

HUMAN RIGHTS FOR TRANSNATIONAL CORPORATIONS

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I. INTRODUCTION

Transnational corporations and human rights law have come into increasing contact with one another in recent years.¹ The pri-

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1. For purposes of this article, a “transnational corporation” or “corporation” is defined as “an economic entity operating in two or more countries - whatever their legal form, whether in their home country or country of activity, . . . and whether taken individually or collectively.” U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. ESCOR, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, ¶ 20, R.21.7.3 U.N. Doc. E/CN.4/Sub.2/2003/L.12/Rev.211 (Aug. 13, 2003) [hereinafter Human Rights Norms].

mary issue arising from this contact is whether transnational corporations are subject to human rights obligations previously thought to be exclusively applicable to states. This issue has been raised in many different venues. In the international arena, the duties of transnational corporations have been recognized through specific language within the body of human rights instruments.² A wide range of international guidelines have attempted to define basic human rights obligations applicable to transnational corporations.³ The most recent effort, the United Nations' Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, identifies six primary duties of all transnational corporations.⁴

The issue of applicability of human rights law to the activities of transnational corporations has also been raised in national legal systems as well as the private sector. Perhaps the most notable recognition in national legal systems has been the substantial body

2. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 5 (1), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply "for any . . . group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 5(1), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply "for any . . . group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant."); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, pmb., art. 30, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (providing "every . . . organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" and prohibiting interpretations of the Declaration that imply for "any . . . group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein").

3. See, e.g., UNITED NATIONS GLOBAL COMPACT ORG., WHAT IS THE GLOBAL COMPACT? (2000), available at http://www.unglobalcompact.org/content/AboutTheGC/Overview_About.htm (creating a voluntary corporate citizenship initiative based upon ten principles relating to human rights, labor and environmental protection); ORG. FOR ECON. COOPERATION & DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2000) (consisting of recommendations by national governments to transnational corporations regarding employment practices, industrial relations, human rights, environmental protection, competitive practices and taxation).

4. The Human Rights Principles impose five primary duties on transnational corporations. These duties are: equal opportunity and treatment in the workplace; respect for the security of persons by refraining from engaging in war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labor, hostage-taking and other violations of humanitarian law; protection of workers' rights through prohibitions upon slavery and forced, compulsory and child labor, maintenance of a safe working environment, payment of fair and reasonable remuneration and recognition of freedom of association and collective bargaining; respect for the sovereignty of states, local communities and indigenous populations; consumer protection; and environmental protection. Human Rights Norms, *supra* note 1, ¶¶ 2-14.

of U.S. case law created by attempts to apply the Alien Tort Statute to corporate activities.⁵ National legal systems have also recognized corporate human rights obligations through reporting requirements⁶ and divestment initiatives targeting alleged human rights violators.⁷

Recognition of the applicability of human rights obligations to transnational corporations in the private sector has taken two primary forms. On an organizational level, there has been wholesale adoption of codes of conduct, guiding principles, credos and similar statements by members of the international business community.⁸ Within such organizations, there is a smaller and

5. The Alien Tort Statute provides “[t]he 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.” 28 U.S.C. §1350 (2000). A detailed discussion of the attempts to apply the Alien Tort Statute to the activities of transnational corporations is beyond the scope of this article. However, there were more than twenty U.S. federal court opinions addressing these attempts and relating to the activities of dozens of transnational corporations in sixteen states at the time of preparation of this article. It further bears to note that the vast majority of these opinions have rejected the application of the Alien Tort Statute to the activities of transnational corporations. For a discussion of recent developments relating to litigation initiated against transnational corporations pursuant the Alien Tort Statute, see Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT’L L. & POL’Y (forthcoming 2007).

6. See, e.g., Law No. 2001-420 of May 15, 2001, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 16, 2001, art. 116, p. 7776 (requiring all French corporations listed on the premier marché to annually report on the social and environmental impact of their activities commencing with their 2003 annual reports). For an analysis and critique of Law Number 2001-420, see Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France’s Nouvelles Régulations Économiques*, 21 ARIZ. J. INT’L & COMP. L. 441 (2004).

7. Recent efforts by state governments within the United States concerning their investments in companies doing business in Sudan or in other states designated as sponsors of terrorism are a primary example of recent divestment initiatives. For discussion of such initiatives, see, e.g., Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245 (2006); Lucien J. Dhooge, *Darfur, State Divestment Initiatives and the Commerce Clause*, 32 N.C. J. INT’L L. & COM. REG. (forthcoming 2007). For an example of recent litigation challenging the constitutionality of state divestment initiatives with respect to Sudan, see *Nat’l Foreign Trade Council v. Topinka*, No. 06C-4251 (N.D. Ill. filed Aug. 7, 2006) (challenging the Illinois Act to End Atrocities and Terrorism in the Sudan as an unconstitutional state interference with the federal government’s authority with respect to foreign affairs and a violation of the Foreign Commerce and Supremacy Clauses and the National Bank Act).

8. For a discussion of codes of conduct, guiding principles, credos and other statements, see, e.g., Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 674-83 (1995); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT’L L. 389 (2005). The number of such codes, principles, credos and other statements is voluminous and beyond the scope of this article. However, for an example of a code of conduct created through the collaborative efforts of national governments, industry, labor and nongovernmental organizations, see BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEPT OF STATE, VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS (2001). The Voluntary Principles establish a code of conduct for U.S. and British companies engaged in the energy and extractive industries. The Principles were the result of consultations between U.S. and British-based oil, gas and mining companies (in-

somewhat less successful campaign to recognize human rights obligations through the adoption of shareholder resolutions.⁹ The social responsibility movement has empowered institutions and individuals to determine the circumstances under which their monies are invested.¹⁰

Largely unaddressed is the issue of whether transnational corporations enjoy rights in a manner similar to human beings. The resolution of this issue turns, at least in part, on the recognition of legal personality for transnational corporations. This article posits that transnational corporations possess legal personality sufficient to be granted rights in a manner similar to those granted to human beings in modern human rights law. In recognizing such status, the article contends that transnational corporations are rights-carrying persons in addition to being duty-bearing entities. The paper initially describes difficulties associated with granting human rights to transnational corporations and the importance of addressing these difficulties. The paper then advances the case for recognition of corporate rights through discussion of the status of corporations in international human rights instruments and the recognition of corporate personhood in national legal systems. The paper does not equate transnational corporations with human beings but rather concludes that the unique status of corporations requires different treatment in the human rights arena. This different treatment is elaborated upon in a two-part test devised for

cluding British Petroleum, Chevron, Conoco, Freeport McMoRan, Rio Tinto and Texaco), non-governmental organizations (including Amnesty International, Human Rights Watch and the Lawyers' Committee for Human Rights), corporate responsibility groups (including Business for Social Responsibility, the Council on Economic Priorities and the Prince of Wales Business Leaders' Forum), the International Federation of Chemical, Energy, Mine Workers and the General Workers' Unions, the U.S. State Department and the United Kingdom Foreign Office. *Id.*

9. The Social Investment Forum reported that shareholder resolutions on social responsibility, corporate governance and crossover proposals implicating both areas increased from 299 proposals in 2003 to 350 in 2004 and 348 proposals in 2005. SOCIAL INVESTMENT FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 16 (2006) available at http://www.socialinvest.org/areas/research/trends/sri_trends_report_2005.pdf. The majority of these resolutions addressed environmental protection, occupational health and safety, equal employment opportunity, labor standards, defense contracting, political contributions, sustainability, tobacco and animal welfare. *Id.* at 17. The average percentage of votes cast in favor of these types of resolutions peaked at 11.9% in 2003 and dropped to 11.4% in 2004 and 10.3% in 2005. *Id.* at 16.

10. Socially responsible investing has been defined as the integration of "social and environmental values into the investment decision-making process . . . link[ing] financial and social goals [and] striving to deploy investment capital in a manner that is consistent with the needs of society and the limits of ecosystems." ETHICAL FUNDS, INTRODUCTION TO SOCIALLY RESPONSIBLE INVESTING 1 (2002). According to the Social Investment Forum, there was \$179 billion invested in 201 socially screened mutual funds and \$1.5 trillion invested in screened separate accounts managed for institutions and individuals at the end of 2005. SOCIAL INVESTMENT FORUM, 2005 REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES, *supra* note 9, at 7, 11.

the purpose of determining what specific rights should be extended to transnational corporations.

II. PROBLEMS ASSOCIATED WITH TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

The question of whether transnational corporations are beneficiaries of modern human rights instruments is fraught with uncertainties. An initial difficulty arises from the relative newness of general incorporation. At the dawn of the Industrial Age, corporate recognition relied on a specific grant of status from the government.¹¹ Corporations were thus relatively rare creatures.¹² Given the lateness of its recognition, freely incorporable entities were not accounted for at the time of the creation of the legal systems they came to inhabit. For example, the term “corporation” does not appear in either the U.S. Constitution or the Bill of Rights. The conferral of legal status on freely incorporable entities thus raised the issue of whether they were properly includable in foundational documents referring to a “person,” “people” or “citizens,” none of which were defined in the Constitution.¹³

To the extent that the intent of the Framers can be ascertained, it may be concluded that the Constitution was designed, in part, to shield individuals from overreaching by the national government.¹⁴ Individuals meant human beings rather than artificial

11. A specific legislative act was required in order to form a corporation in the United States with few exceptions until the mid nineteenth century. See PHILIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW* 22 (1993). Similar rules were applicable in the United Kingdom, which required a charter from the Crown or an act of Parliament. *Id.* See also Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 84 (1999).

