Washington and Lee Journal of Civil Rights and Social Justice

Volume 26 | Issue 2 Article 10

5-29-2020

Artificial Entities with Natural Rights: Pursuing Profits at the Expense of Human Capital

Loren M. Findlay
Washington and Lee University School of Law, findlay.l@law.wlu.edu

Artificial Entities with Natural Rights: Pursuing Profits at the Expense of Human Capital

Loren M. Findlay*

Abstract

This Note explores the legal and constitutional rights granted to corporations and highlights how these corporate benefits are often at the expense of individuals. Over the past century, the corporation has evolved, taking on human-like characteristics. While many statutes and the Constitution use the word "person," courts have inconsistently interpreted the definition of "person" in determining when it expands to corporations. In courts' ad hoc analysis and interpretation, individuals get the metaphorical short-end of the stick.

The First Amendment of the Constitution was interpreted by the U.S. Supreme Court to afford the right of free speech to corporations in the context of political spending. The Religious Freedom Restoration Act (RFRA) was interpreted as giving religious protections to for-profit, closely held corporations. When asked whether a closely held corporation with a single shareholder is protected under the Fifth Amendment's right against self-incrimination, the Court answered in the negative, again, leaving the individual vulnerable. Lastly, this Note covers the Supreme Court jurisprudence prohibiting an individual from suing a foreign corporation acting outside of the United States under the Alien Tort Statute. The rights and protections afforded corporations have been determined without much consistency. The only consistency is the result—harm to individuals and stakeholders.

Table of Contents

I. Introduction 744

II. A Corporation's First Amendment Rights 749
A. Right to Free Speech 749
B. Right to Religious Freedom 753

III. The Fifth Amendment Right Against Self-Incrimination Is Not Applicable to Corporations 758

IV. The Alien Tort Statute Does Not Permit Individuals to Sue Foreign Corporations Acting Outside of the United States 763

V. Analysis of the Case Law 769
A. Proposed Unified Framework 773
1. Proposed Framework and *Citizens United v. FEC* 774
2. Proposed Framework and *Burwell v. Hobby Lobby* 778
3. Proposed Framework and *Braswell v. United States* 780
4. Proposed Framework and *Jesner v. Arab Bank* 785

VI. Concluding Thoughts 788

I. Introduction

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . [I]t possesses only those properties which the charter of its creation confers upon it . . . ."[1] According to *Black's Law Dictionary*, the corporation is legally distinct from the individual, possessing different rights

---

* Candidate for J.D., May 2020, Washington and Lee University School of Law.

1. Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

and powers.[2] Although the *Black's Law* definition says corporations have different rights than individuals, it does not describe those rights.[3] To begin ascertaining corporate rights, the Constitution and statutes are proper starting points. Although the Constitution does not contain the word "corporation," over time, the U.S. Supreme Court has given corporations several constitutional rights and protections.[4] Amidst the uncertainty over corporate rights, the Supreme Court has attempted to define the rights of corporations on an ad-hoc basis, in various landmark cases such as *Citizens United v. FEC*,[5] *Burwell v. Hobby Lobby*,[6] *Braswell v. United States*,[7] and *Jesner v. Arab Bank*.[89] These cases illustrate various rights and protections corporations have as independent legal entities.[10]

---

2. *See Corporation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (outlining and defining essential properties of a corporation).

3. *See id*. (stating that a corporation, "ha[s] authority under law to act as a single person distinct from the shareholders who own it").

4. *See* Zoe Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 608 (2016) ("By and large the rights contained in the Constitution are inclusive speaking only of 'people' or 'persons' or, more narrowly, 'citizens.'").

5. *See* Citizens United v. FEC, 558 U.S. 310, 321 (2010) (holding § 441b of the United States Code facially invalid because it barred corporations and unions "from using their general treasury funds for express advocacy or electioneering communications").

6. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014) (holding the contraceptive mandate, as applied to closely held corporations, violated RFRA and is therefore unlawful).

7. *See* Braswell v. United States, 487 U.S. 99, 110 (1988) ("[T]he custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of *Fifth Amendment* privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.").

8. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018) (determining that the petitioners could not bring a claim against Arab Bank, a foreign corporation, because the claim falls outside of the parameters of the Alien Tort Statute).

9. *See* Robinson, *supra* note 4, at 608 ("[T]he question of who or what holds any given constitutional right has been assessed [by the Court] on an ad hoc basis, right-by-right and claimant-by-claimant.").

10. *Supra* cases cited notes 5–8 and accompanying text.

But how can a corporation, which has "no soul to be damned and no body to be kicked"[11] also have some of the same fundamental rights as individuals? Not only do corporations have some of the same fundamental rights as individuals, many of the rights individuals have today were first fortified in lawsuits involving corporations.[12] The Court has consistently held that corporations are constitutional persons with a range of constitutional rights.[13] This Note will explore the granting and denial of certain constitutional and legal rights to corporations.[14] Often, the method of assigning which legal rights—those rights protected by United States statutory and common law—are extended to whom depends on legal recognition by the Court.[15] The differentiation between who and what are afforded certain legal rights and to what extent extends to constitutional rights.[16] This Note highlights a trend of granting certain rights and protections to corporations while denying other rights to them which all have the same potential result—harm to the individual.[17] While part of this Note focuses on the negative implications certain corporate rights and protections have on individuals, it does not purport to suggest all rights given to corporations are damaging, it is merely the scope of this Note. The variety of cases analyzed is meant to

11. Edward Thurlow, First Baron Thurlow, English jurist and Lord Chancellor (1731–1803).

12. *See* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS, at xxiii (2018) ("Corporate rights were won in courts of law, by judicial rulings extending fundamental protections to businesses, even in the absence of any national consensus in favor of corporate rights.").

13. *See* Robinson *supra* 4, at 622 ("[T]he Court has interpreted the constitution such that corporations are constitutional persons for an extensive array of constitutional rights.").

14. *Infra* discussions Part II–IV.

15. *See* Robinson, *supra* note 4, at 613 ("Legal personhood, then, determines who or what is entitled to legal recognition.").

16. *See id*. ("Constitutional personhood refers to a specific form of legal personhood that denotes a person's status as a constitutional rights holder, entitled to the protective auspices of the rights contained in the U.S. Constitution.").

17. *Infra* discussion Part IV.

provide examples for which a new framework can be used when determining if a corporation ought to be afforded certain legal and constitutional rights. Because there is no consistent framework under which the Court analyzes these questions, a uniform framework will provide more predictability and consistency.

This Note consists of six parts. This part sets forth the foundation and background information for the Note. Part II provides both historical and current analysis of the Court examining what First Amendment rights corporations have.[18] Specifically, *Citizens United* is examined as the leading case illustrating a corporation's right to freedom of speech.[19] *Hobby Lobby* illustrates a corporation's right to freedom of religion under the Religious Freedom Restoration Act.[20]

Part III discusses the Fifth Amendment right against self-incrimination, which is not provided to corporations under the collective entity doctrine.[21] A corporation's lack of a protection against self-incrimination is thoroughly explained through a series of Supreme Court decisions, ultimately leading to *Braswell v. United States*, which still stands as precedent.[22]

Part IV analyzes the most recent test of the Alien Tort Statute (ATS) in *Jesner v. Arab Bank*, in which the Court ruled the ATS does not apply to foreign corporations.[23] Part IV also gives a historical backdrop of ATS, specifically in the context of

18. *Infra* discussion Part II.
19. *Infra* discussion Part II.
20. *Infra* discussion Part II.
21. *Infra* discussion Part III.
22. *Infra* discussion Part III.
23. *Infra* discussion Part IV.

the two modern cases preceding *Jesner*: *Sosa v. Alvarez-Machain*[24] and *Kiobel v. Royal Dutch Petroleum Co.*[25][26]

Part V compares the similarities and differences of some of the rights given and denied to corporations (those illustrated in Parts II–IV). Part V then sets forth a framework, proposing that corporations' legal and constitutional rights should be decided by considering the purpose of the right and then determining whether that purpose is achieved by granting the right to corporations. In doing so, the Court should balance the adverse impact certain corporate rights have on individuals.[27] Part V applies this framework to each of the four rights discussed in this Note.[28]

The Note concludes in Part VI by reflecting on how the framework proposed, if implemented by the Court, may have altered the outcome of the cases.[29] The conclusion aims not to criticize the Court in its decisions, but rather to propose a different way of understanding how these rights may be analyzed.[30] The intention of this Note is to give the reader perspective on how the personification of corporations sometimes comes at the expense of individuals and to provide a potential remedy to this problem.[31]

---

24. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law.").

25. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013)

> [A]ll the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. . . . [I]t would reach too far to say that mere corporate presence suffices.

(citations omitted).

26. *Infra* discussion Part IV.

27. *Infra* discussion Part V.

28. *Infra* discussion Part V.

29. *Infra* discussion Part VI.

30. *Infra* discussion Part VI.

31. *Infra* discussion Part VI.

II. A Corporation's First Amendment Rights

Some corporate legal scholars have found the decisions in both *Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*—both of which further personified the business corporation—to be a disturbing extension of individual rights to artificial entities.[32] The First Amendment of the United States Constitution provides that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[33] Part II of this Note will consider a corporation's First Amendment rights. Subpart A will address freedom of speech, specifically, political speech, afforded to corporations. Subpart B will discuss the religious freedoms given to corporations through statutes which have their roots in the First Amendment.

