

Would a Corporate Death Penalty Be Cruel and Unusual Punishment

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NOTE

WOULD A CORPORATE “DEATH PENALTY” BE CRUEL AND UNUSUAL PUNISHMENT?

*Drew Isler Grossman**

The longstanding legal fiction that corporations are “people” has faced constant criticism since the Supreme Court’s decision in Citizens United. As corporations gained the right to spend freely on elections and exempt themselves from laws on religious grounds, many asked why this fiction is necessary, and proposed constitutional amendments to change these results. For its part, the Supreme Court has never issued a clear explanation of when and why this legal fiction should apply, often unsure which rights are “personal,” which are “universal,” and whether this distinction should matter.

This Note attempts to make sense of this expanding area of law using a question at the farthest reaches of the rights of a corporate “person.” Would the Eighth Amendment’s prohibition on cruel and unusual punishment bar a “corporate death penalty”—the revocation of a corporation’s charter? Using recent cases and scholarship on the death penalty and corporate personhood, this Note argues that the Eighth Amendment could bar such a penalty, but no more so than for a human; even treating a corporation as a person, so long as the crime the corporation committed was sufficiently serious, its dissolution would not be cruel and unusual punishment. In answering this question, this Note challenges the assertion that “fixing” this fiction would cure the perceived ills of Citizens United, Hobby Lobby, and other corporate rights cases, and asks whether the headline-grabbing statement that “corporations are people” is useful discourse or merely a distraction.

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INTRODUCTION

Corporations, as one British scholar famously put it, have “neither bodies to be punished, nor souls to be condemned.”¹ They are not things of flesh and blood, but of contract, a series of agreements between people who join together for a common purpose. When compared to something that breathes, speaks, moves, and thinks independent of any other force, to say a corporation is not a person is trivial.

Nevertheless, it is useful in many legal contexts to treat corporations as persons. This fiction allows corporations to hold property, sue and be sued in their own name, and hold a residency for procedural jurisdiction purposes.² It also explains why a person retains limited liability for their corporation’s actions: the corporate person is legally separate from the natural person, and carries its own assets and liabilities. But this fiction creates unexpected results when courts extend it beyond these traditional areas, especially when interpreting constitutional and statutory rights. Two recent Supreme Court cases—one extending the right to spend

¹ Edward Thurlow, First Baron Thurlow, in JOHN POYNTER, *LITERARY EXTRACTS FROM ENGLISH AND OTHER WORKS* 268 (1844), https://openlibrary.org/books/OL7104074M/Literary_extracts_from_English_and_other_works.

² See Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 590 (1987).

money on corporate speech with abandon to corporations, the other permitting them to claim religious exemptions to laws under the Religious Freedom Restoration Act (RFRA)—highlighted these unexpected results.³ These cases created widespread anger and confusion in many circles, as well as calls for a constitutional amendment to correct their results.⁴

For its part, the Supreme Court’s explanations of when and why the law should treat a corporation as a person are inconsistent and somewhat unsatisfactory. It has addressed Bill of Rights⁵ protections in a piecemeal fashion, unsure what rights are “personal,” what rights are “universal,” and whether the distinction should matter.⁶ In the twenty-first century, a majority of justices have favored a liberal interpretation: they believe that, as far as Bill of Rights protections are concerned, courts may treat persons and corporations the same.⁷ This choice, counterintuitive and one of a number of options available,⁸ leads to more questions about this expanding area of constitutional law.

For example, to what extent does the Eighth Amendment prohibition against cruel and unusual punishment protect corporations?⁹ While most scholarship addressing this question focuses on the Excessive Fines Clause and whether a fine large enough to constitute a death penalty for a corporation would be constitutional,¹⁰ a state or the federal government

³ See *Citizens United v. FEC*, 558 U.S. 310, 348 (2010) (finding that the First Amendment forbids restrictions on political speech “based on the speaker’s corporate identity”); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (finding, based on the Dictionary Act and other precedent, that corporations are persons for purposes of RFRA).

⁴ See *Frequently Asked Questions, MOVE TO AMEND*, <https://movetoamend.org/frequently-asked-questions> (last visited Dec. 29, 2014); Aaron Wysocki, *28th Amendment*, WOLF-PAC (Oct. 19, 2011), <http://www.wolf-pac.com/28th>; S.J. Res. 4, 114th Cong. (2015) (constitutional amendment proposed by Senator and 2016 presidential candidate Bernie Sanders that declares: “Whereas the right to vote in public elections belongs only to natural persons as citizens of the United States, so shall the ability to make contributions and expenditures to influence the outcome of public elections belong only to natural persons.”).

⁵ U.S. CONST. amends. I–X.

⁶ See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (noting a distinction between “purely personal” guarantees that should not apply to corporations, such as protections against self-incrimination, and other protections that should). *But see Citizens United*, 558 U.S. at 357–58 (noting that the dictum in *Bellotti* was not well supported).

⁷ See, e.g., *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886) (“The court does not wish to hear argument on the question whether [equal protection rights] appl[y] to these corporations. We are all of the opinion that it does.”). *But compare* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 325 (1978) (holding that corporations deserve Fourth Amendment protections against unreasonable search and seizure), *with* *United States v. Morton Salt Co.*, 338 U.S. 632, 650–52 (1950) (holding that corporations get less privacy protection than natural persons).

⁸ See Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 914–31 (2011).

⁹ U.S. CONST. amend. VIII.

¹⁰ See Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013); Gabriel Markoff, *Arthur*

could put a corporation to death in another way: by revoking its charter.¹¹ If a state or the federal government attempted to revoke a corporate charter for corporate criminal actions and a corporation claimed this action violated the Eighth Amendment prohibition on cruel and unusual punishment, what would happen?

This Note will attempt to answer that question using recent cases and scholarship on the death penalty and corporate personhood. Part I examines the Court's interpretation of corporate personhood under the Bill of Rights, and how it evolved as the nature of corporations changed. Part II discusses the Court's cruel and unusual punishment jurisprudence as it applies to natural persons, as well as theories of "killing" a corporation. Part III imagines a hearing in which a corporation attempted to challenge its proposed dissolution under the protections of the Eighth Amendment, and how the Supreme Court would likely address such an argument. The Note concludes by addressing the implications of this result.

As this Note will demonstrate, no theory would support granting a corporation unlimited protection against cruel and unusual punishment; it could claim no more protection against a punishment than the individuals comprising the corporation could claim. The Supreme Court currently permits the death penalty for humans provided the punishment fits proportionately to the crime. Thus, so long as the crime the corporation commits is sufficiently serious, a corporate death penalty would not be cruel and unusual. This leads to an important question: does it matter if corporations and the persons that comprise them enjoy the same protections under the Bill of Rights? Or should those that disagree with the result of these recent cases focus their efforts on other aspects of the opinions?

I. THE RIGHTS OF CORPORATIONS

A. *Corporate Personhood*

Broadly, courts in America have considered corporate identity using three distinct theories: artificial entity (corporations are creatures of the state and may be regulated freely by the state), real entity (i.e. it actually exists, separate from its owners or any other power), and aggregation theory (corporations are the aggregate will and endeavor of individu-

Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. PA. J. BUS. L. 797, 805–06 (2013).

¹¹ For one proposal of a potential corporate death penalty statute, see Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 972–1001 (2005).

als).¹² Not surprisingly, each of these theories rose and fell in popularity as corporations’ status under state law changed.

