and *Citizens United*, respectively, reject the notion that corporations should be afforded any constitutional protection outside of those provisions directly related to business transactions.[123] Upon closer inspection, however, these justices are essentially carrying out a similar test as laid out by Justice Powell; they're just coming to a different conclusion about whether the nature, history, and purpose of the provision is such that it should remain "purely personal."

Both Justice Rehnquist and Justice Stevens' dissents rely heavily on a reading of corporations as primarily artificial entities with no claim to rights equivalent to natural

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[121] Ibid.

[122] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[123] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

persons.[124] In making this assertion, Rehnquist cites Chief Justice John Marshall, who stated, "a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law."[125] Rehnquist went on to argue that "since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons…our inquiry must seek to determine which constitutional protections are "incidental to its very existence."[126] Having established this baseline, he then argued that the right of political expression is not necessary for the continued functioning of a corporation.[127] At first glance, this might seem like a different approach than the "purely personal" one laid forth by the majority. But Rehnquist does not actually set forth any argument against the idea of finding some rights to be "purely personal". In seeking to establish whether a constitutional protection is "incidental to its [a corporation's] very existence,"[128] Rehnquist is actually engaging in the same investigation Justice Powell does in the majority: does the constitutional provision have a history, nature, and purpose relevant to corporate rights. Rehnquist only goes a step further in clarifying that, in his opinion, only those provisions whose history, nature, and purpose are necessary to the corporation's existence should be applied. But either way, the same essential analysis is taking place, and the approach is consistent.

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[124] Ibid.

[125] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978).

[126] Ibid.

[127] Ibid.

[128] Ibid.

A similar thing can be said for Justice Stevens' dissent in *Citizens United*, which draws from a similar understanding of corporate personhood as Justice Rehnquist's' opinion in *Bellotti.* Stevens emphasizes that "in the context of election to public office, the distinction between corporate and human speakers is significant"[129] and that corporations are not actually members of society the way natural persons are.[130] The distinction between corporations and natural persons include such things as "financial resources, legal structure, and instrumental orientation,"[131] and it is these differences that are cause for legitimate concern. Justice Stevens dissent rests primarily on the assertion that even if corporations have a measure of freedom of speech, it is not equivalent to that of natural persons and the state has a compelling interest in regulating it.[132] While Stevens does not explicitly refer to the idea of "purely personal" rights, his dialogue of natural persons and corporations as being fundamentally different is an equivalent understanding. His argument fundamentally rests on interpretations of the nature, purpose, and history of freedom of speech, which he sees as primarily for retaining individual freedoms, while the majority focused instead on an interpretation that emphasized freedom of speech as a collective good, with the more contribution the better. But in each case, the justices utilized the same approach.

Although there are certainly other factors, such as compelling state interest regarding a particular regulation, that the Court takes into consideration, these are secondary calculations.

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[129] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[130] Ibid.

[131] Ibid.

[132] Ibid.

The justices must first determine whether the corporation should be afforded a right, and that determination consistently rests on an examination of the provision at hand via a the test laid out in *Bellotti*.[133] Therefore, this "purely personal" approach is consistently utilized across both the history of corporate constitutional case law, as well as across ideologies and opinions about the proper status of corporate constitutional protections. Having thus established the existence of a consistent, if not always explicit, approach, I will now turn to a brief discussion on the Court's reasoning and intent behind this approach.

Court Reasoning and Intent

Unlike selective incorporation, there were no definitive alternatives laid out for the "purely personal" approach utilized by the Court; no Supreme Court opinion, majority or otherwise, has ever suggested the possibility of applying every provision of the Bill of Rights to corporations all at once the way total incorporation via the Privileges and Immunities clause was advocated. The Court has been very careful to ensure that even decisions in favor of expanding a protection to cover corporations are narrowed to particular provisions and could not be misconstrued as granting broader protections.[134] Although it may seem obvious why the Court chose not to sweepingly grant corporations protection under the Bill of Rights, for the purposes of greater clarity in comparison, I will undertake to lay out the reasoning behind this approach.

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[133] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978).

[134] See *First National Bank of Boston v. Bellotti*, 435 US 765 (1978) for an example of this narrowing of decisions.

First, as with selective incorporation to the states, a case-by-case approach to corporate constitutional rights gave the court considerably more freedom, because it allowed for finding certain provisions not to be applicable to corporations, without requiring the Court to lay out what provisions those were right away. As a result, they were also better able to control the breadth of their decisions (as in the area of freedom of expression, in which nuances such as the type of speech are relevant). This approach also afforded the Court significantly more freedom to change its position overtime as opinions changed, as discussed above with freedom of expression.[135] With a flexible and fairly subjective test, should the Court choose to overturn a previous decision regarding corporate rights, the argument need only be that the previous court had an invalid or outdated interpretation of the provision at hand.