12. There were only 317 corporations in the United States at the beginning of the nineteenth century. General incorporation, introduced during the Jacksonian era, did not fully take root until after the Civil War. BLUMBERG, *supra* note 11, at 22, 31. See also Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987) (discussing the preference for sole proprietorships and partnerships in the United States in the late eighteenth and early nineteenth centuries).

13. BLUMBERG, *supra* note 11, at 25, 31. See also Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 298 (1990) (noting the absence of definitions of these terms in the Constitution as well as any description of their characteristics or whether the terms were intended to extend beyond their commonly accepted meanings).

14. See, e.g., MEIR DAN-COHEN, *RIGHTS, PERSONS AND ORGANIZATIONS* 85-87 (1986); Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech is not Free*, 83 IOWA L. REV. 995, 1013 (1998) (describing the American legal system as embodying “an ancient tradition of seeing the world as composed of private individuals and governmental entities”); Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 64, 100 (2005) (contending that the Constitution established an “individualistic framework” wherein “[m]ost of the protections . . . were designed as barriers between the government and individual citizens”).

entities.¹⁵ Utilizing an approach that focuses on this perceived original intent, corporations are not entitled to the guarantees and protections enumerated in the Constitution.¹⁶ Neither do corporate rights arise automatically from a flexible interpretation focusing on the needs of modern society as such an approach has traditionally focused on the expansion of individual liberties, which does not necessarily include corporations.¹⁷

Legislation has not resolved this uncertainty. Legislation adopted prior to widespread acceptance of general incorporation suffers from the same construction problem as foundational documents.¹⁸ While understandable with respect to legislation adopted prior to the ascension of the corporate model, this uncertainty continues to plague modern legislation as well. For example, the Model Business Corporation Act, the fountainhead of modern U.S. corporate law, creates two separate classes of persons. "Individuals" consist exclusively of "natural" people.¹⁹ However, natural people are also defined as "persons," which includes domestic and foreign business corporations.²⁰ The result is that human beings and corporations may or may not be equals depending on the circumstances.

Case law addressing the status of corporations has occasionally added to this uncertainty. The U.S. Supreme Court has simultaneously denied and granted corporations status as "citizens."²¹ This inconsistency continued into the latter half of the nineteenth cen-

15. See, e.g., Mark, *supra* note 12, at 1472 (concluding "the irreducible unit" of the common law existing at the time of the drafting of the Constitution was the individual human being); David Graver, *Comment, Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235, 243 (1999) (concluding that "[t]he Framers thought they were bestowing rights on human beings" based upon the application of original construction).

16. See Krannich, *supra* note 14, at 95 n.225 (citing Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 47 (Antonin Scalia & Amy Gutmann, eds., 1997) wherein Justice Scalia wrote that "[i]f the courts are free to write the Constitution anew, they will . . . write it the way the majority wants . . . [which] is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority").

17. See Krannich, *supra* note 14, at 95 nn. 226-27 (citing Lawrence H. Tribe, *Comment, in* Scalia & Gutmann, *supra* note 16, at 85-86).

18. BLUMBERG, *supra* note 11, at 25.

19. MODEL BUS. CORP. ACT ch. 1, § 13 (1969) (amended 2002).

20. *Id.* ch. 1, § 16.

21. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) (refusing to apply the Privileges and Immunities Clause to state regulation through the Fourteenth Amendment); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844) (holding corporations to be citizens of the states in which they are incorporated for purposes of diversity jurisdiction); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586 (1839) (holding that corporations were not citizens pursuant to the Privileges and Immunities Clause); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88, 91 (1809) (concluding that corporations are not citizens for purposes of diversity jurisdiction).

tury with respect to the issue of whether corporations were “persons.” The Court pronounced in *Santa Clara County v. Southern Pacific Railroad* that it did not wish to entertain argument with respect to applicability of the Equal Protection Clause of the Fourteenth Amendment to corporations as such applicability was settled law.²² Subsequent opinions affirmed this holding with respect to the Fourteenth Amendment.²³ However, the Court has reached different conclusions with respect to application of the freedoms and protections set forth in the Bill of Rights.²⁴

III. THE IMPORTANCE OF GRANTING RIGHTS TO TRANSNATIONAL CORPORATIONS

The previously noted problems are due, in part, to the incongruence between the modern corporation and the concept of personhood. As has been noted by commentators, this form of social organization does not fit neatly into the legal traditions of many states, whose founding documents focus on the regulation of the relationship between individuals and their governments.²⁵ However, if corporations are truly nothing more than the collective effort of individual human beings, then do not these individuals retain rights, constitutionally granted or otherwise, upon the formal organization of their cooperative efforts in the corporate form? To hold otherwise would imply a waiver of the promoters’ individual rights upon their filing of articles of incorporation and receipt of a state charter.

Legal personality is “a condition sine qua non for the possibility of acting within a given legal situation” without which an entity

22. 118 U.S. 394 (1886). The Court stated that it “[did] not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to . . . corporations. We are all of [the] opinion that it does.” *Id.* at 396 (citing to the preopinion statement of chief Justice Waite).

23. *See, e.g.*, *S. Ry. Co. v. Greene*, 216 U.S. 400, 412-13 (1910); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896); *Pembina Consol. Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

24. *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (speech); *Fed. Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257-59 (1986) (speech); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-92 (1978) (holding corporations enjoy First Amendment protection for speech); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569-76 (1977) (attaching double jeopardy to a judgment of acquittal for corporate defendant’s speech); *United States v. White*, 322 U.S. 694, 698 (1944) (cited with approval in *Bellis v. United States*, 417 U.S. 85, 89-90 (1974) (holding protection against self-incrimination limited to natural persons)) *accord* *Wilson v. United States*, 221 U.S. 361, 379-86 (1911); *Hale v. Henkel*, 201 U.S. 43, 70-71 (1906) (search and seizure and self-incrimination).

25. *E.g.*, Krannich, *supra* note 14, at 61.

does not exist.²⁶ The recognition of personhood not only confers life upon the entity but also imbues it with a sense of legitimacy by counting it for purposes of law.²⁷ Personhood also implies recognition of the individuals comprising the group as well as the cause for which they have united.²⁸ The conferral of these benefits and their importance are determined by national legal systems given the absence of an international regime with respect to personhood in general and corporate personality in particular.²⁹

Personality is also essential to corporations for a wide variety of practical reasons. Personality is the basis for ownership of assets separate and apart from individual shareholders. This recognition of separate ownership serves as the basis for contracts wherein corporations undertake duties and receive rights without the necessity of direct participation of their shareholders. Separate existence also permits corporations to avoid the uncertainties regarding individual members that plague other business associations, such as death, entry and exit of members and personal bankruptcy. All of these benefits serve to reduce transaction costs and improve efficiency, the benefits of which may be passed down to consumers. Similarly, these benefits, when combined with the pooling of assets and the shield of limited liability, reduce risk, which no single participant would be willing or able to assume on an individual basis. Finally, personhood may shield individual shareholders from undue intrusion into their business affairs by diverting government attention to their collective activities through the corporate form.

Corporate personality is also vital to the interests of the international community. Obligations and rights accrue only to those

26. Jan Klabbbers, *Legal Personality: The Concept of Legal Personality*, 11 IUS GENITIUM 35, 37 (2005). For general discussion of the importance of legal personality to corporations, see generally Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999). But see Klabbbers, *supra*, at 49, 55 (condemning the "obvious circularity" of the reasoning that one needs to be a person to have rights yet having rights implies that one is a person, questioning the necessity of legal personality to the exercise of rights and enforcement of duties and characterizing the status as merely declaratory); see also August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 37, 72 (Philip Alston ed., 2005).

27. Klabbbers, *supra* note 26, at 61-63 (characterizing the purpose of corporate personhood as certification that "the human group is worthy of recognition (in the broadest sense of the word) in itself" and is essential in order for corporations to be considered "legitimate participants in struggles over scarce resources").

28. *Id.* at 62. Klabbbers contends that non-recognition of a group by denial of personhood implies non-recognition of the individual members. *Id.*

29. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 262 (Michael K. Addo ed., 1999) (discussing the primary role of national governments with respect to corporate personality).

who are recognized subjects of international law.³⁰ Entities lacking legal personality pursuant to national law may not be subjects of international law. The absence of international recognition excuses such entities from international obligations. Behavior deemed to be a violation of international norms by entities possessing legal personality may not be a violation if engaged in by unrecognized entities. Consequently, such behavior creates no right to redress for injured parties. The obligations imposed upon or voluntarily undertaken by transnational corporations referenced in the introduction are thus meaningless without internationally recognized corporate personality. To the extent individuals may benefit from these compulsory obligations and voluntary undertakings, society at large has a stake in the recognition of corporate personality.

Additionally, if modern human rights law imposes new duties and extends existing ones to transnational corporations, then a discussion of freedoms and protections is necessary to enhance the credibility of human rights in corporate boardrooms. Enforcement measures alone are not adequate in this regard. Instead of building credibility for human rights, enforcement measures without accompanying rights may breed contempt and foster an atmosphere of evasion rather than acknowledgment of corporate responsibility. Existing measures, such as litigation, the imposition of monetary penalties, public condemnation and damage to business reputation, may prove inadequate if the financial rewards associated with the behavior in question outweigh the actual or perceived harm to corporate interests.