1. Artificial Entity Theory

From the United States’ founding to the mid-nineteenth century, governments granted corporations charters for a specific purpose and limited period. Early corporations included universities,¹³ banks, churches, and other entities that served a public function.¹⁴ Even some early colonial settlements, such as the commonwealth of Virginia, began as corporations chartered by the King of England to colonize the land in his name.¹⁵ Because a state granted these corporations its authority (and often its resources) for specific public purposes, any rights the corporation carried came from that state. Governments could freely regulate this artificial entity they created for a specific purpose; Bill of Rights protections simply did not apply.¹⁶

The key case from this era is *Trustees of Dartmouth College v. Woodward*, in which Chief Justice Marshall discussed the natural traits of corporations as they were in 1819.¹⁷ Marshall called a corporation “an artificial being . . . existing only in contemplation of law. Being the mere creatures of law, it possesses only those properties which the charter of its creation confers upon it.”¹⁸ In that case, New Hampshire wanted to dissolve Dartmouth College’s corporate charter and recreate it as a public school.¹⁹ After the description above, Marshall decided that the charter guaranteed the college’s trustees certain powers and privi-

¹² See Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831, 835–43 (2013). Padfield also describes two further theories of corporations: entity (“[a] corporation is a separate legal entity that can . . . sue and be sued”) and contract (“[a] corporate charter represents a contract between the state and incorporators”). *Id.* at 836. Neither theory is particularly useful in identifying corporate Bill of Rights protections, and (as Padfield acknowledges) neither was relevant to *Citizens United*. *Id.* at 835.

¹³ Such as New Hampshire’s Dartmouth College. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 518 (1819), discussed *infra* notes 17–21.

¹⁴ See *Corporate Rights and Responsibilities: Hearings Before the S. Comm. on Commerce*, 94th Cong. 3 (1976) [hereinafter *Corporate Rights and Responsibilities*] (statement of John A. Durkin, Senator, New Hampshire) (“[B]ack in 1790 . . . corporations were chartered to perform essentially public activities, to build roads, canals, and bridges.”); see also THOM HARTMAN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 75–76 (2002) (listing types of nineteenth century regulations on corporations).

¹⁵ See FRANKLIN K. VAN ZANDT, *BOUNDARIES OF THE UNITED STATES AND THE SEVERAL STATES* (1966), <http://pubs.usgs.gov/pp/0909/report.pdf>.

¹⁶ See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE CORPORATION AND THE CONSTITUTION*, at ix (1995).

¹⁷ *Woodward*, 17 U.S. at 636–40.

¹⁸ *Id.* at 636.

¹⁹ *Id.* at 626–27.

leges beyond the government's general control.²⁰ Because the King of England (and not the state of New Hampshire) granted the college its charter and the charter contained no provision allowing a state legislature to revoke it, Marshall concluded that the legislature lacked the power to do so.²¹ Thus, even in this era where the courts acknowledged that states alone granted corporate rights, a legislature's power to regulate corporations faced certain limitations.²²

Another contemporary example is *Paul v. Virginia*,²³ in which an insurance company challenged a Virginia law preventing non-Virginia companies from doing business within the state without a license.²⁴ The Supreme Court stated explicitly that corporations were not citizens entitled to protection under the Privileges and Immunities Clause of the Fourteenth Amendment.²⁵ It held that, as a corporation is a creature of "local law" and has "no absolute right of recognition in other States," Virginia's restrictions on out-of-state insurance companies did not violate the Bill of Rights.²⁶

2. Real Entity Theory

Yet as chartering laws and corporations evolved, the way courts analyzed corporate personhood changed as well. The public began to see government approval of corporations—the tit-for-tat grant of power for a specific purpose—as a vehicle for corruption.²⁷ Many states began to permit "free incorporation," allowing individuals to create companies (and gain protection from individual liability) with little more than procedural controls from the state.²⁸ From this evolved the key premise of real entity theory: a corporation is its own distinct entity, and holds rights independent of those granted to its owners and operators.²⁹

²⁰ *Id.* at 661–62.

²¹ *Id.* at 664–65.

²² For one perspective on the reasons for and consequences of this decision, see HARTMAN, *supra* note 14, at 79–81.

²³ 75 U.S. 168 (1868).

²⁴ *Id.* at 168–70.

²⁵ *Id.* at 177–80 ("The only rights [a corporation] can claim are the rights which are given to it in [the charter], and not the rights which belong to its members as citizens of a State.") (quoting *Bank of Augusta v. Earle*, 38 U.S. 519, 519 (1839)).

²⁶ *Id.* at 181.

²⁷ See Schane, *supra* note 2, at 567 ("There developed an increasing mistrust in the efficacy of special charters granted by the state. . . . [T]hey led to corruption, political favoritism, and monopolies.").

²⁸ *Id.* at 567–68. Alternatively, some theorists suggest nineteenth century legislatures enacted "permissive" corporate chartering laws because economic partnerships could become *de facto* corporations using bilateral contracts. See *Corporate Rights and Responsibilities*, *supra* note 14, at 11–12 (statement of Robert Hessen, Graduate School of Business and Hoover Institution, Stanford University).

²⁹ Schane, *supra* note 2, at 568.

An early example of this theory is *Santa Clara County v. Southern Pacific Railroad Company*,³⁰ in which the Supreme Court decreed that the Fourteenth Amendment (specifically the equal protection of the laws guaranteed to every person within the jurisdiction of the United States) applied to corporations.³¹ That case involved a suit to recover unpaid state taxes against railroad companies that believed the taxes were unconstitutional.³² The railroads argued extensively in their briefs that “[c]orporations are persons within the meaning of the Fourteenth Amendment.”³³ Before oral arguments on that case, Chief Justice Waite said the Court wanted to hear no further arguments on that point; the justices all believed the Equal Protection Clause applied.³⁴

3. Aggregation Theory

One final alternate theory goes by many names; Professor Darrell A.H. Miller refers to it as aggregation theory.³⁵ The theory acknowledges that corporations are separate entities, and that they can claim certain constitutional rights.³⁶ However, they can only do so because the individuals uniting under the corporate form can claim those rights.³⁷ In other words, denying a corporation Bill of Rights protections would deny its shareholders, owners, or others those same protections.³⁸ While nineteenth century jurists were aware of this theory,³⁹ modern cases appear to rely on it the most. But as discussed later, courts are not as explicit or clear as they should be when applying this theory.⁴⁰

³⁰ 118 U.S. 394 (1886).

³¹ *Id.* at 396.

³² *Id.* at 403–04.

³³ *Id.* at 396.

³⁴ *Id.*

³⁵ Miller, *supra* note 8, at 928–29.

³⁶ *Id.* at 930–31.

³⁷ *Id.* at 928–29.

³⁸ *Id.* at 929 (“A corporation does not have to exist, but if it does, the government cannot condition its existence on the surrender of certain constitutional rights within its web of contracts.”).

³⁹ See *Cty. of San Mateo v. S. Pac. R.R.*, 13 F. 722, 743–44 (D. Cal. 1882) (“Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business. . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.”).

⁴⁰ For more complete discussions on these theories and their evolution, see Miller, *supra* note 8, at 914–31; Schane, *supra* note 2, at 565–69; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 579–82 (1990); Emily Carlton Cook, Note, *How the Meaning of Incorporation Over Time Lends Support for Corporate Free Exercise Rights*, 48 GA. L. REV. 1149, 1168–74 (2014).

