THE CONTRADICTORY CORPORATE CONCEPT: A METAPHORICAL ANALYSIS OF THE CORPORATE BODY

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INTRODUCTION

Corporate personhood is a legal fiction that allows a corporation to be treated as if it is a person. Modern corporations enjoy the benefit of limited liability—thanks to a theory of a corporation as a distinct "person" separate from its members—while simultaneously gaining rights, like speech rights and enhanced political power, on the basis that corporations are associations of individual citizens.[1] Many concepts of corporation, ranging from a separate person to a collection of individuals, have been used interchangeably to justify corporate rights, which were historically only bestowed upon people. For example, corporations have received Fourteenth Amendment,[2] property,[3] and political speech rights,[4] as well as corporate citizenship for standing in federal court[5] and freedom of religion.[6] When the Court considered corporate citizenship for Article III standing purposes, the Court initially held that corporations are not citizens, but they could be sued because their members are citizens.[7] The Court later reversed its position and held that corporations are themselves citizens because the corporation, like a person, is the named party.[8]

However, the Court stated that for Fourteenth Amendment purposes, under "the designation of person there is no doubt that a private corporation is included" because "corporations are merely associations of individuals."[9] Contrarily, corporate limited liability protection relies heavily upon the theory of a corporation as a real entity or a real person, to justify the corporation, not its members, bearing the full weight of liability exposure for

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[1] *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010); *see also* Elizabeth Pollman, *Corporate Personhood and Limited Sovereignty*, 74 VAND. L. REV. 1727, 1752 (2021) (noting that some of the world's largest companies are now the biggest political spenders).

[2] *See* Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 188–189 (1888); *see also* Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889).

[3] *See* Terrett v. Taylor, 13 U.S. 43 (1815).

[4] *See Citizens United*, 558 U.S. at 376.

[5] *See* Bank of the U.S. v. Deveaux, 9 U.S. 61, 92 (1809); *see also* Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 554 (1844).

[6] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014) (finding the Religious Freedom Restoration Act to include corporations within the definition of persons because a "corporation is simply a form of organization used by human beings to achieve desired ends"). *But see* Amy J. Sepinwall, *Corporate Piety and Impropriety*, CLS BLUE SKY BLOG, (Nov. 17, 2014), https://clsbluesky.law.columbia.edu/2014/11/17/corporate-piety-and-impropriety [https://perma.cc/7MRM-DKBN] (arguing *Hobby Lobby* did not "proclaim corporations are persons, capable of exercising religion).

[7] *Deveaux*, 9 U.S. at 91–92 (1809).

[8] *Letson*, 43 U.S. at 554.

[9] Pembina Consol. Silver Mining Co. v. Pennsylvania, 125 U.S. 181, 189 (1888).

its actions.[10] But recently, in *Citizens United*, the Court held that corporations enjoy the same free speech rights as individuals because a corporation is an "association[] of citizens."[11] Such conceptual oscillation has caused many scholars to question the legitimacy of the Court's understanding of the corporate concept and the concept's theoretical justification entirely.[12]

Before further discussing critiques of the corporate concept or this Note's defense of courts' contradictory applications in corporate law, the primary understandings of the corporate concept must be discussed. Courts oscillate between the following three primary theories of a corporation: the artificial entity theory, the aggregate theory, and the real entity theory.[13] The first theory—the artificial entity theory—arises out of state-chartered corporations, which were initially chartered to serve the public. Under the artificial entity theory, corporations are conceived as temporary creations of the State because they need grants of incorporation from the State.[14] Under the second theory—the aggregate theory—corporations are thought of as an association of individuals.[15] Third, and contrary to the aggregate theory, the real entity theory posits that a corporation is "a separate and distinct real person that is greater than the sum of its individual parts, comprising 'collective enterprises that transcend the self.'"[16] In other words, the real entity theory posits that a corporation is its own distinct person separate from its shareholders.

Conferring corporate rights and benefits is not always problematic; however, problems arise when corporations receive benefits based on inconsistent reasoning about what a corporation is. In some cases, corporations are associations of individuals, and in others, they are singular, distinct people. Such contradiction has prompted some scholars to believe that corporate personhood is a "rhetorical turn of phrase without theoretical justification or fixed substantive meaning."[17] Others argue "[m]odern lawyers know only that a corporation is considered a legal person, . . . [and they find] that terminology devoid of content."[18] The concept's contradiction has led others to argue that the Court simply misunderstands the concept of a corporation, or worse, ignores it. Macey and Strine Jr. argue that the *Citizens United* Court misunderstood the corporate concept because "[a]s a matter of logic, the corporation may be conceptualized by law as either an

[10] Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 969 (2020) ("As a theoretical matter, the concept of complete corporate separateness was required in order to make the idea of limited liability defensible, or at least coherent.").

[11] *See* Citizens United v. Federal Election Comm'n, 558 U.S. 310, 349 (2010).

[12] Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, WIS. L. REV. 451, 458 (2019).

[13] *See* Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and Citizens United*, 12 FLA. ST. U. BUS. L. REV. 1, 24–42 (2013).

[14] *Id.* at 25.

[15] *Id.* at 29.

[16] *Id.* at 37–38 (citing Jeffrey Bone, *Legal Perspectives on Corporate Responsibility: Contractarian or Communitarian Thought?*, 24 CAN. J. L. & JURISPRUDENCE 277, 283 (2011)).

[17] *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 462 (2013) (citing John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655–56 (1926)); *see also id.* at 493 (citing E.P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTIES, 185–86 (New York, Greeley & McElrath 1845) ("Corporate bodies, as organized in this country, are in general exempt from complete pecuniary responsibility . . . . Alas! It 'has no soul' to save! . . . None answer for it; and it has no back to scourge, no body to pierce.")).

[18] *Id.* at 462 (quoting Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1441 (1987)).

entity or an aggregate, but it cannot rationally be conceptualized simultaneously as both."[19] Relying on such inconsistent meanings have caused many to think, as Adam Winkler notes, "Lady Justice may be blind, but the court system is well suited for corporations."[20]

The primary critique that this Note's metaphor-based analysis will rebut is that the doctrine of corporate personhood itself, and courts' application of it, lacks theoretical or logical justification. This Note will utilize George Lakoff and Mark Johnson's theory of metaphor as a framework to provide a theoretical justification for courts' inconsistent applications of the corporate concept. Using Lakoff's theory of metaphor, one of the earliest metaphoric understandings of a corporation—A CORPORATION IS A BODY—will be examined and traced in its development to demonstrate that the modern concept of corporation was structured by the corporate-body metaphor. This structuring will demonstrate that courts' contradictory application of corporate personhood—declaring corporations as both a single person and as an association of people—is theoretically justified because the concept of corporation, due to the corporate-body metaphor, has developed to include both contradictory meanings within it. While I will argue the inconsistent application is theoretically justified by the concept's inherent inconsistent meanings, I believe the doctrine lacks a conceptual limit which gives an "unreasonable advantage . . . to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people."[21] Thus, I propose that legislators define the concept explicitly by statute, or alternatively, the judiciary limits the concept by common law to promote fairness, predictability, and further understanding in the uses of corporate personhood.

Part I will explain Lakoff's theory of metaphoric structuring as it relates to the corporate-body metaphor. Part II will apply Lakoff's theory of metaphor to the development of the United States' corporate personhood jurisprudence to demonstrate that simultaneously recognizing corporations as a single person and as an association of individuals, while contradictory, is theoretically justified because the two contradictory meanings were structured into the modern concept of corporation. The metaphoric analysis will demonstrate that the doctrine's ostensible incoherence is attributable to the development of the concept itself—not the judiciary—and the concept's contradictory meanings should be limited by statute and, as a last resort, the judiciary.

Part III will examine corporate veil piercing as an example of the judiciary limiting the multiple, contradictory meanings encapsulated in the modern concept of corporation. Piercing the corporate veil occurs when a court refuses to recognize limited liability and holds shareholders liable for their corporation's debt. Veil piercing demonstrates moments in which the judiciary recognizes the contradictory understandings of the corporate

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[19] Macey & Strine, Jr., *supra* note 12, at 464.

[20] Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. ONLINE 64, 65 (2018), https://www.bu.edu/bulawreview/files/2018/11/WINKLER-4.pdf [https://perma.cc/33DE-DBJ8].

