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Reassessing Corporate Personhood in the Wake of Occupy Wall Street

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ARTICLES

REASSESSING CORPORATE PERSONHOOD IN THE WAKE OF OCCUPY WALL STREET

Nick J. Sciullo*

I. INTRODUCTION

This article is about corporate personhood, discussed on the backdrop of class consciousness and criticisms of capital generated, in large part, by the recent and continuing Occupy Movements. I am at first concerned with articulating the evolving jurisprudence of corporate personhood as developed in the Supreme Court of the United States. Combined with this doctrinal approach, I offer a Marxist criticism of corporate personhood jurisprudence that culminates in a discussion of the Occupy Movements' logic of resistance to corporate domination in the United States' law and policy. First, I discuss the role Marxist

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1 See infra Part V (tracing the Supreme Court of the United States' corporate personhood jurisprudence from 1819 to 2010).

2 The Occupy Movements are organic, grassroots movements that do not adhere to a hierarchy of organizational principles. See Nathan Schneider, From Occupy Wall Street to Occupy Everywhere, THE NATION, Oct. 11, 2011, http://www.thenation.com/article/163924/occupy-wall-street-occupy-everywhere. While it may be convenient to discuss the Occupy Movement as a singular entity, this does not mean that I view each movement as the same. Occupy Wall Street was the first, see id., but similar movements occurred everywhere from Atlanta, Georgia, see OCCUPY ATLANTA,
criticism has played in legal discourse and articulate the importance of a Marxist framework for current legal criticism. Second, I focus on several authors and their texts, which shape the current struggle against corporate personhood and shed light both on the Occupy Movements and the relationship between law and capitalism. Karl Marx is indispensable to the study of law and capitalism, and I chose to focus on his discussion of law in The Eighteenth Brumaire of Louis Bonaparte, which I read concomitant with Evgeny Pashukanis's Law and Marxism: A General Theory. Fernand Braudel's Civilization and Capitalism provides an analysis of capitalism that illuminates the role of capitalist ideology in early proto-capitalist Europe and is one place to find a historical basis both for the evolution of capitalism and the Occupy Movements' critique. I then analyze Charles A. Beard's An Economic Interpretation of the Constitution of the United States where he brings the centrality of capital to

http://occupyatlanta.org (last visited Mar. 30, 2013); to Oakland, California, see OCCUPY OAKLAND, http://occupyoakland.org (last visited May 25, 2013); Norfolk, Virginia, see OCCUPY NORFOLK, http://occupynorfolk.com (last visited May 25, 2013); to Davis, California, see OCCUPY DAVIS, http://occupydavis.org (last visited May 25, 2013). I hope to work with the similarities of these groups, and while admittedly glossing over the differences, still keep them in mind and respect the multitudinous approach to resisting capitalism.

3 I am cautious of the tendency to talk about Marx as writing about case law and statutory law as opposed to the governing principles of revolution or history. See, e.g., Frederic Jameson, Sandblasting Marx, 55 NEW LEFT REV. 134, 141 (2009) (noting one misreading of Marxist theory is "a misunderstanding of the way in which Marx uses the term 'law'"). He does both, and I intend to, and hopefully, have not conflated the two.


5 EVGENY BRONISLAVOVICH PASHUKANIS, LAW AND MARXISM: A GENERAL THEORY (Chris Arthur ed., Barbara Einhorn trans., Pluto Publ'g Ltd. 3d impression 1929).


7 See infra Part IV.

8 CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (22d prtg. 1968).
government to the study of United States history. This historical critique will help the reader understand the concern corporate personhood causes for many people. I offer Beard as a more specific theorization of the role of capitalism to the law in the United States. This historical focus, I believe, is also in keeping with Marx's interest in the historical. Third, I delve into the evolving jurisprudence of corporate personhood, describing the shifting terrain of the Supreme Court of the United States decisions and the evolution of the corporation as a person from 1819 to the present. I hope that by beginning before Santa Clara County v. Southern Pacific Railroad Co., students, scholars, and activists might enrich their understanding of this complex area of law. Lastly, I analyze the Occupy Movements' position as a critique of corporate personhood specifically and to capitalism in the legal and economic structures of the United States, generally. By analyzing the Occupy Movements, I develop a deeper understanding of the corporate person. I also analyze the many resolutions urging the end of corporate personhood passed at the local and state level, and position these resolutions as indicators of the Occupy Movements' success engendering at least quasi-legal change. The point is simple: capitalism has been enshrined in the jurisprudence of corporate personhood and through theoretical critique and analysis of modern practical resistance the

9 See generally id. at xix (stating the book's purpose was to encourage historical scholars "to turn away from barren 'political' history to a study of real economic forces which condition great movements in politics," such as the ratification of the United States Constitution).

10 See infra Part V.A-L. There are other places to start, of course, and reasons to begin anywhere, but decisions have to be made and I made this decision not to exclude other possible originary points, but to have somewhere to begin, to start a discussion and not to limit other possibilities. It is possible to talk about the evolution of corporations broadly from early mercantile states or the European trading houses, or one could talk about the first use of the word "corporation" and compare the evolution of dictionary definitions to provide clues as to their evolving status. All of these options have some appeal, but I hope to trace as closely as possible the evolution of the legal standard of corporate personhood and in that attempt I am hoping to comment on a significant number of cases that mark this pattern.


12 See infra notes 427-38, 445-70 and accompanying text (showing the Occupy Movements' critique of corporate personhood).
jurisprudence of corporate personhood may be better understood and, indeed, critiqued.  

II. KARL MARX AND THE LAW AND THE UTILITY OF MARXIST CRITIQUE

Why Karl Marx for the law? The idea of engaging in a Marxist critique of the law likely sends spine-tingling shivers through much of the legal academy. Some might call it antiquated, some might call it too leftist, and some might shirk at the possibility of bringing radical politics to law. Be that as it may, I will articulate, in this section, the importance of Marx to legal understanding. Karl Marx was, after all, a law school dropout and certainly no friend of the establishment, the norm, or the system. Marx does not find his way into the law school curriculum in most instances, and it is unlikely that Karl Marx will be cited in one's brief to the state supreme court. It is not that Marx has failed to influence lawyers and legal scholars; rather, despite his constant appropriation by scholars in related disciplines, he has not found a stable home in the legal academy. However, in terms of better understanding the law and the way people engage it, Marx is

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13 See infra Part VI (analyzing the Occupy Movement as a critique of corporate personhood and of capitalism in the legal economic structures of the United States).


15 See generally KARL MARX & FRIEDRICH ENGELS, THE COMMunist MANIFESTO 234 (Penguin Books 2002) (advocating for the "formation of the proletariat into a class, overthrow of the bourgeois supremacy, [and the] conquest of political power by the proletariat").


17 See id. at 251.
critical. He is a critic of the economy,\textsuperscript{18} government,\textsuperscript{19} social relations,\textsuperscript{20} and knowledge;\textsuperscript{21} all four topics are central to the evolution and maintenance of a legal system.\textsuperscript{22} He is a passionate historian concerned with the ways in which history shapes us,\textsuperscript{23} just as many lawyers, activists, and legal scholars appeal to precedent and the arc of jurisprudential reasoning to offer proof that their argument is correct.\textsuperscript{24} To be sure, Marx was a flawed historian;\textsuperscript{25} his method was not complete, he often glossed details,


\textsuperscript{23} British historian Eric Hobsbawm has written of Marx the historian: Marx's study of capitalism contains an enormous amount of historical material, historical illustration and other matter relevant to the historian.

The bulk of Marx's historical work is thus integrated into his theoretical and political writings. All these consider historical developments in a more or less long-term framework, involving the whole span of human development. They must be read together with his writings which focus on short periods or particular topics and problems . . . .


\textsuperscript{25} See Hobsbawm, \textit{supra} note 23 (commenting on how "no complete synthesis of the actual process of historical development can be found in Marx").
and seemingly emphasized material that was most important to his argument while neglecting alternatives. He did little to apply his ideas beyond Europe, and the patriarchy is clearly in power in his writings. Yet, Marx continues to capture the minds of scholars and activists across the world. Far from advancing Marxist criticism because it is en vogue or because polemical assaults on law and/or capitalism are fun or intellectually adventurous, I argue that Marxist criticism will help us better understand the law and the world around us, which will in turn positively affect our understandings of the law in the courtroom, classroom, boardroom, and conference room.

I am not alone in such pursuits as theorists like Evgeny Pashkanis, Maurice Bourjol, Alain Supiot, Duncan

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26 See, e.g., id. at 42 (noting how Marx's "materialist conception of history" "is not history but a guide to history.").
29 Fredric Jameson sums up the pernicious place of Marx today: "A Marx revival seems to be under way, predating the current disarray on Wall Street, even though no clear-cut political options yet seem to propose themselves. Sensible opportunists have welcomed any sign of sympathy for Marxian positions, without wanting to alienate the new converts (or returning fellow-travellers)." Jameson, supra note 3, at 134.
30 Pashukanis (1891-1937) was a Russian legal scholar and legal historian who was of pivotal importance to the Bolshevik's articulation of a theory of Marxism and law. See Chris Arthur, Editor's Introduction to PASHUKANIS, supra note 5, at 10-11.
31 Maurice Bourjol was a French legal theorist who was interested in the intersections between administrative law, municipal law, urbanism, and community. He was a professor on the faculty of law, economics, and social sciences at the University of Tours. See MAURICE BOURJOL, LES DISTRICTS URBAINS (1963); MAURICE BOURJOL, LA RÉFORME MUNICIPALE (1975).
Kennedy, Roberto Unger, and Karl Klare have all completed important work in approaching law from a Marxist perspective. Yet, despite the appeal of many of these theorists, both abroad and in the United States, Marx and the law as a subject does not receive nearly as much attention as law and economics, an often conservative, often market-driven approach to law. There is, quite simply, more work to be done. While critical legal studies (CLS) and Marxist approaches to the law have made some progress, we must continually rearticulate these ideas to further an evolving understanding of the linkages between capital and law and the opposition of capitalism to social justice.

Before delving into what Marx thought about the law, it is important to consider the ways in which his life story also suggests an intimate relationship to the law, lending credence to the appropriateness of studying Marx as a legal commentator. His


36 See supra notes 30-35 (listing a variety of books on the subjects of law and Marxism).


39 See infra notes 40-50 and accompanying text (discussing Marx's study of the law).
father was a lawyer: the occupation of parents seemingly having an 
effect on many a children's chosen occupation, particularly in law 
as many lawyers, legal scholars, and law students can attest to a 
father or mother who went to law school, was or is a lawyer, or 
who wishes they had gone to law school.\textsuperscript{40} Marx attended 
universities in Bonn and Berlin, Berlin being a particularly 
significant place for legal scholarship in his day,\textsuperscript{41} as it is today.\textsuperscript{42} 
In Bonn, in 1835, he began his formal training in civil law.\textsuperscript{43} Marx 
intended to become a lawyer, although he eventually failed at that 
pursuit.\textsuperscript{44} We know that he was reading law at this time and taking 
it at least somewhat seriously,\textsuperscript{45} suggesting that for a time Marx 
hoped to become a lawyer. Gareth Stedman Jones offers proof of 
Marx's serious pursuit of the law:

As a law student in 1836-7, Marx had attended [Karl von] 
Savigny's lectures on the \textit{Pandects}, and it is clear from a 
letter to his father in 1837 that he had read Savigny's 
\textit{Right of Possession}. It also seems certain that he would 
have been familiar with the controversy, which became 
public in 1839, between Savigny and the Hegelian law 
professor Eduard Gans precisely over the relationship 
between possession and right.\textsuperscript{46}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} See Augusto Zimmermann, \textit{Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union}, 2 W. AUSTL. JURIST 1, 18 (2011) (discussing Marx's intent to become a lawyer).
\item \textsuperscript{41} \textit{Id}.
\item \textsuperscript{44} \textit{Id}. at 358.
\item \textsuperscript{45} Gareth Stedman Jones, \textit{Introduction to MARX & ENGELS}, supra note 15, at 157-58.
\item \textsuperscript{46} \textit{Id}.
\end{itemize}
\end{footnotesize}
We can infer that Marx took the law seriously because of the importance he found in reading Savigny's text.\textsuperscript{47} One does not write home about books, especially law books, unless they are important. Letters home carry with them special significance, especially in Marx's time, when e-mails, text messages, and tweets were not available.\textsuperscript{48} Donald R. Kelley has argued that too little attention has been paid to Marx's first professional choice—law.\textsuperscript{49} Kelley has written of Marx's "disillusionment with conventional jurisprudence as it actually related to political and social matters."\textsuperscript{50} With this idea, legal scholars might begin to establish a base for interpreting Marx's critique of law.

Marxism is, at first, a way of understanding knowledge.\textsuperscript{51} It is "that theory which stipulates that politics and political struggle are elaborate fields of knowledge that must be scrupulously examined and painstakingly pursued."\textsuperscript{52} If we take this definition at face value, it is clear that at its roots, Marxism is about critical thinking.\textsuperscript{53} Marxist theory demands "scrupulous examin[ation]" and "painstaking pursu[it]."\textsuperscript{54} It is no easy task and no simple examination. In order to better understand the law, we must think critically about the relationships of law to economics, governance, and society. Marxism is aligned with this way of understanding the world.\textsuperscript{55} As critical thinkers, all persons with a legal education, as well as those generally interested in the law, should be attracted to

\textsuperscript{47} See, e.g., id. at 157.
\textsuperscript{49} Kelley, supra note 43, at 350.
\textsuperscript{50} Id.
\textsuperscript{51} See Abdel Khaliq Mahgoub, By Virtue of Marxism, Your Honor, 109 S. ATLANTIC Q. 159, 161 (2010).
\textsuperscript{52} Id.
\textsuperscript{53} Id. (inferring that Marxism deals with in-depth critical thinking).
\textsuperscript{54} Id.
\textsuperscript{55} See PASHUKANIS, supra note 5, at 54 (explaining that Marxism deals with critically thinking about the relationships of law to economics, governance, and society).
Marxism's critical inquiry into "politics and political struggle."\textsuperscript{56} It is this critical thinking that positions the legal world in a special space upon which to critique the systems that support it.