Concurrent recognition of freedoms and guarantees imbues human rights law with enhanced standing. Such recognition is essential in convincing corporations to appreciate human rights and their responsibilities. Acknowledging transnational corporations as stakeholders in the human rights regime rather than solely as responsible parties encourages them to act to protect rights that they share on an equal basis with others.³¹ Transnational corporations could not credibly claim the benefits of human rights protections while simultaneously denying their accompanying duties and responsibilities.³² Transnational corporations are thus faced with a choice — either receive the benefits flowing from status as rights, carrying entities while simultaneously acknowledging that they are also duty-bearing entities or deny the legitimacy of the applica-

30. Reinisch, *supra* note 26, at 70.

31. Addo, *supra* note 29, at 93 (noting that such recognition gives transnational corporations a stake in the outcome “upon which one can build a relationship of cooperation in the effective protection of human rights”).

32. *Id.* at 25.

tion of human rights principles to their operations and suffer the consequences as efforts to impose increased responsibilities upon them continue without abatement. Corporate self-interest mandates selection of the first option.

Such recognition does not come at the expense of sovereign governments or human beings. It has been aptly noted that “international law is not a zero-sum system” in which recognition of the rights of some detracts from the protection of the established rights of others.³³ Recognition of corporate rights does not detract from the ability and obligation of national governments to exercise their sovereign power if and when necessary. National governments retain their sovereignty and remain the primary focus of public international law.³⁴

Human beings also do not suffer harm as a result of such recognition. Human rights become no less “human” because some of their protections are extended to transnational corporations. Human beings remain the primary beneficiaries of human rights law, do not suffer a diminution of their rights and retain attributes which set them apart from corporations. The result is the continued exercise of sovereign powers by national governments and recognition and protection of the rights of human beings accompanied by the creation and “growth of a complementary system of law that fills the penumbra of existing State-centered international law and facilitates, as well as regulates, activity undertaken by, through, and with sovereign States and their citizens.”³⁵ The uncertainty in the public international legal system in which transnational corporations currently operate is dissipated in favor of the development of new legal regime with readily identifiable and enforceable rights and duties.

By contrast, non-recognition of corporate personhood or its revocation where otherwise established would do far more harm than good.³⁶ Abrogation of corporate personhood would not remedy

33. Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law: An Introduction*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 1, 6 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

34. *Id.*

35. *Id.*

36. See, e.g., Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 824 (2004). But see THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* 252 (2002). Hartmann contends that human beings are ruled by corporations, which are the creatures of their own social construct. The remedy for this situation is inversion of the hierarchy wherein corporations are made legally subordinate to the people and governments who created them. *Id.* According to Hartmann, this inversion may be accomplished, in part, through “a grassroots movement in communities all across America and the world to undo corporate personhood, leading to change in the definition of the word ‘person.’” *Id.* Litowitz dismisses Hartmann’s call for the abolition of personhood as ineffective in remedying corporate abuses and having a disparate impact on

real or perceived abuses by corporate malefactors. The abolition of personhood would free corporations from national and international constraints imposed upon persons. The net effect would be to cast the corporation, including its transnational iteration, as an outlaw “exempt from the operation of some parts of the law and imbued with a power to impose law on its members.”³⁷

Such a result is clearly undesirable given the preeminence of the corporate form of business as the dominant economic actor in the national and global marketplaces.³⁸ Such preeminence has generated enormous resources, which have in turn provided corporations with the ability to assert themselves far more vigorously than their human brethren without consideration of impacted communities.³⁹ These resources and consequent power may even rival those of the states in which they operate and to which they owe their existence.⁴⁰ Trust should not be blindly placed in the hands of corporations to always exercise this economic and political power wisely and legally. Given these realities, corporations must be brought within the legal system and subject to similar duties and restraints as other persons. This necessity supports the imposition of human rights obligations on transnational corporations. This necessity also supports the delineation and careful circumscription of human rights protections for such corporations.

IV. THE LEGAL BASES FOR GRANTING HUMAN RIGHTS TO TRANSNATIONAL CORPORATIONS

A. Introduction

Given the absence of reference to corporations in foundational documents, the undefined or inconsistent usage of terms such as “persons” and “citizens” and the diversity of judicial opinions, it is tempting to conclude that the attributes of corporations, including legal personality, are whatever the law determines them to be or

small and medium sized businesses by penalizing them for the sins of larger transnational corporations. Litowitz, *supra* at 824.

37. Liam Seamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 206 (2006).

38. For discussion of the economic preeminence of transnational corporations, see Krannich, *supra* note 14, at 65.

39. HARTMANN, *supra* note 36, at 6, 105, 252.

40. See, e.g., Blumberg, *supra* note 13, at 298 (describing transnational corporations as operating as “multi-tiered multinational groups” with concentrated power exceeding that of individual nations); Krannich, *supra* note 14, at 65, 70 (characterizing transnational corporations as “once the derivative tool of the state . . . [and now] its rival” and possessing “greater influence in the country and upon the legislation of the country than the states to which they owed their corporate existence”) (internal citations omitted); O'Melinn, *supra* note 37, at 206 (describing a corporation as “an extraordinary kind of person with legal privileges to rival those of the state”).

perhaps what best accommodates corporate needs.⁴¹ The many shared attributes of corporations and human beings lend further support to their equation within the law.⁴² However, the granting of human rights protections to transnational corporations on the basis that the law may grant any right it deems prudent is inadequate.

This section of the article contends that transnational corporations are beneficiaries of international human rights instruments. This conclusion is based upon the recognition of personhood in the express language of human rights instruments and in the vast majority of national legal systems.

B. International Human Rights Instruments

International human rights law provides a basis for corporate legal personality. The significance of the impact of transnational corporations on human rights has been recognized in international instruments dating back to the founding of modern human rights law. The preamble of the Universal Declaration of Human Rights provides that “every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”⁴³ The responsibility of these “individual[s] and organ[s] of society” is reiterated in the Universal Declaration’s

41. See, e.g., John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (stating that the corporate form of business is “whatever the law makes it [to] mean”); Iwai, *supra* note 26, at 604 (contending that the “concept of the corporation is essentially indeterminate” and “can signify essentially whatever law makes it signify”); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1754 (2001) (concluding that “courts have adjusted definitions of personhood to accommodate the modern corporation’s need for [Bill of Rights] protections”).

42. See MODEL BUS. CORP. ACT, *supra* note 19, ch. 3, § 3.02(1-15). Section 3.02 enumerates fifteen separate rights possessed equally by corporations and human beings by providing that a corporation has “the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including”:

(1) to sue and be sued;

(4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(7) to make contracts and guarantees, incur liabilities [and] borrow money;

(8) to lend money . . . [and]

(14) to transact any lawful business. . . .

Id. § 3.02 (1), (4-5), (7-8) (14).

43. Universal Declaration of Human Rights, *supra* note 2, pmbl.

concluding section, which prohibits interpretations “implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”⁴⁴

The “individuals,” “organs of society,” groups and persons to whom these duties are applicable are not defined. Nevertheless, they include transnational corporations to the extent such entities may be characterized as individuals or persons using real entity theory.⁴⁵ Individuals and persons may also include corporations applying aggregate theory to the extent they are viewed as groups formed as a result of contractual relations.⁴⁶ Applying concession

44. *Id.* art. 30.

45. See Louis Henkin, *The Universal Declaration at Fifty and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17, 25 (1999) (interpreting the Universal Declaration of Human Rights to mean that “[e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace”). See also Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 96 (2002) (contending that “[t]o the extent that individuals have rights and duties under customary international law and international humanitarian law, [multinational corporations] as legal persons have the same set of rights and duties”). Real entity theory provides that corporations possess personality due to their nature as full-fledged legal entities possessing free will. Iwai, *supra* note 26, at 600. This existence and free will are separate and apart from that of the ever-changing roster of individuals constituting the organization. See, e.g., BLUMBERG, *supra* note 11, at 28; OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* 67-73 (Frederic W. Maitland trans., 1900); FREDERICK HALLIS, *CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE* 138-65 (1978); GEORGE W. PATON, *A TEXTBOOK OF JURISPRUDENCE* 268-69 (1946); Klabbers, *supra* note 26, at 44; Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1459-63 (1992); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 566-69 (1987). The lack of identification of the corporate entity with its owners requires recognition of the corporation as an autonomous entity. Krannich, *supra* note 14, at 82. See also Mark, *supra* note 12, at 1473. The importance of state action, the hallmark of concession theory, is minimized. Although a state charter is still required, its issuance does not confer status upon the corporation. Rather, the issuance of state charters is “merely confirming the preexisting ‘reality’ of the organizational existence.” BLUMBERG, *supra* note 11, at 28. See also Graver, *supra* note 15, at 238.

46. Aggregate theory provides that corporations are a simple “nexus of contracts” or aggregation of individuals connected by contractual relations between themselves and management. See, e.g., BLUMBERG, *supra* note 11, at 27-28; ROMAN TOMASIC, STEPHEN BOTTOMLEY & ROB MCQUEEN, *CORPORATIONS LAW IN AUSTRALIA* 58 (2d ed. 2002) (describing corporations as “nothing more than a shorthand expression for a multiplicity of private, consensual, contract-based relations between economic actors, each seeking to maximize his or her own benefits”); William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 423-27 (1989); Daniel P. Sullivan & Donald E. Conlon, *Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware*, 31 LAW & SOC'Y REV. 713, 719-20 (1997). Aggregate theory in the United States has been traced back to the early nineteenth century at which time it was deemed “necessary to enhance the powers of individually powerless citizens by allowing them to unite in order to amass power.” Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 252 (1998); see also RONALD E. SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION 1784-1855* 256 (1982) (characterizing aggregate theory as “the economic aspect of the political [sic] and social forces that democratized the United States during the ‘Age of

theory, corporations are organs of society to the extent they are creatures of the law bearing rights and duties as memorialized in state-issued charters.⁴⁷ Regardless of the theory utilized, it is clear that the intent of the Universal Declaration was to reach beyond traditional state actors and create private duties with respect to human rights.⁴⁸

Similar responsibilities are imposed by other international human rights instruments. For example, the other two components of the International Bill of Rights, the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, impose duties on individuals as well as prohibit interpretations that permit the disregard or limitation of rights contained therein by “any State, group or person.”⁴⁹ Similar language ap-

Jackson”). Corporations are disconnected from their state moorings and viewed as private arrangements that should be free from state interference. *See, e.g.*, BLUMBERG, *supra* note 11, at 28; ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 22 (1979); RALPH K. WINTER, GOVERNMENT AND THE CORPORATION 69-73 (1978). *But see* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1648 (1982) (concluding that corporations are subject to no greater or less scrutiny and exercise of government authority than human beings). The “explanatory framework” for the corporation utilizing aggregate theory is thus the provisions of the underlying contracts themselves rather than state action resulting in the creation of an independent institution. Iwai, *supra* note 26, at 600.