[21] FEDERALIST NO. 62 (James Madison), https://guides.loc.gov/federalist-papers/text-61-70 [https://perma.cc/B29T-7RCC] (discussing if "laws . . . [are] so incoherent that they cannot be understood . . . . [an] unreasonable advantage [is given] to the sagacious, the enterprising, and the moneyed few over the industrious and uniformed mass of the people").

concept and refuses to recognize a meaning that will create injustice given the factual context. James Madison wrote that incoherent laws favor the wealthy and powerful with means to manipulate their outcome; this also rings true for contradictory concepts, like the corporation, which laws are based upon.[22] Without a more manageable limit on the corporate concept, corporations, with all their wealth and protections, are greatly favored against the masses, and statutory definitions or the judiciary remain as a last resort to limit the corporate concept. Corporate veil piercing demonstrates a common law mechanism by which judges create a limit for the contradictory concept of corporation. By creating common law elements that must be met to pierce the veil and piercing based on distinct fact patterns, the judiciary creates an external limit to the contradictory concept of corporation. More external limits are needed for the concept of corporation, by common law or by statute.

I. LAKOFF AND JOHNSON'S THEORY OF METAPHOR

A. COGNITIVE THEORY OF METAPHOR

George Lakoff and Mark Johnson posit that the "*essence of metaphor is understanding and experiencing one kind of thing in terms of another*."[23] Lakoff and Johnson point to structural metaphors—in which one concept structures our understanding of another concept.[24] These structural metaphors do far more than orient concepts or allude to comparisons; they use a clearly understood concept to shape the reader's understanding of an ambiguous, often novel, concept.[25] The structural metaphor operates by "mapping onto the new [concept] the structures, inferences, and reasoning methods of the old."[26] The new concept is referred to as a target concept, and the old, or familiar concept, is known as a source concept. For example, in the metaphor LIFE IS A JOURNEY, the target concept, LIFE, is structured by our understanding of the source concept, JOURNEY. We understand generally what a journey entails: moving from one point to another, experiencing things along the way, and including a beginning and an end. The concept LIFE is far more abstract. Thus, metaphorically structuring LIFE AS A JOURNEY allows us to understand LIFE as something in which we move from one point to the next, something in which we experience things, and something with a beginning and an end.

Within structural metaphors, the source concept only partially structures the target concept; the source concept does not totally structure the target

[22] *Id.*

[23] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1980).

[24] *Id.* at 14 (Structural metaphors are "cases where one concept is metaphorically structured in terms of another.").

[25] *Id.* at 61 ("Structural metaphors allow us . . . to use one highly structured and clearly delineated concept to structure another.").

[26] Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRS. 169, 171 (2004) (hereinafter *Sound of a Corporation*); *see also* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law,* 137 U. PA. L. REV. 1105, 1115 n.25 (1989) ("The concept of metaphor used in experientialism refers not to a mere rhetorical device, but rather to a *cognitive process* by which we use a concrete, experienced source domain to structure and understand a more abstract domain.").

because then the source concept would actually be the target concept.[27] The source concept helps to structure a target concept typically in several different ways. Different understandings of the target concept are produced depending on the metaphoric subcase derived from a source concept's structuring. A metaphoric subcase forms when a source concept produces different images or concepts that are then mapped on to the target concept. A source concept's inherent differences produce different metaphoric understandings about the target concept. For example, JOURNEY, the source concept in the LIFE IS A JOURNEY metaphor, produces some of the following subcases: a car trip, a train trip, and a sea voyage. Each subcase of JOURNEY-—a journey by car, train, or ship—produces a different understanding of the target concept LIFE. The understandings produced might involve life as a highway, life on a track, or life with the wind at their back. The following subcases can produce metaphors like *It's going to be a long, bumpy road ahead*, *My life went off the tracks*, or *It's smooth sailing ahead*.[28]

Metaphoric subcases may not produce a consistent metaphoric image or understanding, but they, more often than not, are coherent with one another. A consistent metaphor is one that produces a singular image or understanding. But a subcase need not be consistent to be coherent with the overarching metaphoric concept. The examples of *It's going to be a long, bumpy road ahead*, *My life went off the tracks*, and *It's smooth sailing ahead* are all coherent with the overarching metaphor of LIFE IS A JOURNEY. The subcases produced are not consistent—no single image is produced—but the metaphoric subcases are indeed coherent with the source concept.[29]

Many inconsistent metaphors exist for a single concept because no single metaphor can completely structure the concept and many source concepts have several different meanings themselves; reality requires the constant shifting use of several different metaphors depending on the context.[30] Partial structuring of the target concept, coupled with a source concept that produces inconsistent understandings, allows for selective structuring to occur in which one may not focus on certain aspects of a metaphoric concept and focus primarily on others. Under Lakoff's definition of inconsistent metaphoric subcases, a subcase can be inconsistent without being contradictory. And, most importantly for this Note, metaphoric subcases can be contradictory but still be coherent under their overarching metaphor.

Structural metaphors, and metaphors generally, work because the conceptual understandings are perpetually and unconsciously absorbed and reflected in the human experience.[31] For example, Lakoff and Johnson point to the metaphor ARGUMENT IS WAR. The ARGUMENT IS WAR metaphor is reflected in how we discuss and think about the target concept, ARGUMENT. We aim to *attack* the weak points in arguments, we *defend* our positions, we use *strategies*, and ultimately, we *win or lose* the argument.[32] As a metaphor

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[27] LAKOFF & JOHNSON, *supra* note 23, at 12–13.
[28] *See id.* at 45.
[29] *Id.* at 44.
[30] *Id.* at 221.
[31] *See* Berger, *supra* note 26, at 176 (citing LAKOFF & JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 47 (1999)).
[32] LAKOFF & JOHNSON, *supra* note 23, at 4.

is perpetually absorbed through human experiences, it shapes what we do and how we understand what we are doing.

II. METAPHOR AND THE CORPORATE BODY

A. THE CORPORATE-BODY METAPHOR

The overarching metaphor that structured the development of the corporate concept is the corporate-body metaphor, A CORPORATION IS A BODY. In this metaphor, CORPORATION is the ambiguous target concept, and BODY operates as the source concept that maps meanings to the unknown target. The corporate-body metaphor is derived from the early English cases that wrestled with the question of what the concept of corporation ought to be understood as.

The Case of Sutton's Hospital,[33] one of the earliest English cases concerning the concept of corporation and corporate personhood, describes and wrestles with each of the metaphoric subcases. The corporate charter maintained that a corporation was "one body corporate and politick," a dual contention aligned with the inconsistent metaphoric subcases created by the source concept, BODY, structuring the ambiguous target concept, CORPORATION.[34] Sir Edward Coke, author of the opinion, attempted to reconcile the metaphoric inconsistencies. Coke contended that "the corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law."[35] Coke opted to define a corporation as a legal fiction.

Under Lakoff and Johnson's theory, *The Case of Sutton's Hospital* shows two metaphoric subcases all coherently aligned under the overarching metaphor A CORPORATION IS A BODY. Aligned with the source concept, BODY, the corporation becomes one body and a body politick. Just as the LIFE IS A JOURNEY metaphor produced inconsistent metaphoric subcases of LIFE as a *bumpy road ahead*, *going off track*, or *smooth sailing*, here, the metaphoric subcases are inconsistent but still coherent in that each subcase is accurately categorized under the source concept of BODY. Here, each subcase is derived from a characteristic of the concept of BODY which makes the subcases coherent. The BODY IS ONE BODY is derived from our idea of a body being a single, physical person and reflective of the real entity theory. The BODY IS A BODY POLITIC is derived from the idea of a body being an association of people and reflective of the aggregate theory.[36] These are the two primary metaphoric understandings which courts and the legal community have gravitated towards throughout the development of the corporate concept: (1) A BODY IS A SINGLE, PHYSICAL PERSON OR ENTITY, and (2) A BODY IS AN ASSOCIATION OF INDIVIDUALS. While those are not the only meanings of the term body, the legal community likely gravitated towards these concepts because they are reflective of the real entity and aggregate theories of a corporation. Each present their own powerful arguments for furthering corporate rights and benefits. For example, the

[33] Case of Sutton's Hospital, 77 Eng. Rep. 960 (K.B. 1612).
[34] *Id.*
[35] *Id.* at 973 (emphasis added).
[36] *See* Bank of the U.S. v. Deveaux, 9 U.S. 61 (1809).

concept of a corporation as merely a group of people highlights a focus on the human beings, not the corporation; but a focus on a corporation as its own separate person places the focus on the corporation as an entity and shields the people behind it. Thus, Lakoff and Johnson would posit that these two metaphoric subcases are inconsistent because they do not create a single image or understanding.[37] The subcases are also contradictory; as Strine Jr. and Macey noted, a corporation cannot "rationally be conceptualized simultaneously as both" a single person and an association.[38] However, irrational as it may seem, the corporate-body metaphor has allowed the corporate concept to be conceptualized as both, and the conceptualization is consistent with Lakoff and Johnson's theory of metaphor.