Secondly, and also like selective incorporation, this case-by-case approach allowed the Court to steadily build a case history overtime, therefore creating lasting and significant precedent, making any efforts to dismiss the general right of corporations to at least *some* constitutional rights very difficult. Although corporate constitutional rights had a less contentious start than selective incorporation did, justices in favor of more expansive corporate rights would have favored this incremental approach because it would allow the court to address less controversial provisions of the Bill of Rights (such as the Takings clause)[136] before moving to

[135] From *First National Bank of Boston v. Bellotti*, 435 US 765 (1978), to *Austin v. Michigan Chamber of Commerce,* 494 US 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003), to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[136] *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

more contentious ones (like freedom of religion);[137] certain decisions could wait until the precedent was well established and a Court friendly to the idea came along. And, while perhaps not as necessary as with selective incorporation, this approach allowed both justices and the public to become more and more comfortable with the general idea overtime before delving into more controversial issues.

Justices fearing expansion of corporate rights beyond a certain point would also be in favor of this approach, because it gave clarity as to why some provisions are applicable to corporation and not others; they could argue the vast majority of rights are actually "purely personal" while still protecting businesses against government seizure, for example.[138] Again, the fact that the approach requires a clause-by-clause investigation of each protection in the Bill of Rights before finding it to be applicable to corporations would not only have allowed these justices to avoid making clear distinctions about what rights corporations do or do not have right at the time, it also would have assuaged fear that proponents of corporate rights would be able to make sweeping guarantees. No matter what side a justice took in the overall debate about corporate personhood, they had reason to support this approach.

Thus, the Court settled on an incremental approach, requiring an investigation of the nature, history, and purpose of each provision of the Constitution to determine whether it was applicable to corporations, or if it was "purely personal" and therefore inaccessible by business entities. Although the case history of corporate constitutional rights, particularly in recent years,

[137] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

[138] *Hale v. Henkel*, 201 U.S. 43, (1906).

is messy and at times confusing, the use of this approach is consistent across both time and ideology. Having thus established the approach at work, and explained its appeal to the Court, I will now turn to an analysis and comparison of the two approaches to determine the extent to which one is analogous to the other.

COMPARISON AND EVALUATION

Having now established a clearer understanding of both the doctrine of selective incorporation and the approach utilized by the Court in corporate constitutional cases, this work will now compare the two doctrines to gain a better understanding of the corporate constitutional rights approach, which for several reasons has not yet been well established. In doing so, I will demonstrate the immense similarities between the two jurisprudential approaches in three fundamental areas: their process, the Court's intent, and their overall effect. Finding selective incorporation to be an analogous doctrine for corporation incorporation is significant because it will allow for not only a better understanding of previous Court decisions it this area, but more importantly because it can greatly aid the process of making predictions and provide a new frame of reference for interpreting future decisions.

First, and perhaps most notably, both of these jurisprudential approaches require the same "test", meaning they require the Court to investigate the same things or to ask the same questions. In the area of corporate constitutional rights, Justice Powell clearly laid out this test in *Bellotti,* as discussed in the previous section. It is worth reiterating this here. Having stated that certain rights are not applicable to corporations because they are "purely personal," Powell was then faced with the question of what rights fell into this category. He answered: "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."[139]

[139] *First National Bank of Boston v. Bellotti*, 435 US 765 (1978). Footnote 14.

Once the Supreme Court had decided on the use of the Due Process clause of the Fourteenth Amendment as the textual basis for selective incorporation,[140] the Court was faced with a similar question as Powell; under what basis would the Court determine what rights were implicit in the Due Process clause and which were not? In deciding whether a provision of the Bill of Rights was a fundamental right, necessary to maintain due process the Court turned to the exact same questions as they have in corporate incorporation: what is the nature, history, and purpose of the provision in question.[141] Although the Court's focus in conducting such an inquiry naturally differs depending upon whether the case deals with selective incorporation or corporate constitutional rights, the essential process of the two approaches, which both require an interpretation of the pertinent nature, history, and purpose of individual rights and protections, is the same.