47. *See* Human Rights Norms, *supra* note 1, pmbl. (defining transnational corporations and other business enterprises as organs of society). *See also* Henkin, *supra* note 45, at 25. Concession theory may be traced back to Pope Innocent IV in the thirteenth century. *See* Iwai, *supra* note 26, at 584. Concession theory as recognized in the United States was a descendant of the British legal tradition dating back to the writings of Blackstone and Coke in the seventeenth and eighteenth centuries. *See, e.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 475-76 (1765); EDWARD COKE, FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 250 (1628). Concession theory has also been referred to as artificial or fictional person theory or grant doctrine. BLUMBERG, *supra* note 11, at 26. Concession theory was perhaps best summarized in Trustees of Dartmouth College v. Woodward wherein Chief Justice Marshall described a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law . . . [and thus] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence.” 17 U.S. (4 Wheat.) 518, 636 (1819). The corporation is merely a concession memorialized in a state charter, which grants the participants the right to utilize the corporate vehicle as a means by which to conduct business. *See* Janet Dine, *Human Rights and Company Law*, HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 209, 227. *See also* TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 53. The state maintains an active role only to the extent of ensuring compliance with corporate governance structures. Dine, *supra* at 227. The rights and duties possessed by corporations as “constructed entities” are separate and apart from those enjoyed by the natural persons constituting the organization. *Id.* *See also* BLUMBERG, *supra* note 11, at 26. This separation, as well as the maintenance of state sovereignty with respect to corporate operations, simultaneously preserves the sanctity of natural individuals while permitting them a limited degree of freedom in the methods by which they elect to conduct commercial transactions. TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 53-54.

48. *See, e.g.*, Reinisch, *supra* note 26, at 71 (stating that “the core of human rights obligations are binding on all parts of society including the non-state actors”); Chris Jochnick, *Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights*, 21 HUM. RTS. Q. 56, 64-68 (1999); Jordan J. Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 53-54 (1992).

49. International Covenant on Civil and Political Rights, *supra* note 2, pmbl., art. 5(1) (providing that “the individual, having duties to other individuals and to the community to

pears in regional human rights instruments.⁵⁰ Other international human rights instruments are expressly directed at transnational corporations and impose specific obligations upon them.⁵¹

However, international legal personality entails not only duties, but also an accompanying set of rights.⁵² Many existing international human rights instruments recognize the interconnectedness of duties and rights with respect to transnational corporations by either expressly granting specific rights or being capable of interpretation as to include such rights. For example, the Universal Declaration of Human Rights not only creates duties for every individual and organ of society but also grants rights to such individuals and organs. The Universal Declaration's repeated use of the term "everyone" without limitation to human beings serves to

which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" and prohibiting interpretations that imply "for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant"). *See also* International Covenant on Economic, Social and Cultural Rights, *supra* note 2, pmb., art. 5(1) (providing that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant" and prohibiting interpretations that imply "for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant").

50. *See, e.g.*, African Charter on Human and Peoples' Rights arts. 27-29, June 27, 1981, 21 I.L.M. 58 ("Every individual shall have duties toward his family and society, the State and other legally recognized communities and the international community"); American Convention on Human Rights, art. 28(3)(a), July 18, 1978, OAS Treaty Series No. 36, at 1, OAS Off. Rec. OEA/Ser4v/II 23 ("No provision of this Convention shall be interpreted as permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein"); American Declaration of the Rights and Duties of Man, pmb., Apr. 1948, O.A.S. Res. Res. XXX, OEA/Ser.L.V/II.82, at 17 (stating that "juridical and political institutions . . . have as their principal aim the protection of the essential rights of man").

51. *See supra* notes 3-4 and accompanying text. *But see* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (discussing the refusal of the U.N. Diplomatic Conference on the Establishment of an International Criminal Court to adopt a French proposal to grant the Court jurisdiction over transnational corporation pursuant to Article 23 of the Rome Statute).

52. Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 259, 262 (Michael K. Addo ed., 1999). *See also* Ramasastry, *supra* note 45, at 96. The interconnectedness of rights and duties in international human rights law is perhaps no better expressed than in the American Declaration of the Rights and Duties of Man, which provides, in part, "[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty." American Declaration of the Rights and Duties of Man, *supra* note 50, pmb.

grant numerous rights to human beings as well as transnational corporations.⁵³

Several provisions of the Universal Declaration are too broad to be limited to human beings. For example, the right to receive and impart information and ideas through the media and protect moral and material interests arising from scientific, literary or artistic productions applies to "everyone".⁵⁴ The Universal Declaration does not distinguish between human beings and corporations in the recognition of these rights. Exclusion of corporations from these rights would be an unduly restrictive interpretation to the extent that much of the information imparted to the general public has a corporate source. Similarly, it could not have been the intent of the drafters to exclude recognition and protection of corporate interests in scientific, literary and artistic productions.

The Universal Declaration also grants everyone the right to own property.⁵⁵ However, unlike the rights to freedom of expression and protection of ideas, Article 17 recognizes property rights arising from sole ownership as well as "in association with others."⁵⁶ This language clearly includes transnational corporations to the extent they are viewed as associations of people utilizing aggregate theory. Corporations are also considered persons to the extent they are designated as such by applicable national legal systems.⁵⁷

The other two components of the International Bill of Rights similarly grant human rights to transnational corporations. The International Covenant on Civil and Political Rights grants a wide variety of freedoms and protections to "individuals,"⁵⁸ "persons"⁵⁹

53. See Universal Declaration of Human Rights, *supra* note 2, arts. 2, 6, 10, 11, 12, 18 (stating that everyone is entitled to the rights and freedoms set forth in the Declaration without distinctions of any kind and that everyone has the rights to recognition as a person, a "fair and public hearing by an independent and impartial tribunal" and the presumption of innocence in criminal matters and freedom of thought and conscience and the rights to be free from *ex post facto* laws and "arbitrary interference" with privacy).

54. *Id.* arts. 19, 27(2) ("Everyone with the right to freedom of opinion and expression . . . to seek, receive and impart information and ideas through any media and regardless of frontiers" and the right to "the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

55. *Id.* art. 17(1-2) ("Everyone has the right to own property alone as well as in association with others . . . [and] [n]o one shall be arbitrarily deprived of his property.").

56. *Id.* art. 17(1).

57. *Id.* art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by the law.").

58. International Covenant on Civil and Political Rights, *supra* note 2, art. 2 (stating that individuals are entitled to the rights and freedoms set forth in the Covenant without distinctions of any kind).

59. *Id.* arts. 2(3)(a-b), 14(1), 26 (stating that persons have a right to an effective remedy for violations of the rights set forth in the Covenant to be determined by "competent judicial, administrative or legislative authorities," the right to be equal before the courts,

and “everyone”⁶⁰ and further provides that “no one”⁶¹ shall be subjected to certain actions without distinguishing between human beings and transnational corporations. In a manner similar to the Universal Declaration, the International Covenant on Civil and Political Rights is broader than necessary to be solely applicable to human beings. For example, the right to receive and impart information and ideas through the media applies to all persons without a basis for distinguishing between human beings and corporations.⁶² The same conclusion applies to the right to benefit from the protection of “moral and material interests resulting from any scientific, literary or artistic production” set forth in the International Covenant on Economic, Social and Cultural Rights.⁶³ The Covenant provides that this right is applicable to “everyone” without distinction between human beings and juridical persons, and there is no rational basis upon which to grant human beings such protections while denying the same to transnational corporations.⁶⁴

Similar interpretations exist with respect to regional human rights instruments. For example, the American Declaration of the Rights and Duties of Man specifically refers to “human beings”⁶⁵ but then proceeds to grant numerous rights to “every person”.⁶⁶ These rights include freedom of expression and dissemination of ideas through any medium, which applies to all persons regardless of their nature.⁶⁷ The American Declaration also includes transna-

the right to “a fair and public hearing by a competent, independent and impartial tribunal established by law” with respect to criminal matters and the right to equal protection of the law).

60. *Id.* arts. 14(2-3, 5), 16, 17(2) (providing everyone with the presumption of innocence in criminal matters, minimum guarantees in such proceedings, appeal of convictions and sentences, the right to recognition as a person and the right to protection against arbitrary or unlawful interference with privacy).

61. *Id.* arts. 14(7), 15, 17(1) (providing no one shall be subjected to double jeopardy, the operation of *ex post facto* laws or “arbitrary or unlawful interference with his privacy”).

62. *Id.* art. 19(2) (granting “[e]veryone . . . the right to freedom of expression . . . includ[ing] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice”).