A. Right to Free Speech

A core, fundamental tenet in American democracy is freedom of speech, particularly political speech.[34] It is established that "political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[35] In *Buckley v. Valeo*,[36] the Supreme Court equated political spending with political speech and therefore

32. *See* Robert M. Ackerman & Lance Cole, *Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations*, 81 BROOK. L. REV. 895, 898 (2016) ("In both *Citizens United v. FEC* and *Burwell v. Hobby Lobby Stores, Inc.*, the U.S. Supreme Court advanced the personification of the business corporation in a manner that should be disturbing to both corporate legal scholars and communitarians.").

33. U.S. CONST. amend. I.

34. *See* Nadia Imtanes, *Should Corporations Be Entitled to the Same First Amendment Protections as People?*, 39 W. ST. U. L. REV. 203, 212 (2012) ("One of the bases of America's democracy is freedom of speech, especially political speech.").

35. Citizens United v. FEC, 558 U.S. 310, 342 (2010) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978)).

36. *See* Buckley v. Valeo, 424 U.S. 1, 143 (1976) (declaring various FEC limitations on campaign contributions unconstitutional).

laws hindering political spending were tested under a high level of scrutiny.[37] The Court determined that the Federal Election Campaign Act's limit on independent expenditures was unconstitutional, but did not rule on whether the provision which limited corporate and union expenditures was also unconstitutional.[38] The issue of whether corporations were entitled to First Amendment protections of the right to free speech through political spending was not decided by the Supreme Court until 1978 in *First Nat'l Bank of Bos. v. Bellotti*.[39]

In *Bellotti*, the Court was confronted with a State's criminal law that prohibited banks and corporations from making political contributions.[40] When determining if a law burdening political speech is constitutional, the Court will use strict scrutiny.[41] Strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[42] When applying strict scrutiny, the Court found Massachusetts's law both

---

37. *See id*. at 16 ("[T]his court has never suggested that the dependence of a communication on the expenditure of money operates itself . . . to reduce the exacting scrutiny required by the First Amendment.").

38. *See id*. at 143 ("We conclude, however, that the limitations on campaign expenditures, on independent expenditures by individuals and groups, and on expenditures by a candidate from his personal funds are constitutionally infirm.").

39. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 767 (1978) (striking down a Massachusetts criminal statute forbidding certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals).

40. *See id*. at 767–68

> The statute at issue prohibits appellants, two national banking associations and three business corporations, from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."

(citations omitted).

41. *See* Citizens United v. FEC, 558 U.S. 310, 340 (2010) (indicating the laws that burden political speech whether inadvertently or by design are subject to strict scrutiny).

42. *Id*. (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)).

overinclusive and underinclusive, making it fail the "narrowly tailored" prong, and finding that it unconstitutionally infringed on a business's right to political speech.[43]

A similar issue involving corporate political spending came before the Court thirty-two years later in *Citizens United v. FEC*.[44] In *Citizens United*, the complainant, Citizens United, was a nonprofit organization, which obtained most of its funding from individuals, but some from for-profit groups.[45] The case arose when Citizens United sought to release a film called *Hillary: The Movie* (*Hillary*).[46] *Hillary* was a critical "90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections."[47] After the movie was released, Citizens United sought to increase viewership by releasing the movie through an on-demand forum and also by advertising the movie on television.[48] Citizens United feared such efforts would run afoul of the Bipartisan Campaign Reform Act of 2002 (BCRA).[49] Section 441b of the BCRA prohibited "corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal

43. *See Bellotti*, 435 U.S. at 795 ("Because that portion of § 8 challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated.").

44. *See Citizens United*, 558 U.S. at 330 ("Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech.").

45. *See id*. at 319 ("Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.").

46. *See id*. ("In January 2008, Citizens United released a film entitled *Hillary: The Movie*.").

47. *Id*.

48. *See id*. at 320 ("Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.").

49. *See id*. at 321 ("It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g.").

elections."[50] Because Citizens United desired to make *Hillary* available through video-on-demand within thirty days of the primary elections, it would have violated § 441b's prohibition on electioneering communication.[51]

The Court in *Citizens United* went a step further than it had in past cases and "consider[ed] the facial validity of § 441b."[52] After rejecting Citizens United's "as applied" challenge,[53] the Court found § 441b facially unconstitutional because it stifled a corporation's freedom of political speech.[54] The dissent criticized the majority for quickly rejecting Citizens United's as an applied challenge to § 441b because it "may have been more suitable in light of Citizens United's circumstances as an organization 'funded overwhelmingly by individuals.'"[55] Despite the dissent's disapproval of ruling based on the facial validity of the statute, the Court found § 441b unconstitutional because "no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[56] As it stands today, for-profit corporations may contribute unlimited amounts in political donations from their general treasury pursuant to the First Amendment.[57]

---

50. *Id*. at 320.

51. *See id*. at 321 ("Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. . . . [But, doing so would] subject[] the corporation to civil and criminal penalties . . . .").

52. *See id*. at 333 (stating this further step was necessary "[i]n the exercise of judicial responsibility.").

53. *See id*. at 329 ("As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment.").

54. *See id*. at 385 ("Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.").

55. Ackerman & Cole, *supra* note 32, at 920 (citing Citizens United v. FEC, 558 U.S. 310, 404 (2010)).

56. Citizens United v. FEC, 558 U.S. 310, 365 (2010).

57. *See* Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1024–25 (2013) ("[T]he Supreme Court held in *Citizens United v. FEC* that corporations have a First Amendment right to make unlimited, independent campaign expenditures . . . .").

B. Right to Religious Freedom

For many years, it has been understood in the United States that corporations have the right to engage in political speech, but, as of much more recently, "[a]pparently, they can get religion too."[58] In 2014, the Supreme Court recognized religious protections for closely held, for-profit corporations in *Burwell v. Hobby Lobby Stores, Inc.*[59] In *Hobby Lobby*, a suit was brought by Hobby Lobby, Mardel, Conestoga, the Hahns (family owner of Conestoga), and the Greens (family owners of Hobby Lobby and Mardel) (collectively "complainants") against the Department of Health and Human Services (HHS) and other federal agencies.[60] Conestoga was a for-profit corporation which employed 950 people, Hobby Lobby was a for-profit nationwide chain store that employed over 13,000 individuals, and Mardel was a business affiliated with Hobby Lobby and employed about 400 people.[61]

The complainants challenged a mandate promulgated under the Patient Protection and Affordable Care Act (ACA) which "generally require[d] employers with 50 or more full-time employees to offer a group health plan or group health insurance coverage that provides minimum essential coverage."[62] Part of this essential coverage included requiring an "employer's group health plan or group-health-insurance coverage to furnish preventative care and screenings for women without any cost sharing requirements."[63] The mandate, however, gave an

58. *See* Ackerman & Cole, *supra* note 32, at 925 (describing the effect of the Supreme Court's decision in the *Hobby Lobby* decision).

59. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719 (2014) ("For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.").

60. *See id*. at 703 (outlining the relevant parties).

61. *See* Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1728–29 (2015) (providing background on the complainants).

62. *Hobby Lobby Stores*, *Inc.*, 573 U.S. at 696 (internal quotation marks omitted).

63. *Id*. at 696–97.

exemption to non-profit and religious organizations.[64] Included in women's coverage were all FDA approved contraceptive methods, four of which were at issue in this case.[65] The four contraceptives contested "may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus."[66]

The complainants argued that the ACA's contraceptive mandate violated the Religious Freedom Restoration Act of 1993 (RFRA) and the Free Exercise Clause of the First Amendment.[67] The Hahns, family owners of Conestoga, were devout Christians who decided to run their businesses in accordance with their Christian beliefs.[68] According to the Hahns, providing four of the contraceptive methods they thought were abortifacients—an abortion inducing drug—would violate their religious beliefs.[69] Similarly, the Greens were also sincere Christians who were committed to operating their two family businesses, Hobby Lobby and Mardel, in line with those Christian beliefs.[70] The Hahns and the Greens both objected to the same four contraceptive methods as violating their religious beliefs because they believed those contraceptive methods were abortifacients.[71]

---

64. *See id.* at 692 ("HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives . . . .").

65. *See id.* at 703 ("[The Greens] specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control.").

66. *Id.* at 697–98.

67. *See id.* at 703–04 ("The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.").

68. *See id.* at 700 ("Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church.").

69. *Id.* at 701.

70. *See id.* at 703 ("Each family member has signed a pledge to run the business in accordance with the family's religious beliefs and to use the family assets to support Christian ministries.").

71. *See id.* ("Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point.").

RFRA "prohibits the Government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government can show that the burden to the person furthers a compelling state interest and it is the least restrictive means to achieve that compelling interest.[72] While RFRA applies to "persons," the Court quickly shot down HHS's argument that the plaintiffs, as corporations, could not even bring suit under RFRA.[73] Instead, the Court came to the conclusion that "Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of 'persons.'"[74] When reaching this conclusion, the Court looked at the Dictionary Act definition of the word "person," which included corporations, and decided that if Congress did not want to include corporations, it would have explicitly said so.[75] Furthermore, the Court found no good reason to distinguish between non-profit and for-profit corporations when granting religious protections.[76] Despite persuasive arguments from HHS and the dissenting justices, the Court concluded that RFRA protects for-profit corporations.[77] The Court reasoned that "allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns."[78]

---

72. *Id*. at 705 (internal quotation marks omitted).