A focus on Marx also helps scholars to understand the flows of legal and political history. Thinking about Marx means thinking about evolution, ruptures, change, economics, law, and the relationship between people and the institutions they create.\textsuperscript{57} Marxism calls into question the foundations of our legal and political discourse and helps render change a possibility, not an empty promise.\textsuperscript{58} Evgeny Pashukanis writes about such utility in \textit{The General Theory of Law and Marxism}:

\begin{quote}
The critique of bourgeois jurisprudence from the standpoint of scientific socialism must follow the example of Marx's critique of bourgeois political economy. For that purpose, this critique must, above all, venture into enemy territory. It should not throw aside the generalisations and abstractions elaborated by bourgeois jurists, whose starting point was the needs of their class and of their times. Rather, by analysing these abstract categories, it should demonstrate their true significance and lay bare the historically limited nature of the legal form.

Every ideology dies together with the social relations which produced it. This final disappearance is, however, preceded by a moment when the ideology, suffering the blows of the critique directed at it, loses its ability to veil and conceal the social relations from which it emanated. The exposure of the roots of an ideology is a sure sign of its imminent end.\textsuperscript{59}
\end{quote}

\textsuperscript{56} Mahgoub, \textit{supra} note 51 (inferring from this passage that anyone interested in the law should engage in Marxist's inquiry).

\textsuperscript{57} See, \textit{e.g.}, PASHUKANIS, \textit{supra} note 5, at 54 (showing that Marxism deals with a multitude of factors and changes).

\textsuperscript{58} See \textit{id.} at 64 (critizing the political and legal foundations and making a change based on this evaluation).

\textsuperscript{59} \textit{Id.}
Marxist approaches to the law present some appeal. According to Pashukanis, Marxism focuses the critique on economics, it unmask the biases of those who make the law, it calls attention to history and the formation of legal systems, and it calls attention to the role of ideology and the points of rupture when ideas about the law and state change. These qualities are admirable in any approach to the law; in fact, one might call them necessary if the critic is to understand the law as an evolving web of social constructions, continually reinterpreted discursively, imbued with a complex history of social, political, and economic concerns, and prone to changes and metastasizations of power that disadvantage certain persons and peoples.

One might reason from Pashukanis that law develops from commodity exchange. If this is in fact true, and one might think so given the tremendous number of laws originating from financial markets and mergers and acquisitions (M&A), as well as everyday tort and contract law, then Marxist approaches to law are justified given the commodity's central importance. The field of law is concerned with commodities, not always and not exclusively, but often enough that the relationship between law and commodities should be interrogated. Questions of law that concern commodities also concern the relationships of persons to those

60 See id. (showing this criticism is necessary to unmask the biases of the lawmakers). Karl Marx writes of these biases in The Communist Manifesto:

Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economical conditions of existence of your class.


61 Pashukanis, supra note 5, at 64.

62 See id. (describing the factors which are necessary in understanding and changing the law).

63 See id. at 57 (showing that law develops from commodity exchange).

64 See id. (explaining how the importance of commodities in the Marxist approach would be justifiable if the law does indeed develop from commodity exchange).

65 See id. at 63 (although the basic condition for the existence of law is found in the economy, the most important connection is that between law and commodities).
Both the commodity and the relationship of persons to that commodity are fundamental areas of importance to Marxist inquiries.\textsuperscript{67}

In essence, I am affirming Pashukanis's theory that law is a form of regulation and therefore a place to inquire about the relationship of people to each other\textsuperscript{68} and to the institutions and ideas with which they come into contact.\textsuperscript{69} Law's shaping\textsuperscript{70} influence creates subjective positions that in turn perpetuate and impede the various persons and ideologies acting upon the various apparatuses that are described as legal or juridical in nature.\textsuperscript{71}

Marx helps expose the way in which the state and the law are linked and explains the economy of bureaucratization that serves itself before serving others.\textsuperscript{72} The process has created a class of not

\textsuperscript{66} See id. (explaining certain relationships of people to commodities).
\textsuperscript{67} PASHUKANIS, supra note 5, at 63.
\textsuperscript{68} Id. at 57.
\textsuperscript{69} Id. at 63.
\textsuperscript{70} I use "shaping" at the expense of other terms because of a recent article I read. Saby Ghoshray, Privacy Distortion Rationale for Reinterpreting the Third-Party Doctrine of the Fourth Amendment, 13 FLA. COASTAL L. REV. 33, 34 (2011). I could have easily talked about "frames" or "framing," but I am hesitant in that shaping more accurately describes the influence upon something and not simply the more general idea of framing or presenting. Shaping seems to suggest a more active stance, whereas framing seems at first blush less active, although theorists of framing have described it as an active process. See George Lakoff, How to Frame Yourself: A Framing Memo for Occupy Wall Street, HUFFINGTON POST (Oct. 19, 2011), http://www.huffingtonpost.com/george-lakoff/occupy-wall-street_b_1019448.html; George Lakoff, The Use of 9/11 to Consolidate Conservative Power: Intimidation via Framing, HUFFINGTON POST (Sept. 11, 2011), http://www.huffingtonpost.com/george-lakoff/the-use-of-911-to-consol_b_955954.html; George Lakoff, Words That Don't Work, HUFFINGTON POST (Dec. 7, 2011), http://www.huffingtonpost.com/george-lakoff/occupy-rhetoric_b_1133114.html.
\textsuperscript{71} See PASHUKANIS, supra note 5, at 64.
\textsuperscript{72} See id. at 148.

Pashukanis continues:

The establishment of state financial resources encouraged the appearance of people who live from these means: officials and functionaries. In the feudal epoch, administrative and judicial functions were performed by servants of the feudal lord. Public offices in the true sense of the word first appear in the municipalities; they are the material embodiment of the public nature of power.
simply commodity exchangers, but commodity regulators who play a significant role in the market. These regulators are not necessarily regulators in the traditional sense, but are persons involved in the market who represent guiding principles of the market without being directly involved in specific transactions. More simply, the market continues to draw people in to validate its justness. These people (financial regulators, eBay users who rate transactions, political pundits, and government officials) give assurances to the market and perpetuate participation in it. There is a whole class of people who generate market participation, most of whom likely do so unknowingly. The economy of bureaucratization is the basis on which the Occupy Movements

Authorisation in the private-law sense of a mandates to conclude legal transactions becomes serrated from public office. Absolute monarchy needed only to usurp this public form of power which had originated in the cities and to apply it to a wider area. Every additional improvement in bourgeois stedom, whether achieved by revolutionary outbreaks or by peaceful adaptation to feudal-monarchist elements, can be traced back to a single principle, according to which neither of two people exchanging in the market can regulate the exchange unilaterally; rather this requires a third party who personifies the reciprocal guarantees which the owners of commodities mutually agree to as proprietors, and hence promulgates the regulations governing transactions between commodity owners.

Id. at 148-49.

73 Id. at 149.

74 Id.


76 See Kevin Mason, Buyer Behavior and eBay, 1 J. ORG. LEADERSHIP & BUS. 1, 8 (2012) (showing how feedback from eBay users can provide assurance to the market); Exchange Rate Dynamics & Currency Factors: Top 5 Factors Affecting Exchange Rates, OANDA, http://fxtrade.oanda.com/learn/top-5-factors-that-affect-exchange-rates (last visited May 25, 2013) (showing the positive influence government officials have on the market); Riccardo de Caria, What Is Financial Regulation Trying to Achieve?: The Mainstream Answer and a Hayekian Critique, 9 HAYEK SOC. J. 1, 1-3 (2011) (explaining the assurances that financial regulators provide to the market).

77 See Mason, supra note 76, at 1 (noting that eBay users’ perspective in rating sellers is to create a system of efficiency in making purchases, thereby unknowingly giving assurance and perpetuating the market when providing feedback on product performance).
have coalesced. They oppose the system of law and government that keeps those in the loop rich and those outside it poor.

Returning to our source, Marx was no stranger to legal thought even though he was primarily a historian and economic theorist. Perhaps his most interesting and thorough legal commentary was *The Eighteenth Brumaire of Louis Bonaparte*, in which he gives a clear account of the ways in which law and the bourgeois became one and resulted in the coup d'etat that overthrew the Orleans monarchy of Louis Philippe and led to the establishment of the Second Republic, known as the Revolution of 1848. Although


79 See id. (explaining that the Occupy Movements want to "level the playing field" by guaranteeing a living wage income regardless of employment and ending "Freetrade").

80 See Donald R. Kelley, *supra* note 43 (crediting Marx's transfer to the University of Berlin as "mark[ing] a turning point in Marx's life and very noticeably strengthen[ing] his attachment to legal studies").


The Eighteenth Brumaire is an excellent text to explore in order to better understand Marx's comments on the law, it does not necessarily offer the best historical account of the Revolution of 1848. I want to leave aside the criticisms of Marx's historical method in this article and focus on more substantive discussions of his ideas about law and the applicability of Marxist theory to the pressing issues of corporate responsibility, business law, and social justice.

First, Marx describes the way in which the law controls not only daily affairs, but also legal memory—the way people consider themselves a part of legal history. He writes about the relapse following the French Revolution: "[T]he old dates arise again—the old chronology, the old names, the old edicts, which had long since become a subject of antiquarian scholarship, and the old minions of the law who had seemed long dead." With revolution comes the appeal to the old, and quite often, the regression to the old. This analysis suggests both what the Occupy Movements have to fear and what legal scholars should consider as they battle with the appropriate recourses to precedent or chart a new course to new law. One reason for this fear is that with change or in times of uncertainty, people enter a stage of mystification where lessons are forgotten, where the fetish of the new allows the phantasmagoria of the change to dominate. Marx argues, "[T]he political names and the intellectual reputations, the civil law and the penal code,

85 See The Revolutions in Europe, 1848-1849: From Reform to Reaction, supra note 84, at 51.
86 See, e.g., Richard F. Hamilton, The Bourgeois Epoch: Marx and Engels on Britain, France, and Germany 78-79 (1991) (noting Marx's erroneous assertion that "15,000 were deported without trial" during the Revolution of 1848).
88 Marx's Eighteenth Brumaire, supra note 81, at 6.
89 Id.
90 See id.
91 See generally id. (describing how the French revolutionary movement in 1848 to 1851 was subverted by memories of the old Napoleon who was so powerfully associated with the French concept of revolution).
92 See, e.g., id. at 7 (explaining how the democrats' belief in change on election day made them fail to see that their belief was illusory).
liberté, égalité, fraternité, and the second Sunday in May, 1852—all have vanished like a phantasmagoria," indicating the danger changes present—its erasure of memory. In this space, law is often forgotten. The development of corporate personhood represents such a time where law has changed radically, yet awareness of the change's implications remains mystified. The question of legal change and of the social movements it inspires is one of political memory and the evolution of thought, its creation and retardation.

This petrification of thought has legal implications. Marx argues as much when he describes the recourse to the old, to petrification, to challenges to go back and not to move forward. When political or legal change takes place there is a rush to throw out the old, but the counter-movement, the movement for the old, also hopes to throw out the changes. There is a tremendously difficult period where law is imperiled as it changes and forces

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93 Id.
94 See Marx's Eighteenth Brumaire, supra note 81, at 7 (stating that all the institutions of France were forgotten in the wake of the events of May 1852).
95 See id.
97 Marx's Eighteenth Brumaire, supra note 81, at 9 (stating how progressive changes in law are rejected in the name of order).
98 Id. Marx writes about this complex series of events:
Every demand of the simplest bourgeois financial reform, of the most ordinary liberalism, of the most formal republicanism, of the most shallow democracy, is simultaneously castigated as an "attempt on society" and stigmatized as "socialism." And finally the high priests of "religion and order" themselves are driven with kicks from their Pythian tripods, hauled out of their beds in the darkness of night, put in prison vans, thrown into dungeons or sent into exile; their temple is razed to the ground, their mouths are sealed, their pens broken, their law torn to pieces in the name of religion, of property, of the family, of order.
99 Id. at 42 (showing that the forces in favor of order subvert moderate progress and rescind progressive changes).
mobilization on both sides of change. Here we begin to see the ways in which Marx is specifically concerned with law and how he may be invaluable to considerations not only of corporate personhood, but also of many legal changes. Despite the ability of lawyers to lead tremendous social change, this is not always the case, nor is it the case that the change they create benefits the masses. While the evolution of corporate personhood may have

100 Id. at 17 (showing that neither side of the conflict supported the legal, democratic institutions).

101 Id. (showing how the Constituent Assembly failed to pass the organic laws necessary to implement the constitution, thus making the constitution ineffective).


103 See Marx’s Eighteenth Brumaire, supra note 81, at 47 ("It was not a faction of the bourgeoisie held together by great common interests and marked off by specific conditions of production. It was a clique of republican-minded
concluded, temporarily, with the First Amendment protections of *Citizens United v. Federal Election Commission*, and while some might applaud the significant role *Citizens United* represents to an enriched First Amendment jurisprudence, Marx cautions that laws cause both positive and negative effects on other laws, emphasizing that law is a system and the enrichment of one aspect usually comes with the degradation of another aspect. In fact, Marx argues, it is often personal liberties that are imperiled by legal changes that may be described as justifying other laudable goals.

Furthermore, the bourgeois has a vested interest in the law. The law changes for them and to benefit them. Put another way, bourgeois, writers, lawyers, officers, and officials that owed its influence to the personal antipathies of the country to Louis Philippe, to memories of the old republic, to the republican faith of a number of enthusiasts . . . .