63. International Covenant on Economic, Social and Cultural Rights, *supra* note 2, art. 15(1)(c) (recognizing the right of “everyone . . . [t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production”).

64. *Id.* art. 15(1).

65. American Declaration of the Rights and Duties of Man, *supra* note 50, art. 1 (“Every human being has the right to life, liberty and the security of his person.”).

66. *Id.* arts. 2, 5, 10, 17-18, 23, 26 (granting “all persons” equality before the law, the right to protection from attacks upon his privacy, the inviolability of correspondence, the right to be recognized as a person, resort to the courts for the purpose of protecting his legal rights, the right to own private property and the presumption of innocence, the right to a “an impartial and public hearing” and freedom from “cruel, infamous or unusual punishment” in criminal matters).

67. *Id.* art. 4 (“Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”).

tional corporations to the extent they are viewed as associations of people pursuant to aggregate theory.⁶⁸

The implementation of the American Declaration through the American Convention on Human Rights does not alter this conclusion. Although the American Convention specifically defines persons as human beings,⁶⁹ it simultaneously grants rights to “everyone”⁷⁰ and “anyone”⁷¹ and prohibits certain conduct to which “no one” shall be subjected.⁷² This specific reference to human beings is further qualified by limitations imposed “by the rights of others and by the security of all.”⁷³ These other persons and the “all” whose security is to be preserved are unidentified and thus may include not just other human beings but transnational corporations. The American Convention also includes freedom of expression and dissemination of ideas through any medium in which no distinction is made between human beings and corporations.⁷⁴ The American Convention also includes transnational corporations through its recognition of associations of persons.⁷⁵

The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes a wide variety of rights enjoyed by “everyone”⁷⁶ while simultaneously prohibiting certain conduct to which “no one” shall be subjected.⁷⁷ For example, the European Convention recognizes freedom of expression and dissemination of ideas through any medium without distinction be-

68. *Id.* art. 22 (“Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a . . . economic . . . nature.”).

69. American Convention on Human Rights, *supra* note 50, art. 1(2).

70. *Id.* arts. 11(1-3), 21(1), 25(1) (granting “everyone” the right to privacy, the right to use and enjoyment of property and recourse to a “competent court or tribunal” in the event of a violation).

71. *Id.* art. 14(1) (granting “anyone” the right to reply or make corrections to erroneous information disseminated by communications outlets).

72. *Id.* arts. 9, 21(2) (providing that “no one” shall be convicted of a crime on the basis of an ex post facto application of the law or shall be deprived of property “except upon payment of just compensation, for reasons of public utility or social interest”).

73. *Id.* art. 32(2).

74. *Id.* art. 13(1) (“Everyone has the right to freedom of thought and expression . . . includ[ing] freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”).

75. *Id.* art. 16(1) (“Everyone has the right to associate freely for . . . economic . . . purposes.”).

76. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6(1-3), 8(1), Sept. 3, 1953, 213 U.N.T.S. 222 (stating that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” with respect to the determination of civil rights and criminal charges, the presumption of innocence and minimum procedural protections in criminal matters, the right to privacy and the right to an “effective remedy” for violations of the Convention).

77. *Id.* art. 7(1) (providing that “[n]o one” shall be convicted of a crime on the basis of an ex post facto application of the law).

tween human beings and corporations.⁷⁸ States are required to undertake measures to “secure to everyone within their jurisdiction the rights and freedoms defined in . . . this Convention”;⁷⁹ Any doubt as to the applicability of these protections to transnational corporations is eliminated by Article 34, which grants standing to file a complaint to “any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention”.⁸⁰ The European Court of Human Rights has characterized corporations as non-governmental organizations and has accepted complaints from such entities alleging a variety of violations.⁸¹

In a manner similar to the American Convention, the African Charter on Human and Peoples’ Rights makes a distinction between human beings and other persons.⁸² However, it then proceeds to grant numerous rights to “individuals” without distinction between human beings and other types of persons.⁸³ The African Charter also includes transnational corporations to the extent they possess rights to disseminate opinions⁸⁴ and are viewed as associations of persons.⁸⁵

78. *Id.* art. 10(1) (“Everyone has the right to freedom of expression . . . includ[ing] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”).

79. *Id.* art. 1.

80. *Id.* art. 34.

81. *See, e.g.*, *Pressos Compania Naveira S.A. v. Belgium*, 21 E.H.R.R. 301 (1996) (Article 6 right to fair trial); *Dombo Beheer v. Netherlands*, 18 E.H.R.R. 213 (1994) (Article 6 right to fair trial); *Sunday Times v. United Kingdom No. 2*, 14 E.H.R.R. 229 (1992) (Article 10 freedom of expression); *Observer & The Guardian v. United Kingdom*, 14 E.H.R.R. 153 (1992) (Article 10 freedom of expression); *Pine Valley Develops. Ltd. v. Ireland*, 14 E.H.R.R. 319 (1991) (Article 6 right to fair trial); *Autronic AG v. Switzerland*, 12 E.H.R.R. 485 (1990) (interpreting “everyone” to include natural and legal persons for purposes of Article 10 freedom of expression); *Groppera Radio AG v. Switzerland*, 12 E.H.R.R. 321 (1990) (Article 10 freedom of expression); *Mrkt. Int’l Verlag GmbH v. Germany*, 12 E.H.R.R. 161 (1989) (Article 10 freedom of expression); *Sunday Times v. United Kingdom No. 1, 2* E.H.R.R. 245 (1979) (Article 10 freedom of expression); *Naviflora Sweden v. Sweden*, Application No. 14369/88, (1993) 15 E.H.R.R. 6 (in which the European Commission on Human Rights upheld a complaint that a search of business premises constituted intrusion into the private affairs and correspondence of a corporation in violation of Article 8). *See also* Addo, *supra* note 29, at 194-95 (discussing the application of the human rights protections contained within the European Convention to transnational corporations).

82. African Charter on Human and Peoples’ Rights, *supra* note 50, art. 4 (stating that “[h]uman beings are inviolable . . . [and] shall be entitled to respect for [their lives] and . . . integrity”).

83. *Id.* arts. 2, 3(2), 7(1-2) (granting “individuals” entitlement to the rights set forth therein “without distinctions of any kind”, equal protection of the law, the right to have one’s cause heard, the presumption of innocence and “the right to be tried within a reasonable time by an impartial court or tribunal” in criminal cases and the right to be free from *ex post facto* laws).

84. *Id.* art. 9(1-2) (granting “[e]very individual” the right to receive information and disseminate opinions).

85. *Id.* art. 10(1) (granting “[e]very individual” the right to free association).

C. National Legal Systems

1. The U.S. Legal System

Despite the previously-noted uncertainty in U.S. constitutional and statutory law, there has been a steady trend in judicial recognition of corporate legal personality dating back to the nineteenth century. The U.S. Supreme Court's initial foray into this field concerned the issue of whether corporations were citizens.⁸⁶ The Court addressed the issue of whether corporations were persons in the latter half of the nineteenth century. The Court pronounced in *Santa Clara County v. Southern Pacific Railroad* that it did not wish to entertain argument with respect to applicability of the Equal Protection Clause of the Fourteenth Amendment to corporations as such applicability was settled law.⁸⁷ Although the exact legal basis for this pronouncement remains unclear, this conclusion may have had its genesis four years earlier in the *Railroad Tax Cases* in which a federal circuit court applied the Equal Pro-

86. See, e.g., *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809) (concluding a corporation was not a citizen within the meaning of the Constitution for purposes of federal diversity jurisdiction but rather was a "mere creature of the law, invisible, intangible, and incorporeal"). The specific constitutional clause at issue in *Deveaux* was the grant of jurisdiction to federal courts to hear cases or controversies between citizens of different states. U.S. CONST. art. III, § 2, cl. 1. According to Chief Justice Marshall, "citizens" described only "the real persons who come into court, in this case, under their corporate name." *Deveaux*, 9 U.S. (5 Cranch), at 91. The twin prongs of Justice Marshall's opinion were recognition of the corporation as an entity dating back to Coke and Blackstone combined with an associational view relative to shareholders to the extent necessary to sustain corporate rights to sue and be sued in federal courts utilizing diversity jurisdiction. See BLUMBERG, *supra* note 11, at 32-33. But see *Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (reaffirming the conclusion that a corporation was a "mere creature" of the law without a "legal existence out of the boundaries of the sovereignty by which it was created" but refusing to endorse the associational theory advanced by Justice Marshall, perhaps lest equation of corporations with their shareholders threaten the concept of limited liability). *Id.* at 554, 574. See BLUMBERG, *supra* note 11, at 34. Blumberg bases his conclusion upon the relative newness of the concept of limited liability at the time of the Court's opinion in *Earle* and language in Chief Justice Taney's opinion stating:

[if] members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner . . . [and] be liable to the whole extent of [their] property for the debts of the corporation.

Earle, 38 U.S. at 586.

The specific constitutional clause at issue in *Earle* was the Privileges and Immunities Clause, which states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. See also *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. 497 (1844) (deeming corporations to be citizens of the states in which they were incorporated for purposes of diversity jurisdiction). But see *Paul v. Virginia*, 75 U.S. 168 (1868) (refusing to apply the Privileges and Immunities Clause to state regulation through the Fourteenth Amendment).

87. 118 U.S. 394, 396 (1886).

tection Clause to corporations based upon a constitutional status similar to human beings.⁸⁸ Twenty-two years later, in *Southern Railway Co. v. Greene*, the Court affirmed *Pembina*, but its recitation of the holding in that case omitted the language characterizing corporations as “merely associations of individuals.”⁸⁹ Rather, corporations could stand alone as constitutionally empowered persons utilizing real entity theory.