B. Bill of Rights Protections for Corporations

To some extent, corporations enjoy protections under the Bill of Rights regardless of which theory a court chooses to apply. Even artificial entity theory allows a corporation to possess one of these rights if its charter reserves that right.⁴¹ Yet after *Santa Clara County*'s clear statement on equal protection rights, the Supreme Court recognized Bill of Rights protections for corporations in a variety of contexts. Twenty years after *Santa Clara County*, the Court recognized protections for corporations against unreasonable searches and seizures under the Fourth Amendment.⁴² The Supreme Court has recognized a right to trial by jury for corporations under the Sixth Amendment⁴³ and the Seventh Amendment.⁴⁴ The Court described freedom of the press as "a right to publish 'without a license what formerly could be published only with one,'" implying that this First Amendment protection actually extended a corporate right to individuals.⁴⁵

There are active debates about the limits of these rights. *United States v. White*⁴⁶ reaffirmed that corporations cannot withhold incriminating documents from valid court-ordered subpoenas and further recognized that an individual acting on behalf of the corporation cannot claim that same "purely personal" privilege.⁴⁷ However, the opinion did not clearly indicate what theory of corporate personhood it applied. It noted repeatedly that the privilege against self-incrimination is a "purely personal one" that cannot be used by a corporation, and attempted to apply artificial entity theory in doing so.⁴⁸ But the opinion appears to reach too far; under Fifth Amendment doctrine, a person cannot claim the privilege on behalf of a third person, which would create the same conclusion the

⁴¹ See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 560–61 (1819).

⁴² U.S. CONST. amend. IV; *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (deciding that a corporation enjoys no protection against self-incrimination under the Fifth Amendment, but enjoys protection against unreasonable searches and seizures under the Fourth Amendment). The Court in *Henkel* appeared to apply aggregation theory in reaching its result:

[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.

Id.

⁴³ U.S. CONST. amend. VI; *Armour Packing Co. v. United States*, 209 U.S. 56, 76–77 (1908).

⁴⁴ U.S. CONST. amend. VII; *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970).

⁴⁵ U.S. CONST. amend. I; see *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

⁴⁶ 322 U.S. 694 (1944).

⁴⁷ *Id.* at 699.

⁴⁸ *Id.*

court reached in this case.⁴⁹ Even if one considered a corporation a person, its officers could not claim self-incrimination protection for that “third party” any more than an accountant (as an agent) could claim the privilege for a client principal.⁵⁰ It was thus unnecessary to consider whether the protection was “personal” or “impersonal.”

*First National Bank v. Bellotti*⁵¹ found that all corporations have the right to political expression under the First Amendment and the Fourteenth Amendment, and seemed to rely on some form of aggregation theory in doing so.⁵² However, in *Austin v. Michigan Chamber of Commerce*⁵³ the Court held that a state statute limiting corporate expenditures on political speech during a certain period was valid under a “compelling government interest” exception, meaning that the First Amendment applied less strongly to corporations than to individuals.⁵⁴ Writing in dissent, Justice Scalia argued that the Court used a disfavored mode of analysis: the artificial entity theory of persons.⁵⁵ He claimed that the restriction would harm the First Amendment rights of individuals solely because they chose to join together under the corporate form.⁵⁶

C. *Citizens United*

Justice Scalia had a chance to revisit First Amendment rights for corporations twenty years later in *Citizens United*.⁵⁷ In that case, a not-for-profit corporation challenged a federal election statute forbidding corporations and unions from spending corporate funds to advocate for the election or defeat of a candidate within thirty days of a primary or sixty days of a general election.⁵⁸ The Court, after demanding the parties file supplemental briefs “addressing whether [they] should overrule [*Aus-*

⁴⁹ U.S. CONST. amend. V; see *White*, 322 U.S. at 704 (citing *Hale v. Henkel*, 201 U.S. 43, 70 (1906); *McAlister v. Henkel*, 201 U.S. 90, 90 (1906)).

⁵⁰ See, e.g., *Couch v. United States*, 409 U.S. 322, 329 (1973) (accountant made no claim that he could avoid producing his client’s tax records using the Fifth Amendment, and the Court denied taxpayer’s attempt to stop the accountant’s production of evidence as not part of the “personal protections” of the amendment).

⁵¹ 435 U.S. 765 (1978).

⁵² U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1; *Bellotti*, 435 U.S. at 778 n.14 (“Certain ‘purely personal’ guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals. Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision.”).

⁵³ 494 U.S. 652 (1989).

⁵⁴ *Id.* at 659–60.

⁵⁵ *Id.* at 680 (Scalia, J., dissenting) (“The Court’s opinion says that political speech of corporations can be regulated because ‘[s]tate law grants [them] special advantages’ . . .”).

⁵⁶ See *id.* at 684–85. In fairness, Justice Scalia also argues that corporations themselves have the right to speak, unwittingly invoking real entity theory in doing so. *Id.* at 694–95.

⁵⁷ 558 U.S. 310, 385 (2010) (Scalia, J., concurring).

⁵⁸ *Id.* at 320–21.

tin],”⁵⁹ returned to the standards used in *Bellotti* and *Buckley v. Valeo*.⁶⁰ In other words, because the Court recognized in *Bellotti* that corporations have free speech rights and in *Buckley* that restrictions on purchasing political advertisements violate an individual’s First Amendment rights, the Court decided that a restriction on corporate expenditures for political advertisements is not valid.

It is difficult to identify which theory of corporate rights supported the Court’s decision.⁶¹ The majority opinion appeared to rely on real entity theory, holding that the identity of the “speaker” is irrelevant.⁶² In rejecting arguments that compelling interests support these restrictions, it focused on the rights of “all speakers,” including individuals, media companies, and corporations.⁶³ Yet it also acknowledged that, even if the ban on these expenses were constitutional, “wealthy individuals and unincorporated associations [could] spend unlimited amounts on independent expenditures.”⁶⁴ And though the opinion noted language in *Bellotti* acknowledging that corporate speech could potentially create a danger of corruption that individual speech would not,⁶⁵ it dismissed it as dicta, “supported only by a law review student comment, which misinterpreted [court precedent].”⁶⁶ Concurring, the Chief Justice also appeared to accept real entity theory.⁶⁷

Justice Scalia, in his concurrence, reiterated his reliance on aggregation theory.⁶⁸ He wrote that the dissent “never shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.”⁶⁹ Yet even his analysis rested on the premise that

⁵⁹ *Id.* at 322.

⁶⁰ *Id.* at 365; *Buckley v. Valeo*, 424 U.S. 1, 22–23 (1976) (overturning a law limiting an individual’s ability to spend money in political campaigns, and stated that giving and spending money in political campaigns is political speech for First Amendment purposes).

⁶¹ According to Padfield, the Court engaged in no corporate identity analysis at all, relying instead on the rights of the listener to hear corporate speech. Padfield, *supra* note 12, at 832–33. This observation notwithstanding, the rest of his Article argues that theories of corporate identity are the key to understanding *Citizens United*. *Id.* at 833–34.

⁶² *Citizens United*, 558 U.S. at 364 (“The [First] Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker.”).

⁶³ *See id.* at 351 (“All speakers . . . use money amassed from the economic marketplace to fund their speech.”); *see also id.* at 353–54 (“The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those [speakers] are entitled to less First Amendment protection than those types of speakers [that existed] when the Bill of Rights was adopted.”).

⁶⁴ *Id.* at 355–56.

⁶⁵ *Id.* at 358 (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

⁶⁶ *Id.*

⁶⁷ *Id.* at 373 (Roberts, C.J., concurring) (“The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.”).

⁶⁸ *Id.* at 386 (Scalia, J., concurring).

