CORPORATE PREROGATIVE, RACE, AND IDENTITY UNDER THE FOURTEENTH AMENDMENT

*john a. powell & Caitlin Watt**

INTRODUCTION

In recent Supreme Court history, two cases have sparked quite a bit of national attention: *Parents Involved*[1] and *Citizens United*.[2] These two cases quickly defined the relatively new Roberts Court as both friendly to the corporate world and quite hostile to civil rights for racial minorities. These two groups—while receiving starkly different treatment under the Roberts Court and previous Supreme Courts—have a shared constitutional pedigree in the Fourteenth Amendment that is often ignored or minimized by legal scholars and historians. It is this connection—and its implications—that we seek to unfold in this Article, with the goal of renewing or creating a conversation about power and personhood in American law.

In this Article, we build on an observation made by Justice Hugo Black in the 1937 case *Connecticut General Life Insurance v. Johnson*.[3] Black noted that less than one-half of one percent of the cases reaching the Supreme Court under the Fourteenth Amendment had anything to do with blacks or freed slaves, while more than fifty percent of cases reaching the Court were about corporations.[4] Given that the Fourteenth Amendment was passed after the Civil War to address the subordination of blacks in America, this is a more than disturbing observation. Did Congress and the country believe that, in passing the Fourteenth Amendment, they were adding constitutional protection for corporate

* john a. powell is the Williams Chair in Civil Rights and Civil Liberties, Moritz College of Law, Ohio State University, and Executive Director, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University. The author does not capitalize his name. Caitlin Watt is a legal research associate at the Kirwan Institute. The authors would like to thank Ingrid Babri, a second-year law student at the Moritz College of Law, Ohio State University, for her excellent research and assistance.

1 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

2 Citizens United v. FEC, 130 S. Ct. 876 (2010).

3 303 U.S. 77 (1938).

4 *Id.* at 90 (Black, J., dissenting).

America? And how did the freemen (and women) get lost for so many years from the protection of the Civil War Amendments to the Constitution?

Both *Citizens United* and *Parents Involved* build on a long and convoluted, sometimes confusing and contradictory, history of the nature of corporations and civil rights in relation to our Constitution. *Parents Involved* stands for the proposition that the state cannot use the race of individual students in planning school assignment if the state has not discriminated in the past.[5] *Citizens United* held that the government cannot discriminate based on corporate status when deciding who is able to donate funds to campaigns or who is able to make campaign speech.[6] Both of these decisions fail to understand what we call the "structural differences" between two groups—racial minorities and corporations—that situate them differently than would-be like groups. The result of the decisions is that black grade school students are relegated to lower performing, underfunded schools on one hand, and corporations are given the right to spend enormous wealth accumulated over the course of their unnatural and possibly infinite lives to influence the course of American law. Neither case could have come to pass without the Fourteenth Amendment, and, most important to our claims, both decisions are dependant upon the creation of white identity by corporate elites in the early stages of this nation and bolstered by antebellum reforms of the Southern racial and economic system.

I. EARLY CIVIL RIGHTS UNDER THE FOURTEENTH AMENDMENT

While corporate rights were expanding under the Civil War Amendments, civil rights of newly freed slaves were more or less stagnant. The same Court that radically altered the relationship of the

---

[5] In *Parents Involved*, the Court's plurality held that race-based affirmative action in non-segregated or unitary school districts was effectively the same as segregation and—without some compelling interest other than diversity—a school district would not be able to assign students based on race under the Constitution. The Court stated:

> Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

Parents Involved, 551 U.S. at 747-48 (citation omitted).

[6] In *Citizens United*, the Court ruled that McCain-Feingold limits on corporate campaigns expenditures were unconstitutional under the First Amendment because "[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Citizens United*, 130 S. Ct. at 913.

corporation to the state was quite reluctant to alter the relationship of the federal government to the States and, therefore, of the States to the non-white population. This Part will discuss early civil rights cases under the Fourteenth Amendment.

A. *Slaughter-House*

The first time the Court discussed the Fourteenth Amendment was in *Slaughter-House Cases*, where it held that "the one pervading purpose found in all [the amendments], lying at the foundation of each, and without which none of them would have been suggested" is "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."[7] The Court also expressed great doubt "whether any action of a State not directed by way of discrimination against the negroes as a class will ever be held to come within the purview of this provision."[8] The Court ultimately ruled on behalf of the slaughterhouse.

As exemplified in *Slaughter-House*,[9] expansion of corporate prerogative was likened—at its extreme—to being pushed into the condition of slavery. In *Slaughter-House*, a group of all white butchers in New Orleans objected to a law that, among other things, gave a monopoly to a specific slaughterhouse to oversee all slaughtering activities within the city.[10] The butchers argued that a specific provision of the law, under which they were "required to slaughter at a specified place, and to pay a reasonable compensation for the use of the accommodations furnished [to them] at that place,"[11] violated the Thirteenth Amendment's prohibition of involuntary servitude. Thus it appears that the expansion of corporate prerogative was argued as having created a new class of (white) slaves.

Balking at this argument, the Court—as we previously noted—asserted that the Fourteenth Amendment was passed specially for blacks.[12] Justice Miller went on to doubt that the Fourteenth Amendment would ever be extended to other classes.[13] However, his

---

7 Slaughter-House Cases, 83 U.S. 36, 66 (1873).

8 *Id.* at 83.

9 *Id.*

10 *Id.* at 59-62.

11 *Id.* at 61.

12 *Id.* at 71.