73. *See id*.

> HHS contends that neither these companies nor their owners can even be heard under RFRA . . . because they seek to make a profit for their owners, and the owners cannot be heard because the regulations . . . apply only to the companies and not the owners as individuals. HHS's argument would have dramatic consequences.

74. *Id*. at 706.

75. *See id*. at 708 ("Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.").

76. *See id*. ("No known understanding of the term 'person' includes some but not all corporations.").

77. *See id*. at 709 ("Furthering their religious freedom also 'furthers individual religious freedom.'").

78. *Id*.

After determining that closely held, for-profit corporations were protected under RFRA, the Court then assessed whether the contraceptive mandate violated RFRA by "substantially burdening the exercise of religion."[79] The Court looked at the steep financial burden mandate noncompliance puts on the corporations.[80] The Court illustrated the gravity of the potential fines: "For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year."[81] HHS responded by arguing there was no substantial burden on the exercise of religion because requiring a company to provide health coverage that included the contraceptive mandate was too attenuated of a link to what the companies found to be morally wrong—destruction of an embryo.[82] The Court dismissed this argument for not answering "whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs."[83] After looking at the potential penalties the corporations would face, the Court found the mandate imposed a substantial burden on the businesses.[84]

---

79. *See id*. at 719 (noting that the court had little trouble in determining that the HHS contraceptive mandate did substantially burden the free exercise of religion).

80. *See id*. at 720 ("If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual.").

81. *Id*.

82. *See id*. at 723

> HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated.

83. *Id*. at 724.

84. *See id*. at 726 ("Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.").

Once the Court decided the contraceptive mandate imposed a substantial burden on the businesses, the mandate could only survive if it passed the strict scrutiny test.[85] Under strict scrutiny, HHS first had to show the mandate was in "furtherance of a compelling governmental interest."[86] HHS provided the Court with several compelling governmental interests such as promoting public health, gender equality, and ensuring women have access to all FDA approved contraceptives.[87] The Court agreed promoting public health, gender equality, and ensuring women have access to all FDA-approved contraceptives may be compelling state interests and proceeded to assess whether HHS had used the least restrictive means when furthering that interest—the second prong of strict scrutiny analysis.[88] The Court concluded the contraceptive mandate the HHS imposed was not the least restrictive means for furthering the compelling government interest.[89] There were other viable alternatives the Government and HHS could pursue.[90] Because the Government could "assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious

85. *See id*. ("Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must . . . decide whether HHS has shown that the mandate both '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'").

86. *Id*.

87. *See id*. ("HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting 'public health' and 'gender equality.'") (citations omitted).

88. *See id*. at 728 ("We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA and we will proceed to consider the final prong of the RFRA test.").

89. *See id*. ("The least-restrictive means standard is exceptionally demanding, and it is not satisfied here.") (citations omitted).

90. *See id*. ("HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.").

objections,"[91] the Court concluded that requiring employers to go against their religious beliefs, was not the least restrictive means.[92] The contraceptive mandate could not pass strict scrutiny, making it unlawful.[93] The Court ultimately decided the contraceptive mandate violated RFRA and did not analyze the First Amendment issue, leaving undecided whether or not a for-profit corporation can find religious protection under the Constitution.[94]

III. The Fifth Amendment Right Against Self-Incrimination Is Not Applicable to Corporations

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[95] Despite the plain language of the constitutional amendment, the right to invoke the Fifth Amendment may be available in civil, criminal, and bankruptcy proceedings.[96] The government infringes on an individual's privilege against self-incrimination when the individual can show that: (1) there is testimony; (2) the testimony is compelled; and (3) the testimony is incriminating.[97] In general, an

---

91. *Id*.

92. *See id*. at 730 ("[T]he HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.").

93. *See id*. at 736 ("The contraceptive mandate, as applied to closely held corporations, violates RFRA.").

94. *See* Robinson, *supra* note 4, at 665 ("Although the litigation culminated in a Supreme Court decision that focused solely on the statutory claims made by the corporate litigants, the constitutional issue was argued before the Court, and the potential for a corporate religious liberty claim remains.").

95. U.S. CONST. amend. V.

96. *See* Kastigar v. United States, 406 U.S. 441, 444–45 (1972) (indicating that compelling testimony from an unwilling witness in a civil case is permitted by conferring immunity so long as the compelled testimony and evidence derived therefrom is not used in subsequent criminal proceedings).

97. *See* Fisher v. United States, 425 U.S. 391, 410 (1976) (describing an infringement of the right against self-incrimination when there is compulsion,

individual may not invoke the right against self-incrimination to avoid compliance with a subpoena seeking pre-existing records because the creation of those records was voluntary, and thus not compelled.[98] While the contents of documents are not protected under the Fifth Amendment, the act of producing those documents implicates the privilege against self-incrimination if the act of production is testimonial.[99]

The Supreme Court established the collective entity doctrine in *Hale v. Henkel*[100] when it determined that a corporation has no Fifth Amendment right against self-incrimination.[101] The decision in *Hale* imposed restrictions on the scope of the Fifth Amendment, but left open questions concerning "whether a corporate custodian could resist a subpoena for corporate documents by invoking his own Fifth Amendment privilege."[102] The subsequent cases after *Hale* further refined the nuances of the collective entity doctrine.

In *Wilson v. United States*,[103] the Supreme Court determined that a corporate custodian in possession of corporate

---

whether that act-of-production is testimonial, and whether it is incrimination).

98. *See* United States v. Doe, 465 U.S. 605, 610 (1984) ("As we noted in Fisher, the Fifth Amendment protects the person asserting the privilege only from compelled self-incrimination. Where the preparation of business records is voluntary, no compulsion is present.") (citations omitted).

99. *See Fisher*, 425 U.S. at 410 (illustrating that the act of producing documents may have "communicative aspects of its own, wholly aside from the contents of the papers produced").

100. *See* Hale v. Henkel, 201 U.S. 43, 75–76 (1906) (holding that an officer of a corporation cannot refuse to produce the books and papers of such a corporation when it has been charged with the violation of a statute).

101. *See id.* at 75 ("While an individual may lawfully refuse to answer incriminating questions . . . it does not follow that a corporation . . . may refuse to show its hand when charged with an abuse of such privileges.").

102. Thomas J. Koffer, Note, *All Quiet on the Paper Front: Asserting a Fifth Amendment Privilege to Avoid Production of Corporate Documents in* In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 46 VILL. L. REV. 547, 557 (2001).

103. *See* Wilson v. United States, 221 U.S. 361, 383–84 (1911) (resolving the question left open in *Hale* about whether a corporate custodian may resist a subpoena for corporate documents by invoking his own Fifth Amendment privilege against self-incrimination).

documents could not refuse to produce subpoenaed documents, even if the target of the investigation was the individual, not the corporation.[104] Throughout the early and mid-twentieth century, the Court continued to expand the collective entity doctrine in deciding three cases.[105] In 1913, the Supreme Court in *Wheeler v. United States*[106] ruled that the collective entity doctrine encompassed subpoenaed documents of a dissolved corporation.[107] In *Wheeler*, the Government served subpoenas duces tecum[108] on Mr. Wheeler, the treasurer of Shaw, Inc., when the corporation dissolved.[109] Wheeler argued that because the corporation was dissolved, he could exercise his privilege against self-incrimination and did not have to produce corporate documents.[110] The Court disagreed and ordered the production of the subpoenaed documents pursuant to the collective entity doctrine, finding dissolution immaterial.[111]

---

104. *See id*. at 384 ("If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures.").

105. *See* Koffer, *supra* note 102, at 558 (providing the framework for the twentieth century expansion of the collective entity doctrine).

106. *See* Wheeler v. United States, 226 U.S. 478, 490 (1974) (holding that privilege of corporate officers against self-incrimination in the production of their own effects before a grand jury does not protect the former officers of a dissolved corporation in resisting compulsory production of those effects).

107. *See id*. ("Wheeler and Shaw had been officers of the corporation, and the books of the company had, before the dissolution, been made over to them; but this did not change the essential character of the books and papers, or make them anymore privileged to the investigation of crime than they were before.").

108. *See Subpoena*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A subpoena ordering the witness to appear in court and to bring specified documents, records, or things.").

109. *See Wheeler*, 226 U.S. at 482–83 ("On the same day a subpoena duces tecum . . . was issued, summoning the corporation to appear before the grand jury and produce all the cash books, ledgers, journals, and other books of account of the company . . . .").

110. *See id*. at 483–85 (outlining the reasons for the defendant's refusal to produce the papers and records).

111. *See id*. at 488–90 (holding the dissolution of the corporation immaterial because the essential character of the documents did not change and were still corporate in nature).

Three decades after *Wheeler*, the Court expanded the collective entity doctrine to apply to labor unions in *United States v. White*.[112] The expansion of the collective entity doctrine culminated in 1974 in *Bellis v. United States*.[113] In *Bellis*, the petitioner, Isadore Bellis, was one of three partners at a small law firm until 1969 when he left the firm and the partnership dissolved.[114] After the dissolution of the partnership, Bellis was served with subpoenas directing him to appear and testify before a grand jury and to produce all corporate documents in his possession.[115] Bellis refused to produce corporate records, asserting his Fifth Amendment privilege against self-incrimination.[116] The Court refused to grant him protection under the Fifth Amendment, even though the partnership was dissolved and Bellis was only one of three partners at the firm.[117] Instead, the Court found that because of the "inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege . . . would . . . largely frustrate legitimate governmental regulation of such organizations."[118]

Wheeler, *White*, *and Bellis* paved the way for the most recent Supreme Court case regarding the collective entity

112. *See* United States v. White, 322 U.S. 694, 700–01 (1974) (expanding the collective entity doctrine to apply to a labor union).