⁶⁹ *Id.*

the constitutional text “makes no distinction between types of speakers,” drifting towards real entity theory.⁷⁰

Justice Stevens and the three justices that joined his partial dissent clearly relied on artificial entity theory.⁷¹ Justice Stevens stated that while corporations contribute to society, “[they] are not actually members of it,” and went so far as to declare it a “democratic duty” to “guard against the potentially deleterious effects of corporate spending” in elections.⁷² He said that the Framers of the Constitution “took it as a given that corporations could be comprehensively regulated in the service of the public welfare.”⁷³ Responding to criticisms from Justice Scalia, he declared that no prominent Framer stated that corporate speech deserves less protection than individual speech because “the contrary proposition—if not also the very notion of ‘corporate speech’—was inconceivable.”⁷⁴ His further analysis of cases since the founding relied on his view that, because corporate spending carries a potentially corrupting power and corporations are not people, such spending may be restricted without violating the First Amendment.⁷⁵ He finished with a flourish: “Corporations . . . and their ‘personhood’ often serve as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”⁷⁶

Yet even this opinion swayed across different definitions of a corporation, at times applying all three. For example, when discussing identity-based restrictions, Justice Stevens treated a corporation as if it were a real person, in order to support the idea that identity-based restrictions on speech can be valid in some circumstances.⁷⁷ He then argued that, since “corporations’ [First] Amendment speech and association interests are derived largely from those of their members and of the public in receiving information,” corporate spending is “furthest from the core of political expression.”⁷⁸ Though Justice Stevens says this quotation supports his use of artificial entity theory, it is clearly a direct application of aggregation theory: it relies on a corporation deriving its rights and interests from those of its constituent members. Thus, it appears that this (for most purposes) dissenting opinion does not adequately consider whether

⁷⁰ *Id.*; see also *id.* at 392–93 (“The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals . . .”).

⁷¹ *Id.* at 395 (Stevens, J., concurring in part, dissenting in part).

⁷² *Id.* at 394.

⁷³ *Id.* at 428.

⁷⁴ *Id.* at 430–31.

⁷⁵ See *id.* at 432–41.

⁷⁶ *Id.* at 466.

⁷⁷ See *id.* at 421–23 (Stevens, J., concurring in part, dissenting in part).

⁷⁸ *Id.* at 423–24 (internal citation and quotation marks omitted).

a corporation generally deserves Bill of Rights protections or not. It is instead a defense of one maxim: that corporate political spending is a powerful corruptive force and should be regulated.

Currently, the proposition that the First Amendment protects corporate speech—including “speech” in the form of spending money to influence an election—stands. It is not clear, however, why corporations enjoy such protections. By failing to consider the nature of a corporation, and whether the First Amendment protects the corporate “person” or the individual citizens that comprise it, the Court invited a tidal wave of criticism and rhetoric.⁷⁹ The debate no longer focused on how to control money’s effect on politics; it now focused on whether corporations are people.⁸⁰

D. *Hobby Lobby*

This wave only strengthened when, in *Burwell v. Hobby Lobby Stores, Inc.*,⁸¹ the Court held that closely-held corporations could refuse to provide coverage of certain methods of contraception based on the religious beliefs of the company’s owners.⁸² In that case, the owners of three closely-held for-profit corporations claimed that they ran their businesses according to Christian principles.⁸³ As one of those beliefs is that life begins at conception, the companies claimed that they were exempt from provisions of the Affordable Care Act that required them to provide coverage for contraceptives that may operate after the fertilization of an egg.⁸⁴ Forcing them to provide this coverage, they argued, would violate their rights under the Free Exercise Clause of the First Amendment,⁸⁵ as well as RFRA.⁸⁶

Writing for the majority, Justice Alito found that the corporations were correct.⁸⁷ At the outset, Alito appeared to use aggregation theory to support his analysis. Laws extending to corporations, he claimed, specified “the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with [the] corporation in one

⁷⁹ See *Frequently Asked Questions*, *supra* note 4.

⁸⁰ See generally Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren’t People?*, 44 J. MARSHALL L. REV. 701, 702–03 (2011) (arguing that whether corporations are persons is “constitutionally irrelevant”).

⁸¹ 134 S. Ct. 2751 (2014).

⁸² See *id.* at 2759.

⁸³ See *id.* at 2764, 2766. Hobby Lobby’s statement of purpose, for example, stated that the company should be operated “in a manner consistent with Biblical principles.” *Id.* at 2766.

⁸⁴ *Id.* at 2764–65.

⁸⁵ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

⁸⁶ Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb–4 (2012); see *Hobby Lobby*, 134 S. Ct. at 2765–66.

⁸⁷ See *Hobby Lobby*, 134 S. Ct. at 2759.

way or another.”⁸⁸ The purpose of extending constitutional or statutory rights to corporations, Alito states, “is to protect the rights of these people. . . . And protecting the free-exercise rights of corporations like [the plaintiffs in this case] protects the religious liberty of the humans who own and control those companies.”⁸⁹ Thus, according to Justice Alito, it is “quite beside the point” whether corporations exercise religion “separate and apart from” their individual owners; a law burdening the free-exercise rights of a corporation would burden the rights of a natural person associated with the corporation.⁹⁰

Despite accepting aggregation theory in principal, the rest of Justice Alito’s opinion treated the corporations as if they were real entities. For example, he analyzed the impact of the mandate on “[the owners] and their companies,” stating without clarification that the mandate “demands that *they* engage in conduct that seriously violates *their* religious beliefs.”⁹¹ In part, this occurred because the majority’s decision rested on RFRA and not the Establishment Clause.⁹² Analyzing this statute requires delving into a quagmire of issues—everything from the Dictionary Act to issues of congressional intent—that interpreting corporate constitutional rights does not require.⁹³ These other issues may have influenced Justice Alito’s decision to treat a corporation as if it is a natural person in his analysis.

However, RFRA is an unusual statute: it attempted to restore broad protections to religious beliefs previously recognized under the Constitution that a Supreme Court decision removed.⁹⁴ The statute defines one of its purposes as “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”⁹⁵ And thanks to the Dictionary Act, corporations count as persons absent evidence of congressional intent to the contrary.⁹⁶ According to Justice Alito, this statute protects individuals who wish to incorporate their business; the

⁸⁸ *Id.* at 2768.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 2775 (emphasis added).

⁹² *See id.* at 2785.

⁹³ *See* 1 U.S.C. § 1 (2012) (“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”); *cf.* Emily J. Barnett, *Hobby Lobby and the Dictionary Act*, 124 *YALE L.J.F.* 11, 11–14 (2014), <http://yalelawjournal.org/forum/hobby-lobby-and-the-dictionary-act> (discussing how the Court may apply the Dictionary Act to the RFRA).

⁹⁴ *See* 42 U.S.C. § 2000bb.

⁹⁵ *Id.* § 2000bb(b)(2).

⁹⁶ 1 U.S.C. § 1.

law cannot force them to violate their religious beliefs in order to enjoy the benefits of operating as a corporation available to their competitors.⁹⁷

As the majority decided the case using an application of RFRA, not the First Amendment's Free Exercise Clause as it applies to corporations,⁹⁸ Justice Ginsburg's dissenting opinion primarily focused on the statute instead of the Constitution.⁹⁹ However, she used case law from before RFRA and the case that inspired it to support her belief that the Free Exercise Clause could not pertain to for-profit corporations.¹⁰⁰ In doing so, Justice Ginsburg clearly relied on artificial entity theory. She quoted *Dartmouth College* to support her own belief that "the exercise of religion is characteristic of natural persons, not artificial legal entities."¹⁰¹ But she ignored any impact the law may have on employers' religious beliefs, declaring that the context of the law is different: she saw the "relevant context" as "the employers' asserted right to exercise religion" against the rights of "employees who do not subscribe to their employers' religious beliefs."¹⁰² Such an argument would be interesting and relevant under aggregation theory: is it the rights of the owner or all individuals associated with a corporation that the Constitution protects when applied to a corporation, and what happens when associated persons' interests conflict? But disappointingly, because she subscribes to artificial entity theory, Justice Ginsburg did not pursue the point further.