13 Justice Miller noted:

> Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the

opinion on the matter was soon to be overturned with the help of one of the dissenting Justices.

Justice Field played a critical role in both the development and expansion of corporate prerogatives and the narrow reading of the Fourteenth Amendment by the Court that marginalized blacks. Reading his dissents in both *Munn v. Illinois*[14] and *Slaughter-House*,[15] it is clear that he was an early proponent of both corporate prerogative and substantive due process as a means to cease government regulation of corporations. Much of the Court's early development of substantive due process—epitomized in the *Lochner* era cases[16]—against local regulation of corporate interests was, it turns out, the product of Justice Field. In *Slaughter-House*, Justice Field not only adhered to the proposition that corporations were persons, but also foreshadowed the arrival of substantive due process as a weapon against the state:

> The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations.[17]

Field took a number of strange positions in addition to advocating for substantive due process for corporate rights against the States. Field was very much against the equal protection guarantee in his personal life,[18] and in his professional life he dissented in *Strauder*[19] and joined the majority in *Plessy*.[20] It appears clear that he objected to the spirit of the Fourteenth Amendment's equality guarantees. What *Lochner* and *Plessy* gave us was states' rights as applied to blacks and other non-

---

> Mexican of Chinese race within our territory, this amendment may safely be trusted to make it void.

Id. at 72.

14 94 U.S. 113 (1877) (Field, J., dissenting).

15 83 U.S. 36 (1873) (Field, J., dissenting).

16 The *Lochner* era refers to the Court's expansion of substantive due process, particularly with the right to contract, that occurred during the early decades of last century and greatly expanded the rights of corporations over the rights of citizen and worker protection. The titular case, *Lochner v. New York*, 198 U.S. 45 (1905), stood for the proposition that work week limitations promulgated for the health and safety of bakers in New York interfered with the right of workers to contract for their own conditions.

17 *Slaughter-House*, 83 U.S. at 110 (Field, J., dissenting).

18 This position was expressed in a segment of a letter Justice Field wrote in 1882: "You know I belong to the class, who repudiate the doctrine that this country was made for the people of all races. . . . On the contrary, I think it is for our race—the Caucasian race." HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 195 (1968) (emphasis added).

19 Strauder v. West Virginia, 100 U.S. 303 (1880) (Field, J., dissenting).

20 Plessy v. Ferguson, 163 U.S. 537 (1896).

whites, and judical federal protection against states' rights and Congress as applied to businesses and corporations.

Justice Harlan, who is now claimed by the left and the right of the current Supreme Court, was critical of the Court's expansion of corporate rights and the narrowing of the rights of blacks.[21] His dissent in *Civil Rights Cases* points out the irony of this approach.[22] While not talking about corporations, he noted that the Court had upheld the Fugitive Slave Laws.[23] These laws required states that opposed slavery to cooperate, and in some cases assist, in the recapturing of fugitive slaves. Any plausible constitutional justification that would support the federal government enacting such a law, as noted by Harlan, would be extremely thin.[24] Clearly, such a law trumped states' rights. While Section 5 of the Fourteenth Amendment gives Congress explicit authority to pass laws to carry out the Equal Protection (and Privileges and Immunities) Clause of the Amendment, in *Slaughter-House* and *Civil Rights Cases*, the Court severely limited the power to do so. The Court in *Civil Rights Cases* gave broad authority to private entities that wished to maintain racial hierarchies by limiting the authority of Congress under the Fourteenth Amendment to "state action," narrowly defined.[25] In *Slaughter-House*, the Court diminished the meaning and scope of the Amendment. It was clear to Harlan that not only was the outcome of *Civil Rights Cases* incorrect, but also that the Privileges and Immunities portion of the *Slaughter-House* opinion should be overturned and that limitations on states' rights to regulate corporations were wrong.[26]

While it should now be clear that the same Court that brought us the Jim Crow states' rights doctrine developed a limitation on states' rights to regulate corporations and businesses, it may still not be clear how or why this was done. Sadly, one of the byproducts of law school is to teach lawyers to separate out and categorize cases. We are taught that *Lochner* is a civil rights case or that *Slaughter-House* is a corporations case. The fact that these cases tend to chip away at or expand the rights of corporations and civil rights at the same time is lost in the current educational system. A number of the same members of the Court that sat in *Plessy* also sat in *Lochner*. What were the

---

21 See, for example, Harlan's concurrence in *Hale v. Henkel*:

> In my opinion, a corporation—"an artificial being, invisible, intangible, and existing only in contemplation of law"—cannot claim the immunity given by the 4th Amendment; for it is not a part of the "people," within the meaning of that Amendment. Nor is it embraced by the word "persons" in the Amendment.

201 U.S. 43, 78 (1906) (Harlan, J., concurring).

22 The Civil Rights Cases, 109 U.S. 3 (1883) (Harlan, J., dissenting).

23 *Id.* at 28.

24 *Id.* at 28-29.

25 *Id.* at 11.

26 *Id.* at 33-34.

connections between these corporate and civil rights cases, and what might they have meant to the Justices who decided them? We take up these questions below.