113. *See* Bellis v. United States, 417 U.S. 85, 97 (1974) (finding that a partner holding subpoenaed records of the dissolved three-person law firm in a representative capacity, does not give the custodian of the corporate documents a greater claim of Fifth Amendment privilege and must produce those corporate documents).

114. *See id*. at 86 ("Until 1969, petitioner Isadore Bellis was the senior partner in Bellis, Kolsby & Wolf, a law firm in Philadelphia.").

115. *Id.*

116. *See id*. ("Petitioner appeared on May 9 but refused to produce the records, claiming, inter alia, his Fifth Amendment privilege against compulsory self-incrimination.").

117. *See id.* at 97 ("[T]he District Court . . . held that petitioner's personal privilege did not extend to the partnership's financial books and records . . . .").

118. *Id*. at 90.

doctrine: *Braswell v. United States*.[119] The petitioner in *Braswell* initially operated his business as a sole proprietorship but then had it incorporated.[120] Braswell was the sole shareholder of his corporation and he, his wife, and his mother held the only board and officer positions.[121] The Court found the change from a sole proprietorship to a corporation critical because of the long-established treatment of the collective entity doctrine.[122] The distinguishing feature between collective entity doctrine and the act-of-production doctrine is that "the collective entity doctrine applies in cases involving corporations and the act of production doctrine applies in cases involving sole proprietorships."[123] The Court reiterated that because a corporation acts through its agents, an individual acting in their corporate capacity is not protected against self-incrimination under the act-of-production doctrine.[124] The Supreme Court ultimately rejected Braswell's argument that the subpoenas requiring him to produce the books and records of the company

119. *See* Braswell v. United States, 487 U.S. 99, 102 (1988) (holding that a corporate president could not use the act-of-production doctrine to shield him from producing corporate documents in his custodial capacity because the collective entity doctrine prevailed).

120. *See id*. at 100–01 ("From 1965 to 1980, petitioner Randy Braswell operated his business . . . as a sole proprietorship. In 1980, he incorporated Worldwide Machinery Sales, Inc., a Mississippi corporation, and began conducting the business through that entity.").

121. *Id.*

122. *See id*. at 104 ("[P]etitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.").

123. Alice W. Yao, Comment, *Former Corporate Officers and Employees in the Context of the Collective Entity and Act of Production Doctrines*, 68 U. CHI. L. REV. 1487, 1496 (2001).

124. *See Braswell*, 487 U.S. at 107 ("The plain mandate of these decisions is that without regard to whether the subpoena is addressed to the corporation, or as here to the individual in his capacity as a custodian . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds.").

in which he served as president violated his Fifth Amendment privilege against self-incrimination.[125]

The collective entity doctrine cases illustrate that as long as a business is incorporated, a representative in custody of business records may not refuse production, even if the business is small or the partnership has been dissolved.[126] Part V will discuss how this rule exposes individuals to civil liability, independent of any cause of action against the entity.[127]

IV. The Alien Tort Statute Does Not Permit Individuals to Sue Foreign Corporations Acting Outside of the United States

The Alien Tort Statute (ATS) was created in the Judiciary Act of 1789 and states that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[128] The ATS was originally viewed solely as a jurisdictional statute, granting no new causes of action for plaintiffs.[129] The ATS was only invoked a handful of times in the first 190 years after its enactment.[130] The twenty-first century sequence of ATS cases began with *Sosa v. Alvarez-Machain*.[131] In *Sosa*, plaintiff Umberto Alvarez-Machain (Alvarez) was abducted from Mexico and extradited to the United States,

125. *See id*. at 119 ("Consistent with our precedent, the United States Court of Appeals for the Fifth Circuit ruled that petitioner could not resist the subpoena for corporate documents on the ground that the act of production might tend to incriminate him. The judgment is therefore affirmed.").

126. *Supra* discussion Part III.

127. *Infra* Part V.

128. 28 U.S.C. § 1350 (2018).

129. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("[T]he ATS is a jurisdictional statute creating no new causes of action . . . .").

130. *See* Rebecca J. Hamilton, Jesner v. Arab Bank, 138 S. Ct. 1386 *United States Supreme Court, April 24, 2018*, 112 AM. J. INT'L 720, 720 (2018) ("After almost two centuries of dormancy, the ATS was revived at the urging of American human rights lawyers in 1980, ushering the modern era of transnational human rights litigation in U.S. courts.").

131. *See Sosa*, 542 U.S. at 724 (finding that there was no violation of customary international law so well defined as to support creation of a cause of action that a district court could hear a claim under the ATS).

where he brought a civil action against Jose Francisco Sosa under the ATS for violation of the law of nations.[132] The lower courts determined that Alvarez could bring a cause of action under the ATS for violation of the law of nations because the ATS provided a cause of action.[133] On appeal to the Supreme Court, Sosa and the United States government argued the ATS only granted jurisdiction to the courts, and did not permit any new cause of action without express congressional authorization.[134] The Court went through different historical interpretations of the ATS and determined it was jurisdictional in nature and limited to a narrow set of violations of the law of nations.[135] The Court ultimately found that Alvarez's claim of arbitrary detention did not violate any law of nations and therefore he could not bring a claim under the ATS.[136]

Less than ten years after *Sosa*, the Supreme Court was presented with another ATS suit: This time the issue involved the presumption against extraterritoriality.[137] The petitioners in *Kiobel v. Royal Dutch Petro. Co.*[138] were Nigerian nationals

132. *See id*. at 698 ("[P]etitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.").

133. *See id*. at 699 ("The District Court . . . awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim.").

134. *See id*. at 712 (stating that the petitioners argued that "there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction").

135. *See id*. at 724 ("[T]he reasonable inference from the historical materials is that the statute was intended to have the practical effect the moment it became law. The jurisdictional grant is best read as . . . provid[ing] a cause of action for the modest number of international law violations . . . .").

136. *See id*. at 738 ("Whatever may be said for the broad principal Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.").

137. *See* Ursula T. Doyle, *The Whole Wide World: Recognizing Jus Cogens Violations under the Alien Tort Statute*, 24 BUFF. HUM. RTS. L. REV. 45, 46 (2018) ("[P]articularly since Kiobel, in which the Court held that the statutory canon of interpretation known as the 'presumption against extraterritoriality' applies to the ATS.").

138. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013) (holding that principles underlying presumption against extraterritoriality constrains courts exercising their powers under the Alien Tort Statute).

residing in the United States and sued various Dutch, British, and Nigerian corporations under the ATS.[139] The petitioners alleged that "Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents" and the respondents aided and abetted the Nigerian government in these atrocities.[140] Because these allegations of violence all occurred in Nigeria, to Nigerian nationals, the Court had to determine whether it could recognize a cause of action under the ATS.[141] The respondents argued, and the Court agreed, that an ATS claim may not reach conduct solely occurring in a foreign sovereign.[142] The presumption against extraterritoriality provided that if a statute did not indicate an extraterritorial reach, then it had none.[143] The presumption against extraterritoriality reinforces the belief that United States' law governs domestically, not globally.[144] Using this policy consideration, the Court determined that because all the conduct took place in Nigeria, the petitioners' claim of violations of the law of nations under the ATS was barred.[145] Lastly, the Court said that the presumption against extraterritoriality as applied to ATS claims could only be displaced if the claims

139. *See id*. at 111 (outlining the background and posture of *Kiobel v. Royal Dutch Petroleum Co.*).

140. *Id*. at 113.

141. *See id*. at 111 ("The question presented is whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.").

142. *See id*. at 115 ("Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application.").

143. *See id*. ("That canon provides that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none . . . .'").

144. *See id*. ("[T]he 'presumption that United States law governs domestically but does not rule the world . . . .'") (citations omitted).

145. *See id*. at 124 ("We therefore conclude the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption . . . and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.").

alleged "touch and concern" the United States and do so with "sufficient force."[146]

Most recently, in a 5–4 decision, the Supreme Court ruled on another ATS claim in *Jesner v. Arab Bank, PLC*,[147] this time against a Jordanian bank that allegedly transferred funds to terrorist organizations.[148] The petitioners in *Jesner* were persons or family members of persons injured or killed in various terrorist attacks in the Middle East.[149] Petitioners sought to impose liability on the Arab Bank, a foreign corporation, for the acts of its employees, who allegedly knew the funds transferred were going to terrorist organizations.[150] The Court addressed the ATS claim by first determining "whether the law of nations impose[d] liability on corporations for human rights violations committed by its employees."[151] After addressing the first issue, the Court then determined "whether it ha[d] authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so."[152]

Arab Bank was a predominately Jordanian bank, but had branches all across the world, including in New York City.[153] Petitioners alleged Arab Bank cleared dollar-denominated

146. *See id*. at 125 ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.").

147. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018) (holding that liability under the Alien Tort Statute will not be extended to foreign corporations unless Congress takes further action).

148. *See id*. at 1393 ("Some of Arab Bank's officials, it is alleged, allowed the Bank to be used to transfer funds to terrorist groups in the Middle East, which in turn enabled or facilitated criminal acts of terrorism, causing deaths or injuries for which petitioners now seek compensation.").