Tellingly, only Justice Sotomayor joined the section of Justice Ginsburg's opinion discussing whether corporations could bring claims under RFRA; Justices Breyer and Kagan found it unnecessary to decide this point.¹⁰³ Thus, while Justices Ginsburg and Sotomayor clearly subscribe to artificial entity theory, it is unclear what Justices Breyer and Kagan believe.¹⁰⁴

Though a consensus has started to emerge, the current Court cannot agree on a theory of corporate personhood. Some Justices, such as Ginsburg and Sotomayor, still adhere to artificial entity theory.¹⁰⁵ Some, such as the Chief Justice and Justices Kennedy and Thomas, may adhere to real entity theory.¹⁰⁶ Some, such as Justice Alito, follow aggregation

⁹⁷ *Hobby Lobby*, 134 S. Ct. at 2767–68; see also *id.* at 2774–75 (discussing the difficulty in determining religious beliefs of large publicly-traded corporations, and why it does not apply where corporations are closely held).

⁹⁸ U.S. CONST. amend. I.

⁹⁹ *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

¹⁰⁰ *Id.* at 2793–94.

¹⁰¹ *Id.* at 2794 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819)).

¹⁰² *Id.* at 2796 n.17.

¹⁰³ *Id.* at 2787, 2806.

¹⁰⁴ While it does not necessarily reflect her personal beliefs, Justice Kagan was the Solicitor General cited in *Citizens United*. *Citizens United v. FEC*, 558 U.S. 310, 317 (2010).

¹⁰⁵ See *supra* notes 100–02 and accompanying text.

¹⁰⁶ See *supra* notes 62–67 and accompanying text.

theory.¹⁰⁷ And some, such as Justices Breyer and Kagan, have not clearly articulated their views in judicial opinions.¹⁰⁸ Yet more often than not, the Justices simply do not clearly articulate which theory they prefer.

II. THE CORPORATE DEATH PENALTY

Extending the logic of these recent decisions (using either real entity or aggregation theory), it is possible to imagine a world where corporations claim all Bill of Rights protections as their own. If a corporation is a person for the purposes of the law, why should the United States deny it the most important protections its laws grant persons? At the farthest reaches of this chain of logic would be protection from the most severe punishment United States law currently allows: the death penalty. Given the Justices’ current positions on corporate personhood, under what authority could a state kill a corporation, and to what extent would the Eighth Amendment’s prohibition on cruel and unusual punishment curtail that authority?¹⁰⁹

A. *How to Kill a Corporation*

As a preliminary matter, we must ask: how could a government kill a corporation? The most straightforward manner would be to revoke its corporate charter.¹¹⁰ Professor Mary Kreiner Ramirez, for example, thoroughly described a proposal based on the “nuclear option” of revoking a corporate charter after three strikes.¹¹¹ It is unlikely that any other method proposed would actually result in a corporation’s end. For exam-

¹⁰⁷ See *supra* notes 68–70, 87–90 and accompanying text. Justice Scalia, who supported aggregation theory, died on February 13, 2016. It is difficult to determine what theory current nominee and D.C. Circuit Judge Merrick Garland prefers, but aggregation theory is most likely. He joined a unanimous opinion in 2010 that extended *Citizens United*’s logic to allow unincorporated associations to spend without limit. *SpeechNow.org v. FEC*, 599 F.3d 686, 692–93 (D.C. Cir. 2010). But he also wrote the en banc opinion for *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), which upheld a ban on political campaign contributions by individual government contractors. Key to his analysis was that the statute at issue was closely drawn “to avoid unnecessary abridgement of associational freedoms.” See *id.* at 22–26.

¹⁰⁸ See *supra* notes 103–04 and accompanying text.

¹⁰⁹ U.S. CONST. amend. VIII.

¹¹⁰ See, e.g., DEL. CODE ANN. tit. 8, § 284 (West 2014) (granting Delaware Chancery Courts the power to revoke a corporate charter “for abuse, misuse, or nonuse of its corporate powers, privileges or franchises”). Note that this death is not necessarily permanent; the charter may be reinstated, and contracts created by this “dead” corporation may become operable as soon as the entity is “revived.” DEL. CODE ANN. tit. 8, § 312; see ELIZABETH S. MILLER, *THE WALKING DEAD: FORFEITURES AND INVOLUNTARY TERMINATIONS OF FILING ENTITIES* (2015), <http://www.baylor.edu/law/faculty/doc.php/196822.pdf>.

¹¹¹ See Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 627–28 (2012) (advocating for the replacement of the term “divestiture” in federal sentencing guidelines with the term “charter revocation”); cf. Ramirez, *supra* note 11, at 972–1001.

ple, suppose a court imposed a financial penalty that effectively bankrupted a corporation. Gabriel Markoff, among others, calls this corporate death penalty a “myth” and attempts to show that corporations do not consider the risk of this “penalty” in negotiating “deferred prosecution agreements” with the Department of Justice.¹¹² Additionally, the Eighth Amendment’s Excessive Fines Clause may provide better protection against such a penalty than the Cruel and Unusual Punishment Clause.¹¹³ What if a court sent key directors or officers to prison, directly punishing those responsible for monitoring the company’s activities? While this might severely damage a corporation, activist shareholders regularly vote out entire boards without killing the entity outright.¹¹⁴ Even banning a company from its main areas of business would not necessarily kill it; the company could continue in some form as an advisor or consultant. Michael Milken, who “reinvented” junk bonds at Drexel Burnham Lambert, continues to advise investment firms despite agreeing to a ban from securities trading as part of a criminal plea bargain.¹¹⁵ And the “Wolf of Wall Street” himself enjoys a second consulting career.¹¹⁶ Thus, revoking a corporation’s charter seems like the only solution.

Yet killing a company by revoking its charter is not just academic speculation. Preet Bharara, the U.S. Attorney for the Southern District of New York, carefully considers the risk of a regulator pulling a bank’s charter should his office bring criminal charges, and has referred to such a result as a corporate death penalty.¹¹⁷ And Senator Elizabeth Warren directly requested that regulators shut down financial institutions for criminal behavior.¹¹⁸ Indeed, many state corporation laws already permit

¹¹² Markoff, *supra* note 10, at 797.

¹¹³ See *supra* note 10 and accompanying text.

¹¹⁴ See, e.g., Christopher Boyd & Lisa Baertlein, *Darden Activist Ousts Olive Garden Owner’s Full Board*, REUTERS (Oct. 10, 2014), <http://www.reuters.com/article/2014/10/10/us-darden-board-idUSKCN0HZ0U320141010>.

¹¹⁵ See Edward Cohn, *The Resurrection of Michael Milken*, THE AMERICAN PROSPECT (Nov. 14, 2001), <http://prospect.org/article/resurrection-michael-milken>. Regulators remain uncertain whether Milken’s consulting work violates his ban. See also Scott Cendrowski & James Bandler, *The SEC Is Investigating Michael Milken*, FORTUNE (Feb. 27, 2013), <http://fortune.com/2013/02/27/the-sec-is-investigating-michael-milken/>.

¹¹⁶ Sheelah Kolhatkar, *Jordan Belfort, the Real Wolf of Wall Street*, BLOOMBERG (Nov. 7, 2013), <http://www.bloomberg.com/news/articles/2013-11-07/jordan-belfort-the-real-wolf-of-wall-street>.