II. SCHOLARLY WORK ON CIVIL RIGHTS AND CORPORATE HISTORY BEFORE AND AFTER RECONSTRUCTION[27]

Charles Black in *A New Birth of Freedom* does a careful examination of the citizenship and civil rights ramifications of *Slaughter-House*.[28] He asserts that the Court is wrong in its reasoning and decision and insists this is the worst case in constitutional history.[29] For Black, one can only understand *Slaughter-House*, *Plessy*, *Crenshaw*, *Civil Rights Cases*, and other cases that effectively closed the door and the Court to blacks for the first half of the twentieth century, if one understands what the Civil War Amendments were designed to do. The Amendments were not just about ending slavery and providing equal protection. They were about overturning the decision in *Dred Scott*,[30] which closed the door on the hope of black citizenship in the United States. The Reconstruction Amendments were about opening that door and giving meaning and substance to citizenship.[31] For Black, the Fourteenth Amendment not only conferred national and state citizenship on all those born or naturalized in the United States, but also denied states the right to choose who can and cannot be a citizen under their laws.[32]

In his analysis of *Slaughter-House*, Black focuses on the absurdity of the Court focusing on the strict construction of the Reconstruction Amendments for the specific protection of newly freed slaves.[33] He finds that it is absurd because, first, *Slaughter-House* was not a case about race in the slightest; and second, because the Privileges and Immunities Clause is not race-specific. He supposed that the only "real danger" was that if the Privileges and Immunities Clause had teeth, the slew of laws Congress passed to protect freedmen would be effective in creating some sort of racial equality. Black seems to believe that the

---

27 While there is limited scholarship that explores the nexus between race and corporations historically, these connections are examined by Austin Allen and, to a lesser extent, Charles Black. We will focus on their work in this Part.

28 CHARLES BLACK, A NEW BIRTH OF FREEDOM: ON HUMAN RIGHTS NAMED & UNNAMED (1997).

29 *Id.* at 39 ("It is my own view that no sorrier opinion was ever written than the *Slaughterhouse* opinion, and that case should be thrown into the rustiest trash-can of legal history.").

30 Scott v. Sandford, 60 U.S. (1 How.) 393 (1857).

31 BLACK, *supra* note 28, at 51-53.

32 *Id.* at 24.

33 *Id.* at 71.

Court would not approve of these sorts of laws, and then notes that, "of some twenty-five cases, in which the Court struck down Acts of Congress, through the whole nineteenth century . . . dealing with the affirmative powers of congress, the only ones of any staying power were the ones striking down or narrowing statutes protective of Negroes."[34] He notes that this was—for most other matters—a time of "ample and Court approved expansion of Congress' power."[35]

For Black, the Court shaped the law of the Fourteenth Amendment specifically to lessen its equality guarantees for freedmen. The Court would continue to embrace the spirit of *Dred Scott* in limiting the membership claims of blacks to be part of the political community or full citizens. For the purposes of our work, this falls in line with our theory that there is a connection between the Fourteenth Amendment and the clinging of Supreme Court Justices to white identity. This also is quite in line with what we know of Justice Field.[36]

Austin Allen's *The Origins of the Dred Scott Case* does a wonderful job weaving social, political, and legal history into his previous work on the tension between white identity, corporations, and the Fourteenth Amendment that emerged with the Taney Court. That Court decided *Dred Scott*, which gave rise to the need for the Fourteenth Amendment's citizenship guarantee. In his work, Allen exposes some of the ideological history that necessitated the Citizenship Clause and, in doing so, touches on the state-centric corporate theories espoused by the Court under Taney.[37]

The Taney Court, to this end, decided the infamous *Dred Scott* case and a number of corporate cases espousing its minimalist judicial theory.[38] *Dred Scott* was the most important case at that time to deal with citizenship and its meaning. It was also the first case by which the Supreme Court endorsed an explicitly racist justification for the condition and treatment of blacks.[39] It was understood in *Dred Scott* that the regulation of slavery, and even free blacks, should be left to the States.[40] Indeed, Chief Justice Taney argued that the right of the States to regulate blacks was necessary to protect the survival of the sovereign state.[41] States' rights were seen as critical because of the need to protect the institutions of slavery. In the corporate sphere, the Taney Court worked generally in opposition to that of the Marshall Court.

---

34 *Id.* at 72.

35 *Id.*

36 *See supra* Part I.

37 AUSTIN ALLEN, THE ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT, 1837-1857 (2006).

38 *Id.* at 16-18.

39 *Id.* at 96 ("The slavery cases that preceded *Dred Scott—Moore* being the last of them—never rested explicitly on considerations of black inferiority.").

40 Scott v. Sandford, 60 U.S. 393 (1857).

41 *Id.*

What the corporation was before the Civil War was very different than how we think of corporations today. While Justice Marshall supported a more independent corporation,[42] Justice Taney, like most Southerners, wanted more limited, regulated corporations.[43]

Allen paints the Taney Court as staunchly anti-elitist, devoted to the popular will, and anti-national corporate interest.[44] This disposition was assumed by members of the Court to be amoral, judicial minimalism. However, upon Allen's closer inspection of the major race and corporate cases under the Taney Court, one sees that the Court was very much making sweeping, politicized decisions that "provided a coherent defense of both corporations and slavery in a rapidly democratizing union."[45]

Allen describes two contemporaneous Taney Court cases to illustrate this point: *Bank of Augusta v. Earle*[46] and *Groves v. Slaughter*.[47] In *Earle*, the Court was asked to interpret a provision of the Alabama Constitution that limited the number of banks chartered in Alabama to decide whether banks not chartered in Alabama could set up within the state.[48] After an Alabama judge ruled that it disallowed foreign banks, the Taney Court reversed, stating that Alabama very well could have intended to allow foreign banks to open in Alabama and nothing in the statute said that they wished to disallow them.[49] Therefore, foreign banks could come in and Alabama could revise the constitution as needed.[50] In *Groves*, the Court grappled with a Mississippi statute that outlawed the slave trade after May 1833.[51] The question on the table was whether a contract for slaves made after that date would still be enforceable.[52] The Court decided that it was, since the statute did not give remedies or punish for contracts made after May of 1833.[53] The Taney Court, therefore, was able to use this hands-off approach to legislation to on one hand expand the opportunities for

---

[42] *See, e.g.*, Bank of U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) (espousing an associational view of corporations, where the corporation is seen as inhabiting all of the states of its shareholders). This view tended to prevent corporations from being sued in federal courts under a theory of diversity jurisdiction, as it was rare that a corporation could be completely diverse from the person suing it. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1598 (1988).