149. *Id*.

150. *See id*. at 1394 ("Petitioners contend that international and domestic laws impose responsibility and liability on a corporation if its human agents use the corporation to commit crimes in violation of international laws that protect human rights.").

151. *Id*.

152. *Id*.

153. *Id*.

transactions through its New York branch, some of which went directly to the benefit of terrorist organizations in the Middle East.[154] It is common practice for foreign banks to use their United States branch for dollar-denominated transactions through the Clearing House Interbank Payments System (CHIPS), which occur without human assistance.[155] Arab Bank's connection with New York through its New York branch was the relationship petitioners relied on when bringing suit.[156]

The Court began by deciding whether the Petitioner's claim passed the *Sosa* test, specifically, "whether a plaintiff [could] demonstrate that the alleged violation [was] of a norm that is specific, universal, and obligatory."[157] Because, unlike *Sosa*, the claim was against an entity, the Court looked at footnote 20 of the *Sosa* Court of Appeals opinion, which raised doubt about whether corporations may be liable for violations of international law and norms.[158] In footnote 20, the *Sosa* Court said that "a related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[159] When interpreting footnote 20, the *Jesner* Court ultimately decided principles of international law did not extend liability "for human-rights

154. *See id*. ("[P]etitioners allege as well that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payment System . . . commonly referred to as CHIPS.").

155. *Id*. at 1394–95.

156. *See id*. at 1393 ("Petitioners seek to prove Arab Bank helped the terrorists receive the moneys in part by means of currency clearances and bank transactions passing through its New York City offices, all by means of electronic transfers.").

157. *Id*. at 1399 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

158. *See id*. at 1399–400

> In the course of holding that international norms must be 'sufficiently definite to support a cause of action,' the Court in *Sosa* noted that a 'related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.

159. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

violations to corporations or other artificial entities."[160] The Court determined that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[161] When deferring to Congress, the Court noted that the only cause of action created by Congress under the ATS was the Torture Victim Protection Act (TVPA) and that the rest were court-made.[162] The Court stated that foreign corporations were not subject to liability under ATS because the TVPA "limits liability to 'individuals,' which, the Court has held, unambiguously limits liability to natural persons."[163] The Court assumed that because the only Congress-made cause of action under ATS was limited to individuals, then the Court should not extend the scope to corporations.[164]

The Court reasoned that foreign plaintiffs harmed by corporations still had remedies available because they could sue individual corporate employees under the ATS.[165] The Court also reasoned that foreign corporations should not be liable under ATS because if the United States allowed lawsuits against foreign corporations, foreign sovereigns would respond by haling American corporations into their courts for violating the law of nations.[166] The Court was concerned that setting this standard would dissuade American corporations from investing and doing business abroad, especially in regions with a history

160. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1400 (2018) (noting that this is confirmed by the fact that international criminal tribunals often exclude corporations from their jurisdictional reach).

161. *Id*. at 1403.

162. *See id*. ("Here, the logical place to look for a statutory analogy to an ATS common-law action is the TVPA—the only cause of action under the ATS created by Congress rather than the courts.").

163. *Id*. at 1404.

164. *See id*. ("Congress' decision to exclude liability for corporations in actions brought under the TPVA is all but dispositive of the present case.").

165. *See id*. at 1405 ("[P]laintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.").

166. *See id*. ("This judicially mandated doctrine, in turn, could subject American corporations to an immediate, constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world . . . .").

of human rights violations.[167] Lastly, the Court stated that the purpose of the ATS was to "promote harmony in international relations" and in the current lawsuit, the opposite was occurring.[168] With all of these considerations in mind, the Court affirmed the Court of Appeals judgment dismissing the petitioners' ATS claims.[169]

V. Analysis of the Case Law

Unfortunately for legal scholars, law students, and the general members of society, "there is no consistent, unified approach across the Court's corporate constitutional personhood cases."[170] This Part is meant to synthesize the outcomes and reasoning of the cases discussed in Parts II–IV. This Part first highlights the similar effects the cases have, then considers inherent contradictions in the Court's reasoning in the cases previously discussed, and lastly proposes a more unified framework with which to assess corporation's rights.

Despite the inconsistent way in which the Court has chosen to assign rights to corporations, there are some similarities in the results. Specifically, "the collective entity doctrine and the *Citizens United/Hobby Lobby* line of cases may share a common disregard for the interests of employees and minority shareholders."[171] Notwithstanding the reality that granting corporations political speech rights may silence the speech of

167. *See id*. at 1406 ("In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations . . . .").

168. *See id*. ("The ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable.").

169. *See id*. at 1408 ("For these reasons, judicial deference requires that any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of Government.").

170. Robinson, *supra* note 4, at 625.

171. Ackerman & Cole, *supra* note 32, at 911.

minority shareholders as well as the general public, the Court in *Citizens United* quickly brushed that concern aside, dismissing it as not determinative of the case.[172] Justice Scalia's concurrence in *Citizens United* went into great detail about when it comes to freedom of speech, the identity of the speaker does not matter.[173] He concluded that "the [First] Amendment is written in terms of speech, not speakers" and there is no basis for "excluding any category of speaker, from the single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals."[174] If, at the time of the Constitutional Convention, corporations were "legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with the public welfare,"[175] then should our country and our Courts prioritize, emphasize, and facilitate individual's political voices? Perhaps in line with that concern over corporate power, after *Citizens United*, there was great resistance: "As of 2016, sixteen states and hundreds of municipalities had endorsed a constitutional amendment to overturn *Citizens United* and clarify that constitutional rights belong to human beings, not corporations."[176]

In stark contrast to the Court in *Citizens United*, the *Braswell* Court found the distinction between a sole proprietorship and an artificial entity dispositive.[177] The

172. *See* Fisk & Chemerinsky, *supra* note 57, at 1024 ("When the Supreme Court held in *Citizens United v. FEC* that corporations have a First Amendment right to make unlimited, independent campaign expenditures, it dismissed in a few sentences the idea that the corporate leadership's use of corporate resources on politics might infringe the rights of dissenting shareholders.").

173. *See* Citizens United v. FEC, 558 U.S. 310, 392–93 (2010) (Scalia, J., concurring) (arguing that the concern of the First Amendment is the speech, not the speaker).

174. *Id.*

175. *Id*. at 427 (Stevens, J. dissenting).

176. WINKLER, *supra* note 12, at xvi.

177. *See* Braswell v. United States, 487 U.S. 99, 110 (1988) ("Artificial entities such as corporations act only through their agents, and a custodian's assumption of his representative capacity leads to certain obligations,

moment one incorporates, even if he/she is the sole shareholder, the newly formed corporation is not protected by the right against self-incrimination.[178] In *Braswell*, the distinction between corporations and sole proprietorships directly conflicts with the reasoning given in *Hobby Lobby* when the majority said religious protection does not discriminate between corporations and sole proprietorships.[179] Although the Court made the blanket statement that RFRA does not discriminate between for-profit corporations and sole proprietorships or partnerships, it did not substantiate that statement.[180] The *Hobby Lobby* Court rhetorically asked "[i]f . . . a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?"[181] The Court justified not drawing the distinction between artificial entities and individuals based on the theory that corporations are associations of the people, and the individual's beliefs cannot be separated from the corporation's.[182] It is difficult to reconcile the Court's willingness to extend political speech rights and religious freedoms to corporations in *Hobby Lobby* and *Citizens*

including the duty to produce corporate records on proper demand by the Government.").

178. *See id*. at 102 ("The court rejected petitioner's argument that the collective entity doctrine does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego.").

179. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) ("The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.").

180. *See id*. at 692 ("Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections.").

181. *Id*. at 710.

182. *See* Citizens United v. FEC, 558 U.S. 310, 343 (2010) ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'").

United, but refuse to do so for the right against self-incrimination in *Braswell*.[183]

"Corporations are the major players of the twenty-first century,"[184] and our Courts ought to hold them to a higher level of accountability. In *Jesner v. Arab Bank*, the Court was concerned that allowing an ATS suit against a corporate defendant would set bad precedent around the world, when in reality, "the picture emerging from America's highest court is of a playing field in which corporations enjoy plenty of rights, and the rest of us face a shrinking set of tools to hold them accountable."[185] In light of the Supreme Court's ruling in *Jesner*, international litigation in the United States for violation of human rights by foreign corporations is no longer an option under the ATS.[186] While *Jesner* did not completely eliminate the ATS, "it may reasonably be viewed as its 990th paper cut."[187]

In the realm of freedom of political speech and religion, the privilege against self-incrimination, and protection against being sued under the Alien Tort Statute, the Supreme Court has interpreted the Constitution and various federal laws in favor of corporations—sometimes to the detriment of individuals. The Court's personification of corporations has gotten more extreme and tends to directly contradict the objectives of corporate

---

183. *See* Ackerman & Cole, *supra* note 32, at 910–11

> [T]he *Braswell* Court's acknowledgement that, under the collective entity doctrine, incorporation can deprive the incorporator(s) of their constitutional rights under the Self-Incrimination Clause of the Fifth Amendment, stands in stark contrast to the view of corporate personhood that the Court accepted 20-plus years later in *Citizens United* and *Hobby Lobby*.