While these two primary metaphoric subcases are inconsistent, they are coherent under Lakoff's definition. They are coherent because body as a single, physical being and body as an association of individuals are coherent, derivative understandings of the source term BODY. Just as a car trip, a train trip, and a boat trip are all coherent subcases in the LIFE IS A JOURNEY metaphor, here, a single, physical body and an association of individuals are coherent subcases of the corporate-body metaphor.

The corporate-body metaphor presents a unique issue regarding its inconsistent metaphoric subcases. The inconsistent subcases of a corporation as a single, physical person and a corporation as an association of people do not merely produce inconsistent understandings, rather completely contradictory understandings are produced. Partially structuring the target concept of corporation as a single, physical person creates an understanding that a corporation is something like one person or a single body. But partially structuring corporation as an association of people produces a contradictory understanding of a corporation as something like a collection of people. These contradictory subcases produce immense difficulty for courts deciding corporate personhood cases when the primary issue underlying their rulings is deciding what exactly a corporation is. Thus, when the charter structured the concept of corporation with two contradictory understandings that are coherent under the corporate-body metaphor, Coke likely struggled to choose between the two and instead opted for attempting to rationalize the contradiction.

The third metaphoric subcase, a BODY AS A BODY IN ABSTRACTO, comes from the legal rationalization of the inconsistencies between the original source term of body. For the law could not have the concept of body mean both a singular person and many people, the option of defining the corporate body as a legal fiction which is "only in intendment and consideration of the law" is merely an attempt to justify such contradiction.[39] Alternatively, corporations were often chartered by the government for specific public purposes which might explain Coke's draw to defining a corporation as existing only "in intendment and consideration of the law."[40] But such

[37] LAKOFF & JOHNSON, *supra* note 23, at 44 (noting that "two metaphors are not consistent (that is, they form no single image), [but] nonetheless 'fit together,' by virtue of being subcategories of a major category").
[38] Macey & Strine, Jr., *supra* note 12, at 464.
[39] Case of Sutton's Hospital, 77 Eng. Rep. at 973.
[40] *Id.*

justification does nothing to address the contradiction between the first two metaphoric subcases, allowing the contradictory metaphoric subcases to eventually both have a place in the modern concept of corporation. Coke's contribution should be qualified by noting that the assertion of a corporation as a legal creation does not do anything to reconcile the contradictory metaphoric subcases—it only masks their presence. Deciding what a corporation is became increasingly difficult when these contradictory subcases began being reinforced into the very concept of corporation by the legal community.

Several years after *Sutton's Hospital*, William Shepheard's 1659 treatise, *Of Corporations, Fraternities, and Guilds*, defined a corporation as a "Body, in fiction of Law; or, a Body Politick" and noted that "this politick body, is either of one person [only] . . . . [o]r it is of many persons together."[41] The body is a "central referent" when it comes to legal entitlements related to the ownership and disposition of property, as well as the capacity to sue and be sued.[42] In Shepheard's treatise, the concepts of body as the singular, physical person and as an association of people are more explicitly revealed than in *Sutton's Hospital*. Shepheard explicitly pointed out the three metaphoric subcases as: (1) fictive; (2) physical, single person; and (3) an association of people. While Coke alluded to the Charter's contention that a corporation was both a physical body and body politic, Shepheard asserted that the corporate concept includes both of the metaphoric subcases in *Sutton's Hospital* as well as Coke's understanding of corporation as a legal creation.[43] Shepheard's assertion shows how the inconsistent but coherent iterations of the metaphoric subcases structured and informed his definition of corporation. Shepheard's treatise also reaffirms, or begins to conventionalize, all three metaphoric understandings into the corporate concept—a process that proved very damaging to the perception of the legitimacy of the doctrine of corporate personhood and courts' application of the doctrine.[44]

Lakoff and Johnson would contend that Shepheard's definitions were the product of the overarching corporate-body metaphor which structured his experience and his perceptions of the corporate concept. Shepheard later argued that "Members of a Corporation have a double Capacity" as they retain "their naturall [sic] Bodies" while being a part of the corporate-body politic.[45] Each part of this double capacity corresponds to elements of the

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[41] WILLIAM SHEPHEARD, OF CORPORATIONS, FRATERNITIES AND GUILDS 1–3 (1659).

[42] The physical body as a "central referent," when applied to corporations, shows that the legal fiction also reconciles the fact that corporations actually have no physical body of their own, but nevertheless must have a physical body represent them legally. *See* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 489 (2013). *Cf.* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1383 (1988) (showing the metaphor of standing "comes from the physical practices of the courtroom: A court will only hear a litigant if he or she is standing. . . . [T]he metaphor is *motivated* by our experience.").

[43] Case of Sutton's Hospital, 77 Eng. Rep. 960 (K.B. 1612).

[44] *See* Linda L. Berger, *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, 22 J.L. & POL'Y 147, 149 (2013) (citing Dedre Gentner et. al, *Metaphor is Like Analogy*, *in* THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE, 199, 227–36 (2001)) (discussing conventionalization as the process of a metaphor's meaning becoming more solidified and clearly understood).

[45] Matambanadzo, *supra* note 17, at 490.

source concept of body, which gives the partial structuring its coherence.[46] Body, as a concept, contains the elements of the natural body as well as an association of people organized as a body politic. Thus, the inconsistent metaphoric imagery, while problematic in law, is acceptable and coherent as a purely metaphoric matter; Shepheard's treatise reinforces the coherency of the corporate-body metaphor by asserting the validity of both metaphoric subcases.

Thirty-two years after Shepheard's treatise, in *Sir James Smith's Case*, the Kings Bench described a corporation as "an artificial body composed of divers constituent members ad instar corporis humani [within or near the likeness or image of a human body], and that the ligaments of this body politick . . . bind and unite all its members together."[47]

For Lakoff and Johnson, the description of corporation in Sir James Smith's Case exhibits a high degree of structuring accomplished by the corporate-body metaphor. The corporation is described as an "artificial body *composed*" of an image like a human body and "ligaments of this body politick" are the "franchises and liberties" that hold the corporate members together. Identifying the corporation as an artificial body composed of images that reflect the human body and a body politic calls attention to the partial structuring by the corporate-body metaphor. While Lakoff and Johnson point to the ARGUMENT IS WAR metaphor and later metaphoric subcases such as attacking the weak points, defending your position, or surrendering the argument, here, the King's Bench evokes a coherent metaphoric subcase in the metaphor of an artificial body being composed of the likeness of a human body and the ligaments of the body politic. Just as the human body is composed of several different parts, here, the corporate body is explicitly defined as being composed of several working parts—described as "ligaments"—that further demonstrate the concept of body structuring the development of corporation as a concept. However, unlike the ARGUMENT IS WAR metaphor, the corporate-body metaphor contains contradictory metaphoric subcases, and conventionalizing the contradictory metaphoric subcases creates a concept that defies logic and eventually leads to the critiques that the concept lacks "theoretical justification."

But metaphoric concepts can contain contradictory understandings and be coherent, as is the case here. While limiting a concept to not be understood in contradictory ways would have been optimal, especially in the legal realm, failure to do so does not create a concept devoid of substantive meaning or theoretical justification. The concept might merely appear that way because of the legal community's resistance to contradiction and belief that a corporation "cannot rationally be conceptualized as [a single person and an association of people]";[48] but this resistance does not negate the continual reinforcement of the understanding of corporation as both a single person and an association of people. The early development of the corporate-body

[46] *Cf.* LAKOFF & JOHNSON, *supra* note 23, at 80 (contending argument tactics like maneuvering, defending, retreating, attacking, surrendering are coherent because they all correspond to elements of the source concept WAR).

[47] Matambanadzo, *supra* note 17, at 488 (citing Sir James Smith's Case (1691), 90 Eng. Rep. 730, 730).