[43] *See, e.g.*, Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497 (1844) (holding that a corporation is a citizen of the state which created it, and therefore more easily subject to diversity jurisdiction than the Marshall Court previously held).

[44] ALLEN, *supra* note 37, at 14.

[45] *Id.* at 17.

[46] 38 U.S. 519 (1839).

[47] 40 U.S. 449 (1841).

[48] *Earle*, 38 U.S. at 585-87.

[49] *Id.* at 597.

[50] *Id.*

[51] *Groves*, 40 U.S. at 498.

[52] *Id.* at 499.

[53] *Id.* at 504-03.

businesses in a state that did not seem to want those opportunities, and on the other hand enforce slavery contracts in a state that explicitly did not want slavery contracts after 1833.

The Taney position rested on two principles. The first was anti-elitism: that we should not have powerful economic interests which are not subject to the people. The other was states' rights. This particular iteration of states' rights was explicitly racist. Like many Southerners, Taney was concerned that if a corporation, as a legally-created, fictitious person, could claim to be a person for diversity jurisdiction, it would open the door for blacks, free and otherwise, to sue in federal court under diversity jurisdiction.[54] If corporations could claim to be a person or a citizen for this purpose, then certainly blacks would have an even stronger claim.

In this way, it is clear that corporate prerogative and civil rights were connected in the minds of the Taney Court Justices. Furthermore, it is clear that the same anti-elitists who were against corporate prerogative were against it at least in part because they were afraid of the power of ruling elites to glom racial equality on to corporate freedom. This connection and disconnection continued throughout the century, reaching its climax when the Court ruled that corporations were people under the same constitutional vehicle that allowed newly freed slaves to be citizens while limiting many of the freedman's claims.

III. APPROACHING THE WHITE CORPORATION

As we have seen, the Northern elites, including members of the Court, were interested in a national platform for business, a national bank, and limiting the spread of slavery. In addition to sectarian conflict, there were other concerns as well. In order to find a solution that would mollify the South and the North, Taney developed the position in *Dred Scott* that separated the doctrinal grounds for blacks and for corporations. This required creating a special category for blacks. They were to be neither citizens nor persons. There needed to be a justification that distinguished them from corporations as an artificial person for diversity jurisdiction, and of course from the natural person of women and others who did not enjoy full rights of citizenship. Taney's move was to use the "inferiority" of blacks to create a special category for blacks that would deprive them of diversity jurisdiction and allay state concerns of federal intrusion in slavery and race issues. At the same time, it would lay the foundation for protection of corporations that would satisfy the concerns of Northern elites.

54 ALLEN, *supra* note 37, at 126.

While this accommodation clearly did not work, and may have increased tensions leading to the Civil War, it would resurface at the end of Reconstruction. Radical Republicans were not as interested in a national platform for corporations. While some were interested in protecting property and business, others were not. What united them was their strong opposition to slavery and the commitment of many to equality. They also believed in national citizenship and a role for the federal government in protecting the freed slaves. Some of the radical Republicans believed that the only way that freed slaves could be free was to break the economic stranglehold of the plantation owner and slaveholder over black labor. It is easy to forget that slavery was about both white domination of blacks and forced labor. This led them to support the redistribution of land both to weaken the slave owner class as well as to strengthen the free man. Eventually the radical Republicans would lose out to Republicans interested in a national platform for business and not in a national platform for citizenship.

Republicans who were not radical were less passionate about slavery. Many who opposed slavery were Free Soilers who were also hostile toward slaves and free blacks. They wanted to keep slaves out of certain territories. Their opposition to the spread of slavery was not the same as their support for those enslaved or for blacks generally. What united the non-radical Republicans was their support for a national platform for business. Many shared Justice Field's belief that blacks were not, and could never be, equal to whites. Many opposed slavery as a drag on the economy, not for moral reasons.

The compromise that ended Reconstruction was just as much about economics as politics. Indeed, it made little sense to try to separate the two. As Eric Foner and others have noted, the Northern elites were not interested in destroying Southern elites, but in giving them enough power and trust to use the freed slaves as junior partners.[55] They used the voting power of blacks to consolidate power over the South and the rest of the country. Thaddeus Stevens believed that blacks would need to have an economic base to be free of white plantation owners, and is credited as the first to suggest "forty acres and a mule."[56] The very idea of confiscating property was an anathema to moderate Republicans. Moderate Republicans were less interested in securing full citizenship for blacks and more interested in slowing down—but not destroying—the propertied in the South. They also wanted to secure a national platform for business.

Although there were earliersigns of the ending of Reconstruction, it is often associated with the Hayes-Tilden presidential election of

---

[55] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 298 (Perennial Classics 2002) (1988).