184. Hamilton, *supra* note 130, at 726.

185. Todd Tucker, *Is the Supreme Court Going Too Easy on Overseas Corporations?*, POLITICO (May 8, 2018), https://www.politico.com/agenda/story/2018/05/08/supreme-court-overseas-corporate-accountability-000659 (last visited Mar. 25, 2020) [https://perma.cc/Q8FS-ABHF].

186. *See* Hamilton, *supra* note 130, at 720 ("The exclusion of transnational human rights litigation from U.S. federal courts is, for most practical purposes, now complete.").

187. *See id.* at 724 ("In its heyday, some two decades ago, the ATS was a beacon of hope for survivors of human rights atrocities. That period is now over. . . . What remains of the ATS is highly circumscribed.").

law.[188] With its various holdings, the Court has oscillated between focusing on who the claimant is when deciding if they are afforded a certain right and putting the emphasis on the purpose of the right itself.[189]

A. Proposed Unified Framework

This subpart proposes a more dependable framework with which various constitutional and legal rights could be assessed by the Court. While other scholars have proposed tests for the Court to use, their proposals have focused on corporate constitutional rights exclusively, not factoring in the harm done to individuals.[190] When deciding whether a constitutional or statutory right applies to corporations, the Court should first look to the purpose of the right in question; second, determine whether that purpose is achieved when the right is extended to corporations; and lastly, consider the potential adverse impacts granting that right to corporations may have on individuals. This framework will be applied to each of the four constitutional and legal rights previously discussed in this Note.[191]

Issues arose in the forgoing cases over whether or not corporations were protected under a certain constitutional provision or federal legislation. In *Citizens United*, the Court

188. *See* Ackerman & Cole, *supra* note 32, at 969 ("Nevertheless, the Supreme Court's expansive view of corporate rights and its limitation on the ability of the legislature—state or federal—to constrict those rights broadens the constitutionally protected functions of the corporation and repudiates those who would limit corporate objectives to only the maximization of shareholder profit.").

189. *See* Robinson, *supra* 4, at 655–56 ("[T]he Court's predominant focus has been on the right at issue rather than the claimant. . . . [There] are a number of examples where the court has held that the nature of the claimant is determinative of their constitutional personhood.").

190. *See* Blair & Pollman, *supra* note 61, at 1679–80 (concluding that the Court has recognized corporate Constitutional rights as derivative rights, stemming from the people who comprise the corporation); *see also* Robinson, *supra* note 4, at 612 (proposing a "functional framework for determining constitutional personhood that focuses on the purpose of the right at issue, and measures the fit of the claimant with that purpose in order to determine whether constitutional personhood should vest").

191. *Infra* Parts V.A.1–4.

grappled with the issue of whether the First Amendment's freedom of political speech applied with equal force to corporations as to individuals;[192] in *Hobby Lobby*, whether closely held corporations had religious protections under the Religious Freedom Restoration Act;[193] in *Braswell*, whether the collective entity doctrine precluded a sole shareholder of a corporation from invoking his right against self-incrimination when subpoenaed to produce corporate documents;[194] and *Jesner*, whether the Alien Tort Statute could be used to sue a foreign corporation for tortious acts committed abroad.[195]

1. Proposed Framework and Citizens United v. FEC

The First Amendment's protection of speech is moored in the United States' notion of democracy.[196] The purpose of the

192. *See* Citizens United v. FEC, 558 U.S. 310, 339–42 (2010) (determining the facial validity of § 441b, which disallowed corporations to use its general treasury funds to make independent political expenditures for speech that qualifies as electioneering communication).

193. *See* Burwell v. Hobby Lobby Stores, Inc.*,* 573 U.S. 682, 688 (2014)

> We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA) permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners.

(citations omitted).

194. *See* Braswell v. United States, 487 U.S. 99, 100 (1988) ("[W]hether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him in violation of the Fifth Amendment.").

195. *See* Jesner v. Arab Bank, 138 S. Ct. 1386, 1394 (2018) (deciding whether the Court has the authority to make extend ATS liability to foreign corporations that commit crimes in violation of international laws, without express authorization from the legislature).

196. *See* Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."); *see also* Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940))).

right has been seen as a "fundamental component of the liberty safeguarded by the Due Process Clause."[197] In *Citizens United*, the Court stressed that the purpose of the fundamental right of political speech protects the speech itself, irrespective of the identity of the speaker.[198] Under the theory that the right protects speech without taking into consideration the identity of the speaker, extending the right to corporations was a natural extension according to the Court.[199] The Court took the stance that because § 441b prohibited corporations from making independent political contributions, the law was an unconstitutional ban on political speech.[200] The dissent, however, pointed out that there have been several instances in which limiting political speech has been upheld without violating the purpose of the right.[201] Additionally, despite the fact that corporations were permitted to make unlimited donations through political action committees (PACs), the Court still found § 441b's restriction to violate the First Amendment.[202] The Court reasoned that because PACs are created by corporations, their donations are not corporate speech, and even if it was, PACs are "burdensome alternatives" and "expensive to administer."[203] What the Court did not

197. *Bellotti*, 435 U.S. at 780.

198. *See Citizens United*, 558 U.S. at 347 ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

199. *See id*. at 342 ("This protection has been extended by explicit holdings to the context of political speech. Under the rationale of these precedents, political speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting *Bellotti*, 435 U.S. at 784)).

200. *See id*. at 339 ("If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.").

201. *See id*. at 423 (Stevens, J., dissenting) ("These statutes burden the political expression of one class of speakers, namely, civil servants.").

202. *See id*. at 337 (majority opinion) ("Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.").

203. *See id*.

> A PAC is a separate association from a corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not

address in great detail was the possible ramifications its ruling would have on individuals.

Even if the Court in *Citizens United* accomplished steps one and two of the proposed framework—concluding that the purpose of political speech is to promote democracy, which should not be burdened, and that that purpose was furthered by affording political speech to corporations—it did not adequately account for the harm which would result to individuals. The law at issue in *Citizens United* "target[ed] a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it."[204] While the Court focused on corporations being deprived of its political speech rights, it did not seriously take into consideration the impact its holding had on the shareholders of those corporations.[205] The issue of dissenting or minority shareholders was swiftly punted off as an issue of corporate democracy, and therefore not a sufficient reason to restrict corporate political expenditures.[206]

The dissent went into greater detail about how shareholders might be affected by letting corporations make unlimited political contributions.[207] Specifically, some shareholders might have their financial investments "used to undermine their political convictions."[208] Although the majority

---

allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b.

204. *Id*. at 419 (Stevens, J., dissenting).

205. *See id*. at 361–62 (majority opinion) ("There is, furthermore, little evidence of [abuse] that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" (citing Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 794 (1978))).

206. *See id*. (dispensing with the Government's argument that corporate independent expenditures can be limited to protect dissenting shareholders from being compelled to fund corporate political speech).

207. *See id*. at 476 (Stevens, J., dissenting) (describing unlimited corporate political contributions as coerced speech for shareholders who do not support the cause).

208. *See id*. at 475 (noting that the shareholders foot the bill to fund the political cause the corporation decides to support).

said this potential harm could be remedied through corporate democracy and breach of fiduciary duty lawsuits, a favorable result for shareholders is unlikely, and the injury has already occurred.[209] Despite the Court's assumption that shareholders could protect themselves through corporate governance, a study found that "shareholders were not able to protect themselves from misuse of corporate funds for political purposes prior to *Citizens United*, and the risk of such misuse has increased as a result of the decision."[210]

Not only does giving freedom of political speech to corporations in the form of political spending hurt minority shareholders, it also undermines individuals' speech.[211] Allowing unlimited political spending by corporations for use in advertising and campaigning will inevitably lead to the silencing of the voices of individuals and grassroots efforts in elections.[212] There is a recognized concern that allowing powerful corporations to use their vast economic power to contribute to political campaigns can drown out the voices of the voters during the electoral process.[213]

---

209. *See id*. at 477 ("By 'corporate democracy,' presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that 'these rights are so limited as to be almost nonexistent . . . .'").

210. John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 J. EMPIRICAL LEGAL STUD. 657, 659 (2012).

211. *See* Imtanes, *supra* note 34, at 212 ("Democracy is supposed to be based on the popular vote of the people. Corporations that exert unlimited amounts of money to campaign advertising cause increased control over the outcome of elections. Corporate speech after Citizens United may overwhelm individual speech.").

212. *See id*. at 213 ("A threat to democracy may result from corporate campaigns and advertising overshadowing and overpowering the voice of the average person.").

213. *See* Ackerman & Cole, *supra* note 32, at 915 ("It has long been recognized however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process." (citing Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 809 (1978))).

2. Proposed Framework and Burwell v. Hobby Lobby

In *Hobby Lobby*, the Court considered the purpose behind the religious protections granted in the Religious Freedom Restoration Act (RFRA).[214] When looking at the statutory history of RFRA, the Court found it was enacted "in order to provide very broad protection for religious liberty."[215] RFRA's enactment was in response to several Supreme Court decisions that criticized religious exemption challenges to laws of general application and enforcement.[216] Congress responded to this criticism by declaring that laws which appeared to be "neutral" towards religion, "may burden religious exercise as surely as laws intended to interfere with religious exercise."[217] It is evident from the legislative history that the purpose of RFRA was to protect the exercise of religion, even from laws of general applicability.