¹¹⁷ Preet Bharara, U.S. Attorney for the Southern District of New York, Prepared Remarks at SIFMA’s Compliance and Legal Society Annual Seminar (Mar. 31, 2014) (transcript available at <http://www.justice.gov/usao/nys/pressspeeches/2014/SIFMARemarks2014.php>).

¹¹⁸ See Jeff Connaughton, *Regulatory Rockstar: Elizabeth Warren Is Using Her Senate Seat to Grill Those Who Let the Big Banks Off the Hook*, NEW REPUBLIC (Apr. 18, 2013), <http://www.newrepublic.com/article/112947/elizabeth-warren-senate-banking-committee-rockstar> (explaining that Senator Warren wanted this penalty applied to HSBC after they acknowledged they laundered money for drug cartels, terrorists, and others).

the revocation of a corporate charter because of felonious conduct.¹¹⁹ National banking charters may also be revoked if a bank’s directors knowingly commit or allow employees to commit violations of the National Banking Act.¹²⁰ It is entirely conceivable that a legislature could pass a criminal statute requiring the forfeiture of a corporate charter because of certain fundamentally unfair behavior.

B. *The Death Penalty, Humans, and the Eighth Amendment*

Yet to understand how the Eighth Amendment might protect corporations from a “death penalty,” one must understand how it protects humans. While the debate is not settled, current jurisprudence permits the death penalty for humans under certain circumstances. In *Gregg v. Georgia*,¹²¹ the Supreme Court held that “the death penalty is not a form of punishment that may *never* be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”¹²² So long as the punishment does not “involve the unnecessary and wanton infliction of pain” and is not “grossly out of proportion to the severity of the crime,” the Court said such a punishment is permissible if a legislature deems it necessary.¹²³

Subsequent cases based on Eighth Amendment challenges to the penalty mainly focused on procedural defects to its application. For example, the Court found that mandatory death penalty statutes violate the Constitution.¹²⁴ However, it has upheld schemes that separate the decisions on guilt and on punishment and permit juries to weigh all aggravating and mitigating factors.¹²⁵ By requiring that trials take into account all relevant factors, the Supreme Court recognized the unique nature of death as a punishment and attempted to create safeguards against a fun-

¹¹⁹ See TEX. BUS. ORGS. CODE ANN. § 11.301(a)(5) (West 2013) (permitting a court to terminate a filing entity’s existence if the entity or its “high managerial agent” is convicted of a felony, or to prevent future “felonious conduct”); N.Y. BUS. CORP. LAW § 1101(a)(2) (McKinney 2014) (permitting revocation of the charter of a company that has “conducted or transacted its business in a persistently fraudulent or illegal manner”).

¹²⁰ 12 U.S.C. § 93(a) (2012); Larry J. Stein, *Actions by National Bank Insiders that Can Lead to Charter Revocation*, 106 BANKING L.J. 472, 472 (1989). Banks and corporations generally are different concerns, as significant governmental interests in regulating currency inflows and outflows complicate this question in the field of banking. Even then, the Comptroller of the Currency rarely uses this severe penalty anymore, and must still gain judicial approval before executing it. Stein, *supra* note 120, at 473–74, 473 n.3.

¹²¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹²² *Id.* at 187 (emphasis added).

¹²³ *Id.* at 173.

¹²⁴ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

¹²⁵ See *Gregg*, 428 U.S. at 195; *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976); *Jurek v. Texas*, 428 U.S. 262, 273–74 (1976).

damentally irreversible harm.¹²⁶ Those standards try to ensure that, even when the punishment in question is the destruction of a person, the punishment fits the crime.¹²⁷

III. *STATE V. GLOBO BANK: A HYPOTHETICAL*

While various states' corporation laws might permit the revocation of corporate charters for felonious conduct, challenges to these laws are rare.¹²⁸ In New York, for example, the most recent prominent case challenging a court order dissolving a corporation for fraudulent practices was 1975's *State v. Cortelle Corp.*¹²⁹ While the challenge actually rested on whether or not the action to dissolve the corporation was time barred, the Court of Appeals of New York also discussed the origin of this statute:

The State's cause of action is for the abuse of power entrusted to its creature, a corporate body. In this sense, apart from any possible wrong to individuals, it is also a wrong against the State. This wrong against the State gave rise to the right of the State (or the sovereign) to petition courts to amend corporate charters or dissolve corporate existence. It is both traceable back to English common law and has continued into [New York law].¹³⁰

There are two initial concerns about the court's analysis. First, this would mean that a corporation that violates a sufficiently serious law commits two crimes: the underlying act itself, and an "abuse of power entrusted to [it]" by the state of New York.¹³¹ And second, the court's analysis rests squarely on the artificial entity theory of a corporation. While the Supreme Court would grant the New York Court of Appeals' interpretation of the statute deference, the statute must still comply with federal constitutional law.¹³² In other words, dissolution of a corporate charter under this provision is ripe for a challenge under the Eighth Amendment.¹³³

¹²⁶ See *Gregg*, 428 U.S. at 188 (quoting *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)) (“[T]he Eighth and Fourteenth Amendments cannot tolerate . . . legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

¹²⁷ For more on the death penalty and the Eighth Amendment as it applies to humans, see generally Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 795–97 (1998).

¹²⁸ See *Ritchie v. Rupe*, 443 S.W.3d 856, 869–70 (Tex. 2014) (discussing punishments for “illegal” and “fraudulent” actions by corporations).

¹²⁹ 341 N.E.2d 223 (N.Y. 1975).

¹³⁰ *Id.* at 225–26.

¹³¹ See *id.* at 225.

¹³² See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

¹³³ U.S. CONST. amend. VIII.

A. *The Case’s Background*

Suppose that in 2015, reacting to numerous banking scandals over the past five years and the growing threat of extremist groups to the financial markets that New York State provides, the New York State Assembly amends its criminal code. “Any corporation that provides support for an act of terrorism,” the new law says, “must have its charter permanently revoked under the procedures of New York Corporations Law § 1101(a)(2).” A few months after the law takes effect, the first company faces this harsh penalty. Globo Bank, a multinational financial institution incorporated in New York State, provided a small business loan for a small chemical company based in the Middle East. The chemicals this company produced, as came to light at trial, were used in a terrorist attack in the region that harmed New York citizens, among others.¹³⁴

Globo Bank argues at trial that it was unaware these chemicals would be used in illegal acts, though it concedes that it knew the substances the chemical company wanted to research could cause great harm if misused. Unsympathetic, a jury finds the bank guilty. Constrained by the statute as written, the judge orders the bank’s charter revoked.¹³⁵ All appeals within New York State—including an argument that the penalty is cruel and unusual punishment—prove fruitless. As a last resort, Globo Bank’s lawyers petition the Supreme Court to hear the case, arguing that the statute procedurally and substantially violates the Eighth Amendment prohibition against cruel and unusual punishment. Miraculously,¹³⁶ the Supreme Court grants certiorari and hears the case.

B. *The Court’s Analysis*

Globo Bank’s strongest argument would be that the punishment is not proportional to the crime. The highest punishment the state can bestow on a corporation, the bank could argue, should not be applied automatically, and not to a crime with such a low level of culpability.¹³⁷ How the Supreme Court analyzes such an argument depends on which theory of corporate personhood it chooses to apply.

¹³⁴ For the purposes of this hypothetical, assume that Globo Bank was only charged under N.Y. Corp. Law § 1101(a)(2), and actions such as rescission of a national banking charter do not apply.