[56] *See, e.g.*, Walter L. Fleming, *Forty Acres and a Mule*, 182 N. AM. REV. 721, 722 (1906).

1876. The South threatened to go back to war unless the Southerner, Tilden, was seated as President. Hayes became President with a number of capitulations to the South. The North agreed to scale back the federal presence in Southern states, in effect handing control of the South back to white supremacists. Northern elites other than abolitionists and radical Republicans, both of whom had lost power, were at best ambivalent about blacks being in society and certainly not willing to take the country to the brink of another war to protect black interests. The Court was already shifting toward acceptance of the right of states to regulate and suppress the freed black. In economic terms, it meant the South could push blacks into new forms of extreme exploitation, such as sharecropping and prison work camps. What non-radical Republicans and the Court were much more reluctant to do was to allow the States or Congress to regulate corporations and businesses.

The North's abandonment of blacks was not just because of the concern of another war. Northern leaders were also concerned that the freed slaves and blacks were pushing for economic reforms that would limit the development of national capitalism. The coalition between Northern Republicans and freed slaves ended with a recommitment to the protection of property under the federal government and the control of non-whites—particularly blacks—under the States.

Many of the Justices on the Court were Republicans who shared the aspirations of the national business platform but were indifferent or hostile to the rights of blacks, despite the Civil War Amendments. But blacks were not only abandoned by moderate Republicans. They were also abandoned by conservative Democrats and, eventually, progressives. Tom Watson, the leader of the progressive movement, pushed for a black-white coalition based on common economic interest. In many ways, he and the progressive movement had impressive early success. As they threatened powerful conservatives, they were attacked for working with blacks. These attacks proved successful, and Watson and the progressives shifted positions and also began to attack blacks. Despite differences between the various parties, a broad anti-black consensus emerged. Progressives came to believe that economic issues could only be won after excluding blacks and uniting whites. Racial solidarity overwhelmed economic interest. The abandoning of blacks weakened blacks and eventually weakened the labor movement in its fight with business.

This disturbing pattern would repeat itself in the 1930s and 1940s. When unions went South and realized that they could not be successful with a large part of the country unorganized, they launched Operation Dixie.[57] After early success, Southern whites would bolt from being in

---

57 *See* OPERATION DIXIE: THE C.I.O. ORGANIZING COMMITTEE PAPERS, 1946-1953: A GUIDE TO THE MICROFILM EDITION (Katherine F. Martin ed., 1980).

unions with blacks, withdrawing their support for unions. A coalition of Republicans and Southern Democrats would come together to pass the Taft-Hartley Act,[58] which hurt the cause of union organizing so severely that unions would never recover. The Act put into law restrictions on workers' organizing activity, created unfair labor practices that applied to workers and not management, allowed management equal time to oppose the union, and basically put the corporation as an entity on the same footing as the likely underpaid and overworked employee. This would also strengthen the hand of corporations and lead to a period of expanding corporate prerogatives.

After Reconstruction, Court support for this new white solidarity was doctrinally expressed in terms of states' rights on one hand and corporations as persons under the Fourteenth Amendment on the other. The summit of the corporate rights mountain was reached when the Court in *Santa Clara*, without argument, found that corporations were persons under the Equal Protection Clause of the Fourteenth Amendment.[59]

It is this history that gave birth to the *Lochner* and Jim Crow eras. As the Court shifted into the *Lochner* era, progressives, who sought to regulate and control business at the state level, began waging a losing battle. The Court time and again struck down attempts to pass broad wage and hour laws, child labor laws, and safety regulations. The Court found that any such regulation of corporations or businesses violated freedom of contract. It took the advocate Louis Brandeis to break this cycle, ironically leading to strong state control over what is, and is not, regulated.[60] Meanwhile, the Court was largely unwilling to hold—and progressives were largely unwilling to make a claim—that states could not regulate race, and Jim Crow raged on.

As white workers recognized, to give protection to corporations would also limit the rights and protections of white workers. What the majority of the Court has been reluctant to recognize is that to give greater prerogative to corporations entails curtailing the rights of workers and citizens. What most have failed to address is the racial connection between corporate rights and black subjugation and the Civil War Amendments.

Some would argue that this is because elites have been able to use a divide-and-conquer strategy to distract whites from their common interest with blacks and other non-whites in opposition to the ruling

---

58 Labor-Management Relations Act, ch. 120, § 1, 61 Stat. 136. (1947) (current version at 29 U.S.C. § 141 (2006)).

59 Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886). This was not the actual holding in the case as identified by the reporter. Despite this, the case is widely accepted for finding corporations to be persons for Fourteenth Amendment due process purposes.

60 Louis Brandeis was an advocate in *Muller v. Oregon*, 208 U.S. 412 (1908), which was integral in overturning the *Lochner* era's laissez-faire economic philosophy.

elite. While this argument has some appeal, it is too limited. Steve Martinot asserts that the very concept of whiteness was born in a corporate structure that demanded allegiance from below without responsibility.[61] What Martinot proposes is that white identity is structured to identify with the elite and control the racial other. It is not, then, just an issue of interest, but an issue of being. One could not give up this position without making a substantial ontological move. Whites, then, are called into a middle position of resentment and control that defines their identity in opposition to the racial other and in aspiration with the elite. The inter-class identity of whiteness trumps, in most cases, the inter-racial interest of class.[62] Martinot also reminds us that class condition is not the same as class consciousness.[63] But perhaps the biggest mistake is not understanding the interrelatedness of class and race in the United States.[64]