The Court also has a long history regarding corporate entitlement to the protections and guarantees set forth in the Bill of Rights. In *Hale v. Henkel*, the Court held that corporations were persons subject to the Fourth Amendment protection against unreasonable search and seizure.⁹⁰ The persons comprising such entities did not surrender their right to be free from such intrusions merely by electing to conduct their business relations utilizing the

88. 13 F. 722, 744 (C.C.D. 1882), *appeal dismissed as moot*, *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885). The majority opinion held that “[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.” *Id.* at 747. Some commentators have focused on this statement as an endorsement of an associational view of corporations rather than a grant of corporate personhood. *See, e.g.*, Krannich, *supra* note 14, at 77; Morton J. Horowitz, *Santa Clara Revisited, The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 183 (1985) (equating corporate interests for constitutional purposes with shareholder interests). Further support for this interpretation may be found in the Court’s holding two years later in *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania* in which the Court not only affirmed its previous conclusion in *Santa Clara County* but also determined that corporations were entitled to the Fourteenth Amendment’s due process protections as “merely associations of individuals.” 125 U.S. 181, 189 (1888). *But see* *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896) (concluding that it was “settled” that corporations were persons within the meaning of the Equal Protection and Due Process Clauses of the U.S. Constitution).

89. 216 U.S. 400, 412 (1910). This omission has been characterized as a rejection of the associational theory of constitutional personhood. *See* BLUMBERG, *supra* note 16, at 37.

90. 201 U.S. 43, 71 (1906). The search and seizure clause of the Fourth Amendment provides “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated.” U.S. CONST. amend. IV. However, the Court refused to hold that corporations were “persons” for purposes of the Fifth Amendment’s self-incrimination clause. *Hale*, 201 U.S. at 70. The self-incrimination clause of the Fifth Amendment provides “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. Such a result would be, in the Court’s view, a “strange anomaly” contrary to the state’s exercise of sovereignty to inquire through requests for production of documents how entities created pursuant to its own laws had been employed or abused. *Hale*, 201 U.S. at 74. Subsequent decisions have affirmed this conclusion. *See, e.g.*, *Bellis v. United States*, 417 U.S. 852, 889-90 (1974); *United States v. White*, 322 U.S. 694, 698 (1944) (stating that the privilege to be free from self-incrimination is “essentially a personal one, applying only to natural individuals”); *Wilson v. United States*, 221 U.S. 361, 379-86 (1911). The result is different in other common law states. For example, corporations possess the right to be free from self-incrimination in the United Kingdom, Canada and New Zealand. *See, e.g.*, *Triplex Safety Glass Co. v. Lancegaye Safety Glass, Ltd.*, (1939) 2 K.B. 395 (U.K.); *Reg. v. Bank of Montreal*, (1962) 36 D.L.R.2d 45 (Can.); *New Zealand Apple & Pear Mktg. Co. v. Master & Sons, Ltd.*, [1986] 1 N.Z.L.R. 191 (N.Z.).

corporate form.⁹¹ Although the Court, indeed a single Justice, reached two different results regarding the same “person” with respect to two different amendments, this apparent conflict may be reconciled on the basis that protection from unreasonable search and seizure pursuant to the Fourth Amendment is justified by associational theory. Shareholders should not be deemed to have surrendered their Fourth Amendment rights on the basis of their choice of business entity. By contrast, the Court’s refusal to extend the self-incrimination privilege to corporations did not conflict with the personal interests of shareholders to be protected by such privilege.⁹² The search and seizure portion of the Court’s opinion has been upheld in subsequent decisions.⁹³

The Court’s opinion in *Marshall v. Barlow’s, Inc.* is particularly instructive with respect to two aspects of corporate legal personality. First, the opinion traces the right of businesses to be free from warrantless searches back to the colonial period immediately preceding the American Revolution.⁹⁴ Thus, the inclusion of businesses within the meaning of “people” protected by the Fourth Amendment’s warrant requirement is not a late twentieth century interpretation but rather the intent of the Founding Fathers.

Second, the opinion recognizes that businesses possess rights with respect to their commercial premises identical to those of human beings with respect to their residences, specifically, to conduct their affairs “free from unreasonable official entries.”⁹⁵ Warrantless searches of business premises jeopardize this right to the

91. *Hale*, 201 U.S. at 76. (“A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body.”).

92. See BLUMBERG, *supra* note 11, at 41.

93. See, e.g., *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (“Dow plainly has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings, and it is equally clear that expectation is one society is prepared to observe.”); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311 (1978) (holding that the warrant requirement of the Fourth Amendment is applicable to commercial buildings as well as private residences); *See v. Seattle*, 387 U.S. 541, 543 (1967) (holding that the right of a businessperson to be free from “unreasonable official entries upon his private commercial property” is violated to the extent regulatory authorities can enter such property “without official authority evidenced by a warrant”); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (concluding that the general prohibition upon warrantless searches is applicable to commercial premises).

94. *Marshall*, 436 U.S. at 311-12. The Court found that the “particular offensiveness” of the general warrant during the colonial era was “acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary measures that most irritated the colonists,” including the Stamp Act of 1765, the Townshend Revenue Act of 1767 and the Tea Act of 1773. *Id.* at 311, 311 n.7. According to the Court, the warrant requirement “grew in large measure” from the experiences of merchants with these measures. *Id.* at 311. As a result, it was “untenable” to conclude that the prohibition upon warrantless searches was not intended to protect businesses as well as private residences. *Id.* at 312.

95. *Id.* at 312.

same degree as such searches jeopardize the rights of human beings to the security of their residences.⁹⁶ The Court also equated businesses with “individuals” and “persons” in its conclusion that the purpose of the Fourth Amendment’s warrant requirement is “to safeguard the privacy and security of individuals against arbitrary invasions of their property by governmental officials” and that the privacy interests of “persons” suffer as a result of searches conducted without the benefit of a warrant.⁹⁷ Corporations are thus the legal equivalent of human beings with respect to the Fourth Amendment’s prohibition upon unreasonable search and seizure.

The Court has also addressed corporate personhood in the context of the prohibition upon double jeopardy contained in the Fifth Amendment.⁹⁸ The prohibition upon double jeopardy utilizes the term “person” in the same manner as the Self-Incrimination Clause, which it immediately follows in the Constitution. The Double Jeopardy Clause also utilizes the term “jeopardy of life or limb,” neither of which is possessed by corporations, thus leaving the impression that such rights are personal in a manner similar to the Self-Incrimination Clause. Given these similarities and the Court’s holding in *Hale*, it would be fair to assume that corporations are not persons for purposes of the Double Jeopardy Clause. Nevertheless, the Court has concluded on more than one occasion that the clause does in fact protect corporations from double jeopardy.⁹⁹

Corporations have also been recognized as possessing speech rights pursuant to the First Amendment.¹⁰⁰ Corporate speech rights had their judicial origin in numerous cases extending First Amendment protection to commercial speech, which the Court defined as “expression related solely to the economic interests of the

96. *Id.*

97. *Id.* at 312.

98. The double jeopardy clause of the Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

99. *See, e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (noting that the prohibition upon double jeopardy applies to corporations in order to shield them from “embarrassment, expense and ordeal”) (citation omitted); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946). According to critics, the Court has never adequately explained the theoretical basis for these decisions and their difference from the holding in *Hale*. *See, e.g.*, Krannich, *supra* note 14, at 97-98. Particularly unpersuasive to critics is the Court’s conclusion that policies justifying the prohibition with respect to natural persons—specifically, protection from “embarrassment, expense and ordeal”—were equally applicable to corporations. *Id.* at 97 n.242.

100. The First Amendment provides, in part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I.

speaker and its audience.”¹⁰¹ These decisions served as the foundation for subsequent opinions granting speech rights to corporations. For example, the majority opinion in *First National Bank of Boston v. Bellotti* found resolution of the corporate personality debate unnecessary in order to strike down a Massachusetts statute restricting the use of corporate monies to influence state initiatives.¹⁰² According to Justice Powell, the question of what the First Amendment speech clause was intended to protect was far more important than the identity of the speaker.¹⁰³ Society’s interest in the preservation of the “right of public discussion” guaranteed by the First Amendment prevented Massachusetts from barring certain participants from this discussion.¹⁰⁴ This conclusion abrogated any need for addressing corporate personality in the context of the First Amendment.¹⁰⁵ Subsequent opinions have utilized this approach.¹⁰⁶

Later opinions have recognized that the unequal power possessed by corporations may skew Justice Powell’s marketplace of

101. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980) (overturning a regulation issued by the New York Public Service Commission prohibiting advertising by electric utilities) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (striking down a Virginia statute defining unprofessional conduct of state licensed pharmacists to include advertising the price of drugs available only by prescription)); *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (overturning a disciplinary rule prohibiting advertising by attorneys of prices for “routine legal services”). *But see* *Friedman v. Rogers*, 440 U.S. 1, 11 (1979) (upholding a provision of the Texas Optometry Act prohibiting the practice of optometry utilizing a trade name on the basis that the Act furthered the state’s interest in protecting the public from the deceptive use of trade names); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (rejecting a claim by an attorney that the solicitation of clients was protected speech not subject to the disciplinary provisions of Ohio’s Code of Professional Responsibility).

102. 435 U.S. 765 (1978).

103. *Id.* at 776 (stating that the proper issue for resolution was not “whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons [but rather] . . . whether [the Massachusetts legislation] abridges expression that the First Amendment was meant to protect”).

104. *Id.* at 792.