What is less clear is whether that protection should extend to for-profit corporations. The question over whether the HHS mandate should apply to corporations was considered because, when enacting the contraceptive mandate, HHS intentionally included an exemption for religious nonprofits corporations.[218] The text of the statute specifically prohibited the "Government [from] substantially burden[ing] a *person's* exercise of religion even if the burden results from a rule of general applicability."[219] Despite the fact that the text of the statute explicitly said a "person's exercise of religion," the Court nevertheless determined that "persons" included

214. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693–94 (2014) (discussing the RFRA).

215. *See id*. at 693 (providing the enactment history of the RFRA).

216. *See id*. at 694 ("Congress responded to *Smith* by enacting RFRA.").

217. *See id*. (reviewing the congressional findings that served as the foundation behind the RFRA).

218. *See id*. at 688–92 (describing the HSS's contraceptive mandate exemption for religious nonprofit corporations which ensures the employees of these organizations have the same access to the contraceptives as an employee of a company who does not have a religious exemption).

219. 42 U.S.C. § 2000bb-1a (2018) (emphasis added).

corporations.[220] The Court failed to mention, but the dissent eagerly pointed out, that when RFRA was passed, the Senate voted down an amendment "which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions."[221] In light of the Senate's decision, it seemed as though Congress purposely decided not to leave health care choices, including contraceptive methods, to the discretion of employers.[222] Additionally, the Court had never before, until the instant case, granted for-profit corporations a "religious exemption from a generally applicable law."[223] Looking at the text of the statute, the legislative history, and case precedent, it seems as though RFRA was not meant to apply to for-profit corporations.

Even if the Court was convinced that RFRA applied to for-profit corporations, it did not adequately take into account the harm granting these corporations religious protections has on individual employees. A potential negative result of the holding was the disenfranchisement of individual employees, by potentially only valuing majority shareholders or owners.[224] The dissent and the Department of Health and Human Services made compelling arguments about the grave implications the

220. *See Hobby Lobby*, 573 U.S. at 707–08 ("Thus, unless there is something about the RFRA context that 'indicates otherwise,' the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.").

221. *Id.* at 744 (Ginsburg, J., dissenting) (internal quotation marks omitted).

222. *See id.* ("Rejecting the 'conscience amendment,' Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.").

223. *See id.* at 751–52 ("The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities.").

224. *See* Ackerman & Cole, *supra* note 32, at 925 ("[T]he *Citizens United* and *Hobby Lobby* holdings strongly suggest that the only human beings that count in corporations are the ones who control them. The people who are employed by them or hold minority ownership interests in them seem to count for little.").

majority's decision and interpretation of RFRA had on third parties.[225]

The dissent went into greater detail on the potential consequences of denying women these four contraceptives.[226] For example, corporations wanted to exclude intrauterine devices (IUDs) under the mandate.[227] Excluding IUDs is problematic because they are attractive to employees because of their effectiveness but they are more expensive to pay for out of pocket.[228] Specifically, a report showed that the average cost of an IUD is approximately equal to "a month's full-time pay for workers earning the minimum wage."[229] Shifting this cost to women employees because the family owners of a for-profit corporation had religious objections may have weighed more heavily into the majority's decisions had it used the framework set forth here. The Court disregarded the potential health impacts its decision would have on thousands of female employees and their dependents who do not share the same religious beliefs as their employers.[230]

3. Proposed Framework and Braswell v. United States

Applying the framework set forth in this Note to *Braswell*, the purpose of the protection against self-incrimination must

---

225. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting)

> In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.

226. *See id*. at 761 ("The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening.").

227. *See id*. (discussing the contraceptives for which Hobby Lobby and Conestoga resisted coverage).

228. *See id*. (explaining the problem with excluding IUDs from coverage).

229. *Id*. at 762.

230. *See* Blair & Pollman, *supra* note 61, at 1730 ("The majority's analysis disregarded the impact on thousands of employees and dependents who do not share the religious faith of the shareholders.").

first be explored. The purpose of the right against self-incrimination is to protect individuals from exposing themselves, not a third party, to liability—criminal or civil.[231] Because the privilege against self-incrimination has been long recognized, the *Braswell* Court adopted much of the reasoning about its purpose from past cases.[232] The nature of the privilege against self-incrimination stems from a deeply personal level, which can apply only to individuals.[233] Our justice system has held this right in high regard, even though the privilege is sometimes subject to misuse.[234] The privilege against self-incrimination is meant to protect individuals from any disclosure of words, documents, or chattels sought to be used against him or her in a legal proceeding.[235]

Because of the foregoing reasons, the Court declined to extend the right against self-incrimination to corporations and other business entities pursuant to the collective entity doctrine.[236] The Court declined to extend the right to corporations and other artificial entities, making this the "only provision of the Bill of Rights that the Supreme Court has held to be completely unavailable to corporations and other business entities."[237] Because the privilege against self-incrimination is a

---

231. *See* Lance Cole, *Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities—Should Business Entities Have a Fifth Amendment Privilege?*, 2005 COLUM. BUS. L. REV. 1, 15 (2005)

> First, the Court made clear that the privilege against self-incrimination is a personal privilege that cannot be asserted by a witness to protect a third party from prosecution, whether the third party is another individual or a corporation and whether or not the witness is an agent of the third party.

232. *See generally* Braswell v. United States, 487 U.S. 99, 103–09 (1988).

233. *See* United States v. White, 322 U.S. 694, 698 (1944) (noting that the privilege against self-incrimination grows out of the regard our jurisprudence has for dignity, humanity and impartiality).

234. *See id*. at 698–99 ("While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal framework as a bulwark against iniquitous methods of prosecution.").

235. *Id*. at 699.

236. *See Braswell*, 487 U.S. at 104 ("[F]or the purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.").

237. Cole, *supra* note 231, at 10.

personal one, it cannot be used by or on behalf of any corporation or business organization.[238] Through a series of cases, culminating with *Braswell*, the Court expanded the collective entity doctrine to prevent a sole shareholder of a corporation, which was previously operated as a sole proprietorship, from invoking his Fifth Amendment right against self-incrimination.[239] The distinction between a sole proprietorship and a collective entity is important when determining whether the purpose of the privilege against self-incrimination is fulfilled when extended to corporations.[240] When individuals act as representatives for an organization, they are not exercising their own individual rights, "rather they assume the rights, duties and privileges of the artificial entity" and have no privilege against self-incrimination.[241]

When denying protection against self-incrimination to corporations, individual agents of the corporations are the ones who must produce the corporate documents, often themselves becoming subject to parallel civil or criminal proceedings.[242] The nature of investigations results in law enforcement targeting both the companies and the individuals who work for those companies simultaneously.[243] The risk of parallel proceedings has the potential to harm litigants because a litigant is often not

238. *White*, 322 U.S. at 699.

239. *See Braswell*, 487 U.S. at 101–02 ("The District Court denied the motion to quash, ruling that the 'collective entity doctrine' prevented petitioner from asserting that his act of producing the corporations' records was protected by the Fifth Amendment privilege against self-incrimination.").

240. *See id*. at 104 ("Had petitioner conducted his business as a sole proprietorship, *Doe* would require that he be provided the opportunity to show that his act of production would entail testimonial self-incrimination.").

241. United States v. White, 322 U.S. 694, 699 (1944).

242. *See* 13 BUSINESS & COMMERCIAL LITIGIGATION IN FEDERAL COURTS § 131:15 (4th ed.) (explaining that for the past forty years, the Supreme Court has recognized the government's ability to conduct simultaneous civil and criminal investigations).

243. *See* 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, 387 (1981) ("[L]aw enforcement officials cannot afford to ignore either the individual or the firm in choosing their targets, but can realize important economies of scale by simultaneously pursuing both.").

informed there is more than one investigation happening, and some courts do not require disclosure of concurrent investigations.[244] There are significant risks for litigants involved in civil proceedings because they may also be potential targets in criminal investigations.[245] For example, if a litigant chooses to testify at a civil proceeding, he or she may expose himself/herself to criminal prosecutors in the process of building a case against the litigant, or others involved in the matter.[246]

The Court in *Braswell* acknowledged the dangers of requiring a corporate custodian of company records to produce documents because the act of production may personally incriminate the individual.[247] Acknowledging the threat, the Court decided to strike a balance.[248] Evidentiary immunity, as the Court established in *Braswell* under the collective entity doctrine, is far narrower than immunity under 18 U.S.C.A. §§ 6002, 6003 which apply to those who assert their Fifth Amendment privilege against self-incrimination under the act-of-production doctrine.[249] Sections 6002 and 6003 require a

244. *See* 13 BUSINESS & COMMERCIAL LITIGIGATION IN FEDERAL COURTS § 131:15 ("The [Ninth Circuit] also noted that, although the government may not 'affirmatively mislead the subject of parallel civil and criminal investigations,' the SEC had no affirmative duty to inform witnesses of an existing or contemplated criminal investigation." (citing United States v. Stringer, 535 F.3d 929, 940–41 (9th Cir. 2008))).

245. *See id*. ("Because parallel proceedings may arise in a government investigation of almost any commercial transaction in which allegations of fraud have been made, counsel representing a client in an investigation involving the SEC should carefully consider whether a related criminal investigation may have commenced.").

246. *See id*. ("Litigants in civil proceedings who are also the potential subjects or targets of criminal investigations face significant risks.").

247. *See* Braswell v. United States, 487 U.S. 99, 117–18 (1988) ("Although a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating, we do think certain consequences flow from the fact that the custodian's act of production is one in his representative rather than personal capacity.").