¹³⁵ Most likely such a conviction, or even the chance of one, would start a run on the bank resulting in its bankruptcy. While not addressed here, this severe result outside the courtroom could be one point in favor of finding such a penalty cruel and unusual.

¹³⁶ The Court might grant certiorari as a result of the media attention the case would surely attract, as well as the “chilling effect” other banks claimed this punishment had on loans to small businesses in the United States and abroad.

¹³⁷ To support its proportionality arguments, the bank could cite *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

1. Artificial Entity Theory

Dissenting justices from *Citizens United* and *Hobby Lobby*¹³⁸ would continue to argue the traditional position: a corporate entity does not receive protection under the Bill of Rights. The state granted Globo Bank its powers and protections, they could argue, and may revoke those protections essentially at will. Further, because the corporation has no body that can be “punished,” they could argue, it cannot suffer the type of punishment that this clause of the Eighth Amendment protects against.

This interpretation has the common law on its side. Under early English law, the sovereign could assert that a corporate body was “‘guilty of an abuse of the power entrusted to [it]’ and seek its dissolution.”¹³⁹ This power rested with whatever sovereign created the corporation.¹⁴⁰ And committing a crime such as aiding terrorists could certainly count as an abuse of entrusted power.

These justices would also argue that these corporations gain no protection from “cruel and unusual punishment” because they are not natural persons. A footnote in *Bellotti* suggested that certain constitutional rights are “purely personal” and unavailable to corporations.¹⁴¹ According to that opinion, the “nature, history, and purpose of the particular constitutional provision” determines if its protections are available to corporations.¹⁴² As the Cruel and Unusual Punishment Clause focuses on punishments to a person’s actual form and the Excessive Fines Clause focuses on the forfeiture of money or property, Justices applying the artificial entity theory would point out that no natural person would lose their life because of this provision. At most, they would consider it a taking of property, covered by the limits of the Excessive Fines Clause. Thus, they would dismiss Globo Bank’s claims.¹⁴³

There are two flaws in this position. First, the “purely personal” protections concept, which comes from an opinion denying a corporation the constitutional privilege against self-incrimination, is arguably based

¹³⁸ Specifically, Justices Ginsburg and Sotomayor. *Citizens United v. FEC*, 558 U.S. 310, 393 (2010). Justices Kagan and Breyer may or may not accept this view, given their reservations in *Hobby Lobby*. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2806 (2014).

¹³⁹ *State v. Cortelle Corp.*, 341 N.E.2d 223, 226 (N.Y. 1975).

¹⁴⁰ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 664–65 (1819).

¹⁴¹ *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

¹⁴² *Id.*

¹⁴³ See U.S. CONST. amend. VIII. Compare *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“The Eighth Amendment succinctly prohibits ‘[e]xcessive’ sanctions.”), with *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (“The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as *punishment* for some offense.’”) (internal citations omitted).

on dicta.¹⁴⁴ As noted above, the Court would have reached the same result whether they treated the corporation as a constitutional person or not, as an officer of the corporation could not claim the privilege on the corporation’s behalf. Second, scholars, legislatures, and judges all but rejected the concept that a corporation’s authority comes from the state alone in the late nineteenth century.¹⁴⁵ Letting the state discriminate against individuals in deciding who could incorporate for any given purpose and who could not was in itself a vehicle for corruptive forces.¹⁴⁶ Since then, most considered incorporation a free choice for a sole proprietor, subject to procedural restrictions from the state. Nowadays, even when business organization statutes permit states to revoke corporate charters, such provisions about prohibitions on using the corporate form for a fraudulent purpose.¹⁴⁷ It is highly unlikely that a state could dissolve a corporation formed for a legitimate lawful purpose that nevertheless negligently breaks the law simply because that state set out the procedures required to form the corporation.

2. Real Entity Theory

If a corporation is a person for the purposes of the law, it deserves the same protection granted to a person by the law. Therefore, justices that choose the real entity theory¹⁴⁸ might apply the same test for cruel and unusual punishment as against persons. Under that test, the statute would clearly fall. First and foremost, the Court expressly forbid mandatory sentences of death.¹⁴⁹ As in *Woodson*, this statute does not allow a judge or jury to consider mitigating factors, and is therefore unlawful. Second, even if the statute let the jury weigh aggravating and mitigating factors, it may find that corporate death is far too extreme given the corporation’s conduct. Globo Bank’s lapse in this case is arguably one of judgment, not of character or intent. Just as the death penalty splits murders into degrees, the level of “aiding terrorists” necessary for corporate dissolution may not pass this extreme mark.¹⁵⁰ Justices applying the real entity theory would therefore likely strike the statute down.

¹⁴⁴ See *supra* notes 46–50 and accompanying text.

¹⁴⁵ See *supra* notes 27–29 and accompanying text.

¹⁴⁶ See Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 589–92 (1994).

¹⁴⁷ See, e.g., N.Y. BUS. CORP. LAW § 1101(a) (McKinney 2014).

¹⁴⁸ Chief Justice Roberts and Justices Kennedy and Thomas have expressed their support for this theory, though they may not continue to do so in the future. See *Citizens United v. FEC*, 558 U.S. 310, 364 (2010); *id.* at 373 (Roberts, C.J., concurring) (“The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.”); *id.* at 480 (Thomas, J., dissenting in part).

¹⁴⁹ *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

¹⁵⁰ See *Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

One argument to the contrary is that the historical revulsion juries showed to mandatory death sentences created this ban on automatic death sentences. “The history of mandatory death penalty statutes in the United States,” the Court observed in *Woodson*, “reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.”¹⁵¹ That assertion, clear from history in the case of natural persons, simply lacks authority in the case of corporate persons.¹⁵²

Another argument is the fault that many find in *Citizens United* and *Hobby Lobby*: a corporation is not a person. As noted time and again, it has “no soul to be damned, and no body to be kicked.”¹⁵³ As Justice Alito notes in his opinion in *Hobby Lobby*, “Corporations, ‘separate and apart from’ the human beings who own, run, and are employed by them, cannot do anything at all.”¹⁵⁴ And while one can argue that the Framers of the Constitution intended the Eighth Amendment’s protections to be broad, the distinction between a real person and an entity that at its core is a collection of contracts should be clear. The death of a corporation by dissolution of its corporate charter is obviously different in its impact than taking the life of a human being.¹⁵⁵ It is, at its core, the taking of property.

3. Aggregation Theory

Aggregation theory¹⁵⁶ would not examine whether revoking a corporation’s charter would be a cruel and unusual punishment to the corporation itself.¹⁵⁷ Instead, it would look to the actions of and impact on the corporation’s human stakeholders—its directors, officers, employees, shareholders, creditors, and others—and decide if the punishment would be cruel and unusual to them. Since under this theory the Bill of Rights only protects corporations because it protects people, the relevant harm must be the harm done to these persons.¹⁵⁸ In the same sense that banning corporations from speaking (arguably) punishes individuals who de-

¹⁵¹ *Woodson*, 428 U.S. at 292–93.

¹⁵² *Id.* at 293; see also *supra* notes 129–30 and accompanying text (demonstrating clear historical support for revoking corporate charters without the same “historical revulsion” to the penalty).

¹⁵³ John C. Coffee, Jr., “No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 (quoting Edward Thurlow, First Baron Thurlow).

¹⁵⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

¹⁵⁵ Nor, arguably, is it permanent. Revoking Globo Bank’s New York charter would not necessarily kill off its global branches, which could reincorporate in their respective home countries or states.

¹⁵⁶ Justice Alito explicitly supports aggregation theory. See *supra* note 107.