One might read this history and believe that this is an example of what Derrick Bell calls "interest convergence,"[65] where the interests of whites converge in opposition to blacks, economic regulation, and democracy. While this is a fair reading of this period, it would be wrong to assume that white interest will always converge in this way. White interest—just like whiteness itself—is not nearly so stable over time. What is also at interest throughout this history is not just white interest but white identities. Most of the efforts, both during the end of Reconstruction and more recently, have been organized around a narrow concept of interest, or more accurately, the assumption that economic interest and white interest are the same. What we are calling for is the deliberate creation of a space for both a new kind of racial identity and a new kind of citizen that would implicate the role and identity with the elite and corporate America.[66]

Rejection of identification with the racial other then becomes closely tied to the rejection of government, once government is

---

61 STEVE MARTINOT, THE RULE OF RACIALIZATION: CLASS, IDENTITY, GOVERNANCE (2002).

62 *See* JOEL OLSON, THE ABOLITION OF WHITE DEMOCRACY 32-33 (2004).

63 Steve Martinot, *The Duality of Class Systems in US Capitalism*, http://www.ocf.berkeley.edu/~marto/ClassDuality.htm (last visited Dec. 23, 2010). One can think of the fight between whites as a family feud that cannot be resolved by affiliation with blacks or non-whites. This is the ultimate betrayal. *See* Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Diveregence Dilemma*, 91 J. AM. HIST. 92, 105 (2004).

64 *See* john a. powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355 (2007).

65 *See* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

66 Henry Giroux has called for the construction of a positive progressive white identity. *See* OLSON, *supra* note 62, at 111. But others, while accepting the need for a new white identity, worry about re-centering whiteness and not addressing issues of power and privilege associated with whiteness. *Id.* at 112.

associated with both whites and non-whites. This may help to explain why there was so much concern about government intervention in healthcare and so little concern about the role of corporate insurance in healthcare. To take another example, if we look at the immigration debate, much of the fuss is about immigrants coming here to work illegally and, in the process, committing crimes, mostly drug crimes. There is little recognition of the reasons why immigrants come here to work low-wage jobs in the first place. Critics rarely talk about how NAFTA allowed the drain of high-paying jobs from the Midwest to Mexico, where those jobs became low-paying, low-benefit jobs that destroyed the Mexican middle class. Few talk about how companies like Walmart or large agribusiness and food processing conglomerates hire undocumented immigrants to work low-paying, highly dangerous jobs. Because these corporations depend upon cheap foreign labor, they are not wholeheartedly supporting (with their money) immigration reforms that would allow Mexican workers to cross the border legally and gain citizenship. Their inaction perpetuates an underground network of human smuggling that also encourages the smuggling of drugs in and guns out, leaving Mexican immigrants victimized, unrepresented, and unable to speak out against their low-wage jobs picking Monsanto vegetables or working for Walmart for fear of deportation.

If this is right, it is not simply that corporations threaten our democracy, it is that corporations also undermine the possibility of racial justice, which then weakens or threatens our democracy. The white strategy is to be a separate individual in a private corporate space where individuals are overwhelmed. Omi and Winant have described our society as a racial dictatorship.[67] What they did not develop is the role of corporations and how these structures limit democracy for whites and non-whites.

As long as there was a robust body of middle-class consumers, there was little attention paid to the fact that consumers are not the same as citizens. In the present arrangement, the status of whites as consumers and citizens is being called into question. But this question cannot be adequately addressed without understanding the relationship of corporate prerogative and race.

Martinot describes white racialization as a product of manufactured fears starting with Bacon's Rebellion.[68] Before the Rebellion there was an allegiance to the colony and to England. Threatened by the raceless solidarity movement during the Rebellion, European elites manufactured a new threat in the prospect of an African

---

[67] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S, at 65 (1994).

[68] MARTINOT, *supra* note 61, at 62.

slave uprising.[69] The elites deputized a patrol of poor whites to control the slave classes.[70] The allegiance was now to the elites and to whiteness. This is what Martinot calls the "intermediary control stratum."[71] Whiteness was created in opposition to blackness, and defined by control over blacks and identification and allegiance with those in power. In describing the domination identity, Martinot uses the example of Senator Benjamin Watkins Leigh of Virgina speaking against abolition by noting that in the Northern states where there were free blacks, whites had formed mobs and rioted against them.[72] Martinot notes that, in Leigh's view, the white mobs were not engaging in criminal behavior so much as "simply demonstrating the Anglo-Saxon propensity to dominate and enslave other races."[73]

Martinot continues his work by discussing the role of the corporate state in racialization. In his view, corporate personhood through *Santa Clara* bestows corporations with "respectability, social authenticity, and structural legitimacy—in other words, a niche in the administrative network of command and control."[74] When corporations were in their infancy in America, they were subordinate to the state. Corporations were defined by their charter and could not move outside of the charter. As corporations gained personhood, and then gained constitutional protections and rights, they moved away from state control and started to lobby, to control elites, and to determine political and policy outcomes. Corporations, like whites, are in a position that is defined in large part by control and domination over, or exclusion of, the other. Whites occupy the middle stratum between the corporations, as the elites to whom they owe allegiance, and the non-whites over whom they dominate.

As whiteness is largely defined by control and not color, any movement toward racial equality is a threat, not just to white interest in domination, but to white identity itself. For this reason, whites who were threatened by government intervention into racial equality moved away from public spaces and into private space. When Johnson signed the Civil Rights Act, he famously said that he was giving up the South for at least two generations. This came to be the case as Southern whites moved from the Democratic Party to the Republican Party over the past forty years. Whites formed a party based on the near-deification of the profit motive and of little government intervention, not just in race but also in business. The rise of neoliberal policies in

---

69 *Id.* at 63.