248. *See id*. at 118 (stating that the custodian must produce the corporate records, even if personally incriminating, but the government is prohibited from making direct evidentiary use of the act of production in any subsequent prosecution of the custodian).

249. *See* SARAH SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:14 (2d ed. 2019) ("[T]he government cannot take the inconsistent position of

witness to testify or provide information pursuant to a court order, and that information may not be "used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[250] Evidentiary immunity is the automatic protection a witness gets when forced to produce corporate documents.[251] While evidentiary immunity may seem sufficient to protect individuals, it often is not because in an independent criminal prosecution of the corporate custodian, the government may present evidence the corporation produced certain documents, without saying who produced the documents.[252] This merely leaves the jury to draw the line between the criminal defendant custodian, who potentially was the sole shareholder of the corporation, and the fact that he produced the incriminating documents.[253] In practice, the collective entity doctrine allows prosecutors to get the corporate documents without granting full transactional immunity, leaving the producing individual only evidentiary immunity.[254]

The purpose of the privilege against self-incrimination is a purely personal one and does not seem to nicely extend to corporations. However, when looking at how the Court has in the past made exceptions for certain types of corporations when granting rights—in *Hobby Lobby* with religious protections for

---

demanding that the particular individual produce corporate records in his representative capacity, and then advise the jury at trial that that individual was the person who produced them . . . .").

250. 18 U.S.C. §§ 6002–6003 (2018).

251. *See Braswell*, 487 U.S. at 118 ("Therefore the government concedes, as it must, that it may make no evidentiary use of the 'individual act' against the individual.").

252. *See id*. ("The government has the right, however, to use the corporation's act of production against the custodian.").

253. *See id*. ("Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in the case.").

254. *See* Cole, *supra* note 231, at 53–54 ("More important for purposes of the collective entity doctrine, it makes it possible for investigators and prosecutors to compel a business entity to produce documents and records without granting full transactional immunity to the entity, thus leaving open the option of subsequently prosecuting the entity.").

close corporations but not publicly traded corporations—a similar exception can be made for the privilege against self-incrimination. After balancing the purpose of the right and how it can be fulfilled when extended to artificial entities with the harm done to individuals by not extending the right to corporations, the Court can modify the existing rule to give entities with only one single shareholder protection under the Fifth Amendment.

4. Proposed Framework and Jesner v. Arab Bank

In *Jesner*, the Court determined that the ATS did not extend to suits against foreign corporations.[255] The scope of the ATS at the time of its enactment pertained to violations of "safe conducts, infringement of the rights of ambassadors, and piracy."[256] Specifically, what prompted the enactment of the ATS was a series foreign-relations problems, for which the government had no adequate remedies under the Articles of Confederation.[257] In reaching this decision, the Court looked at the history and purpose of the ATS, finding that its objective was to "avoid foreign entanglements,"[258] specifically, international comity was the primary purpose for enacting the ATS.[259] The ATS was not meant to be a divisive statute, but

255. *See* Jesner v. Arab Bank, 138 S. Ct. 1386, 1407 (2018) ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

256. *Id*. at 1397.

257. *See id*. at 1396

> In 1784, the French Minister lodged a protest with the Continental Congress after a French adventurer . . . assaulted the Secretary of the French Legion in Philadelphia. . . .A few years later, a New York constable caused an international incident when he entered the house of the Dutch Ambassador and arrested one of his servants.

258. *See id*. at 1397 (stating that the purpose in enacting the ATS was to avoid foreign entanglements by ensuring the availability of a federal forum, since failing to have one could cause another nation to hold the United States responsible for an injury to a foreign citizen).

259. *See* Doyle, *supra* note 137, at 58 ("However, comity was, in fact, the reason that Congress passed the ATS, and it might require the exercise rather than the rejection of jurisdiction.").

rather was "intended to promote harmony in international relations."[260]

There was not much argument over the purpose of the ATS between the parties in *Jesner* or between the majority and the dissent. The major controversy, and ultimately the deciding point of the case, was over whether the ATS was meant to encompass suits against foreign corporations.[261] After the decision in *Kiobel*, it was left unresolved whether the ATS extends to suits against foreign corporations.[262] Due to the uncertainty after *Kiobel*, some legal scholars still believed that the decision did not bar ATS claims against certain foreign corporations.[263]

The Court in *Jesner* gave an overview of when international courts granted jurisdiction over natural persons, starting with the Nuremberg Tribunal, which was the prosecution of those involved in the atrocities at concentration camps during World War II.[264] The Court went on to list other instances where the scope of jurisdiction was limited to individuals, such as the United States Military Tribunal in its prosecution of "24 executives of the German corporation IG Farber;"[265] the "Rome Statute of the International Criminal Court;"[266] and several other examples of the international community's decision to

260. *Jesner*, 138 S. Ct. at 1406.

261. *See id*. at 1398 ("With these principles in mind, this Court now must decide whether common-law liability under the ATS extends to a foreign corporate defendant.").

262. *See id*. at 1395 ("The rationale of the holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved.").

263. *See* Doyle, *supra* note 137, at 66–67 ("[T]he Supreme Court's narrow holding in Kiobel should not bar claims against U.S. corporations or claims against foreign corporations with substantial ties to the United States." (quoting Professor Beth Stephens)).

264. *See* Jesner v. Arab Bank, 138 S. Ct. 1386, 1400 (2018) ("The Charter for the Nuremberg Tribunal, created by the Allies after World War II, provided that the Tribunal had jurisdiction over natural persons only.").

265. *Id*.

266. *Id*. at 1401.

limit the authority of the tribunals to natural persons.[267] The petitioners in *Jesner* argued to extend the ATS to suits against foreign corporations by giving examples where international conventions enabled corporations to be held liable.[268]

Another reason to not extend the ATS to suits against foreign corporations is pursuant to separation of powers. The Court urges that the decision to allow suits against foreign corporations under the ATS should only be made by an act of Congress, not by the judicial branch.[269] The opposing view of this argument is that the ATS explicitly limits the class of plaintiffs to "aliens" while not limiting the class of defendants at all, suggesting that Congress did not wish to limit who may be sued under the ATS.[270] Additionally, the dissent recites instances in which the political branches, and not the judiciary have "twice urged the Court to reach exactly the opposite conclusion of the one embraced by the majority."[271]

While the Court in *Jesner* went into detail about arguments for and against extending ATS liability to foreign corporations, it did not take the additional step to adequately assess and weigh the harm suffered by individuals, as set forth in this framework's third step. The Court quickly espoused the notion that individuals harmed by the tortious conduct of corporations can nevertheless bring a suit against the individuals in that corporation, so there is no need to sue the corporation under the ATS.[272] The concern that individuals will stop seeking to hold other individuals responsible in favor of seeking the deep

267. *See id*. at 1400–01 (discussing the jurisdiction of international courts).

268. *See id*. at 1401 (referring to the International Convention for the Suppression of the Financing of Terrorism as an example of a convention which imposes an obligation on nation-states to hold corporations liable in certain circumstances).

269. *See id*. at 1403 ("[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.").

270. *See id*. at 1426 ("[S]ilence as to defendants cannot be presumed to be inadvertent.").

271. *Id*. at 1431 (Sotomayor, J., dissenting).

272. *See id*. at 1405 (majority opinion) ("And plaintiffs still can sue the individual corporate employees responsible for a violation of international law under the ATS.").

pockets of foreign corporations was the extent of the concern the Court had with the harm suffered by the plaintiffs.[273] However, the dissent argued that just because those harmed by the conduct of corporations can hold the individuals personally liable, that does not immunize the corporation.[274]

VI. Concluding Thoughts

This Note takes a methodical approach going through four important, yet controversial, constitutional and statutory rights. These rights in and of themselves are not necessarily controversial—it is the Court's ad hoc application of them to corporations which make them contentious. As the law stands today, for-profit corporations have unfettered political spending power, they are protected from legislation which "substantially burdens" their exercise of religion, and foreign corporations are protected from being defendants in an ATS suit. Artificial entities, no matter how small, however, do not have the privilege against self-incrimination under the Fifth Amendment.

There is no explicit guide for courts to follow when determining whether or not a corporation gets the protection of certain rights. The unpredictable way in which the Court assigns these rights has caused frustration with the parties involved in the litigation and the general public. After analyzing the arguments of the four major cases in this Note, it is apparent that much of the turmoil over these rights stems from the effect they have on individuals. In all four instances, the Court's holdings have potentially grave consequences for innocent third parties.

The framework proposed in this Note is an attempt at making a more predictable yet thoughtful determination when

---

273. *See id*. ("If the Court were to hold that foreign corporations have liability for international-law violations, then plaintiffs may well ignore the human perpetrators and concentrate instead on multinational corporate entities.").

274. *See id*. at 1435 (Sotomayor, J., dissenting) ("[H]olding only individual employees liable does not impose accountability for the institution-wide disregard for human rights. Absent a corporate sanction, that harm will persist unremedied.").

deciding if a constitutional or legal right applies to a corporation. Looking at the purpose of the right in question is important to carry out the proper intention of the right. Part II analyzes that purpose and determines if it is furthered when applied to a corporation. That is important because corporations today are not the same corporations in existence at the time the right was established. Lastly, considering the potential harm individuals may suffer as a result of granting corporations the right in question is crucial. While protecting and promoting corporations, it cannot rightfully be done at the expense of individuals' rights. This Note is about striking a balance, and such balance is accomplished through the framework proposed in pursuit of predictability and fairness.