105. Justice Powell did note that the dissenting opinions of Chief Justice Rehnquist and Justice White (with whom Justices Brennan and Marshall concurred) upholding the Massachusetts statute on the basis of the artificial entity theory and thereby entitling corporations to only those rights granted by the state was “extreme.” *Id.* at 778 n.14, 792. Justice Powell subsequently retracted this characterization nine years later. *See* *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987).

106. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986) (holding that the identity of the speaker was not relevant to the determination of whether speech was protected, and corporations as well as their human counterparts contributed to the “‘discussion, debate and the dissemination of information and ideas’ that the First Amendment seeks to foster”) (citation omitted); *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 544 (1980) (striking down a prohibition upon discussion of political issues contained in billing envelopes on the basis that the prohibition abridged protected speech and improperly limited public access to information and ideas).

ideas at the expense of other less powerful participants.¹⁰⁷ The Court's post-*Bellotti* holdings have been described as a careful balancing act designed to provide equal access to the public forum while maintaining some semblance of balance between the speakers.¹⁰⁸ Nevertheless, it is incontestable that corporations have a right to participate in the marketplace of ideas created by the First Amendment regardless of whether or how their legal personalities are described.

There are several conclusions to be reached as a result of this survey of corporate personhood in the United States. First, the U.S. Supreme Court has recognized that corporations are separate from their founders, shareholders, managers, and directors. This recognition of separate personality is accompanied by a concurrent grant of associated rights. The Court's conclusions are not without critics.¹⁰⁹ However, corporate personhood has been largely assumed for the past 120 years. The current debate, to the extent it

107. *See, e.g.*, *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (noting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" in upholding a law prohibiting spending in connection with state elections by nonprofit corporations comprised of for-profit corporations); *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 257-59 (1986) (opining that a federal law prohibiting all corporate spending in connection with federal elections may have been constitutional if it only applied to for-profit corporations due to the "corrosive influence of concentrated corporate wealth").

108. Krannich, *supra* note 14, at 99.

109. *See, e.g.*, BLUMBERG, *supra* note 11, at 44-45 (contending that the Constitution is largely irrelevant to the U.S. Supreme Court's conclusions with the exception of search and seizure law pursuant to the Fourth Amendment as the Court has expanded the meaning of the term "person" beyond the framers' intent or the text of the document). This alleged lack of basis in either the text of the document or the framers' intent has been criticized as "a foundational problem in corporate constitutional law, for the Court has granted corporations constitutional rights without engaging in the preliminary inquiry of whether a corporation is entitled to them." Krannich, *supra* note 14, at 62. Krannich has also criticized the granting of rights to corporations on the basis that U.S. constitutional law is individualistically oriented. As legal actors, corporations are entitled to recognition and protection. However, the U.S. legal system is ill-suited to make this determination due to its traditional focus on individual rights. *Id.* at 66; *see also* Douglas Litowitz, *The Corporation as God*, 30 IOWA J. CORP. L. 501, 503 (2005) (criticizing the many judicial incarnations of corporations as "a set of contractual obligations," a "fictional person," and "an incorporeal, artificial creature of the law"); Mark, *supra* note 12, at 1472 (concluding that "[t]he irreducible unit of the common law" existing at the time of the drafting of the Constitution was the individual human being); Rivard, *supra* note 45, at 1465-66 (criticizing U.S. Supreme Court jurisprudence with respect to the issue of constitutional personhood for corporations as utilizing only "pragmatic concerns," following "a result-oriented approach," and addressing corporate personhood as "a conclusion, not a question"); Graver, *supra* note 15, at 243 (concluding that "[t]he Framers thought they were bestowing rights on human beings" based upon the application of original construction); Note, *supra* note 41, at 1747, 1751-52, 1754, 1759 (criticizing judicial opinions addressing corporate personality as lacking "philosophical support," "confused," "haphazard," "result oriented," and reflecting "fundamental disorganization").

exists, "relate[s] only to the details of the superstructure erected on a universally accepted foundation."¹¹⁰

2. Other National Legal Systems

Corporate legal personality is well-established in national legal systems outside of the United States. For example, corporate personality is accepted throughout common law systems. Corporate personality dates back to the late nineteenth century in the United Kingdom. In *Salomon v. Salomon & Company*, the House of Lords established the principle that a company was a separate legal person from its creator and controlling shareholder and was not merely such person's agent.¹¹¹ This principle has been followed in subsequent cases despite attempts to evade the holding in *Salomon* to reach a "more just" resolution.¹¹² More recently, the Companies Act of 1985 permitted the creation of entities with legal personalities separate from its members.¹¹³ These entities possess numerous rights separate and apart from their creators, including the acquisition, utilization, and transfer of property, and protection of their rights through the initiation.¹¹⁴

Other common law jurisdictions have followed the holding in *Salomon* in their legislation and judicial precedents. Canadian courts have established separate corporate personality except in the instance where the company is "a mere 'agent' or 'puppet' of its controlling shareholder."¹¹⁵ This recognition entitles corporations

110. BLUMBERG, *supra* note 11, at 47.

111. [1897] A.C. 22, 42 (H.L.) (appeal taken from Eng.) (U.K.); *see also* Rainham Chem. Works, Ltd. v. Belvedere Fish Guano Co., [1921] 2 A.C. 465, 475-76, 501 (H.L.) (appeal taken from Eng.) (U.K.); *Janson v. Driefontein Consol. Mines, Ltd.*, [1902] A.C. 484, 497-98, 501 (H.L.) (appeal taken from Eng.) (U.K.).

112. *See, e.g., In re A Company*, (1985) 1 B.C.C. 99421, 99425 (C.A.) (U.K.) (concluding that "the court will use its powers to pierce the corporate veil if it is necessary to achieve justice"); *Macaura v. N. Assurance Co.*, [1925] A.C. 619 (P.C.) (appeal taken from N. Ir.) (U.K.) (denying recovery for damage to company property as the result of a fire pursuant to insurance policies issued in the name of the owner of the company). *But see* *Adams v. Cape Indus. plc*, [1990] B.C.C. 786, 822 (C.A.) (U.K.) (rejecting the contention that the holding in *Salomon* could be disregarded on the basis that it may lead to an unjust result and permitting disregard of a company's separate legal personality only when the company serves as "a mere façade concealing the true facts") (citation omitted); *Woolfson v. Strathclyde Reg. Council*, (1979) 38 P. & C.R. 521 (H.L.) (U.K.) (permitting disregard of the separate legal personality of a company only when it is a "façade").

113. Companies Act, 1985, c. 1, § 1(2)(a) (U.K.).

114. For a summary of the rights granted to companies as a result of the Companies Act of 1985, *see* Ben Pettet, *Public Company Law in the United Kingdom*, in *CORPORATIONS AND PARTNERSHIPS* 75 (Kluwer L. Int'l ed., 1995).

115. *Kosmopoulos v. Constitution Ins. Co.*, [1987] S.C.R. 1, 10 (Can.); *see also* *Wandlyn Motels, Ltd. v. Commerce Gen. Ins. Co.*, [1970] S.C.R. 992 (Can.); *Meadow Farm Ltd. v. Imperial Bank of Can.*, [1922] 66 D.L.R. 743 (Alta. C.A.); *Associated Growers of B.C. Ltd. v. Edmunds*, [1926] 1 W.W.R. 535 (B.C.C.A.); *Fidelity Devs., Inc. v. Chief of Res.*, [1979]

to numerous rights traditionally extended to human beings pursuant to the Canadian Charter.¹¹⁶ The House of Lords' opinion in *Salomon* is also a hallmark of Australian company law, which provides that, upon completion of incorporation, a corporation is a legal entity separate and independent from its creators, investors, directors, and managers.¹¹⁷ This separate and independent entity possesses the same legal capacity as human beings.¹¹⁸ Applicable Australian precedent continues this equation in likening the corporate body to the human body.¹¹⁹ The same result holds true in New Zealand pursuant to the Companies Act of 1993 and applicable case law.¹²⁰ In South Africa, corporations acquire separate rights and duties upon registration of the memorandum establishing the company.¹²¹ South African corporations are also entitled to the fundamental rights set forth in the Constitution "to the extent required by the nature of the company and the nature of the rights concerned."¹²² Similarly, Botswana law relies upon *Salomon* in

W.W.R. 151 (N.W.T.); *White v. Bank of Toronto*, [1953] O.R. 479 (O.C.A.); *Carter v. Fournier*, [1937] 75 Que. S.C. 530 (C.S. Qué.); *R. v. Meilicke*, [1938] 3 D.L.R. 33 (Sask. C.A.).

116. *See, e.g.*, *Thomson Newspapers Ltd. v. Canada*, [1990] 1 S.C.R. 425 (Can.) (discussing Sections 11 and 13 fair trial); *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, 971 (Can.) (discussing Section 2(b) freedom of speech); *Ford v. Quebec*, [1988] 2 S.C.R. 712, 766-67 (Can.) (discussing Section 2(b) freedom of speech); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 (Can.) (discussing Section 8 privacy).

117. Corporations Act, 2001, Cth., § 119 (Austl.).

118. *Id.* § 124(1).

119. *H.L. Bolton (Eng'g) Co. v. T.J. Graham & Sons.* (1957) 1 Q.B. 159 (U.K.) in which Lord Denning stated:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does.

Id. at 172. However, Australian jurisprudence has refused to extend every right accorded to human beings to corporations. *See, e.g.*, *Env'tl. Prot. Auth. v. Caltex Refining Co.* (1994) 12 A.C.S.R. 452, 504 (wherein the Australian High Court refused to extend the privilege against self-incrimination to corporations); *see also* TOMASIC, BOTTOMLEY & MCQUEEN, *supra* note 46, at 59.