105 See Marx's *Eighteenth Brumaire*, supra note 81, at 13 ("The inevitable general staff of the liberties of 1848, personal liberty, liberty of the press, of speech, of association, of assembly, of education and religion, etc., received a constitutional uniform which made them invulnerable. For each of these liberties is proclaimed as the absolute right of the French citoyen, but always with the marginal note that it is unlimited so far as it is not limited by the 'equal rights of others and the public safety' or by 'laws' which are intended to mediate just this harmony of the individual liberties with one another and with the public safety.").

106 Id. Consider how similar claims have been made about the PATRIOT Act, which was presented as a way to protect individuals against terrorism, to secure the homeland, and improve not only national but international security. *See generally* Nick J. Sciullo, *On the Language of (Counter)Terrorism and the Legal Geography of Terror*, 48 WILAMETTE L. REV. 317, 317 (2012) (discussing how the language of national security policy masks national security policy's insidious purposes); Nick J. Sciullo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 561 (2011) (discussing how the rhetoric of terror contains an unmentioned, destructive specter of violence).

107 See Marx's *Eighteenth Brumaire*, supra note 81, at 13.

108 See Zimmermann, supra note 40, at 20.
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R. A. Hughes, with others, argues as such: "Law was in a sense merely an application of ruling party policy." The evolution of corporate personhood jurisprudence evidences a greater degree of support of, and protection for, business. Business does not benefit the poor. To be sure, business employs people, but this elementary economic analysis is not the point. If business benefited the poor in a substantive way, the evolution of corporate personhood, not to mention deregulation in the 1980s, 1990s,

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111 But cf. id. at 130 ("Paying a just wage is a fundamental element of any business that employs people.").

112 Id.


and any number of other developments that gave more power to businesses, should have uplifted the economically disadvantaged. Yet, more people are on welfare, poverty is increasing, the gap between the rich and the poor continues to

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115 See generally TIMOTHY WERNER, PUBLIC FORCES AND PRIVATE POLITICS IN AMERICAN BIG BUSINESS 7 (2012) (discussing the ways in which businesses have become powerful relative to people and governments).


widen,\textsuperscript{119} and slums and tent cities are more significant now than ever.\textsuperscript{120}

Marx also describes the ways in which law can be used to control people, to solidify power at the expense of citizens,\textsuperscript{121} which seems to foreshadow, amongst many legal developments, \textit{Citizens United}.\textsuperscript{122} The result of the Revolution of 1848, for Marx, was power against the citizens, was laws designed to harm.\textsuperscript{123}


\textsuperscript{121} See Marx's Eighteenth Brumaire, supra note 81, at 47 ("The party of Order appears to be perpetually engaged in a 'reaction,' directed against press, association, and the like, neither more nor less than in Prussia, and, as in Prussia, carried out in the form of brutal police intervention by the bureaucracy, the gendarmerie, and the law courts."). Laws do not always protect individuals; they are often quite dangerous to individuals. \textit{Id.} at 27 ("Meanwhile, the party of Order celebrated the reconquest of a power that seemed lost in 1848 only to be found again, freed from its restraints, in 1849, celebrated by means of invectives against the republic and the constitution, of curses on all future, present, and past revolutions, including that which its own leaders had made, and in laws by which the press was muzzled, association destroyed, and the state of siege regulated as an organic institution.").


\textsuperscript{123} Karl Marx provides an important summary of the resulting events in France that initiated a time of executive tyranny, which substantially limited
Government that is too strong, businesses that are too powerful, are clear dangers to individual well-being.\textsuperscript{124} France bears this out,\textsuperscript{125} but what we are now faced with is not the tyranny of the executive, but the tyranny of the corporate.\textsuperscript{126} While France experienced a domineering executive that disempowered the legislative,\textsuperscript{127} the United States now faces a corporate power, a personified threat with all the characteristics of a tyrannical executive leader that dominates the individual.\textsuperscript{128} This increasing corporate power and the strengthening of the nexus between neoliberal economic policies and their government promoters is why Marx is as useful now as ever for legal analysis.

individual freedom and disadvantaged not only the poor, but all classes. See \textit{Marx's Eighteenth Brumaire}, supra note 81, at 61. Marx writes:

\begin{quote}
But if the overthrow of the parliamentary republic contains within itself the germ of the triumph of the proletarian revolution, its immediate and obvious result was Bonaparte's victory over parliament, of the executive power over the legislative power, of force without phrases over the force of phrases. In parliament the nation made its general will the law; that is, it made the law of the ruling class its general will. It renounces all will of its own before the executive power and submits itself to the superior command of an alien, of authority. The executive power, in contrast to the legislative one, expresses the heteronomy of a nation in contrast to its autonomy. France therefore seems to have escaped the despotism of a class only to fall back under the despotism of an individual, and what is more, under the authority of an individual without authority. The struggle seems to be settled in such a way that all classes, equally powerless and equally mute, fall on their knees before the rifle butt.
\end{quote}

\textit{Id.}\textsuperscript{124} See, e.g., id. (showing the reach of the executive's power).
\textit{Id.} (understanding the history of France).
\textsuperscript{126} John W. Schoen Sr., \textit{Are Corporations Taking over the World?}, NBCNEWS.COM (Mar. 23, 2007), http://www.nbcnews.com/id/17346255/ns/business-answer_desk/#.UUe_eVcaUs9 (showing that there is tyranny when corporations control the government).
\textsuperscript{127} \textit{Marx's Eighteenth Brumaire}, supra note 81, at 61.
\textsuperscript{128} See Schoen, supra note 126 (understanding that corporations controlling government can cause tyranny for the individual).
III. CAPITALISM IS IN THE LAW

Cavanaugh and Mander write:

The global corporations of today stand as the dominant institutional force at the center of [social] activity. Through their market power, billions of dollars in campaign contributions, public relations and advertising, and the sheer scale of their operations, corporations create the visions and institutions we live by and exert enormous influence over most of the political processes that rule us.\(^{129}\)

Capitalism is firmly bound up with the law.\(^{130}\) The two are, in their current state, inextricable.\(^{131}\) As Arnold Kawano has argued, "[C]ourts of law sanction capitalist rule by providing ideological support and justification for the enforcement of the capitalist economic system."\(^{132}\) The law is also structured in a way that supports the logic of capitalism,\(^{133}\) and this makes it no different than society writ large.\(^{134}\) Economic systems are usually supported by legal systems; there is nothing particularly unusual about this arrangement, but it is an important and often overlooked point of critical inquiry.\(^{135}\) Slavoj Žižek argues Marx was concerned about the ways in which formal legal principles are the basis for

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\(^{131}\) See id. (understanding that the laws drive capitalism and capitalism drives the economy).

\(^{132}\) Id.

\(^{133}\) Nick J. Sciullo, Žižek/Questions/Failing, 47 WILLAMETTE L. REV. 287, 302 (2010) (explaining that law also celebrates winning for the sake of winning).

\(^{134}\) Id. (quoting GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA 140 (Robert Hurley et al. trans., U. of Minn. Press 1983)).

exploitation, a point, while perhaps overly general, warrants some consideration:

I think we are moving towards a much more authoritarian global apartheid society. Traditionally, for Marx, the ideal form of exploitation was through formal legal freedom. In ideal capitalist conditions there is equal, free exchange. But, more and more, capitalism can no longer sustain this. It can no longer afford freedom and equality.136

One needs look no farther than the United States Constitution as a source of capitalist codification in the United States legal system.137 Revered historian138 Charles A. Beard explained this hypothesis in his seminal work, An Economic Interpretation of the Constitution of the United States.139 Beard, a leader of the progressive historiography movement, discussed the role economic interests played in the penning and signing of the Constitution.140 Although Beard may be a common name to undergraduate history majors, he is by no means a household name, and for that reason a brief sketch of his arguments is necessary to promote this article's

139 CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE UNITED STATES 17 (22d prtg. 1968).
140 Id. at 53.
larger thesis regarding the use of Marxist analysis for understanding the law.

Beard describes that money capital was imperiled under the Articles of Confederation.\footnote{Id. at 31.} It was unable to seek profitable outlets because the Articles failed to protect domestic manufacturing, trade, and land speculation.\footnote{Id.} Secondly, it was handicapped by the depreciation of money and an inability of creditors to collect debts.\footnote{Id.} Thirdly, there was a lack of uniformity in currency.\footnote{Id. at 31-32.} Beard summarized: "Large and important groups of economic interests were adversely affected by the system of government under the Articles of Confederation, namely, those of public securities, shipping and manufacturing, money at interest; in short, capital as opposed to land."\footnote{Beard, supra note 139, at 63.}

Further, delegates to the Constitutional Convention had extreme economic interests in the development of the Constitution.\footnote{Id. at 73-152; see McDonald, supra note 138, at 38-92.} There was much at stake for the delegates, a group of political and landed elites that formed, at least in title, the new country.\footnote{See generally Beard, supra note 139, at 73-152 (discussing the founders' economic interests).} Most had interests in some combination of land speculation,\footnote{See John Achenbach, The Grand Idea: George Washington’s Potomac and the Race to the West 6 (2004); Curtis Dewees, George Washington’s Kentucky Land vi (2005); Dennis Brindell Fradin, The Founders: The 39 Stories Behind the U.S. Constitution 115 (2005); Joseph C. Morton, Shapers of the Great Debate at the Constitutional Convention of 1787, at 284 (2006); Charles Royster, The Fabulous History of the Dismal Swamp Company: A Story of George Washington’s Times 287 (1999); Robert K. Wright, Jr. & Morris J. MacGregor, Jr., Soldier-Statesmen of the Constitution 63 (1987) (all discussing George Washington’s interests in land in various states).} large-scale agriculture,\footnote{See Fradin, supra note 148, at 115; Morton, supra note 148, at 284.} financial instruments and institutions,\footnote{See generally Richard Brookhiser, James Madison 37 (2011); Alan Fusonie & Donna Jean Fusonie, George Washington: Pioneer Farmer 6} shipping and logistics,\footnote{See generally Richard Brookhiser, James Madison 37 (2011); Alan Fusonie & Donna Jean Fusonie, George Washington: Pioneer Farmer 6} and domestic business.\footnote{Id. at 31.}
The Constitution protects economic liberties and attempts to guard against government intervention in the economy. The founding generation sought very clearly to limit government's involvement in wealth accumulation and in the institutionalization of social status. The Constitution was as much a challenge to the old rules of European monarchies as it was a radical new document espousing new ideas about the relationship between government and people.

Many conservative commentators have embraced the notion of the Constitution being a capitalistic document, claiming that the Constitution was of course set up to protect capitalism because the young state was in fact a capitalist system. Government and economic policy work best for states when they support each other. The picture is much more unclear however, when we


151 See MORTON, supra note 148, at 295; FRADIN, supra note 148, at 104.

152 See MORTON, supra note 148, at 135.

153 Id. at 126.

154 Id.

155 See generally HOW CAPITALISTIC IS THE CONSTITUTION? (Robert A. Goodwin & William A. Schambra eds., 1982) (collecting essays under the auspices of the conservative economic think tank, the American Enterprise Institute, discussing the Constitution and capitalism).

156 See generally How Capitalistic is the Constitution?, supra note 156, at 22, 22.

157 Edward S. Greenberg, Class Rule Under the Constitution, in How Capitalistic is the Constitution?, supra note 156, at 22, 22.

158 Id.
consider how these ideas impacted broad swaths of societal tapestry. Yet anti-corporation sentiments ran high throughout much of the Early Republic's history. Perhaps this seems intuitive. The colonists fled England to resist concentrations of power that occurred in the state, church, and trades. All were at odds to the freedom of the individual. There was little opportunity for upward movement, and there were few resources for the disadvantaged. One should not equate a desire to raise one's social standing with a desire to form corporations or large businesses. One should not equate a desire to profit with a desire to form monopolistic regimes.

IV. FERNAND BRAUDEL, CLASS CONFLICT, AND THE ROOTS OF UNREST

Fernand Braudel's three-volume series, Civilization & Capitalism, 15th-18th Century, provides important insights into the anger of the Occupy protestors, the development of capitalism,

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159 See generally id. at 23-24 (explaining the different views).
162 See id. at 43 (understanding the separatists fled because of persecution by the church in England was against their freedom).
163 See id.
164 See id. at 42.
165 See id. ("But such monopolies were not suited to the rigorous conditions which demanded the utmost in individual initiative and resourcefulness, and within a few years most of these charters were revoked or purchased for the common good.").
166 Fernand Braudel is the preeminent French historian who along with founding the Annales School, a leading group of French historians, is highly regarded for his study of economics throughout pre-industrial society. Samuel Kinser, Annaliste Paradigm? The Geohistorical Structuralism of Fernand Braudel, 86 AM. HIST. REV. 63, 63, 66 (1981).
and the relationship between capitalism and the law. Of particular interest is the discussion of class struggle in Volume 2: The Wheels of Commerce. Braudel is an important access point to critique capitalism because his study is grounded in the historical unfolding of pre-industrial society, with an emphasis on the relationship between the European economic system and the people that it governed. In this respect, he engages in a more historically contingent analysis of the structures and interpersonal relationships Karl Marx also addressed this in Das Kapital. Marx's historical view was short, whereas Braudel's is, as the title of his work indicates, roughly 300 years long. Braudel provides a clear access point for critiques of the logics of capital contextualized in the juridico-historical discourses beginning roughly in High Renaissance society. He succinctly described the way society viewed capital historically with resounding aplomb that resonates clearly today: "Every society accumulates capital which is then at its disposal, either to be saved and hoarded unproductively, or to replenish the channels of the active economy, which in the past chiefly meant the merchant economy."