There are also considerable similarities in the Court's reasoning behind adopting each approach, suggesting the Court had similar intents behind both. Although this work does not purport to know exactly why any individual justice favored these incremental approaches over another, there are obvious benefits to these approaches which the justices likely took into consideration. Because the two approaches are so similar, their benefits are essentially identical. For example, because both approaches required the Court to make decisions on a case-by-case basis, interpreting individual provisions at a time, both allowed to the Court to decide cases on fairly narrow grounds (incorporating or applying a single provision) while deferring decisions on

[140] *Hurtado v. California*, 110 U.S. 516, (1884); and, later, *Twining v. New Jersey*, 211 U.S. 78 (1908).

[141] *Twining v. New Jersey*, 211 U.S. 78 (1908).

other provisions. The Court could wait until an applicable case arose to perform the necessary analysis of that provision. This relatively slow progression of case history was also important in building up precedent sufficient to firmly ground each doctrine and to help prevent a future court from overturning the entire doctrine. Although perhaps more relevant to selective incorporation than corporate rights, these gradual approaches also allowed the public (and justices) to adjust to new a new understanding of the role of the Bill of Rights. Furthermore, they provided firm precedent for the Court to rely on when deciding more controversial cases (such rights of the accused under selective incorporation[142] or freedom of speech under corporate rights[143]). Yet, while these large number of cases helped establish a secure precedent, it also gave the Court a greater opportunity to overturning single decisions in the future as overall opinions (and the makeup of the Court) changed. This allowed the Court to maintain the original approach and still disagree with a case outcome; all a new majority would need to do was argue convincingly that the previous Court's interpretation of that particular provision was invalid (something fairly easy to do considering the subjective nature of this interpretation). It is also important to remember that the incremental nature of these approaches was appealing to both those in favor of expanding rights as well as those seeking to maintain more limited interpretations. The reasons above clearly demonstrate why many justices in favor of incorporation to the states or corporate constitutional rights would consider the approach a wise one, but those justices wary of either of these two jurisprudential patterns could find comfort that an incremental approach would provide

[142] Various Warren Court decisions including *Gideon v. Wainwright,* 372 U.S. 335 (1963) and *Miranda v. Arizona,* 384 U.S. 436 (1966).

[143] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

a lot of opportunities to argue against expansion of rights, as well as ensure that the process would not be quick and comprehensive.

Finally, the effect of each approach has so far been very similar. Most notable is of course the fact that both approaches required the Court to take a slow, incremental approach, interpreting single provisions of the Bill of Rights on a case-by-case basis. This explains the decades long history of both selective incorporation and corporate constitutional rights, including several instances of decisions being overruled or modified. Changes overtime (and depending on the makeup of the Court) are common within both timelines. It is interesting to note, for example, that it took several decades and a very friendly court for many of the criminal protections of the Bill of Rights (which were more controversial than many previous decisions) to be applied to the states.[144] The applicability of this situation to the future of corporate constitutional rights will be addressed in the next section. For now, it is sufficient to point out that the timelines of both doctrines follow a similar pattern; less controversial rights were applied first (such as freedom of expression for selective incorporation and property rights for corporation) while more contentious issues (such as rights of the accused or freedom of speech) were addressed later, once the doctrine was well established.

It is important to acknowledge, of course, that while there are obviously many similarities between the two approaches, there are important differences as well. For one, some may argue that total incorporation of the Bill of Rights had a firmer textual basis and greater viability than

[144] Various Warren Court decisions including *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

any similar attempt at applying every provision of the Bill of Rights to corporations. It would be much more difficult to argue, if anyone even would, that every provision of the Bill of Rights should be applied to corporations. Another, related, difference has been the speed with which each line of cases has progressed. As the previous sections established, the case history of selective incorporation and corporate rights have similar starting points and significant overlap early on. Yet in the contemporary era, far more provisions of the Bill of Rights have been applied to the states than to corporations. Is there a fundamental difference between these two approaches, and more importantly, does it affect the ability to make predictions about the future of one using the other? I would argue no. While the purpose of the two doctrines is inarguably different (because the difference between ensuring the Bill of Rights protects individuals from state encroachment and ensuring the Bill of Rights protects non-human entities like corporations is inarguable), this does not detract from the numerous critical similarities of these approaches that makes selective incorporation such an appropriate and innovative analogy for corporate constitutional rights jurisprudence. After all, that a stronger argument may have been made for total incorporation did not help it to be any more successful as a judicial strategy than full applicability of the Bill of Rights to corporations. Nor does it really say much that the Court has progressed further in applying protections to the states than to corporations. Periodic breaks in the selective incorporation timeline of cases were not an indication that the Court had incorporated every provision they had intended to, or that there wouldn't be future Courts that would seek out and decided many cases on the issue within a small period. The same can be said of corporate constitutional rights.