[48] Macey & Strine, Jr., *supra* note 12, at 464.

metaphor foreshadows the concerns Judge Richard Posner had about the use of metaphor in the law: Metaphors are "powerful though alogical modes of persuasion."[49]

B. THE CORPORATE BODY AND THE UNITED STATES

The corporate-body metaphor and its inconsistent, but coherent, metaphoric subcases continued to structure the concept of corporation. Blackstone's Commentaries, which would greatly influence the Supreme Court's conceptual structure of corporations, reflected an understanding of the underlying metaphoric subcases considered by the King's Bench. For Blackstone, corporations were "artificial persons" and "bodies corporate" that "may maintain a perpetual succession . . . a kind of legal immortality."[50] These "bodies corporate" were "many persons united together into one society,"[51] "a franchise for a number of persons . . . and . . . a body politic."[52] Even for Blackstone, the corporate-body metaphor structures the very concept of corporation.

Blackstone defined corporation as both an "artificial person" and "bodies corporate," which further demonstrates the corporate-body metaphor structuring the corporate concept. Referring to a corporation as an "artificial person" calls back to the artificial entity theory. Within the "bodies corporate" are the physical body of each individual and the body politic, or association of individuals, making up the corporation. Thus, Blackstone's definition further conventionalized the three inconsistent metaphoric subcases of the corporate-body metaphor. While all three of these subcases exist coherently in the understanding of the corporate concept, the contradiction between the metaphoric subcases of a corporation as one person and many struggles to exist in law. The corporate-body metaphor, a powerful but illogical mode of persuasion as Judge Posner noted, structured a legal concept of corporation that defies logic and has left much of the legal community baffled by such inherent contradiction. The battle between the contradictory metaphoric subcases came to a head in *Bank of the United States v. Deveaux*[53] and *Hope Insurance v. Board-man*.[54]

In *Deveaux*, Georgia imposed a tax on the Bank of the United States for operating within their state, and the Bank refused to pay the tax. Deveaux, a tax collector, collected the tax by force and the Bank filed suit claiming diversity jurisdiction in federal court. The Bank was headquartered in Pennsylvania and Deveaux was a citizen of Georgia.[55] So, the Court faced the question whether the Bank was a "[c]itizen" under Article III of the Constitution.

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[49] RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 456 (1990).

[50] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 47 (2018) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:446 (1876)).

[51] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 457 (1765).

[52] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 657 (1819) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 37) (J. Washington, concurring).

[53] Bank of the U.S. v. Deveaux, 9 U.S. 61 (1809).

[54] Hope Insurance Co. v. Boardman, 9 U.S. 57 (1809).

[55] WINKLER, *supra* note 50, at 40–42.

In *Deveaux*, the arguments before the Court as to whether the Bank of the United States had standing in federal court as a citizen under Article III show that the inconsistent metaphoric subcases of the corporate-body metaphor struggle to exist together under the law; while they might be conceptually coherent, the contradiction overrides the metaphoric coherency between the subcases legally. Horace Binney, the lawyer for the Bank, argued that a "corporation is composed of natural persons," and the Court should "collapse the distinction between the corporation and its members" and view the Bank as a citizen because its members were.[56] In other words, the Court, under the aggregate theory, should view the corporation as an association of individuals, and accordingly, grant the corporation citizenship.

In *Deveaux*'s companion case, *Hope Insurance*, an insurance company was being sued in federal court. The insurance company's lawyer argued that corporations are distinct legal entities and, because corporations cannot "derive aid from the personal character of its members," they should not be able to be sued in federal court.[57] Because the lawsuit was brought in the corporation's name, the company's lawyer argued that the corporation should not be viewed as a citizen just because its members were. Thus, the corporation should not have standing to be sued in federal court. This argument gravitates toward the metaphoric subcase A CORPORATION IS A SEPARATE PERSON, the real entity theory, and the idea that any question of jurisdiction cannot rely on the citizenship of the corporation's members because the corporation is the sole individual being attacked by the lawsuit.

Deveaux and *Hope Insurance* do not only present two different modes of thinking about corporations' constitutional rights, but also show the inconsistent metaphoric subcases coming to an impasse.[58] The Bank's lawyer relied upon the metaphoric subcase of A CORPORATION IS AN ASSOCIATION OF PEOPLE; whereas the insurance company's lawyer, arguing that corporations were not citizens, relied upon the metaphoric subcase of A CORPORATION IS A SEPARATE ENTITY. As the metaphoric analysis demonstrated, each of these metaphoric subcases, while contradictory, are coherent with the overarching corporate-body metaphor, which creates immense ambiguity for courts. Courts are left with the challenge of applying an inherently contradictory concept in consistent ways.

Inconsistency and contradiction often demand justification in the law. Here, Chief Justice Marshall attempted to justify the inconsistency by holding that corporations themselves cannot be citizens, but nevertheless can sue or be sued in federal court because the corporation's members are citizens.[59] Such an attempt at reconciling the contradictory understandings calls back to Sir Edward Coke's attempt in the early English case of *Sutton's*

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[56] *Id.* at 54–55. Winkler refers to collapsing the distinction between a corporation and its members as "piercing the corporate veil." *But see* Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1211–12 (arguing Winkler's use of piercing the corporate veil "is an inapt metaphor. It suggests that the theory of the corporation the Court has adopted in its constitutional rights jurisprudence is consistent with the rest of corporate law.").

[57] WINKLER, *supra* note 50, at 60.

[58] *See id.* at 61.

[59] *See* Bank of the U.S. v. Deveaux, 9 U.S. 61, 92 (1809) ("Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.").

Hospital. Chief Justice Marshall attempted to balance the inconsistent subcases being presented before the Court because while they are inconsistent they are still metaphorically coherent which creates a conceptual problem before the Court: Should a corporation be considered a citizen on the basis that a corporation is a separate person or an association of people? The Court answered that corporations are not Article III citizens; however, they have standing to sue and be sued in federal court given that their members have that right. Chief Justice Marshall did not balance the metaphorical subcases of the corporate-body metaphor, but instead, he chose the metaphoric subcase of A CORPORATION IS AN ASSOCIATION OF PEOPLE, not the subcase of A CORPORATION IS A SEPARATE ENTITY. In other words, Chief Justice Marshall chose the aggregate theory of corporation over the real entity theory.

Chief Justice Marshall collapsed the distinction between a corporation and its members, a process that Winkler refers to as "piercing the corporate veil."[60] While piercing cases typically refer to a unique set of circumstances in which the corporate form, and also the members' limited liability protection, is disregarded, Winkler's choice to describe the Court's opinion as "piercing" provides insight to what conceptually occurred in *Deveaux*. In *Deveaux*, Chief Justice Marshall chose to pierce, or disregard the corporate form as a separate person, and look to the metaphoric subcase of A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS. By choosing to view a corporation as an association of individuals, the Court abstained from recognizing the corporate body as a separate person and structured the corporate body as an association of people. While Winkler refers to this as "piercing the corporate veil," it is unclear whether the view of the corporation as a separate entity operates as a default; rather, Chief Justice Marshall, as the "corporationalist" he was, may have simply made a choice between the two metaphoric subcases as applied to a corporation's ability to be a party in federal court. The metaphoric subcases, albeit inconsistent, exist coherently and, thus, can be applied in different ways in different circumstances. Consistency may be attained afterwards in subsequent cases which parallel the particular factual circumstances—only then must the consistent metaphoric subcase aligned with past precedent be applied. However, this assumes that the law consistently applies the correct metaphoric subcase to each factual scenario, which it has failed to do, as will be discussed in the analysis of *Louisville, Cincinnati & Charleston Railroad Company v. Letson*.[61] The repercussions of the Court's inconsistent application have led to the critiques that corporate personhood lacks theoretical justification and the Court's application of the corporate concept defies logic.