If we begin by reading Fernand Braudel as an oppositional discourse to the positive discourse of capitalism's beneficence, then we may be able to get at the problems against which today's

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168 See FERNAND BRAUDEL, supra note 6, at 72 (stating that in every generation there is a "ceiling which restricts all human life").
170 Id. at 26-28.
171 Marx, for me, has always been about relationships, yet the relationships are what we often gloss over, if not forget, when applying Marxist criticism. Law is also fundamentally about relationships, which explains why Marx and legal analysis offer such fruitful synergies. See Edmund Wall, Marx, Law, and Coercion, 32 J. SOC. PHILOSOPHY 70, 75 (2001) (describing Marx's view of the coercive effects of laws within a capitalist society).
173 BRAUDEL, supra note 169.
174 See id.
175 Id. at 386.
Occupy Movements are, in part, coalescing. To be sure, whether we talk of the merchant classes of Amsterdam, the Mediterranean, England, the capitalist elites of New York, Singapore, or Dubai we are talking about wealth inequalities that underscore a myriad of other differences between the moneyed elite and non-moneyed masses and that underlie the antagonisms of our society. It is the powerful who wish to maintain control, and they do so with the assistance of the state, because no class could be so powerful as to maintain control without the assistance of the state. It should come as no surprise that the founding generation was interested in preserving power, and as it had seen proven by history, ruling

177 F. Mauro, Towards an 'Intercontinental Model': European Overseas Expansion Between 1500 and 1800, 14 ECON. HIST. REV. 1, 1-2 (1961). I am particularly moved and influenced by paintings like Thomas Wyck's Merchants from Holland and the Middle East Trading in a Mediterranean Port and Italian Port, Merchants from Holland and the Middle East Trading in a Mediterranean Port, ARTCHIVE, http://www.artchive.com/web_gallery/T/Thomas-Wyck/ Merchants-from-Holland-and-the-Middle-East-trading-in-a-Mediterranean-port.html (last visited May 25, 2013). Further, I view as important in picturing early capitalist impulses the paintings of Jan Sanders Van Hemessen's The Calling of St. Matthew and Lorenzo Lotto's Storie di Santa Barbara. The Heilbrunn Timeline of Art History, The Calling of Matthew, THE METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/toah/works-of-art/71.155 (last updated Apr. 26, 2013); Lorenzo Lotto, SETTE MUSE. IT, http://www.settemuse.it/pittori_scultori_italiani/lorenzo_lotto.htm (last visited Apr. 7, 2013). These paintings, collectively, demonstrate the profound complexities of capitalism, while also stressing the stature or cultural capital associated with being engaged in capitalism. See generally The Heilbrunn Timeline of Art History, The Calling of Matthew, supra (noting that this painting shows how the vice of greed and the power of money can distract people from righteousness). They express a position of high authority for the capitalist, where the lower classes are obscured, less important, or completely removed from a painting's scene. See generally id. (describing the shortening of Matthew's arms and head in the painting).
elites were sure to face challenges. These challenges were due both to competition amongst elites as well as challenges from the lower classes.

Combining Braudel's theory of class in pre-capitalist society with an economic interpretation of the Constitution that views the Constitution as a document safeguarding economic wealth, accumulation, and the interests of the moneyed elite, we begin to understand the Constitution as a document that importantly shapes the economic welfare of all under its purview. Class struggle existed in the young country, as well. Far from being a Jeffersonian agrarian democracy, power was coalescing from original settlements forward, positioning colonists and eventually the revolutionary generation in a society deeply divided over wealth. Class antagonisms festered before and well after the Constitution. The state is both an enabler of class antagonism and a powerful check against it, for too much antagonism would upset the order.

Braudel describes the evolution of capitalism as the evolution of accumulation and the rise of the merchant, along with the rise of the speculator. Speculation was not the complex arrangement of futures markets and other ephemeral acts of money changing and stock ticker reading, but instead arose with increased lending during the fifteen to eighteenth centuries. As Braudel

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181 Id.
183 See Mark D. Schneider, Note, Peaceful Labor Picketing and the First Amendment, 82 COLUM. L. REV. 1469, 1495 (1982) ("The early businessmen who came to America did so in part to escape the government control of the Tudor industrial code that was the centerpiece of a mercantilist economy slowly being challenged by the rise of laissez faire in England.").
185 See id. at 545 (describing the state of poverty prior to the Constitution).
186 David Lockwood, Civic Integration and Class Formation, 47 BRITISH J. OF SOCIOLOGY 531, 533 (1996).
187 BRAUDEL, supra note 169, at 455-56.
188 Id. at 386.
describes, "The really big lenders, those who counted, were usually men of substance, known by the end of the seventeenth century by the specific title 'capitalists.'" Capitalism then was about speculation and uncertainty. Today the impetus behind the Occupy Movement is, at least in part, the way those big lenders (corporations) gamble with the meager pittance of the working class. From the term's inception, capitalists were a people apart from everyday wage laborers, artisans, the poor, and salaried persons. They were something different, something beyond the everyday exchange of funds, commodities, and labor. Capitalism created a linguistic regime that demanded difference, a difference built from symbols upward to displace a sense of common struggle amongst the laboring population.

The rise of the speculator is an important analogy to the rise of corporate personhood. Both the speculator and the corporate person require an element of fantasy—for the speculator, it is the fantasy of stable or even exceptional returns or tangible

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189 Id. at 388.
194 Id.
investments in commodities; for the corporate person, it is a fantasy of existence and a fantastical belief in inalienable rights.  

V. THE EVOLVING JURISPRUDENCE OF CORPORATE PERSONHOOD

These corporate persons have been given many superhuman qualities. They have infinite life spans, reside simultaneously in many nations, create their own parents, and cut off parts of themselves to form new entities. They cannot go to jail for committing a crime, and do not need fresh air to breathe, clean water to drink, or safe food to eat. These and other extraordinary qualities—combined with constitutional protections intended for natural persons—have enabled large transnational businesses to acquire enormous wealth and political power that is used by a few to rule over many.  

Before engaging in an analysis of the individual cases that mark the journey along the jurisprudential road of corporate personhood, it is appropriate to discuss generally what "corporate personhood" means. Amanda D. Johnson pithily and succinctly describes the nothing of corporate personhood: "Corporate personhood is the concept that the federal Constitution provides for equal identity between corporations and persons." Lawrence Friedman indicates constitutional law began to develop favorably to big business during the later quarter of the nineteenth century. Arthur Macewan phrases it this way: "[T]hrough the late [nineteenth] century and up to Citizens United, the courts have extended the rights of these 'legal people,' treating them increasingly like real people . . . . Citizens United has been another

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196 See Bank, supra note 195; see also CAPITALISM, http://capitalism.org/ (last visited May 25, 2013) (noting that capitalism is based on individual rights).
199 Id.
important step." The notion that corporations received the protection of the Fourteenth Amendment began roughly in the 1880s, although, as I highlight in the cases below, there was important ground being gained by big business before this. The evolving jurisprudence of corporate personhood hijacked the positive impetus and indeed important enactment of the Civil War/Reconstruction Amendments (Thirteen, Fourteenth, and Fifteenth Amendments). These Amendments were intended to protect the newly free black population from depredations by a white racist majority. While they were instrumental in improving protections for blacks (and later, other people of color), these Amendments became a dominant force in protecting big business. As Friedman succinctly puts it: "Laws which regulated business, then, faced the constitutional gamut."  

In order to proceed in a way that gives content to our current understanding of corporate personhood as well as sheds light on the Occupy Movements, I will outline a brief discussion of the jurisprudence of corporate personhood. While this overview is intended to be instructive, it is not inclusive. We could trace much more deeply the jurisprudence of corporate personhood, but I want to hit the high notes (and some of the moderate notes).

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202 See FRIEDMAN, supra note 200, at 521.
203 See infra notes 219-58 and accompanying text (discussing cases from the Supreme Court of the United States affecting corporate personhood prior to the 1880s).
204 See Rubin, supra note 160, at 551 ("County of Santa Clara, which pronounced for the first time in American legal history that corporations had the same rights as natural persons under the Fourteenth Amendment, stands as testimony to the fact that bad law, supported by a powerful business community, can have devastating effects on the populace.").
205 Id. at 560.
206 See FRIEDMAN, supra note 200, at 521.
207 Id.
I work from the premise that the Fourteenth Amendment was never intended to apply to corporations. As discussed below, I am not the only person to feel this way. Mitt Romney added fuel to the fire in the discussion of corporate personhood when he responded to a heckler: "Corporations are people, too, my friend." Far from being a dead issue in the wake of Citizens United, corporate personhood remains important, and because I see this evolving area of jurisprudence as being particularly relevant today, I take a critical historical approach to unpacking how we got to where we are.

The evolution of the jurisprudence of corporate personhood has moved in a direction counter to the original intent of the Framers. I am cognizant of the 1924 warning given by Wisconsin Senator Bob La Follette:

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210 Id.

211 Dave Johnson, Corporations Are Not People, INDUSTRIAL SAFETY & HYGIENE NEWS 12, 12 (Dec. 2011).

212 The notion that corporation law is dead has weaved its way through a tremendous swarth of legal scholarship. Although we know see these prognostications and dire diagnoses are wrong, their vitality bears mentioning to historically situate the evolving jurisprudence of corporate personhood. See Bayless Manning, The Shareholder's Appraisal Remedy: An Essay for Frank Coker, 72 YALE L.J. 223, 245 n.37 (1962) ("[C]orporation law, as a field of intellectual effort, is dead in the United States. When American law ceased to take the 'corporation' seriously, the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together but containing nothing but wind.); Roberta Romano, Metapolitics and Corporate Law Reform, 36 STAN. L. REV. 923, 923 (1984) (describing corporation law as "uninspiring"); Richard Booth, Five Decades of Corporation Law: From Conglomeration to Equity Compensation, 53 VILL. L. REV. 459, 460 (2008) (describing 1970s corporation law as "more or less dead").

213 See Johnson, supra note 198, at 208.

"Democracy cannot live side by side with the control of government by private monopoly. We must choose, on the one hand, between representative government, with its guarantee of peace, liberty, and economic freedom and prosperity for all the people, and on the other, war, tyranny, and the impoverishment of the many for the enrichment of the favored few."^215

While one might regard Senator La Follette as drawing false dichotomies, his intentions seem good. Democracy exists because of the power of a people,^216 not the power of a government of ruling business class.^217 The threat of corporate personhood strikes at the basis of democracy, challenging the power of people by reinforcing the power of corporations.^218

A. Trustees of Dartmouth College v. Woodward (1819)^219

This case was a Contract Clause^220 case with the following fact scenario.^221 The Board of Trustees for Dartmouth College deposed the college's President.^222 The New Hampshire legislature wanted Dartmouth College to become a public institution, which would allow the Governor the power to appoint trustees.^223 The State appointed William H. Woodward as the secretary of the new board.^224 The college objected to the State's action as unconstitutional.^225 The Supreme Court of the United States upheld

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^215 Id. (quoting Senator Bob LaFollette).
^218 Id. at 977.
^221 Trustees of Dartmouth College, 17 U.S. at 626-27.
^223 Trustees of Dartmouth College, 17 U.S. at 539-40, 546.
^224 FARRAR, supra note 222, at 26.
^225 Trustees of Dartmouth College, 17 U.S. at 627.
the charter of the college, which pre-dated the formation of the State of New Hampshire. In so doing, the Supreme Court of the United States gave tremendous support to private corporations as opposed to public interests, beginning the steady erosion of the people's power and the rise of businesses' power in the United States. Simply put, corporations now had the right to protection under the Contract Clause of the United States Constitution. Interestingly, Chief Justice John Marshall wrote an intriguing sentence that both suggests a limit to the rights of corporations, yet also provides the basis for the expansion of those very rights: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Corporations are artificial beings, but beings nonetheless.

B. Society for the Propagation of the Gospel in Foreign Parts v. The Town of Pawlet (1823)

In Pawlet, an English company, Society for the Propagation of the Gospel in Foreign Parts, sought protection under the Constitution when Vermont sought to revoke land grants to the

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226 See id. at 519.
227 Id.
229 Beau Wittmer, Hello, Citizens United, My Name is Santa Clara, a Brief History of Corporate Personhood in America, 1 YALE UNDERGRADUATE L. REV. (2010), http://yulr.org/hello-citizens-united-my-name-is-santa-clara-a-brief-history-of-corporate/
230 See generally id. (noting that Justice Marshall does not answer the question of what rights people are entitled to and corporations are not).
231 Trustees of Dartmouth College, 17 U.S. at 636.
232 Id.
society. The case arose from certification from the Circuit Court for the District of Vermont. Justice Story, writing for the Court, extended the same protection to corporate-owned property as existed for person-owned property. Corporations were not protected under property law yet were able to hold land as people. It should be evident that notions of corporate personhood are slowly seeping into discrete areas of law: contract, property, all the way up to and in Citizens United, the First Amendment. That corporations could hold property and that this right was protected under law instantiated the idea that the Declaration of Independence's "Life, Liberty, and the pursuit of Happiness" were now inalienable rights of the corporation.

C. Providence Bank v. Billings (1830)

While I have tried to sketch the contours of the cases discussed herein, with Billings I want to focus on a short sentence written by Chief Justice John Marshall. Marshall wrote, "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." This sentence seems innocuous enough, but it is telling. Marshall writes of the "great object," indicating that what he is about to describe is exceptional, not representative; it is what makes the corporation extraordinary. By "individuality," Marshall means personhood or subjectivity. He is indicating that incorporation "bestow[s] the character and properties" of persons to a collective, embodied in

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234 Id. at 500-01.
235 Id. at 500.
236 Id. at 501-03.
237 Id. at 502.
239 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
241 Id. at 562.
242 Id.; see Trustees of Dartmouth College, 17 U.S. at 636.
243 See Providence Bank, 29 U.S. at 562; Trustees of Dartmouth College, 17 U.S. at 636.
the corporation.\textsuperscript{244} This means that corporations are like people, imbued with characteristics that are of people.\textsuperscript{245} One could restate Marshall's argument in this way: 'the purpose of corporations is to give a group of people individual rights.'\textsuperscript{246} Here is one of the more clear indicators that the issue of corporations and personhood will be complicated in the years to come.