Thus, it should now be clear that the doctrine of selective incorporation is an exemplary analogy for the jurisprudential approach utilized by the Court in applying constitutional provisions to corporations, with critical similarities in process, intent, and effect. This offers a unique opportunity to look towards the future of corporate constitutional rights and make predictions based on this new understanding of the Court's approach, which this work will now endeavor towards.

PREDICTIONS AND CONCLUSIONS

Having established the use of the selective incorporation doctrine as an appropriate analogy for the approach the Court has utilized in deciding corporate constitutional rights, this work will now put this analysis to work, and in doing so seek to make predictions about the future of corporate constitutional rights. Before delving into these predictions, however, it is important to note that the current state of the Supreme Court makes this a particularly difficult, but also significant, time to be making predictions about future Court jurisprudence.

With the death of Justice Scalia in February 2016, at the time of this writing, there remains a vacant seat on the Court. Judge Neil Gorsuch, previously of the United States Court of Appeals for the Tenth Circuit, has been announced as President Trump's nominee. His confirmation hearing is currently set for March 20, 2017.[145] As with any new appointee, there has been much speculation about where Gorsuch will stand on a variety of issues, including corporate constitutional rights. Although there have certainly been instances in the past of justices making surprising reversals once appointed to the Court, it is nevertheless useful to discern Gorsuch's current position regarding corporate constitutional rights. Keeping in mind that several of the recent corporate rights cases have been decided on narrow five-to-four margins, and that Justice Scalia consistently voted in favor of those rights, Gorsuch's position is crucial in evaluating the future of jurisprudence in this area.

[145] Seung Min Kim, "Gorsuch confirmation hearing set for March 20," Politico, February 16, 2017, accessed March 14, 2017, http://www.politico.com/story/2017/02/gorsuch-confirmation-hearing-set-for-march-20-235084.

Without the benefit of the confirmation hearing, in which the Senate Judiciary Committee may very well explicitly ask Gorsuch's views on corporate rights, the next best thing is to turn to his case history while on the Tenth Circuit. This case history points to a consistently conservative viewpoint, similar to the late Justice Scalia's in many ways. Notably, it also indicates a favoring of corporate constitutional rights. Gorsuch's positions in two major cases, both of which continued to the Supreme Court, are good examples. In both *Hobby Lobby* and *Little Sisters of the Poor*, Gorsuch voted in favor of granting religious freedom rights to corporations; in the case of *Little Sisters of the Poor*, that corporation was a non-profit, while in the case of *Hobby Lobby*, the claimant was a closely-held for-profit corporation.[146] Although Gorsuch did not write the majority opinion in either of these cases, which limits the extent to which we can garner his exact views, it is clear that he did not take issue with the corporate status of the appellants in either case, indicating a position in favor of corporate constitutional rights. Although less directly related, Gorsuch also has a history of ruling against administrative agencies, whose regulations often limit the capabilities of corporations.[147] While certainly not decisive evidence, it does suggest, especially when coupled with his rulings in *Hobby Lobby* and *Little Sisters of the Poor*, a pattern of favoring corporate rights. It seems imminently reasonable, considering the evidence currently available, to assume Gorsuch will fill Justice Scalia's role as a consistent vote in favor of corporate constitutional rights.

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[146] *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 799 F.3d 1315 (10th Cir. 2015).

[147] See *Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1143 (10th Cir. 2016)* and *Caring Hearts Personal Home Services., Inc. v. Burwell*, 824 F.3d 968 (10th Cir. 2016).

Keeping this in mind, let us now investigate what the history of selective incorporation can tell us about the future of corporate constitutional rights. For one, the timeline of selective incorporation suggests that long gaps in cases do not indicate an end to further application.[148] Therefore, should this Court decide to refuse cases positing expansion of corporate constitutional rights, that is not sufficient reason to think that a future Court will not take up the issue with force. In fact, the history of selective incorporation provides significant evidence that with this style of approach, favorable Courts may seek to take advantage of their position and make many consecutive decisions while they can, leaving sporadic upticks in cases amongst otherwise long gaps. The Warren Court is a prime example of this occurrence within selective incorporation, where the liberal majority incorporated many provisions of the Bill of Rights, including the significantly more controversial rights of the accused and criminal defendants.[149] With the Court likely to retain its five-justice majority favoring corporate constitutional rights, and considering the cases that have already been decided by the Roberts Court, there is sufficient reason to believe that we are entering a similar situation with corporate constitutional rights. With a sufficient precedent established and a favorable court, the time is ripe for using the incremental approach to apply many more rights and protections to corporations. Therefore, if the analogy

[148] Consider, for example, the distance between *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and the closest previous case (perhaps as far back as *Benton v. Maryland*, 395 U.S. 784 (1969)).