C. STRUCTURING AND CONVENTIONALIZING CONTRADICTION

Chief Justice Marshall continued to structure the concept of corporation in the case of *Trustees of Dartmouth College v. Woodward*.[62] In *Dartmouth College*, the Court addressed the question of whether corporations were

[60] WINKLER, *supra* note 50, at 54–55.
[61] Louisville, Cincinnati & Charleston R.R. Co., v. Letson, 43 U.S. 497, 554 (1844).
[62] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

public or private.[63] Arising out of a struggle to control Dartmouth College, a corporation, the trustees enlisted Daniel Webster to represent them against the new board and officers. The new board and officers were appointed when the state of New Hampshire reorganized the corporate charter by law—the original trustees contended that such reorganization was unconstitutional because corporations were private entities not subject to state interference.[64] Looking back, Blackstone noted that corporations had public and private aspects.[65] So, it was unsurprising when Webster and the original trustees lost in the lower court as the New Hampshire court explained that corporations were "public entities subject to public control."[66]

However, Chief Justice Marshall and the Supreme Court reversed and held that corporations were private because the corporation was "the assignee of [the donors'] rights" and "stands in [the donors'] place."[67] The Court's holding again collapses the distinction between the corporation and its members—adopting the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS which reflected the aggregate theory. While Webster's choice to appeal to Horace Binney's argument from *Deveaux*—that corporations were merely made up of their members—may have been mere legal strategy, the Court's decision reaffirmed the metaphoric subcase of body as an association of individuals as the correct subcase in the eyes of the law. *Deveaux* was the first case to pick between the metaphoric subcases, as they were literally pitted against one another in a legal battle.[68] *Dartmouth College* operates as continued metaphoric structuring in which the metaphoric understanding becomes increasingly accepted. Legally, one simply calls this reaffirming precedent; but conceptually, the Court picks between a metaphoric subcase declaring one a winner and the other an unviable loser.[69] Here, the Court reaffirms the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS, not the subcase A CORPORATION IS A SEPARATE ENTITY.

The Court's opinions in *Deveaux* and *Dartmouth College* did not only begin to conventionalize the concept of corporation as merely a stand-in for its members, but the opinions also continued to structure the corporate-body metaphor by relying upon the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS. While the holdings chose the subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS, Chief Justice Marshall, at times, recognized that corporations may possess individual qualities as well. Winkler posits that Chief Justice Marshall's *Dartmouth College* opinion "flirted with corporate personhood," but it should not be understood as supporting corporate personhood.[70]

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[63] WINKLER, *supra* note 50, at 76.
[64] *Id.* at 78.
[65] *Id.* (discussing individuals forming corporations and needing government to receive special benefits of the corporate form like a separate legal identity).
[66] *Id.* at 79.
[67] *Id.* at 86 (citing *Dartmouth College*, 17 U.S. at 642).
[68] *See* Robert Cover, *Violence and the Word in* NARRATIVE, VIOLENCE AND THE LAW 203 ("Legal interpretation takes place in a field of pain and death.").
[69] *See* Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 449 (1899) (discussing law as a "struggle for life among competing ideas, and of the ultimate victory and survival of the strongest").
[70] WINKLER, *supra* note 50, at 86.

However, Chief Justice Marshall wrote "Corporations . . . may act as a single individual."[71] Merely recognizing that corporations may act as a single individual while holding that corporations are associations of individuals continued to conventionalize, or validate, the contradictory metaphoric subcases within the concept of corporation. Merely mentioning the corporate concept as both metaphoric subcases in the opinion keeps the contradictory corporate-body metaphoric subcases alive; but the conflict derived from the Marshall Court's opinions do not do nearly as much conceptual damage as the later Taney Court rulings.

While the Marshall Court's opinions may have "flirted" with the idea of corporate personhood, they did not base its holdings off of the concept of the corporation as a separate entity; contrarily, Chief Justice Taney, hoping to curtail corporate rights, fully endorsed the metaphoric subcase A CORPORATION IS A SEPARATE ENTITY.[72] In *Louisville, Cincinnati & Charleston Railroad Company v. Letson*, the Taney Court—answering the same corporate citizenship question as *Deveaux*—held that the state where a corporation is incorporated should control the matter of corporate citizenship because the members themselves could not be sued and the suit named the railroad itself.[73] *Deveaux* held that corporations were not citizens, but they could still be sued in federal court because their members were citizens. *Letson* explains that "nothing must be looked at but the legal entity," so a corporation is deemed a citizen of the state in which it incorporated.[74] *Deveaux* and Chief Justice Marshall adhered to the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS, and *Letson* and Chief Justice Taney adhered to the subcase A CORPORATION IS A SEPARATE ENTITY. The Taney majority affirmed the separate entity metaphoric subcase again in *Marshall v. Baltimore & Ohio Railroad Company* by declaring a corporation a separate "juridical person" and only considering its state of incorporation for citizenship purposes.[75] Merely a change of the Court's personnel flipped the Court's conceptual understanding of corporation, which speaks to the underlying structuring done by the original corporate-body metaphor. All that was needed to change between metaphoric subcases was a change in the people looking at the concept.

The Court changing its understanding of corporation is conceptually coherent, as both metaphoric subcases were derived from the corporate-body metaphor, but such a change creates legal issues like contradictory understandings and the appearance of legally unsound decisions. It appears that the Taney Court adopted the metaphoric subcase that mirrored the real entity theory and abandoned the Marshall Court's metaphoric subcase that mirrored the aggregate theory; however, the Taney Court in *Letson* and

[71] *Dartmouth College*, 17 U.S. at 636.

[72] *See id.* at 107 (quoting Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 554 (1844) ("The corporators as individuals are not defendants in the suit, but they are parties having an interest . . . . It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity.")).

[73] Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 554 (1844).

[74] *Id.*

[75] Marshall v. Baltimore & Ohio R.R. Co., 57 U.S. 314, 328 (1854). *But see id.* at 351 (J. Campbell, dissenting) ("A corporation is not a citizen. It may be an artificial person, a moral person, a juridical person, a legal entity, a faculty, an intangible, invisible being; but Chief Justice Marshall employed no metaphysical refinement, nor subtlety, nor sophism, but spoke the common sense . . . 'that it certainly is not a citizen.'").

Marshall merely demonstrate a shift between the metaphoric subcases. This shift appeared seamless because both contradictory subcases had already been coherently structured as the corporate-body metaphor developed.[76]

The Taney Court's about-face concerning the conceptual understanding of corporation solidified the contradictory metaphoric subcases within the legal community's understanding of the term corporation. Critics, like Dewey, contend that the doctrine of corporate personhood lacks theoretical justification, but this is not the case; the concept merely appears to lack justification because of the corporate concept's inherent contradictory understandings. The Court's early decisions lay the foundation and allow both contradictory metaphoric subcases to persist as viable means for corporations to convince courts to expand their rights and benefits.

When the Marshall Court chose the metaphoric subcase identifying the corporate body as an association of individuals, they also disregarded the subcase of a corporate body as a separate person. The Taney Court's decision to recognize a corporation as a separate entity capable of having Article III citizenship exposed the underlying metaphoric inconsistency: a corporation was legally recognized as both a separate entity and a body of individuals. While one may argue that the Taney Court's rulings merely declare the Marshall Court as having picked the wrong metaphoric subcase, the uncovering of the metaphoric inconsistency—and the ease of choosing between the two—removed any conceptual containment that might have been set in place by the Marshall Court. This failure to contain the corporate concept can be best seen in the application of the corporate-body metaphor applied across different corporate law doctrine such as corporate rights, limited liability, and piercing the corporate veil. Neither metaphoric subcase—A CORPORATION IS A SEPARATE ENTITY nor A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS—uniformly prevails across the various areas of corporate law because the corporate concept itself is inherently contradictory and both meanings have been affirmed.

D. GAINING RIGHTS

The corporate campaign to be recognized as a person under the Fourteenth Amendment is embroiled in controversy and conspiracy.[77] Several critics of this development contend that the Court relied on hollow legal ground or was deceived by Roscoe Conkling's suspect argument that the drafters of the Fourteenth Amendment intended to include corporations within the definition of "person."[78] Even if this is the case, as some findings now reflect it likely is, the Court's interpretative moves during this era, while legally problematic, are conceptually coherent and align with how the corporate-body metaphor had shaped the concept of corporation up until this point in United States' corporate law jurisprudence.

Roscoe Conkling, an esteemed lawyer who helped draft the Fourteenth Amendment, argued in *San Mateo County v. Southern Pacific Railroad*

[76] *See* Berger, *supra* note 44.
[77] WINKLER, *supra* note 50, at 115–17.
[78] *Id.* at 135–36 (noting that Howard J. Graham's research concluded that Conkling "suppressed pertinent facts and misrepresented others") (internal quotations omitted).

Company that the drafters of the Fourteenth Amendment intended to include corporations under the term "persons"; Conkling appealed to his own personal knowledge, having assisted in drafting the amendment, and a journal he claimed contained notes on the drafters deliberations.[79] Researchers have since found that Conkling's argument was embellished at best and fraudulent or "purposefully mis[leading]" at worst.[80] While *San Mateo County* never yielded a holding, settling before reaching a Supreme Court decision, many commentators point to Conkling's deception as a means to undermine the Court's corporate personhood jurisprudence.