\textbf{D. The Slaughter-House Cases (1872)\textsuperscript{247}}

Here the Supreme Court of the United States distinguished between "naturalized" citizens and corporations.\textsuperscript{248} In this case, we are also treated to the Court's first discussion of the Fourteenth Amendment.\textsuperscript{249} The case arose from a group of butchers in New Orleans, Louisiana, who objected to a law that gave a monopoly to a certain slaughter-house.\textsuperscript{250} The butchers were concerned that law violated the Thirteenth Amendment's prohibition on involuntary servitude.\textsuperscript{251} The law required butchers to pay a fee to use the accommodations of the slaughter-house given monopolistic power by the law.\textsuperscript{252} Ultimately the Court decided the Fourteenth Amendment was passed for the protection of Blacks.\textsuperscript{253} The Court also decided that the term "citizens" applied only to natural persons and not to corporations.\textsuperscript{254} Indeed, it recognized the historical

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{244} Providence Bank, 29 U.S. at 562; see also Trustees of Dartmouth College, 17 U.S. at 636.
\item \textsuperscript{245} See Trustees of Dartmouth College, 17 U.S. at 636.
\item \textsuperscript{246} See id.
\item \textsuperscript{247} The Slaughter-House Cases, 83 U.S. 36 (1872).
\item \textsuperscript{248} Id. at 95, 100 (Fields, J., dissenting) ("[T]he court held, that a corporation, being a grant of special privileges to the corporators, had no legal existence beyond the limits of the sovereignty where created, and that the recognition of its existence by other States, and the enforcement of its contracts made therein, depended purely upon the assent of those States, which could be granted upon such terms and conditions as those States might think proper to impose.").
\item \textsuperscript{249} The Slaughter-House Cases, 83 U.S. at 59-60.
\item \textsuperscript{250} Id. at 43.
\item \textsuperscript{251} Id. at 61.
\item \textsuperscript{252} Id. at 71.
\item \textsuperscript{253} Id. at 100 (Field, J., dissenting).
\end{enumerate}
\end{footnotesize}
characteristics of the Reconstruction Amendments, and wrote that the intent of these amendments was to promote "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."\footnote{255} Furthermore, Justice Miller, writing for the Court, penned these words:

Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.\footnote{256}

Strong words, yes, but history would show that history could not define intent and could not limit the expanse of corporate power.\footnote{257} The Court did not close the door on the issue of corporate personhood.\footnote{258} In the \textit{Slaughter-House Cases}, the Court attempts to temper its support for corporations, yet leaves the door open for expanding corporations' rights.\footnote{259}

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\footnote{255} \textit{Id.} at 71 (majority opinion).
\footnote{256} \textit{The Slaughter House Cases}, 83 U.S. at 70 (majority opinion).
\footnote{258} \textit{The Slaughter-House Cases}, 83 U.S. at 99 (Field, J., dissenting) ("[T]he court answered, that corporations were not citizens within the meaning of this clause; that the term citizens as there used applied only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature had prescribed . . . though it had been held that where contracts or rights of property were to be enforced by or against a corporation, the courts of the United States would, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State, under the laws of which it was created, and to this extent would treat a corporation as a citizen within the provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States . . . ").
\footnote{259} \textit{Id.}
E. Santa Clara County v. Southern Pacific Railroad Co. (1886)\(^{260}\)

Santa Clara stands for the proposition that corporations have personhood for the purposes of the Fourteenth Amendment.\(^{261}\) Corporations were now legal persons able to enjoy the full protection of the Constitution.\(^{262}\) This was a revolutionary change in the corporate jurisprudence, especially given the importance of the Fourteenth Amendment as one of the Reconstruction Amendments that initiated a period in which race was steadily challenged as a precondition for legal objectification.\(^{263}\) Indeed the Supreme Court emphatically stated, some 115 years after Santa Clara, in Grutter v. Bollinger,\(^{264}\) that the "purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."\(^{265}\) The Fourteenth Amendment now applied to persons and the things they made: corporations, which have no life of their own, no subjectivity, but rather are mere creations of a subjectivity collective.\(^{266}\)

Santa Clara began a slow slide toward the oppression of the individual in favor of the power of corporations.\(^{267}\) The following cases provide a glimpse of the continued erosion of subjectivity and the growth of corporate dominance in relation to the conditions of possibility for individual political action.


\(^{261}\) Id. at 396.


\(^{265}\) Id. at 341 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

\(^{266}\) See Storck, supra note 209 (explaining that corporations are merely artificial entities created for legal convenience).

\(^{267}\) See Rubin, supra note 160, at 584 ("The infamous holding in the Santa Clara case led not only to the exponential increase of corporate influence in American life. . . . Cases such as Buckley, Bellotti, and Citizens United, all of which unquestionably accept the 'corporations as natural persons' mantra, have created a politically atmosphere in which corporations can wield their financial power while the interests of the people has been relegated to the sidelines.").
F. Northwestern National Life Insurance Co. v. Riggs (1906)\textsuperscript{268}

*Riggs* reached the Supreme Court by way of a writ of error from the Circuit Court of the United States for the Western District of Missouri.\textsuperscript{269} In *Riggs*, the insurance company, Northwestern National Life Insurance Company, sought review of a circuit court decision in favor of two life insurance policy beneficiaries.\textsuperscript{270} Without delving too deeply into the Missouri laws relevant to the case, Missouri sought to regulate insurance companies by limiting their ability to void life insurance policies.\textsuperscript{271} Northwestern National argued that such a law violated its constitutional rights under the Fourteenth Amendment.\textsuperscript{272} The Court decided that there was no Fourteenth Amendment violation because the statute in question was enacted within the state’s legislative police powers.\textsuperscript{273} The state could regulate insurance companies operating within its jurisdiction in order to promote the common good.\textsuperscript{274} While the insurance company was entitled to Fourteenth Amendment protection, that did not mean states were unable to protect society from unscrupulous companies by regulating businesses in their jurisdiction.\textsuperscript{275} Here, the Supreme Court makes clear that Fourteenth Amendment protection is not absolute, but does in fact exist.

G. Western Turf Association v. Greenberg (1907)\textsuperscript{276}

*Western Turf* involved an action by a visitor alleging wrongful ejectment from an amusement park owned by a corporation.\textsuperscript{277} The visitor allegedly became boisterous and was subsequently asked to leave the park.\textsuperscript{278} The Supreme Court of California affirmed the

\textsuperscript{269} Id. at 249.
\textsuperscript{270} Id. at 247-49.
\textsuperscript{271} Id. at 249-50.
\textsuperscript{272} Id. at 252-53.
\textsuperscript{273} Id. at 253, 255.
\textsuperscript{275} Id. at 253-54.
\textsuperscript{276} W. Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).
\textsuperscript{277} Id. at 361.
\textsuperscript{278} Id.
lower court's decision in favor of the visitor, and the corporation appealed to the Supreme Court of the United States, which again affirmed the verdict in favor of the visitor.\textsuperscript{279} The Supreme Court opinion begins with a simple statement of law from \textit{Riggs},\textsuperscript{280} which was decided only one year earlier, that describes the prevailing opinion on corporate personhood:

The same observation may be made as to the contention that the statute deprives the defendant of its liberty without due process of law; for, liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons. Does the statute deprive the defendant of any property right without due process of law? We answer this question in the negative.\textsuperscript{281}

Corporations are not guaranteed the same rights as citizens because corporations are not natural persons.\textsuperscript{282} At issue was whether the corporation could claim property rights that were deprived by the relevant California statute.\textsuperscript{283} As an artificial person, it could not.\textsuperscript{284} The Court continued:

The statute is only a regulation of places of public entertainment and amusement upon terms of equal and exact justice to every one holding a ticket of admission, and who is not at the time under the influence of liquor, or boisterous in conduct, or of lewd and immoral character. In short, as applied to the plaintiff in error, it is only a regulation compelling it to perform its own contract as evidenced by tickets of admission issued and sold to parties wishing to attend its race-course.\textsuperscript{285}

\begin{itemize}
\item \textsuperscript{279} \textit{Id.}
\item \textsuperscript{280} \textit{Id.} at 363.
\item \textsuperscript{281} \textit{Id.} (internal citations omitted).
\item \textsuperscript{282} \textit{Greenberg}, 204 U.S. at 363.
\item \textsuperscript{283} \textit{Id.}
\item \textsuperscript{284} \textit{Id.}
\item \textsuperscript{285} \textit{Id.} at 363-64.
\end{itemize}
The Court states that the statute was intended to keep order and obligate amusement parks to admit people who had purchased tickets, not to give parks the power to kick people out. Because the statute protected individuals, it could not be construed to protect corporations. Indeed, the corporation had an obligation to the individual. The Court offers a firm statement in favor of the individual and opposed to corporate interest:

The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public, and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute.

Here, the Court has provided an important rationale for the state to regulate business and for business to serve individuals. Western Turf may be seen as a preservation of the power of the individual over corporations. The tide would turn, however, as the Court continued to hear cases that implicated the question of corporate personhood.

H. Selover, Bates and Co. v. Walsh (1912)

Selover, Bates and Co. involved a plaintiff who sold land located in Colorado via a contract executed in Minnesota. The buyer (Walsh) failed to pay taxes on the land while making payments in furtherance of the contract. The seller, Selover (and

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286 Id. at 364.
287 Id.
288 Greenberg, 204 U.S. at 364.
289 Id.
290 Id.
293 Id. at 120.
294 Id.
295 Id. at 121.
Bates as assigner of Selover), terminated the contract after giving notice in North Dakota. The buyer sued for breach of contract in Minnesota. When the case reached the Supreme Court of Minnesota, the Court found that the seller had failed to give the buyer thirty-days notice before terminating the contract as well as a thirty-day period to repair any defects; and therefore, the seller was in breach of contract. On appeal, the Supreme Court of Minnesota held that Minnesota law had been applied correctly because: (1) the contract was executed in Minnesota and (2) the money for the contract was paid in Minnesota. Therefore, the lex loci contractus was Minnesota law. The Supreme Court of the United States held that the law was applied correctly. The Court also held that the thirty-day period to repair defects did not violate the Constitution's Equal Protection Clause because it treated all sellers equally. Lastly, and most importantly for our present purposes, the Supreme Court of Minnesota held that because the seller was a corporation, it could not claim equal protection under the Fourteenth Amendment. The Supreme Court of the United States affirmed this holding. In ruling that corporations could not claim equal protection, the Court contrasts "corporations" with "citizens," indicating that the Fourteenth Amendment applies to citizens, which are distinct from corporations.

I. Connecticut General Life Insurance Co. v. Johnson (1938)

Johnson came to the Court from a decision in the Superior Court of California, which had ruled against an insurance

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[296] Id. at 120.
[297] Id. at 121.
[299] Id.
[300] Id. at 120-21.
[301] Id. at 125.
[302] Id. at 125-26.
[303] Id. at 126 (citing W. Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907)).
[305] Id.
[307] Id. at 78.
company (whose home state was Connecticut) and, as a result, prevented the insurance company from collecting taxes (on policies issued in California) paid under protest to the California Treasurer.\(^{308}\) Appellant insurance company sought protection under the Fourteenth Amendment's Due Process Clause.\(^{309}\) The Supreme Court reversed the state court decision, subsequently allowing the insurance company to collect the taxes paid under protest.\(^{310}\) In so doing, the Court allowed a corporation to claim protection from state laws that discriminate.\(^{311}\) Here, we begin to see corporate personhood seeping into insurance law.

Justice Black's dissent offered an important moderating influence on the majority's opinion.\(^{312}\) He argued that corporations are not persons.\(^{313}\) Black wrote, "I do not believe the word 'person' in the Fourteenth Amendment includes corporations."\(^{314}\) He references both the context and history of the Fourteenth Amendment as reasons why we ought not interpret the Amendment as including corporations.\(^{315}\) He echoes Justice Miller's opinion from decades earlier.\(^{316}\) Black provides a lengthy reading of the historical developments related to personhood, and does so with the aplomb of an historian;\(^{317}\) yet, his opinion did not carry the day.