70 *Id.* at 65-67.

71 *Id.* at 130.

72 Steve Martinot, *The Cultural Roots of Interventionism in the United States*, 30 SOC. JUST., no.1, 2003 at 112, 126.

73 MARTINOT, *supra* note 61, at 107.

74 *Id.* at 135.

the 1980s brought even more corporate control when businesses were not forced, but incentivized, to behave as the government wished, giving corporations power to implement or not implement policy "on the ground." Thus, government was largely to stay out of the affairs of businesses, and businesses continued to control government through lobbying and donating. Whites, in turn, shun governments and identify with corporations as the elites.

After Bacon's Rebellion, the elites planted fear of a black uprising and imported more slaves to amplify the fear of an "us versus them" battle, while allowing poor whites to patrol and control the slaves. In modern times, we see the healthcare industry fighting government-controlled medicine by planting fear in whites that the "socialization" of medicine will cause a decrease in services and force whites to share medical care with blacks. Thus, conservative whites band against the government and with corporations to fight against their interest and for the interests of corporations.

It is for this reason that we need something more than interest convergence to overcome racial inequality and the corporate prerogative. Whites have more than merely an economic interest in being white. They have an invested ontological identity in whiteness, which allows them to associate with other elites and to not associate with non-whites, especially blacks. Without an appropriate substitute for this identity any sort of breakdown of racial hierarchies cannot happen. This is because the white identity is largely based on domination, and has always been so. The very essence of whiteness is a power differential. Likewise, when corporations seek to increase profits via consumerism, it behooves them to play to this identity of power, privatization, and control. What we are experiencing today as the country enters a shifting racial terrain is white identity anxiety.

Let us return to *Citizens United*, where we began this Article. We again have the Supreme Court expanding the prerogative of corporations at the expense of citizens. This same Court has again been using the Bill of Rights to limit the aspiration of non-whites to be full members of society. If one should read *Plessy* with *Scott*, one should also read *Citizens United* with *Parents Involved*. The Court has constructed a doctrine that on one hand appears to protect white prerogative, but then undermines this position in favor of corporations. The shrinking middle class is largely shrinking as consumers. There is little thought of them as participant citizens. As John Rawls noted, we can have a corporate welfare society or a democratic property-protected society. He believed we have the former.[75]

---

[75] JOHN RAWLS, THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED" 139 (2002).

If we think about whiteness in terms of the right to exclude and to dominate, it might be that the real whites in our society are corporations. And this right to exclude and limit the reach of the democratic mass moves beyond nations in the form of Anglo-American globalization. The prerogatives of corporations are not just being championed by the Court but also the World Trade Organization and the World Bank. Like many things, corporations may make a good servant but a bad master.

Let us take a closer look at *Citizens United* and *Parents Involved* through the lens we have set out here. As with *Dred Scott*, *Lochner*, *Plessy*, *Slaughter-House*, and *Santa Clara* before them, *Citizens United* and *Parents Involved* represent the expansion of corporate rights at the same time as the reduction of civil rights, especially the civil rights of blacks.

In *Parents Involved*, the Court limited the ability of the public sphere to remedy or otherwise reshape the racial makeup of public schools. The Court found that it is unconstitutional for a school district to use race to determine assignment in area schools if that school is no longer or was never under court supervision.[76] Here, the public sphere is limited by the Constitution. But state support for cross-racial affiliation is experienced as a threat and a betrayal by those holding on to their white identity. This is one reason that there was such hostility to *Brown*.[77] *Parents Involved* did not just reject *Brown*, it holds up part of the tacit agreement against cross-class racial bonding and in support of exclusion of non-whites. It is not just a rearticulation of the agreement born out of the Bacon Rebellion, but an affirmation of the spirit of *Dred Scott*. As the public space becomes increasingly non-white, there will likely be a fight to both shrink and withdraw resources from the public. Like the post-*Brown* South, there will be a form of "public space" that is really private and virtually all white. But for whites stuck in more diverse public spaces, *Parents Involved* offers some assurance of disaffiliation.

In *Citizens United*, the Court determined that the private sphere need not be regulated by the government even when it is seeking to affect the government.[78] This private/public distinction is not just important in a Fourteenth Amendment state action context. It is part of a much larger picture of what whiteness has become in relation to non-whites, what corporations are in relation to government, and the connection between the two.

---

76 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

77 Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1484-86 (2004).

78 Citizens United v. FEC, 130 S. Ct. 876 (2010).

While the Court has shown some ambivalence and hesitation about relying on the *Santa Clara* doctrine of corporate personhood, its tendency to protect and expand corporate prerogatives to the detriment of individual rights and states continues. It has also been assertive and aggressive in the move to limit civil rights. It has turned the Civil War Amendments on their heads in protecting white choice, prerogatives, and exclusion. There is a credible argument that Chief Justice Roberts, and Justices Scalia, Thomas, and Alito wish to overturn *Brown*[79] based on their treatment of diversity and integration in *Parents Involved*, while Justices Ginsburg, Breyer, Sotomayor, Kennedy, and perhaps Kagan, would continue to severely limit it.