Santa Clara County v. Southern Pacific Railroad Company is often referred to as the pivotal case granting corporations Fourteenth Amendment rights.[81] However, as Winkler notes, the case's holding actually specifically refrains from deciding this question as the Court ruled on narrow grounds and found it unnecessary to decide any other "questions of constitutional law."[82] In *Santa Clara*, the railroad company refused to pay a specific California tax and argued that the tax violated its Fourteenth Amendment rights to equal protection and due process. The issue in the case was whether corporations had rights under the Fourteenth Amendment.

Prior to *Santa Clara* arriving at the Supreme Court, Justice Field, writing for the circuit court, found that provisions of the Constitution that protect people's property "[extend] to corporations."[83] Justice Field subscribed emphatically to the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS; accordingly, he thought Fourteenth Amendment protections should always extend to corporations because the Fourteenth Amendment extends to a corporation's members. But the Supreme Court refused to adopt this as their holding. Rather, the *Santa Clara* case syllabus quotes Chief Justice Waite, prior to oral argument, as having said, "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations. We are all of opinion that it does."[84] This is the famed quote that many regard as granting corporations Fourteenth Amendment rights; however, this was merely included by the court reporter in the syllabus of the case and is not the actual holding of *Santa Clara*.[85]

Three years later, in *Minneapolis & St. Louis Railway Company v. Beckwith*, Justice Field would rely upon the *Santa Clara* syllabus to assert that "corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara*."[86] Winkler claims that this statement was

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[79] *Id.* at 114–15 (citing County of San Mateo v. Southern Pac. R. Co., 116 U.S. 138 (1885)).

[80] *See id.* at 115; *Id.* at 135–36 n.30 (citing HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION, 31, 93) (finding that Conkling's journal, while genuine, did not support his contention that the drafters changed the language from citizen to person to include corporations in light of the *Deveaux* decision that corporations were persons but not Article III citizens).

[81] Santa Clara County v. Southern Pac. R.R. Co., 118 U.S. 394 (1886).

[82] WINKLER, *supra* note 50, at 148 (citing *Santa Clara*, 118 U.S. at 416).

[83] *Id.* at 144.

[84] *Santa Clara County*, 118 U.S. at 396 (1886) (syllabus).

[85] WINKLER, *supra* note 50, at 151–52. The same court reporter, J.C. Bancroft Davis, is responsible for the *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888), quote that "under the designation of person there is no doubt that a private corporation is included." Winkler contends that these dubious assertions lack sound legal basis, but nevertheless, were instrumental in the Court's subsequent shaping of corporate Fourteenth Amendment rights.

[86] Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 28 (1889).

"patently false" because this was not the holding; rather, it was simply a statement—that may or may not have actually occurred—that was recorded in the syllabus of the case.[87] The Court would go on to rely on *Santa Clara* to reaffirm corporate rights over the next twenty years.[88]

Winkler contends that corporations were not "really people in the sense of having rights of their own," but rather they had rights "merely as a way of protecting the property of their stockholders."[89] However, examining how the legal community adopted both inconsistent metaphoric subcases from the corporate-body metaphor shows that the legal community, in cases like *Deveaux* and *Letson*, structured corporations to be able to receive Fourteenth Amendment rights and benefits based on both subcases.[90] Even if *Santa Clara*, its progeny, and Conkling's misleading journal argument do form a hollow legal foundation for the basis of corporate Fourteenth Amendment rights, these cases are mere byproducts of the Court having already adopted both contradictory metaphoric subcases inherent within the very concept of corporation.

The corporate-body metaphor had already structured the legal understanding of corporation as encompassing both metaphoric subcases, which were affirmed by the interaction between the Marshall and Taney Courts. The move from *Deveaux* to *Letson* and *Marshall* conventionalized both metaphoric subcases in the legal concept of corporation by revealing that a corporation is both a separate person and an association of individuals—it merely depends on the context or court.[91] Thus, whenever a new factual context is in question, courts generally have wide latitude in choosing which metaphoric subcase to adhere to; courts have the justification of both metaphoric subcases at their disposals. Courts can look to the corporate form as a separate person, and courts can similarly disregard that subcase and see a corporation as merely an association of individuals. While the corporate rights dispute often centers around whether the Fourteenth Amendment originally intended corporations to be included as people, the legal community had already structured the corporate concept as both a separate person and an association of individuals.[92] The Fourteenth Amendment was unquestionably meant to protect people. In the absence of evidence showing that corporations were explicitly excluded from the definition of people, corporations had and continue to have extremely powerful metaphoric subcases at their disposal to argue that they are included under the Fourteenth Amendment as a person in their own right or because their members are protected under the Fourteenth Amendment.

The corporate-body metaphor and its influence on corporate law's development, show that the intention to include corporations under the

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[87] WINKLER, *supra* note 50, at 156.

[88] *Id.* at 157 n.69 (citing Charlotte, C. & A. R. Co. v. Gibbes, 142 U.S. 386, 391 (1892); Covington & Lexington Turnpike Road Co. v. Sanford, 164 U.S. 578, 592 (1896); Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 154 (1897); Black v. McClung, 172 U.S. 239, 259 (1898); Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 550 (1923)).

[89] *Id.* at 159–60.

[90] *See infra* notes 93–102 and accompanying text (discussing corporate "nerve center" and double-taxation as concepts structured by the corporate-body metaphor).

[91] Berger, *supra* note 44 (discussing conventionalization by repeated use of a novel metaphor).

[92] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:446 (1876).

Fourteenth Amendment should be given far less weight than it has; rather, the focus should be placed upon the inadequacy of the legal community's concept of corporation. The legal concept of corporation is inadequate because there is no method to sufficiently contain the contradictory understandings of the term corporation because it has been structured as both a single person and association of individuals. Such structuring can be seen in the development of other corporate law doctrine as well. For example, the corporate-body metaphor's structuring can be seen in the development of the "nerve center" test for determining corporate jurisdiction.[93] Moreover, C-Corp entities are taxed doubly: first, at a corporate level, as if the corporation is its own separate being, and again when its members are distributed earnings, as if the corporation is an association of individuals—which shows both inconsistent subcases structuring the corporate world.[94] Following the corporate-body metaphor's development shows that the inconsistent characterizations of a corporation, as a person for some applications and as an association of individuals for others, have been structured into the legal community because they are coherent under the original source concept of body. However, the corporate concept in the legal realm needs a limit.

Arguably the most influential corporate rights case of this century is *Citizens United v. FEC*.[95] In *Citizens United*, the Supreme Court found that corporations are entitled to the same free speech rights to engage in political spending on the grounds that corporations are "associations of citizens."[96] Jonathan Macey and Leo E. Strine Jr. argue that the *Citizens United* Court "ignored the entity theory of the corporation and adopted a view that the corporation is an aggregate of its shareholders;"[97] such a conceptual move is reminiscent of the Taney Court. Macey and Strine Jr. also argue that the Court's analysis "confuses the traditional general partnership form of business organization . . . with the corporate form of business organization."[98] Macey and Strine Jr. define a general partnership as an association of partners with responsibilities indistinguishable from the entity and a corporation as a separate juridical entity with distinct rights and responsibilities.[99] Moreover, Macey and Strine Jr. give several corporate law examples of corporations being treated as separate entities distinct from their stockholders. They point to the following examples: a corporation's inability to represent itself in court;[100] looking to a corporation's state of incorporation

[93] *See* Hertz Corp. v. Friend, 559 U.S. 77, 81–82 (2010) ("We believe that the 'nerve center' will typically be found at the corporation's headquarters.").

[94] *See* LAKOFF & JOHNSON, *supra* note 23, at 4 (discussing how metaphors shape what we understand and experience). Further, consider the legal fiction of treating one person who acts as a CEO, Board Chairperson, and shareholder as three different people. Such a fiction parallels the inconsistent metaphoric subcases of the corporate-body metaphor.

[95] Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010).

[96] *Id.* at 349; *see also* Macey & Strine, Jr., *supra* note 12, at 454 ("In *Citizens United*, Justice Kennedy, writing for the majority, views the corporation as an "association of citizens" and it is on this basis that he is able to conclude that corporations are entitled to First Amendment protections.").