¹⁵⁷ *Hobby Lobby*, 134 S. Ct. at 2767–68; *Citizens United v. FEC*, 558 U.S. 310, 385–86 (2010) (Scalia, J., concurring).

¹⁵⁸ See *supra* notes 35–38 and accompanying text.

cide to incorporate, violating those persons’ First Amendment rights, this statute would punish thousands of people for the criminal actions of a few key individuals. The theory raises difficult questions of criminal law: who bears the burden of ensuring these loans do not fund terrorists? Who is innocent and who is guilty within the corporation, and who would punishing the corporation unfairly harm? Why should employees be out of their jobs because of the actions (or shortcomings) of as few as one individual?

In one sense, this is the strongest argument against dissolving a company using this penalty. And this is the most likely counterargument to artificial entity theory; it was the key to Justice Scalia’s concurrence in *Citizens United*,¹⁵⁹ and played a fundamental role in the majority’s *Hobby Lobby* opinion.¹⁶⁰ It is also satisfying, from a populist standpoint, to consider the harm done to workers and other stakeholders should the corporation face dissolution.

But under this theory, the death penalty metaphor falls apart. No employee, investor, or director faces death under this statute; at best, they face the loss of their property.¹⁶¹ The Court recognized that these takings of property are not cruel and unusual punishment, but could face scrutiny as excessive fines.¹⁶² But this method of analysis would force the Court to admit that the severity of the punishment that makes death “different” for humans is inapplicable for corporations.

Nevertheless, given the level of conduct involved and the severe harm to shareholders and creditors—not to mention the financial system as a whole—Justices relying on this theory would likely find this punishment arbitrary and capricious as applied. Thus, they would find this specific statute violates the Eighth Amendment.

C. *Disposition of the Case*

Most likely, the Court would strike down this statute as applied on two grounds. First, the Court would find the mandatory sentencing requirement unfair. The statute would not permit juries to consider the

¹⁵⁹ *Citizens United*, 558 U.S. at 385–87 (Scalia, J., concurring).

¹⁶⁰ *Hobby Lobby*, 134 S. Ct. at 2768 (“An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.”).

¹⁶¹ The average at-will employee faces less than that, as some courts have acknowledged there is no property interest in at-will employment. *See, e.g.*, *Bailey v. Richardson*, 182 F.2d 46, 58 (D.C. Cir. 1950) (noting that at-will government employees hold no property interest in the position itself).

¹⁶² *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (“The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as *punishment* for some offense.’”).

harm dissolving the company would render onto corporate stakeholders, nor mitigating circumstances the corporation or its shareholders, directors, and officers might provide. While this clearly violates death penalty jurisprudence for humans,¹⁶³ which would convince those Justices that apply real entity theory, aggregation theory would support this conclusion as well. Mandatory minimum sentences must proportionately fit the crime, and taking away a business from its stakeholders for a negligent action seems far too harsh.¹⁶⁴ Even those Justices applying artificial entity theory might consider revoking the charter an excessive fine.¹⁶⁵

Second, even if the mandatory sentence provision did not exist, a majority of the Justices would likely find that dissolving the company for essentially negligent action would be disproportionate. Those Justices applying real entity theory would note that almost every state statute imposing the death penalty requires an aggravated killing of a person.¹⁶⁶ Even federal statutes only allow the death penalty in ten serious situations not involving murder, including treason; espionage; deaths resulting from aggravated activities such as hijacking, bank robbery, or civil rights offenses; and deaths resulting from destruction of property “related to foreign or interstate commerce.”¹⁶⁷ Unwittingly funding the development of materials used in a terrorist attack abroad does not rise to the same severe level as these crimes. Those applying aggregation theory would apply a similar analysis.¹⁶⁸ The minority of justices that would apply artificial entity theory would find such a punishment acceptable. Under this theory, New York could place any restriction it desires on the entities it grants authority as corporations—including that this “contract” is broken by negligently funding terrorism.¹⁶⁹ Nevertheless, only a small minority of Justices would accept this theory.

While it is unclear whether the Court would go further than this, it may clarify that the punishment *could* be valid if amended. All three theories would allow it. Artificial entity theory would permit it under

¹⁶³ See *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

¹⁶⁴ *Solem v. Helm*, 463 U.S. 277, 290 (1983); see U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, app. E at 11–12 (2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Appendix_E.pdf.

¹⁶⁵ *Austin*, 509 U.S. at 604 (noting that the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property).

¹⁶⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES 5 tbl.1 (2014), <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>.

¹⁶⁷ *Id.* at 7 tbl.3.

¹⁶⁸ While beyond the scope of this Note, punishment under this theory also implicates the theories underlying corporate criminal liability, in itself a controversial topic. See, e.g., V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1478 (1996) (exploring the purpose behind imposing corporate criminal liability for the actions of employees, rather than individual liability).

¹⁶⁹ See *supra* Part II.A.1.

any circumstance; the state would retain the power to control the entities it creates. Real entity and aggregation theories would permit the statute, provided the punishment fit the severity of the crime. The standards would be different. Justices applying real entity theory strictly would require it match the heightened level necessary for permanently destroying an entity.¹⁷⁰ Those applying aggregation theory would merely require the crime committed justifies taking the property of investors, employees, creditors, and other stakeholders.¹⁷¹ But both would agree: under certain circumstances, revoking a corporate charter for criminal actions could be entirely justified.

CONCLUSION

Critics of “corporate rights” treat opinions like *Hobby Lobby* and *Citizens United* as evidence of a corrupt legal system and seek to amend the Constitution to change the cases’ results.¹⁷² Politicians lose political points (and even elections) for approaching the subject with anything less than a ten-foot pole.¹⁷³ In certain sections of public discourse, “corporations as people” is the worst sign of corruption in our government, and the opinions that rely on this premise must by definition be incorrect. This Note set out to explore the bounds of that conclusion by asking if a corporation could claim a corporate right to protection against cruel and unusual punishment.

It appears the answer is yes—but no more so than a human could. Only a theory that assumes corporations carry no rights beyond what the state grants them supports a contrary result.¹⁷⁴ Such a theory would require individuals to give up their rights and protections under the Constitution to gain corporate rights and protections like limited liability, implicitly tying the approval of the state to creating a business. And at least since the late nineteenth century, corporate law in the United States has not accepted this extreme position.¹⁷⁵

To those that are unsatisfied with this result, perhaps the focus is on the wrong parts of the opinions they disagree with. Instead of asking why a corporation can speak as freely as a person, perhaps we should ask, “Why is money considered speech?” Instead of questioning whether a corporation can hold a religious belief, perhaps we should criticize the

¹⁷⁰ See *Atkins v. Virginia*, 536 U.S. 304, 304 (2002).

¹⁷¹ See *supra* notes 158–62 and accompanying text.

¹⁷² See *MTA Coalition*, MOVE TO AMEND, <https://movetoamend.org/about-us> (last visited Nov. 24, 2015).

¹⁷³ See, e.g., Philip Rucker, *Mitt Romney Says ‘Corporations Are People,’* WASH. POST (Aug. 11, 2011), http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html.

¹⁷⁴ See *supra* note 169 and accompanying text.

¹⁷⁵ See *supra* Part II.A.2.

breadth of a well-meaning protection of religious liberty that may extend its reach too far. “Corporations are people” (or “The Corporate Death Penalty,” for that matter) is an eye-catching statement. But perhaps it hides issues that should be the focus of our discourse, distracting us from the real questions. Instead of asking what’s best for corporations and what’s best for people, perhaps we should focus on what’s best for us.