\textit{J. Wheeling Steel Corp. v. Glander (1949)}\(^{318}\)

\textit{Wheeling Steel Corp.} involved taxes levied on out-of-state corporations by the state of Ohio.\(^{319}\) The Court decided that an \textit{ad}

\footnotesize{\begin{itemize}
\item \(^{308}\) \textit{Id.}
\item \(^{309}\) \textit{Id.} at 79-80.
\item \(^{310}\) \textit{Id.} at 78, 82.
\item \(^{311}\) \textit{Id.} at 81.
\item \(^{312}\) \textit{Johnson}, 303 U.S. at 83-90 (Black, J., dissenting).
\item \(^{313}\) \textit{Id.} at 85.
\item \(^{314}\) \textit{Id.}
\item \(^{315}\) \textit{Id.} at 85-86 ("Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection.").
\item \(^{316}\) \textit{Id.} at 86 (quoting The Slaughter-House Cases, 83 U.S. 36, 70-71 (1872)).
\item \(^{317}\) \textit{Id.} at 85-90.
\item \(^{318}\) Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).
\item \(^{319}\) \textit{Id.} at 563-64.
\end{itemize}}
valorem tax by the State\footnote{Id. at 571-72.} on out-of-state corporations violated the Equal Protection Clause of the Fourteenth Amendment.\footnote{Id. at 573-74.} Because Ohio had admitted these corporations to conduct business in Ohio, the corporations paid taxes to maintain this privilege; and because Ohio chose to domesticate these foreign businesses, the businesses were entitled to the same protection of the law as domestic corporations in Ohio.\footnote{Id. at 571-72.} In reaching this decision, the Court addressed the notion of corporate personhood.\footnote{Id. at 576.}

Justice Douglas offered a strong dissent in which he challenged the evolution of corporate personhood from \textit{Santa Clara} to the present.\footnote{Wheeling Steel Corp., 337 U.S. at 576-81 (Douglas, J., dissenting).} He wrote that the notion of corporate personhood is firmly situated in Supreme Court jurisprudence since \textit{Santa Clara}.\footnote{Id. at 576.} He also wrote a searing critique of the Court's decision in \textit{Santa Clara}:

\begin{quote}
The Court was cryptic in its decision. It was so sure of its ground that it wrote no opinion on the point, Chief Justice Waite announcing from the bench: "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary.\footnote{Id. at 576-77.}

Justice Douglas is downright mean in this passage. His pointed criticism positions the evolution of corporate personhood
as deeply problematic. It is almost as if the concept appeared out of thin air. There was no "history, logic, or reason" provided. We see this criticism echoed in many of the opinions against corporate personhood, yet those opinions never gain the traction necessary to change the evolution of the Court's doctrine. When such a broad assertion is made in a majority opinion, it prevents discussion of an unsettled issue—in this case that of corporate personhood.

K. Buckley v. Valeo (1976)

Buckley involved a suit filed in the United States District Court for the District of Columbia regarding the constitutionality of the Federal Election Campaign Act of 1971 (FECA). FECA placed limits on campaign spending and political contributions, which the plaintiffs alleged restricted free speech. The Supreme Court delivered a lengthy per curiam

327 See id. at 579 (noting case precedent that repudiated corporate personhood, yet positing that "[h]istory has gone the other way").
328 Id. at 577.
330 Id. at § II, pt. B ("When Waite simply asserted that the equal protection clause applied to corporations, he foreclosed discussion of a question that was unsettled at the time."").
333 Buckley, 424 U.S. at 6-8.
334 Trevor Potter, Buckley v. Valeo, Political Disclosure and the First Amendment, 33 AKRON L. REV. 71, 73 (1999) ([FECA], enacted in 1971 and 1974, laid out a comprehensive system of federal campaign finance regulations. The disclosure provisions required political committees, political parties and candidates to register with the Federal Election Commission, and to disclose the identity of contributors and the dollar amount of their contributions, as well as the size and recipients of their expenditures or disbursements. It also required individuals and groups other than political committees or candidates to report independent expenditures over $100 to the FEC.").
opinion in which several of the Justices concurred and dissented.\footnote{Buckley, 424 U.S. at 6, 235, 257, 286, 290 (per curiam) (Burger, J., concurring in part and dissenting in part) (White, J., concurring in part and dissenting in part) (Marshall, J., concurring in part and dissenting in part) (Blackmun, J., concurring in part and dissenting in part) (Rehnquist, J., concurring in part and dissenting in part).}
The Court decided that many of the FECA's limitations were constitutional, but it also struck down some of the limitations.\footnote{Id. at 143-44 (per curiam).}
While there might be reason to cheer for the limitations that were upheld, the effect of \textit{Buckley} was to drown out the individual's ability to participate in campaigns unless he was wealthy.\footnote{Burton Neuborne, \textit{Campaign Finance Reform & The Constitution: A Critical Look at Buckley v. Valeo} 18 (1998) ("[T]he Buckley opinion took a congressional program designed to minimize the impact of wealth on campaigns and turned it into an engine for the glorification of money.").}
Wealth aggregates in corporations and often in those who own or work in upper management at large corporations.\footnote{See id. at 18-19 (explaining how the Buckley decision allows traditionally wealthier individuals, such as CEO's or corporate managers, the ability to finance their own campaigns).} \textit{Buckley} then provided a way for that wealth to exact an increasing influence on the election process.\footnote{Id.}

Deborah Hellman has written, "\textit{Buckley v. Valeo} rests on the claim that restrictions on both giving and spending money are tantamount to restrictions on speech, and thus can only be sustained in the service of important or compelling governmental interests."\footnote{Deborah Hellman, \textit{Money Talks but It Isn't Speech}, 95 Minn. L. Rev. 953, 953 (2011).}
\textit{Buckley} is complicated because it indicts free speech, then protects it, and even provides a standard for limits on free speech: there must be "compelling governmental interests."\footnote{Id. Hellman is referring to language in \textit{Buckley} stating that governmental restraints on freedom of speech are subject to strict scrutiny. See, \textit{e.g.}, \textit{Buckley}, 424 U.S. at 44.}
Thus, 	extit{Buckley} stands for the proposition that there is a large burden to overcome if one is to limit free speech.\footnote{Hellman, supra note 341, at 953 n.1.} Commentators have
focused on the freedom of speech aspect of the case, but as that falls outside this article's purview, I will refrain from engaging in this complex latticework of legal theory and case law.


I do not want to focus on the First Amendment concerns of *Citizens United*, but rather the case's intersection with *Austin v. Michigan Chamber of Commerce*. In *Austin*, the Court held that there was a substantial governmental interest in "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's ideas."

Legal scholars have run to critique a number of problems with *Citizens United*. This is an interesting notion, perhaps, but it also demonstrates a clear linkage to the Occupy Movement's fear, angst, and anger for the capitalist accumulation of the modern corporation.

The Supreme Court took a significant step in *Citizens United* when the majority subscribed to the natural person theory of

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348 Id. at 660.
corporate personhood, which made corporations no longer legal persons, but natural persons. The difference is subtle yet important. Now corporations are not legal fictions, but people, indistinguishable from persons walking down the street. While the casual observer might think that that such a theory does not represent a change, such an opinion would ignore the arc of development in corporate personhood jurisprudence and fail to see the threat that Citizens United represents. It would also ignore how these subtleties are the very stuff of significant change. The Citizens United ruling sounded a startling ring for progressives like Ralph Nader who have been appalled by the evolving doctrine of corporate personhood. No matter where one focuses his or her interest in the Citizens United opinion, the Court's ruling may be considered a victory for corporations.

Mathew J. Allman has argued that there are three major problems with the natural person theory of corporate personhood. He suggests that these problems are: "the theory is divorced from observable reality," "the theory is logically incoherent," and "the theory is inconsistent with the meaning and purpose of the Constitution." At first blush these problems might be obvious. Clearly, in reality, a corporation is not a natural person. It cannot breathe, procreate, give gifts on the holidays, or reason. The logical incoherency argument rings true from the

351 See Allman, supra note 349.
353 Legal fictions have been discussed thoroughly in the literature. Nancy J. Knauer, Legal Fictions and Juristic Truth, 23 ST. THOMAS L. REV. 1, 1, 9 (2010); Natasha N. Aljalian, Note, Fourteenth Amendment Personhood: Fact or Fiction?, 73 ST. JOHN'S L. REV. 495, 501 (1999).
355 Ralph Nader, How to Curb Corporate Power, THE NATION, Oct. 10, 2005, at 24 ("The court-made doctrine of 'corporate personhood,' created by pro-corporate judicial activists in the late nineteenth century, continues to expand as the result of a well-orchestrated 'business civil liberties' movement led by dozens of corporate-front legal groups and right-wing think tanks.").
356 See Macewan, supra note 201.
357 Allman, supra note 349.
358 See id.
simplest, most colloquial, statement of the argument: "[A] corporation is a 'person.'" There is a reason that if said to a room of non-attorneys, this statement would inspire quizzical looks. People understand, at least vaguely, what a corporation is, how it is created, and how it runs. People also understand what a person is, what they are, and what it means for them to possess this thing called personhood. The last problem Allman discusses is a version of the argument that runs through this article, namely, that corporations are not people and were not intended to be people in the Constitution, and that only through aberrant case law, which became the norm, did corporations become people.

If, as Pashukanis argues, "every legal relation is a relationship between subjects [and a] subject is the atom of legal theory, the simplest and irreducible element," then the corporation has now become the simplest element of the law. It is a subject, not an object. It now warrants treatment previously unknown. It is a subject of law, a legal subject, no longer a legal fiction, a legal object. At law's center is the subject, questions of subjectivity, the relations between subjects, and the ways subjects act and are affected. Now that corporations have shifted from being objects to being subjects, they reside in the center of law, in precisely the same place as individuals. As I will suggest below, Citizens United is not the final word.

360 See Allman, supra note 349 (discussing Allman's arguments).
361 See supra notes 219-356 and accompanying text.
362 See Pashukanis, supra note 5.
363 Id.
364 See David Gans, Should Corporations Have the Same Free Speech Rights as Individuals?, 45 Am. Hist. 20, 21 (Feb. 2011) ("We've been down this road before. In the Lochner era, the Supreme Court turned its back on the Constitution's text and history in decisions that gave corporations equal rights with 'We the People.' It is a chapter in the Court's history that is reviled by liberals and conservatives alike. When the Court changed, the idea that corporations had the same inalienable rights as living persons was disowned. Citizens United deserves a similar fate.").
Furthermore, the notion of corporate personhood has been codified in the United States.\textsuperscript{365} Corporate personhood is not simply a story arc to trace through countless court cases; it is fundamentally the law, as written, in the United States.\textsuperscript{366} Perhaps then, it is important to think about the permanence of corporate personhood in the law and to disregard the caprice of judges or the changing winds of jurisprudence. \textit{Citizens United} changed everything about the way we view the law of corporations.\textsuperscript{367}

There are also ethical implications for the corporate person.\textsuperscript{368} When we grant rights that were reserved for people to non-people, then our ethical paradigm becomes confounding.\textsuperscript{369} Perhaps, the corporate person can be seen as more culpable, more easily blamed or criticized than the corporation that is clearly not a person, but such judgments are difficult to make and difficult to sustain under scrutiny.\textsuperscript{370} \textit{Citizens United} presents students, scholars, and activists with more than a new interpretation of First Amendment law.\textsuperscript{371}

VI. THE OCCUPY MOVEMENT AS CAPITALIST CRITIQUE

Most Americans know we've got problems with corporate power. Eighty-six percent say Wall Street and its lobbyists have too much influence in Washington, D.C., and [eighty] percent oppose \textit{Citizens United}, the Supreme Court ruling that opened the floodgates to corporate campaign contributions. But how do we change that when

\textsuperscript{365} 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise—. . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").
\textsuperscript{366} \textit{Id.}
\textsuperscript{367} \textit{See} Avi-Yonah, supra note 349.
\textsuperscript{369} \textit{See id.}
\textsuperscript{370} \textit{See id.} at 197-98.
\textsuperscript{371} \textit{See}, e.g., Avi-Yonah, \textit{supra} note 349 (discussing the impact of \textit{Citizens United} as "another step in the evolution of our legal views of the corporation"); \textit{see also} Allman, \textit{supra} note 349.
corporations have so much wealth with which to protect their privileges?  

The Occupy Wall Street (OWS) movement has created a force of tremendous social awareness and fostered far-reaching criticism. It has spawned related movements across the United States as well as in several other countries. The movement is at once a concerted effort to challenge capitalism’s juridical stranglehold over the masses while also representing a more

372 See van Gelder, supra note 118.
373 Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street, PROTEST & ASSEMBLY RIGHTS PROJECT 9 (2012), http://www.nplusonemag.com/files.SuppressingProtest.pdf (“In expressing the concerns that motivated the encampment and expanding protest, protesters referred to the U.S. Supreme Court’s decision in Citizens United and the broader issue of corporate influence in politics, the housing crisis and the foreclosures that have followed, high health care costs, student loans and the costs of private college tuitions, the inability of college graduates and manual laborers to find jobs, and U.S. involvement in two wars, financed through deficit spending.”).


375 Schneider, supra note 2 (“Sister occupations have been appearing all over the country and the world, in big cities and smaller ones, often using a similar assembly model, taking back public space and turning it into an agora, a place where politics might, finally, be about people. #OccupyWallStreet—the action, the idea, the meme—has become #OccupyEverywhere. It has started a movement.”). But see Christopher A. Ford, “Occupy Wall Street” and Communist China’s Emerging “Neo-Kong” Discourse of Antidemocratic Legitimacy, HUDSON INST. SEC. & FOREIGN AFFAIRS BRIEFING PAPER, 1-15 (May 2012), http://www.hudson.org/files/publications/CFord–OccupyWallStreet–052012.pdf (discussing the ways in which the Chinese Communist Party has seen the Occupy Movements as legitimizing its power).

general break with the striations of global capitalism. It resists the logic of capitalism as well as the logic of juridical economic metanarratives that are bound up in the very existence of the United States, and the rest of the world.

I describe capitalism as juridical because capitalism is bound up with the state. When I describe the state, I intend to imply not just the state or the government, but the legal apparatuses that reinforce the state's power. There is no place to talk of the United States without talking of capitalism. The two are inseparable, imbued with each other's mutually reinforcing logics.

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378 Forum Post: How Do We Fight Capitalism & the 1%?, OCCUPYWALLSTREET.ORG (Nov. 14, 2012), http://occupywallst.org/forum/how-do-we-fight-capitalism-the-1/ (discussing the reasons why capitalism is corrupt and how it is harming the economy of the United States).


of order and control. Capitalism is United States democracy and United States law.

Slavoj Žižek says:

We are not destroying anything. We are only witnessing how the system is destroying itself. We all know the classic scene from cartoons. The cat reaches a precipice but it goes on walking, ignoring the fact that there is nothing beneath this ground. Only when it looks down and notices it, it falls down. This is what we are doing here. We are telling the guys there on Wall Street, "Hey, look down!"