[97] Macey & Strine, Jr., *supra* note 12, at 462.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 487.

to determine its citizenship;[101] the structure of corporate income tax;[102] and corporate criminal liability.[103]

However, the corporate-body metaphor demonstrates that these scholars' conception of corporation is inconsistent with the centuries-long metaphoric structuring that created a corporate concept that includes both a corporation as an association of individuals and a corporation as a distinct juridical entity.[104] Macey and Strine Jr. do not overlook the contradictory metaphoric subcases. Instead, they reject the subcases' co-existence. They contend that "[a]s a matter of logic, the corporation may be conceptualized by law as either an entity or an aggregate, but it cannot rationally be conceptualized simultaneously as both."[105] Their analysis operates similarly to Sir Edward Coke's in *The Case of Sutton's Hospital* and Chief Justice Marshall's in *Deveaux*; rather than wrestle with the contradiction, they reject it. Justice Holmes famously wrote of a concerning fallacy that "the notion that the only force at work in the development of the law is logic."[106] No matter how illogical the contradictory concept seems, such rejection ignores the corporate law pattern of oscillating between a corporate concept that is at times an aggregate and at other times a single being.

One of the most compelling arguments by Macey and Strine Jr. is that the Court's characterization of corporation as an association of individuals ignores the modern reality of corporations.[107] Further, they argue that the Court ignores the fact that state law has established that corporations are separate entities. Accordingly, Macey and Strine Jr. argue that the Court's statement that a corporation is "an association of individuals" is an unsupported assertion. However, their critique is misplaced because the corporate concept, as this Note has established, includes the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS. The critique, if any, should be directed at the Court's choice to adhere to that metaphoric subcase in this instance. This scholarly analysis of *Citizens United*, while impressive and thorough, misplaces its critiques upon the Court's concept of corporation because their critiques should be placed upon the Court's inability to demarcate the contradictory metaphoric subcases that have been structured in the corporate concept.

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[101] *Id.* at 488.

[102] *Id.* at 490. Macey and Strine Jr. point to corporate double-taxation as an example that a corporation is viewed as a distinct legal entity separate from its shareholders. However, it should be noted that the existence of corporate double-taxation can, and should, also be viewed as a result of the corporate-body metaphor's structuring. Double-taxation simultaneously demonstrates the corporate concept as containing both an understanding of corporation as a separate entity and as an association of individuals because the corporation is taxed on its profits as a separate entity and the associated individuals are then taxed again on distributions. Double-taxation should be seen as affirming the existence of both metaphoric subcases rather than only being viewed as inconsistent with the association of individuals understanding of corporation.

[103] *Id.* at 491.

[104] Macey and Strine Jr.'s analysis uses theoretical economic frameworks to analyze the concept of corporation from the "nexus of contracts" theory and the "separation of ownership and control" theory. Both of these theories operate on the assumption that a corporation is an entity distinct from its shareholders. In other words, the theories only consider the A CORPORATION IS A SINGLE ENTITY metaphorical subcase. It is then no surprise, operating on this assumption, that they argue the Court's focus on a corporation as an association of individuals is misguided.

[105] Macey & Strine, Jr., *supra* note 12, at 464.

[106] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

[107] Macey & Strine, Jr., *supra* note 12, at 505–06.

Corporation, the amorphous concept it has become in American law, allows its proponents to argue that a corporation is whatever it is needed to be in that moment. The metaphoric structuring, as Lakoff and Johnson would point to, has pervasively allowed an inconsistent, contradictory concept to establish a stronghold in American corporate law. Such inconsistency provides an immense, unfair conceptual and rhetorical advantage in the courts because corporate entities can conceptually shapeshift to present their best form given what they hope to attain. But, as Lakoff's metaphoric analysis showed, the presence of inconsistent subcases does not make them incoherent, and it is the metaphoric coherency between the body as separate person and association of individuals that justifies the Court's decisions.

Many may believe corporate manipulation of the corporate-body metaphor is unfair. I believe, however, that the unfairness does not make the Court's decisions conceptually unsound. The very concept of corporation itself lacks a conceptual limit—it is both one and many—and thus, the Court's decision-making reflects this contradictory conception of corporation. Indeed, the validity of the decisions should not be the focus of attack, because tracing the metaphoric development shows such validity is justified when the concept itself lacks a definitional limit; rather, the focus should be placed on the legislative and judicial inability to demarcate the corporate concept to promote fairness and predictability. Just as the corporate lawyers and advocates switch between metaphoric subcases, so too do the judiciary, and the very unfairness that has given corporations such immense power is the same interpretative mechanism that allows judges to take such power away.

III. PIERCING THE CORPORATE VEIL AND THE LIMITING PRINCIPLE

Before analyzing how piercing the corporate veil reflects the conventionalization and judicial acceptance of both inconsistent metaphoric subcases of the corporate-body metaphor, it is important to establish that limited liability for corporations depends upon the first metaphoric subcase—viewing a corporation as a separate person. This is the case because liability is fully placed upon the corporation as a separate person capable of bearing the liability exposure, rather than upon its underlying shareholders. Early corporations in the United States often did not provide limited liability to their shareholders. Shareholder limited liability was not the true norm until as late as 1900.[108] However, due to the overarching metaphorical understanding of corporation as simultaneously a separate person and an association of individuals, corporations were able to leverage the conventionalization of the view that corporations were not only associations of individuals, but also separate entities.[109] The conventionalization of the latter metaphoric subcase was paramount because,

[108] Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 208 (1985).

[109] *See also*, I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 514 (1912) (citing Washington Ins. Co. v. Price (N.Y. 1825) (discussing case in which judge held shares of stock in company party to his case and "regarded himself as competent to sit under such circumstances, relying upon the distinction between the corporation and its shareholders").

theoretically, the metaphoric subcase of the corporation as a separate entity is necessary to justify making the corporation the separate person responsible for liability rather than its shareholders.[110] Jonathan Macey and Joshua Mitts's thorough empirical study revealed that courts will allow corporations to be established for the "sole purpose of avoiding personal or corporate liability on the part of investors."[111] Allowing an association of individuals to incorporate for the sole purpose of imposing liability on the corporation shows that movement between the metaphoric subcases is recognized as legally valid; Lakoff and Johnson would argue that the corporate-body metaphor has structured the corporate concept as permitting such movement. Without the conventionalization of the separate entity metaphoric subcase, there would be no conceptual basis for justifying limited liability because, like the Marshall Court's conceptual view, a corporation was merely an association of individuals.

Courts began piercing the corporate veil, for limited liability purposes, to prevent scrupulous individuals from seeking protection behind the corporation as a separate entity—unjustly abusing the inconsistent metaphoric subcases that had been conventionalized in the legal concept of corporation. Courts tend to consider corporations as "a separate legal entity until there is sufficient reason" to disregard that metaphoric subcase.[112] If continuing to recognize a corporation as a separate entity—capable of bearing its own liability—would "produce injustices and inequitable consequences," then a court has sufficient reason to disregard the corporation as a separate entity and view it as a mere association of individuals.[113] "Injustices and inequitable consequences" are likely intentionally left broadly defined in most jurisdictions to allow judicial discretion to prevent the abuse of the lack of a conceptual limit inherent in the corporate concept. Macey and Mitts found that courts find "injustice" that warrants piercing when a corporation is established solely for limited liability in conjunction with one of the following three cases: (1) when seeking limited liability is inconsistent with the goals of a regulatory or statutory scheme; (2) when there is evidence of fraud or misrepresentation in an attempt to obtain credit; or (3) when respecting the corporate form "enables favoritism among claimants to the cash flows of a firm."[114] The development of piercing the corporate veil demonstrates the conventionalization of both metaphoric subcases in the legal concept of corporation, and it also shows the judicial decision to use the concept's lack of a conceptual limit to further a just result. This may be the best outcome given that the concept has been structured without an inherent conceptual limit because it is contradictory.

The development of piercing the corporate veil, or disregarding the corporate form, reflects the judicial acceptance of the inconsistent

[110] *See Macey*, *supra* note 10, at 969 ("As a theoretical matter, the concept of complete corporate separateness was required in order to make the idea of limited liability defensible, or at least coherent.").

[111] Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 114 (2014).

[112] Baatz v. Arrow Bar, 452 N.W.2d 138, 141 (S.D. 1990).