[149] Warren Court incorporation cases include: *Mapp v. Ohio*, 367 U.S. 643 (1961) (right against unreasonable search and seizure, *Robinson v. California*, 370 U.S. 660 (1962) (protection against cruel and unusual punishments, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in felony cases), and *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination).

stands, it is reasonable to argue that, just as selective incorporation gradually built upon itself, we can expect several more decisions applying constitutional rights and protections, building upon themselves, and we can expect them in the relatively near future. Although somewhat outside the scope of this thesis, it is also interesting to note that within both timelines, although it is common to reverse previous cases to find in favor of expanding rights, it is very rare for the Court to "take back" a right once it has been applied (either to the states or to corporations). To the extent that this pattern continues in corporate constitutional jurisprudence especially, it provides further support for the argument that the Court will continue to expand corporate constitutional rights. The question then becomes what rights are most likely to be applied next.

Retaining the use of selective incorporation as an analogy for the Court's approach to corporate constitutional rights suggests a tendency to decide less controversial cases first in order to build precedent. In selective incorporation, this was a series of cases incorporating freedom of expression, which most states already protected to a certain degree, and which the public was largely in favor of. For corporate constitutional rights, this was a series of cases protecting corporate contracts and property, which had obvious connections to the functionality and success of a business. Once a friendly Court began deciding more controversial cases relating to rights of the accused on criminal defendants, many similar cases followed. Therefore, reasoning by analogy once again, it is logical to suggest that since the current Court has indicated an interest in expanding corporate freedom of expression rights, the trend will continue. Continued and more expansive rulings giving for-profit corporations freedom of religion, for example, is likely. This is especially so when one considers how this issue of religious freedom has recently become intimately intertwined with the ability of business owners or employees to refuse service to

LGBT persons on religious grounds. Should a case come before the Supreme Court asking it to rule on whether a corporation has religious freedom and whether it can be used to refuse service, there is significant reason to believe they will answer in the affirmative. Further opportunities to affirm *Citizens United* and the position that corporations should enjoy freedom of (political) speech are also likely to be taken up by the Court. This includes further limiting of regulations on corporate spending in the political arena.

As for other constitutional provisions, the future remains more uncertain, and the analogy of selective incorporation may prove less useful. The Court, for example, has already found that corporations can be found guilty of crimes,[150] and that certain procedural rights such as due process and double jeopardy are applicable.[151] In the wake of recent decisions regarding corporate speech, it would be interesting to see the Court revisit its previous decisions which refused to apply the right of self-incrimination to corporations.[152] Would today's Court, which has thus far clearly favored a reading of corporations as more than just state-created, artificial entities, reconsider the finding that such a right is "purely personal"? In the wake of several decades of massive class-action lawsuits with punitive damages in the millions of even billions of dollars, might the current (or a future) Court find that corporations should be protected against excessive fines? With little precedent to go on, it is difficult to say. Still, it is important to remember that there was a time in the history of selective incorporation when justices and the

[150] *New York Central R. Co. v. United States*, 212 U.S. 481 (1909).

[151] *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 395 (1886); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

[152] *Hale v. Henkel*, 201 U.S. 43, (1906).

public alike were certain that the selective approach that had been chosen would ensure only a limited number of fundamental rights would be incorporated. Considering the striking similarities this work has established between the selective incorporation doctrine and the approach of the Court to applying constitutional rights to corporations, we must ask ourselves to what extent we are just as naïve in assuming certain rights will remain "purely personal" and therefore inapplicable to corporations.

With recent Court decisions putting corporate constitutional rights at the forefront of many public issues, including placing them at odds with other important rights, there has been a significant increase in the interest in the topic. This inevitably has led to an outpouring of opinions about not only what is the *correct* path for the future of our nation, but also what the *most likely* path is. Without a firm understanding of the Court's case history, especially any established patterns in reasoning across those cases, these predictions all miss a fundamental piece of information. This work has sought to provide a new basis for understanding Supreme Court jurisprudence in the area of corporate constitutional rights. By comparing the approach the Court has used to apply provisions of the Bill of Rights to corporations with the well-known approach of selective incorporation, which applied provisions of the Bill of Rights to the states, this helps to establish a unique framework for understanding the Court's decisions in past corporate rights cases. More importantly, though, it allows for a new tool in predicting the future of corporate constitutional rights.

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