But, what hope is there for the future? This is an important question because the strength of revolution lies not in its successful present, but its future possibilities. If the Occupy Movements are, as Žižek describes, the awakening of the demise of capitalism, then there remains the question of what the Occupy Movements will produce. If the movements are illustrating the danger of corporate personhood, including its extraordinary legal development, and its threat to individual subjectivity, then what happens next? This moment of awareness is crucial and the attention the Occupy Movements are receiving is important; however, these protestors and their colleagues cannot be content because very little has changed.

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382 Cf. Meher Ahmad & Elizabeth DiNovella, We, the People, THE PROGRESSIVE, Apr. 2012, 8-9 (“The 2012 Presidential election is the first under which 'money as free speech' has been given free rein in political campaigns, thanks to the Supreme Court's Citizens United ruling. In its 5-to-4 vote, the court allowed unlimited political spending by corporations, unions, and other special interest groups so long as they maintain the fiction that they are not coordinating their efforts with the candidates.”).
383 See JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 7 (2006) (explaining the foundation for capitalism including how it affects the legal and economic theories of the United States).
385 Id.
386 Id.
Žižek further argues:

There is a danger. Don't fall in love with yourselves. We have a nice time here. But remember, carnivals come cheap. What matters is the day after, when we will have to return to normal lives. Will there be any changes then? I don't want you to remember these days, you know, like "Oh. We were young and it was beautiful." Remember that our basic message is "We are allowed to think about alternatives." If the taboo is broken, we do not live in the best possible world. But there is a long road ahead. There are truly difficult questions that confront us. We know what we do not want. But what do we want? What social organization can replace capitalism? What type of new leaders do we want?  

These questions are important. Much of the criticisms leveled against Marxist critique are the lack of an alternative. For many, the critique of capitalism must have an end—a juncture where a new economic system is put in place—where a new politics of class replaces the old. But might scholars, students, and activists of all stripes draw on the simple hope of middle school librarian Rachael Myers who said, "Like a lot of people, I first visited the Occupy Wall Street encampment because of a shared frustration and anger toward economic inequality and corporate personhood, . . . but I've stuck with it because, in the last month, OWS has transformed into a hopeful and optimistic collective voice for change."

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387 Id.
388 See Jameson, supra note 3, at 133 (discussing what is known as "Marx-avoidance").
389 Sarahana, supra note 384 (encouraging people not to allow the Occupy Movement to die out without any changes occurring).
VII. THE LOGICS OF RESISTANCE

Ernesto Laclau and Chantal Mouffe provide several important guiding principles to the logics of resistance. First, is the notion that "wherever there is power[,] there is resistance" (borrowing from Michel Foucault) and this resistance takes many forms. Laclau and Mouffe make a second and related point that sheds particular light upon the Occupy Movements: "There is therefore nothing inevitable or natural in the different struggles against power, and it is necessary to explain in each case the reasons for their emergence and different modulations that they adopt. The struggle against subordination cannot be the result of the situation of subordination itself."393

The field of law is a unique place for resistance to occur because while legal systems provide the methods of control to limit action, they also provide for the conditions of possibility that lead to social change. As Tor Krever argues, with respect to French legal theorist Alain Supiot:

In principle, law is as much a hermeneutic device as a system of norms. It creates a discursive space in which a shared vision of justice can be forged through dialogue; in which questions of value can be posed, the exercise of power challenged and the cold logic of the market


393 Id. at 152.

394 SUPIOT, BEYOND EMPLOYMENT, supra note 32, at 1-3; SUPIOT, HOMO JURIDICUS, supra note 32, at xxiv-xxv (explaining the relation of legal developments and anthropology); SUPIOT, SPIRIT OF PHILADELPHIA, supra note 32, at 14 (analyzing how the concept of social justice affects economic development).
subordinated to broader human needs. The promise held out—if never actually delivered—by post-war European social democracy represents, perhaps, the high point of its advance to date . . . .

This unfulfilled promise of law—of a space for justice—is where the Occupy Movements exist. The movements have stepped into this space to challenge the very space they occupy, to challenge the systems that inform their condition and enable their anger, and to express a concern for people’s needs and their well-being. Such a project seems wholly appropriate as a way in which to challenge the law. The movements also stem from a long history of resistance that includes the Arab Spring and Movement of the Squares. Seen this way, the Occupy Movements are a continuation of revolutionary strategies specifically designed to challenge law’s hegemony.

The Occupy Movements are an example par excellence of the resistance that has always existed alongside capitalism’s power. While the movements are certainly new, the motivating factors that spurred their birth are not. Nothing inevitable has happened. The struggle against capitalism, corporate greed, corporate personhood, etc. would not have manifested in the Occupy Movements had people decided not to occupy. The occupation of parks and other

395 Tor Krever, Calling Power to Reason?, 65 NEW LEFT REV. 141, 143 (Sept./Oct. 2010).
397 Joshua Clover, Reflections from UC Davis: On Academic Freedom and Campus Militarization, 39 COLLEGE LITERATURE 1, 3 (Spring 2012).
public places is a particular modulation of the resistance movement.\(^\text{399}\)

This logic of resistance is based on several claims, namely, that organizing seeks to challenge what is, imagines what ought to be, and thinks of ways to change the world as it is.\(^\text{400}\) This logic governs what we do in the law, in our family and personal lives, and in our everyday interactions. The logic of resistance is also a logic of praxis.\(^\text{401}\) Far from being an ideological discussion to be had in faculty lounges, the logic of Marxist resistance—and here I invoke the political turn of Antonio Gramsci that helped to bring Marx to the streets, to the practice of everyday struggle—is a logic of action and change\(^\text{402}\) that I find resonates in the Occupy Movements.

The Occupy Movements are first and foremost a call to challenge the relational apparatuses instantiated by capitalism.\(^\text{403}\) They are about macro-politics and micro-politics.\(^\text{404}\) Raymond Shonholtz describes the logic of the Occupy Movements as fundamental ideas of fairness and equality:

Occupy Wall Street is a courageous conversation. It does not, as yet, require heroism, but it does require resolute actors, an inclusion of the "other" and righteous goals.

While the "Tea Party" was a challenge to Republican mainstream politics, OWS challenges the very economic


\(^{400}\) Anna L. Anderson-Lazo, A Reflection on Political Research and Social Justice Organizing, 2 NEW PROPOSALS: J. MARXISM & INTERDISCIPLINARY INQUIRY 61, 70 (May 2009).


\(^{402}\) Id. at 7-8.


\(^{404}\) Id.
foundation of the nation by asking questions about social justice, equity, and whether this and the next generation can have and secure lives better than their parents’ generation, the essence of the American work ethic and dream.\textsuperscript{405}

The Occupy Movements are also causing a profound change in the way people acquire and process information,\textsuperscript{406} an important, if not necessary, step for active participation in the public sphere.\textsuperscript{407} Indeed, the Occupy Movements look much like earlier efforts at agrarian reform, to wit, populism in the nineteenth century,\textsuperscript{408} as well as later efforts to inform and improve the urban centers of the United States.\textsuperscript{409} As there were then,\textsuperscript{410} problems of


\textsuperscript{406} Sasha Lilley, \textit{Wall Street, Small Business, and the Limits of Corporate Personhood: An Interview with Doug Henwood}, MRZINE (Jan. 21, 2012), http://mrzine.monthlyreview.org/2012/henwood210112.html (“People are talking, reading, they’re thinking. Aside from being a movement, it’s a great effort of self-enlightenment, self-education, which is also wonderful.” (quoting Doug Henwood)).

\textsuperscript{407} Id.

\textsuperscript{408} Id. (“The populists of the late [nineteenth] century did a lot of that. You had farmers studying monetary theory, a hundred some odd years ago. [We are] back to some version of that. People are really getting involved in the nitty-gritty of economics and finance in a way they [have not] in a very long time.”).


\textsuperscript{410} Doug Henwood discusses the populist roots of the Occupy Movements in this way:

In the United States, they were mostly rural, mostly farmers. There were workers’ movements in the cities which were not really populist, a lot of them were traditional labor radicals or socialists, people we’d more or less recognize today. But the rural populists hated the big cities, hated the bankers in the big cities. They were also suffering from the economic environment of the time. The late [nineteenth] century was a time of repeated economic panic and crisis. About a half of the last few decades of the [nineteenth] century were spent in depression. The price levels were relentlessly declining. It was a period of the gold standard and of monetary austerity and relentless
solidarity plague every movement, including the Occupy Movements.\textsuperscript{411} Doug Henwood has argued that the threat is not corporate personhood; instead, the real threat is that people can spend money however they want, and it will be viewed as an expression of free speech based on the concepts of corporations as people and money as speech.\textsuperscript{412} In a way, Henwood is correct because \textit{Citizens United} opens the floodgates for people to flood campaigns with money; but in a way he is also wrong because he glosses over the logic that causes this catastrophe, the instantiation of a stronger position of corporate personhood.\textsuperscript{413} Henwood forgets the cause in his concern about the effect.\textsuperscript{414} He continues by suggesting that the logic of fighting corporate personhood is

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\textbf{412} Henwood explains that the real danger is people, not the legal fiction of corporate people:

The \textit{Citizens United} decision means that corporations can spend money as freely as they want, without restrictions, if money is a form of speech and corporations are legally the same as individual persons. The problem with that to me is not so much that corporations have the same rights as people do, but that people have the right to spend as much money as they do and that's considered expressing their freedom of speech. That seems to be the problem. You could have the Koch brothers, everyone's favorite emissaries of Satan, free to spend their personal billions as they like to pursue their nasty agenda—that seems to be the problem to me, not the corporate personhood.

\textbf{Lilley, supra note 406 (quoting Doug Henwood) (emphasis added).

\textbf{413} \textit{Id}.

\textbf{414} See \textit{id}. (posturing that the problem is not corporate personhood but that corporations have lots of money that they can use to exercise freedom of speech).
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flawed because it "is not going to be very helpful." Yet, I wonder whether attempts to curb the effects of a bad policy are anymore than Pyrrhic victories that distract from real social change at a more foundational level.

President Barack Obama, of course, has voiced his opposition to the logic of *Citizens United*, which should not be discounted in an evaluation of the discourse surrounding this legal issue *de jure*. Whether these statements had an impact on the Occupy Movements is less clear, but the statements do represent resistance at the highest level of government. President Obama's concerns are the same as those voiced by the Occupy Movements, and his criticisms of the decision run the gamut of critique from fear of the power of large corporations, to the erosion of democratic principles, to threats to the electoral process.

415. *Id.* ("Just trying to undo corporate personhood or the corporate form is not going to be very helpful. One of the reasons that the [nineteenth] century was such an unstable time economically speaking is that it was before the corporation had really taken its modern form and you had a lot of smallish units that didn't have the resilience to withstand economic shocks."); see also *Doug Henwood, Fleshing out the Corporate Person*, LBO NEWS (Nov. 15, 2011), http://lbo-news.com/2011/11/15/fleshing-out-the-corporate-person/ (noting that corporations enjoy all the rights of living people but bear none of the responsibilities).

416. President Obama directly called the Supreme Court of the United States to task in the 2010 State of the Union Address:

> With all due deference to separation of powers, last week the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.


417. Barack Obama, *Remarks by the President on the DISCLOSE Act*, THE WHITE HOUSE (July 26, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-disclose-act ("A vote to oppose these reforms is nothing less than a vote to allow corporate and special interest takeovers of our elections. It is damaging to our democracy.").

418. *Id.*
The Occupy Movements have begun to agitate about corporate personhood,\textsuperscript{420} signaling an important message. Something must change. But to what will this change in law lead? Polls have shown that the majority of United States citizens oppose the Supreme Court ruling,\textsuperscript{421} but opposition reflected in polls is not enough to change the law. A Washington Post poll found that eighty percent of respondents opposed the \textit{Citizens United} ruling, and seventy-two percent favored congressional action to limit corporate spending on campaigns.\textsuperscript{422} Opposition was nearly uniform along party lines with eighty-five percent of Democrats, seventy-six percent of Republicans, and eighty-one percent of independents opposing the Court's opinion.\textsuperscript{423} This gap between public opposition and court action is where the Occupy participants have interceded in an attempt to actuate change.

The message is resonating in local legislative bodies as well as state legislative bodies,\textsuperscript{424} but nothing has happened at the federal level. No test cases have made their way through any of the courts,

\textsuperscript{419} President Obama elaborated upon this idea in the same speech: Now, imagine the power this will give special interests over politicians. Corporate lobbyists will be able to tell members of Congress if they don't vote the right way, they will face an onslaught of negative ads in their next campaign. And all too often, no one will actually know who's really behind those ads.


\textit{Id.}\textsuperscript{422} Id.

\textit{Id.}\textsuperscript{423} Id.

\textit{See infra} notes 430-36, 446-76 and accompanying text (discussing state and local government resolutions, suggesting an end to corporate personhood by constitutional amendment).
and no serious federal legislative action has occurred.\textsuperscript{425} One way to test the success of the Occupy Movements is if they are able to affect legislative or legal change. This might not be the best way to judge a movement's success, but it is one way. In the following paragraphs I will highlight some of the legislative successes, however limited, the Occupy Movements have achieved. That these successes have occurred from late 2011 to the present day are a sign that, even though many of the Occupy Movements have been evicted from their encampments,\textsuperscript{426} they still resonate in current political and legal discourse. This means that their challenge to corporate personhood remains an issue in play, and as such, it is relevant to continued exploration by legal and political science scholars.

Several localities, along with various Occupy Movements, have begun to debate, and in some occasions, pass resolutions calling for some end to corporate personhood.\textsuperscript{427} These legislative and quasi-legislative measures suggest that there is an interest in changing the law, and this interest is manifesting in some legal changes.\textsuperscript{428}

Occupy Boulder joined the fight to challenge corporate personhood by supporting Boulder ballot measure 2H, which was

\textsuperscript{425} See infra notes 440-45 (discussing Congressional resolutions that have not received much traction that call for a constitutional amendment ending corporate personhood).