[113] *Id.* (quoting Farmers Feed & Seed, Inc. v. Magnum Enter., Inc., 344 N.W.2d 699, 701 (S.D. 1984); *see also id.* (discussing injustices such as fraudulent representation by directors; undercapitalization; failure to observe corporate formalities; absence of corporate records; comingling funds; promotion of fraud, injustice, or illegalities).

[114] Macey & Mitts, *supra* note 111.

metaphoric subcases of the corporate-body metaphor.[115] One of the earliest article's description of piercing the corporate veil showcases how the corporate-body metaphor structured the corporate concept and later corporate law metaphors; I.M. Wormser noted that "there is no magic in incorporation . . . . [T]he legal armor-plate can be torn aside and the acts of the flesh and blood associates, disclosed and scrutinized."[116] This description, which is one of the earliest acts of piercing the corporate veil, shows that the corporate-body metaphor deeply structured the legal community's understanding of corporation because the metaphoric subcase A CORPORATION IS A SEPARATE ENTITY becomes a "legal armor-plate" which can be torn aside to expose the "flesh and blood associates" beneath it. "[F]lesh and blood associates" reflects the metaphoric subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS. These metaphorical descriptions fit coherently within the corporate-body umbrella as both the armor-plate and flesh and blood metaphors can be categorized as body-based metaphors. Dedre Gentner would point to these descriptions as evidence that the corporate-body metaphor has been solidified as conventional in American corporate law.[117] Lakoff and Johnson would point to this as an example of the corporate-body metaphor structuring how the legal community thinks and interacts with corporations, given that the community's understanding is structured by the corporate-body metaphor.

In *Montgomery Web Company v. Dienelt*, the Montgomery company had changed its name and formed a new corporation in an attempt to discharge the debts of the old corporation.[118] The court in *Montgomery* asked, "Is the Montgomery company [after changing its name] so completely a new and different person from the Aronia company that the law must close its eyes to the fact that the difference is a mere juggle of names?"[119] Simply asking this question reveals that the metaphoric subcase A CORPORATION IS A SEPARATE ENTITY had been conventionalized in the legal community because it assumes the Montgomery Company to be a "person." The court did "not think there [was] any compulsion to such legal blindness."[120] Refusing to recognize the Montgomery Company's name change as becoming a new and separate entity is functionally equivalent to collapsing the distinction between the corporation itself and its members. The court, refusing to allow such "legal blindness," looks past the corporation's change into a separate person and views the corporation as an association of individuals. Because the association of individuals was the same, the court refused to recognize the Aronia Company as a separate person from the Montgomery Company. Averting "legal blindness," the Montgomery Court saw beyond "the corporate form" and recognized both metaphoric subcases and chose to view the corporation as merely an association of individuals—thereby making the

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[115] *Cf.* WINKLER, *supra* note 50, at 54–55 (referring to "collapsing the distinction" between the corporation and individuals to justify corporate standing in federal court as "piercing the corporate veil), *with* Joshua C. Macey, *What Corporate Veil?*, 117 MICH. L. REV. 1195, 1211–12 (2019) ("It is unfortunate that Winkler describes the Supreme Court's [actions] as 'piercing the corporate veil,' because that phrase conceals what the Supreme Court is actually doing. . . . [T]he way the Court has treated corporations in corporate-rights cases is more radical and less justifiable than Winkler's metaphor suggests.").

[116] Wormser, *supra* note 109, at 512–13.

[117] Berger, *supra* note 44.

[118] Montgomery Web Co. v. Dienelt, 19 A. 428 (Pa. 1890).

[119] *Id.* at 430.

[120] *Id.*

name change irrelevant. In piercing the corporate veil, the court does not only recognize both conventionalized metaphoric subcases, but it also uses the concept's inherent contradictory understandings to hold the fraudulent individuals accountable. The court essentially uses its power to create a factual limit demarcating acceptable and unacceptable uses of the contradictory corporate concept.

In re Muncie Pulp Company[121] and *In re Rieger, Kapner & Altmark*[122] are early piercing cases which demonstrate courts' recognition that the legal rendition of the concept of corporation lacks a conceptual limit and can easily be manipulated unjustly. Both cases involved the members of a corporation forming a new corporation solely for liability protection and to escape the liability of the former corporation. The court in *In re Muncie Pulp Company* found that the "Great Western Company was undoubtedly a *mere creature* of the [Muncie] pulp company, having no independent business existence and organized solely for the purpose of facilitating the business of the latter [bankrupted company]."[123] The court in *In re Rieger* stated that if an individual were found to have kept two separate business books and bank accounts to obtain a double-line of credit for the same business purposes, a court "would have no difficulty in brushing aside the *subterfuge* . . . subjecting the whole of his property to the payment of his debts."[124]

Both cases create a new metaphor relating to the corporate concept. *In re Muncie* introduces the metaphor A CORPORATION IS A CREATURE OF ANOTHER COMPANY and *In re Rieger* introduces the metaphor A CORPORATION IS A SUBTERFUGE. Both metaphors fall outside of the umbrella of the corporate-body metaphor because CREATURE and SUBTERFUGE are not persons and do not relate to the concept body. Because these metaphors cannot be properly categorized within the corporate-body umbrella, they are incoherent with the development of the concept. Accordingly, these metaphoric descriptions of corporation refer to certain uses of the concept that the courts are demarcating as beyond the limit. The court's refusal to recognize the metaphoric subcase of A CORPORATION IS A SEPARATE ENTITY and enforcement of the subcase A CORPORATION IS AN ASSOCIATION OF INDIVIDUALS impose a limit on the concept. Such a conceptual limit runs counter to how the corporate concept developed, but the court is able to utilize a distinct factual situation to limit and maneuver within the corporate-body metaphoric subcases. Setting precedent based upon specific factual scenarios, like courts have done in piercing cases, is one of the legal community's best chances at limiting the corporate concept to a manageable and fair legal doctrine. As has been done in piercing cases, courts should call attention to the presence of the inconsistent metaphoric subcases within the corporate-body metaphor and explicitly limit the corporate concept to one of the metaphoric subcases depending on the factual scenario.

[121] *In re* Muncie Pulp Co., 139 F. 546 (2d. Cir. 1905).
[122] *In re* Rieger, 157 F. 609 (S.D. Ohio 1907).
[123] *In re* Muncie Pulp Co., 139 F. at 548 (emphasis added).
[124] *In re* Rieger, 157 F. at 613 (emphasis added).

CONCLUSION

As Justice Holmes noted, "It is one of the misfortunes of law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[125] What Justice Holmes calls encysted, Lakoff and Johnson might call structured and conventionalized. This is the case with the corporate-body metaphor. Both metaphoric subcases have become encysted in the legal understanding of corporation. While some academics and advocates work to fight against corporations' manipulation of the inconsistent concept in their quest for power, the judiciary has the means to begin to limit how the corporate concept is used. Even though the corporate-body metaphor's inconsistencies are entrenched in the world of corporate law, judges can utilize factual distinctions to limit the corporate concept to merely one of its metaphoric subcases—thus furthering the doctrine's predictability and fairness. Words and their meanings possess immense power in the law, and ill-defined concepts can become a threat to the public. The corporate-body metaphor and the conventionalization of the inconsistent metaphoric subcases demonstrate that, as Justice Cardozo noted, "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it";[126] once a concept which lacks a conceptual limit becomes encysted in the law, the judiciary needs to provide a limit which, rather than restructure the metaphor conceptually, should be done by limiting our understanding based on tying specific understandings to certain facts.

Alternatively, and preferably, legislators should clearly define the corporate concept, as a single person or an association of persons, as applied to each statute governing corporations. Statutory or constitutional limitation would create clear guidance and demarcate the corporate concept, which would level the playing field between corporations and the general public. Some statutes have already begun to explicitly define corporations as people or not.[127] Even better, if legislators were to explicitly define whether a corporation will be deemed a separate entity or an association of people for the purposes of a given statute, the problem of the contradictory corporate concept would be taken out of the hands of the judiciary, and businesses and lawyers alike would be given far more clarity concerning the concept of corporation.

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[125] Hyde v. United States, 225 U.S. 347, 391 (1912) (J. Holmes, dissenting).

[126] Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

[127] *See* 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). However, this definition fails to address the underlying metaphoric subcases and explicitly define the corporate concept as either separate individual or association of individuals. A more comprehensive definition should be explicitly stated within each statute dealing with corporations as this will provide far better guidance to courts and businesses alike.