In *Dred Scott* the Court found it necessary to distinguish between blacks and corporations in order to grant special status to corporations. In both *Citizens United* and *Parents Involved* the Court adopted a formal position. In *Parents Involved*, the Court sees whites and non-whites as the same. They are functionally equal and the Court must be neutral; the state is not allowed to notice race, except in limited circumstances. In *Citizens United*, the Court insists that corporations cannot be distinguished. The First Amendment prevents us from noticing the nature of the speaker. In each of these moves the Court is distributing power.

CONCLUSION

So what is this allegiance to corporate protection and race? One answer might be suggested from our past. As Steven Martinot reminds us, the first colony—the Virginia Colony—was a joint-stock corporation, and all settlers were mere employees of that corporation.[80] What this corporation—and all corporations—would demand was allegiance to the top and obedience from the bottom. When juxtaposing the corporation with the colonial master and servant, Martinot was not just talking about economic interests but also cultural and individual identity. Of course, a corporation has economic interests, as do each of its employees in that they wish the corporation to succeed for their own benefit. But when a corporation is so entwined with who you are—as a colonist, as a businessman, as a new settler in a new world—American-style corporate identity changes. Martinot describes whiteness in his work as the primary interest. When whiteness is aligned with corporate interest—as it is when, for example, whites resist unionization in the South as a form of integration—whiteness and corporate interests become one. Looking back on American history, there are plenty of

79 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

80 MARTINOT, *supra* note 61.

examples of how whiteness and corporate interests converge for the benefit of both. It is our premise that they are now almost totally merged.

Whiteness, as Martinot describes it, is a middle-stratum identity that has allegiance to the elite and demands obedience and control over those (non-whites) below. We can see this today in the way that the new Republicans—and the Tea Party—have coalesced around the idea of low taxes, no government control over corporations, and defiance of healthcare that is not corporate-controlled. This iteration of whites voting and acting directly against their economic interests in favor of corporate prerogative demonstrates the middle-stratum mentality. While Martinot's assertion is too complicated to fill out in this short piece, it does suggest a different way of thinking about race and corporations in America.

It could be suggested that whites in America increasingly concede to corporate power and identify with it as part of whiteness. It is their ability to exclude, control, and dominate that defines their racialness. And the middle stratum—as well as the elites—are inclined to identify with this power.

There certainly have been times of deep challenge to corporate expansion of power—probably none more sharp or successful than the progressive era and the New Deal. Yet both were deeply racialized and many, if not most, progressives during these periods believed it was first necessary to develop a solid white base before attacking economics. What we are suggesting in this Article is that racial justice, civil and human rights, and corporate prerogatives are deeply related and generally under-theorized. This failure is likely to limit not only our democracy, but also our civil rights and efforts to properly situate corporations in our society and world.

One might read this Article and think we are calling for the destruction of corporations and the market, and a reclamation of state control over a communist market. This would be a mistake. Ours is not an anti-corporate or anti-market stance. We recognize that corporations have done and continue to do much good. For example, corporations and businesses sided with the end of slavery and participated in helping to create markets that lifted millions of Americans out of poverty. But corporations in their present form have also helped in weakening our democracy and helped to maintain a race- and gender-segmented market. In their present form, they make it more difficult to invest in needed and new infrastructure, and more difficult to change the system through a workers' strike. The systems supported by the Court to protect corporations from regulation by the state have expanded the difficulty of the nation-states regulating corporations under the guise of Anglo-American globalization. Just as creating national protections for

corporations while denying similar protections for freed slaves created a deep structural imbalance that helped to facilitate dual markets with exploitation of workers and super-exploitation of workers of color, we now see similar dynamics happening on a global scale. As systems are put in place to protect the movement of capital, the movement of people and labor has often become more restricted.

This dynamic has decidedly racial implications. And just as the progressives tried, but then failed, to make common cause with people of color in the United States, we have failed to make common cause with labor, especially in marginal and emerging markets. The Court has been especially aggressive in creating these systems and undermining the rights of citizens and workers. What we are calling for is a new balance of power here at home and globally, one which, as Derber explains, is "different than any prior social movement . . . made up of a worldwide coalition of labor, environmentalists, women, minorities, students, and others who have not spoken with one voice before."[81] The failure to do this not only threatens the environment and human and civil rights but, as George Soros noted, the market itself.[82] This can only be done with the government playing an important role. This would not be the first realignment. The *Lochner* era itself was a realignment, but in the wrong direction. More recently, the New Deal, the civil rights movement, the women's movement, and the environmental movement were all realignments. But realignment can happen in different directions. What we are calling for is a realignment where corporations exist for the public good, the people, and democracy. As Rawls noted, we can have a democracy where corporations are in service of people, or we can have a corporate society where government is in service of corporations.[83] Rawls worried years ago that we had the latter.

Some writers have asserted that American exceptionalism is largely about race and elevating the corporation, wealth, and property above people. This is not the way to be exceptional. But the real goat in this story is not the corporation, but the Court. Our concern is that cases like *Citizens United*, which must be read alongside *Parents Involved*, show more the passing shades of *Lochner* and *Plessy*. While many have discussed some of the excesses of *Citizens United*, and a different group has bemoaned *Parents Involved* and *Ricci*, these cases are seldom discussed together. Our hope in writing this Article is to change that.

---

[81] Charles Derber, *Globalization and the New "Corpocracy,"* IKEDA CTR., http://www.ikedacenter.org/themes/economic_derber.htm (last visited Dec. 4, 2010).

[82] GEORGE SOROS, THE CRISIS OF GLOBAL CAPITALISM: OPEN SOCIETY ENDANGERED 58 (1998).

[83] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).