\textsuperscript{428} See Jarvis, supra note 427.
passed by the Boulder City Council. The referendum is non-binding. The ballot question was:

Shall the people of the city of Boulder, Colorado, call for reclaiming democracy from the corrupting effects of corporate influence by amending the United States Constitution to establish that: 1) Only human beings, not corporations, are entitled to constitutional rights; and 2) Money is not speech, and therefore regulating political contributions and spending is not equivalent to limiting political speech.

Clearly this is an attempt to challenge the holding in *Citizens United*. The fear articulated is one that is based on the threat to democracy as well as corporate greed. But, the thrust of the ballot measure is that corporate personhood represents a threat to the fundamental pillars of democracy. The people of Boulder came down sharply on both sides of the issue, yet a majority of City Council members supported the initiative. Actions like this are testaments to the success of the Occupy Movements, but non-binding actions only do so much for a cause. While some have resulted in changes to the law, others have fallen on deaf ears.

The Los Angeles City Council unanimously voted to support a constitutional amendment to overturn *Citizens United*.

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431 Id.

432 Id.

433 See Karl Rusnak, *Anti-Corporate Personhood Resolutions Gaining Steam*, ECON. IN CRISIS (Dec. 9, 2011), http://economyincrisis.org/content/anti-corporate-personhood-resolutions-gaining-steam (explaining how many local jurisdictions have taken action but it is ultimately up to Congress to address the issue of corporate personhood).

Council President Eric Garcetti sponsored the resolution.\(^{435}\) Los Angeles is the first large city in the United States to endorse such a position.\(^{436}\) Unfortunately, the resolution has no legal impact on what the Court or Congress will do.\(^{437}\) But, the action is important as a strong statement about public opinion and a pronouncement of sorts about what people, at least in Los Angeles, think the Supreme Court should have done and why the *Citizens United* decision poses a threat to the well-being of United States citizens. In response to the Los Angeles City Council action, *Huffington Post* writer and entertainment attorney Miles Mogulescu writes:

> In the meantime, Tuesday's resolution by the Los Angeles City Council supporting an end to the political auction—which will hopefully be followed by actions in cities and towns across America—is one important step in the long march to restore democracy to America and address the nation's pressing problems.\(^{438}\)

On the other side of the country, Senator Bernie Sanders (I-Vt.) has also been moved by the logic of the Occupy Movements,\(^{439}\) proposing the Saving American Democracy Act,\(^{440}\) which is companion legislation to Representative Ted Deutch's (D-
Fla.) House resolution, appropriately titled "Outlawing Corporate Cash Undermining the Public Interest in our Elections and Democracy (OCCUPIED) Amendment." The Joint Resolution is subtitled with the following explanation:

Proposing an amendment to the Constitution of the United States to expressly exclude for-profit corporations from the rights given to natural persons by the Constitution of the United States, prohibit corporate spending in all elections, and affirm the authority of Congress and the States to regulate corporations and to regulate and set limits on all election contributions and expenditures. As of the writing of this article, the joint resolution had not gained much traction in the House of Representatives or the Senate. But, that does not mean that it will not.

Unfortunately, resolutions, even those passing Congress, cannot overturn a Supreme Court decision on the Constitution, nor can they do much more than encourage the adoption of a Constitutional Amendment. The resolution, while significant in its origin and the imprimatur of members of congress, is only a slightly more powerful statement than those initiated at the state and local level.

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443 With a presidential election in November 2016 and an August recess, it is unlikely there will be any action on these resolutions and it is also unlikely that they will spur other legislative action in the near future.

The New York City Council recently adopted Resolution 1172, which opposes the Supreme Court of the United States' decision in *Citizens United*. Passed on January 4, 2012, this resolution was sponsored by twenty-eight members of the fifty-one members of the New York City Council, including City Counsel Speaker Christine C. Quinn. Chair of the committee of jurisdiction, the Committee on Government Operations, Gale A. Brewer, was also a sponsor. The resolution passed forty-one to five, with one abstention. The resolution concluded that:

Resolved, That the Council of the City of New York opposes the Supreme Court's interpretation of the Constitution in *Citizens United* regarding the constitutional rights of corporations, and supports amending the Constitution to provide that corporations are not entitled to the entirety of protections or "rights" of natural persons, specifically so that the expenditure of corporate money to influence the electoral process is no longer a form of constitutionally protected speech, and calls on Congress to begin the process of amending the Constitution.

Similar, although with obviously not the faintest aura of legal force (New York City Council's Resolution is a resolution, not a law), Occupy DC passed a resolution through its General

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447 Id.


449 Res 1172-2011, supra note 446.
Assembly calling for there to be a constitutional amendment ending corporate personhood.\textsuperscript{450} It reads in pertinent part:

In 2010, the United States Supreme Court decided in \textit{Citizens United v. Federal Election Commission} that independent spending on elections by corporations and other groups could not be limited by government regulations. This decision is only the latest in a long line of judicial rulings that have invented the legal doctrine of corporate personhood, affording corporations the same constitutional rights as people. The corrupting influence of money in politics, exacerbated by corporate personhood, subverts democracy. The Supreme Court has enshrined corporate personhood and interpreted the First Amendment to prohibit Congress from regulating money in politics. The only way to reverse these rulings is an amendment to the Constitution.\textsuperscript{451}

What affect such quasi-legislative work has is debatable. Clearly no resolution passed by any of the Occupy Movements does anything to the law, but it may send a signal. That such events are reported in local, regional, national, and international media outlets\textsuperscript{452} is notable. Ralph E. Stone, a former Federal Trade Commission (FTC) attorney, has described these actions at the state and local level as "promising,"\textsuperscript{453} but wonders if such hope is misplaced, if progressives are putting too much emphasis on big dreams and not small successes, like media coverage, expressions of solidarity from celebrities and elites, and meetings with elected


\textsuperscript{451} Id. (emphasis added).


officials.\textsuperscript{454} These are small victories, perhaps, but time is needed to effectuate large change and the law moves slowly. Perhaps more emphasis should be given to the small successes of the Occupy Movements, rather than chastising attempts to bring down corporate personhood.

The City Council of Portland, Maine also passed a non-binding resolution on January 18, 2012.\textsuperscript{455} The vote was six to two for the resolution calling on Maine's congressional delegation to support a constitutional amendment abolishing corporate personhood.\textsuperscript{456} Councilmember David Marshall sponsored the resolution and indicated that this was not the first time the Portland City Council had condemned federal action.\textsuperscript{457} The mayor also joined Councilmember Marshall in supporting the resolution.\textsuperscript{458} Again, the resolution has little meaning and no force of law, but it does send a signal to the city, state, and federal representatives of Maine.

On March 6, 2012, fifty Vermont communities passed resolutions calling for an end to corporate personhood.\textsuperscript{459} The resolutions were passed on Vermont's Town Meeting Day, a day reserved for Vermonters to address pressing issues of the day.\textsuperscript{460} The day has particular political significance because it is dedicated to addressing not only local issues, but also national issues.\textsuperscript{461} Vermont Senator Bernie Sanders applauded the action: "Unlike the

\textsuperscript{454} Id.
\textsuperscript{456} Id.
\textsuperscript{457} Id.
\textsuperscript{458} Id.
\textsuperscript{460} Id.
\textsuperscript{461} Id.
U.S. Supreme Court, Town Meeting Day voters understood that corporations are not people. The resounding results will send a strong message that corporations and billionaires should not be allowed to buy candidates and elections with unlimited, undisclosed spending on political campaigns . . . .

Here we have an indication that local action is being heard in the federal government, but there is no indication that this message is having any legal repercussions.

Most recently, the City of New Haven, Connecticut Board of Aldermen unanimously passed a non-binding resolution on June 4, 2012, calling for a convention to make a constitutional amendment to abolish corporate personhood. Perhaps a resolution from the people of the Constitution State will carry more weight than the other resolutions being passed across the country. But, that seems optimistic at best. Alderman Douglas Hausladen brought the resolution to the board. In arguing for a twenty-eighth amendment, he said, "It is critical to call for a constitutional convention because we can't leave this problem in the hands of the D.C. establishment that got us into this mess. Congress has done absolutely nothing to protect our rights as real people and citizens." Like other municipal bodies, the call was for a constitutional amendment to end the legal fiction of corporate personhood.

State legislatures have also joined the call for amending the constitution. Six states as of July 5, 2012, have passed

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462 Id. (citing the statement of Senator Bernie Sanders).
463 Board of Aldermen is a city council by another name, most often found in Connecticut, just as similar governing bodies are called a board of freeholders, common in New Jersey. See generally City Councils, NAT'L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/city-councils (last visited May 25, 2013).
465 Id.
466 Id.
467 Id.
468 Anna Almendraia, Citizens United: California Becomes Sixth State to Call for Amendment Against Ruling, HUFFINGTON POST (July 7, 2012),
resolutions calling for an end to corporate personhood through a constitutional amendment: California, Hawaii, Vermont, Rhode Island, Maryland, and New Mexico. The last constitutional amendment was ratified in 1992, reminds Anna Almendraia, so hope for a new amendment is slim at best. That amendment, the Twenty-seventh Amendment, was proposed some 203 years prior to its eventual ratification, perhaps signifying that any new amendment would face a considerably long road to ratification. Yet, this has not deterred state legislators from supporting resolutions calling for action. There is no way of knowing if more resolutions will come or if Congress will take action to amend the Constitution, but the Occupiers should feel a sense of hope that if their message is not producing change, then at least it is generating awareness, which is a prerequisite to change, legal or otherwise.

The question of what to do next looms large in every movement. The Occupy Movements are no different. How can the Occupiers see change happen? Through continued grassroots advocacy for which Jan Edwards argues? At the ballot box, as Nathan Schneider and George Lakoff advocate? The startling

http://www.huffingtonpost.com/2012/07/05/citizens-united-california_n_1652684.html.

469 Id.

470 Id.


472 See Almendraia, supra note 468.

473 Jan Edwards, Challenging Corporate Personhood: Corporations, the U.S. Constitution and Democracy, 23 MULTINATIONAL MONITOR 30, 32 (Oct./Nov. 2002).

474 Nathan Schneider, Change Now, Vote Later, YES! MAGAZINE (Feb. 28, 2012), http://www.yesmagazine.org/issues/9-strategies-to-end-corporate-rule/change-now-vote-later ("Of course, if the Occupy movement ultimately wants to defeat the kind of shameless corporate personhood-ization that goes largely unchallenged in government, it will have to show its power at the ballot box as well as in the streets.").
success of the Tea Party Movement is that it gained political traction and successfully encouraged candidates to run for office, often resulting in the election of Tea Party-backed candidates. To be sure, many Occupiers may abhor the political party options of the day (Democratic, Republican, Green, Constitution, etc.), but then, parties and their candidates do get things done. If for a moment I sidestep the criticisms of voting, which are many, Lakoff has a point in that the Tea Party won because its candidates were elected to office and those candidates pushed the Tea Party's issues. The Occupy Movements could do the same thing, even running candidates under the Democratic banner, just as Tea Party candidates ran under the Republican banner. Lakoff describes,

Whatever Occupiers may think of the Democrats, they can gain power within the Democratic Party and hence in election contests all over America. All they have to do is join Democratic Clubs, stick to their values, speak out very loudly, and work in campaigns for candidates at every level who agree with their values.

Once elected, Occupy candidates may be able to engage in the politicking necessary to change the direction of corporate personhood jurisprudence. It will not be an easy battle, but is one that is necessary to change the minds of those in power. The Occupiers have seen that there is support in Congress for their position, but the question remains—will Occupiers take the movement and message to the places where they can act directly on the system of laws that supports the idea of corporate

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476 *Id.*
478 Lakoff, *supra* note 475.
479 *Id.*
personhood they oppose? The revolutionary potential of the Occupy Movements seems to stall at the point at which legal change must occur because the Occupy Movements are not able to make legal change occur; rather, they are only able to agitate for change. As Lakoff suggests, "occupying elections" are the next step for the Occupy Movements. If that translates into changes in corporate personhood jurisprudence, then the legal academy, students, activists, and lawyers will have learned something about the power of revolution to effectuate practical legal changes in a complex legal system.

VIII. CONCLUSION

I have articulated an evolving jurisprudence of corporate personhood and explained why the debate in this area of jurisprudence remains relevant. I have also articulated the utility of Marxist critique to law and positioned the Occupy Movements as specific strategies to challenge corporate personhood. By reading an array of scholars, I have argued for the centrality of capitalism in the law and the importance of Marxist criticism for study of the nexus of economics, history, politics, and law.

Far from being irrelevant to legal discourse, the Occupy Movements have produced quasi-legal change by encouraging local and state governing bodies to pass resolutions calling for an end to corporate personhood. While these resolutions may seem unimportant, they represent the seeds of success and are an important reminder that grassroots activism can help start change.

480 See Schneider, supra note 474 (while the question presented in the article is a hypothetical one, it is one which has been reiterated by numerous scholars in various works).
481 Lakoff, supra note 475.
482 See supra Part V.
484 See supra Part II and accompanying text.
485 See supra Part II and accompanying text.
486 See supra notes 426-37, 444-71 and accompanying text.
In front of us is an important and unfolding story. Will the Occupy Movements encourage further change? Are they dead in the water? Will the efforts of Senator Sanders and Representative Deutsch result in anything? Will corporations continue to amass more power and be protected under the legal system? Of course, only time will tell, but, I hope to have interceded in this debate in ways that will encourage students, scholars, and activists to use Marxist theory and the empirical results of social movements to advance criticisms of corporate personhood, and unmask the continually more complex relationship between capitalism and law.