120. *See, e.g.*, Companies Act 1993, §§ 15, 16(1), 1993 S.N.Z. No. 105 (recognizing registered companies as separate persons from their creators, shareholders, officers, and managers and granting such companies full capacity to undertake any business, engage in any activity, or enter into any transaction); *Meridian Global Funds Mgmt. Asia Ltd. v. Sec. Comm'n.*, [1995] 3 N.Z.L.R. 7 (P.C.); *N.Z. Apple & Pear Mktg. Bd. v. Master & Sons*, [1986] 1 N.Z.L.R. 191 (C.A.); *Lee v. Lee's Air Farming, Ltd.*, [1961] N.Z.L.R. 325 (P.C.); Gordon Williams, *Public Company Law in New Zealand*, in *CORPORATIONS AND PARTNERSHIPS* 93 (Kluwer L. Int'l ed., 2005) (discussing the ability of companies registered in New Zealand to enter into contracts and commit crimes and torts, including those requiring human attributes such as intent and knowledge).

121. *See* Michele Havenga, *Public Company Law in South Africa*, in *CORPORATIONS AND PARTNERSHIPS*, *supra* note 114, at 19.

122. *Id.*; *see also* S. AFR. CONST. 1996, ch. 2, § 739 (listing twenty-seven separate rights possessed by South African citizens, including several relevant to businesses, such as equal

concluding that public companies are separate entities possessing legal personality, which permits them to acquire, hold, and transfer property, enter into contracts, and sue and be sued in their own names.¹²³

Recognition of separate corporate personality is not restricted to the common law tradition. European law also recognizes separate corporate personality. For example, Article 58 of the Treaty of Rome states that “[c]ompanies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall . . . be treated in the same way as natural persons who are nationals of Member States.”¹²⁴ Similar language is found in the national laws of the member states as well as those states aspiring to future membership in the European Union.¹²⁵

protection of the law, privacy, expression, association, citizenship, property, access to information and courts, and just administration of the laws).

123. See John Kiggundu, *Public Company Law in Botswana*, in CORPORATIONS AND PARTNERSHIPS 93 (Kluwer L. Int'l ed., 2000).

124. Treaty of Rome Establishing the European Economic Community art. 58(1), Mar. 25, 1957, 2 B.D.I.E.L. 45. “Companies or firms” are defined broadly to include all entities “constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profitmaking.” *Id.* art. 58(2). For additional discussion of corporate personality in the European Union, see STEPHAN RAMMELOO, CORPORATIONS IN PRIVATE INTERNATIONAL LAW 27-29 (P.B. Carter ed., 2001).

125. For discussion of corporate personality in member states of the European Union, see, e.g., Ioanna G. Anastassopoulou, *Public Company Law in Greece*, in CORPORATIONS AND PARTNERSHIPS 27, 46 (Kluwer L. Int'l ed., 1992) (discussing the separate personality and rights of the public company limited by shares (anonymi etairia); Józef Frackowiak, *Public Company Law in Poland*, in CORPORATIONS AND PARTNERSHIPS 29 (Kluwer L. Int'l ed., 1996) (discussing the separate personality and rights of the share company (spółka akcyjna) and the limited liability company (spółka z ograniczoną odpowiedzialnością); Koen Geens, *Public Company Law in Belgium*, in CORPORATIONS AND PARTNERSHIPS 59 (Kluwer L. Int'l ed., 1997) (discussing the separate personality and rights of the public company limited by shares (naamloze vennootschap or société anonyme)); Carl Henström, *Public Company Law in Sweden*, in CORPORATIONS AND PARTNERSHIPS 34 (Kluwer L. Int'l ed., 1995) (discussing the separate personality and rights of the public company limited by shares (aktiebolaget)); Timo Rapakko, *Public Company Law in Finland*, in CORPORATIONS AND PARTNERSHIPS 40 (Kluwer L. Int'l ed., 1997) (discussing the separate personality and rights of the corporation (osakeyhtiö or oy)); Dragos-Alexandru Sitaru, *Public Company Law in Romania*, in CORPORATIONS AND PARTNERSHIPS 54 (Kluwer L. Int'l ed., 1992) (discussing the separate personality and rights of commercial companies (including general and limited partnerships and partnerships limited by shares)). For a discussion of corporate legal personality in states aspiring to membership in the European Union, see, for example, Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1988, No. 7, Item 785, art. 2(2-3), which provides that a limited responsibility society formed pursuant to Russian law is a juridical person from the moment of its government registration and possesses civil rights “necessary for the effectuation of any types of activity not prohibited by Federal laws if this is not contrary to the subject and purposes of activity specifically limited by the charter of the society,” including the right to “acquire and effectuate property and personal non property rights, bear duties, and be a plaintiff and defendant in a court”). See also Ünal Tekinalp, *Public Company Law in Turkey*, in CORPORATIONS AND PARTNERSHIPS 40 (Kluwer L. Int'l ed., 1994) (discussing the separate personality and rights of commercial associations, including companies limited by shares, partnerships with limited liability, general and limited partnerships, and partnerships limited by shares).

Separate personality is also a principal feature of Asian legal systems. Corporations have separate legal personality and resultant rights in the People's Republic of China and the Republic of China.¹²⁶ A similar characterization of corporations exists in the Japanese Commercial Code, which defines companies as juridical persons whose legal capacity must be considered pursuant to the Civil Code, which in turn grants rights and imposes duties upon such persons.¹²⁷ Korean law closely tracks applicable Japanese law in its grant of personhood to all corporate forms. This recognition of personhood grants businesses specific rights, including the power to own property, enter into contracts, and sue or be sued.¹²⁸ Thai law as elaborated upon in the Public Liability Company Act and an earlier judicial opinion grants registered companies legal personality separate from that of their shareholders and directors and numerous resultant rights.¹²⁹ A similarly detailed list of rights accruing to corporations is contained in the Corporations Law of the Philippines.¹³⁰

126. See Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective Jan. 1, 2006), art. 3, *translated in CHINA LAWS FOR FOREIGN BUSINESSES—BUSINESS REGULATION* ¶13-518 (2005) (P.R.C.) (providing that a company organized pursuant to Chinese law is “an enterprise legal person which owns independent legal person property and enjoys legal person property rights”); Company Law, art. 1, Faigui Huibian (2001) (R.O.C.) (defining a company as “a corporate juristic person organized and incorporated in accordance with this law for the purpose of profit making”). However, it bears to note that no provision of Taiwanese company law specifically equates companies with human beings. See Neil Andrews & Angus Francis, *Company Law in Taiwan*, in *COMPANY LAW IN EAST ASIA* 219, 237 (Roman Tomasic ed., 1999).

127. See Shōhō [Commercial Code], Law No. 48 of 1899 as amended, art. 54 (Japan); Minpō [Civil Code], Law No. 89 of 1896 as amended, art. 43 (Japan). See also Stephen Bottomley, *Company Law in Japan*, in *COMPANY LAW IN EAST ASIA*, *supra* note 126, at 39, 45.

128. COMMERCIAL CODE [COMM. C.] Law No. 1000, arts. 170, 171, Jan. 20, 1962 (S. Korea) (granting legal personhood and associated rights to the partnership company (hapmyong-hoesa), the limited partnership (hapcha-hoesa), the limited company (yuhan-hoesa), and the stock company (chusik-hoesa)). Personhood is limited to the objects set forth in the organizational documents, and actions taken outside the scope of such documents are null and void. See Kon-Sik Kim & Choong-Kee Lee, *Public Company Law in South Korea*, in *CORPORATIONS AND PARTNERSHIPS* 42 (Kluwer L. Int'l ed., 1999). However, as Professors Kim and Lee note, the *ultra vires* doctrine has been subject to much criticism within Korea, and its effects “have been practically evaded by flexible interpretation of the objects clauses [of organizational documents] by the courts.” *Id.*

129. Public Liability Company Act, B.E. § 42 (1992) (Thail.) (enumerating corporate rights to include the right to sue and be sued; obtain, utilize, mortgage, benefit from, or transfer property; borrow money; issue and trade in negotiable instruments; acquire, hold interests in, and manage other companies; and “engage in any other operation which a natural person may be able to do”); see also Case No. 734 [Sarn Dika] [Supreme Court] (1958) (Thail.) (recognizing the separate legal personhood of public liability companies); Saowanee Asawaroj & Eugene Clark, *Thai Company Law*, in *COMPANY LAW IN EAST ASIA*, *supra* note 126, at 343, 350-51.

130. CORPORATION CODE, B.P. Blg 68, §§ 36-44 (1980) (Phil.) (granting corporations the right to sue and be sued, engage in trade, sell or dispose of assets, invest funds, enter into contracts, and exercise powers that “may be essential or necessary to carry out its purpose or purposes as stated in the articles of incorporation”); see also Geoffrey Nicoll, *The Corporations Law of the Philippines*, in *COMPANY LAW IN EAST ASIA*, *supra* note 126, at 507,

Latin and South American legal systems also recognize corporate personality. For example, the Mexican *sociedad anónima* bears many similarities to corporations in the United States, including a legal existence separate from its shareholders, directors, and managers and the rights to own real estate, transact business and sue or be sued in its own name.¹³¹ Similarly, Argentina's *sociedad anónima* possesses full and separate legal personality upon completion of the formation process.¹³² Venezuelan law provides that the *compañía anonima* is regarded as an artificial person with a separate existence from its shareholders, directors, and officers and the capacity to exercise rights in the same manner as natural persons from the moment of its addition to the National Commercial Registry.¹³³ By contrast, Uruguay does not specifically address legal personality in its Commercial Code, but nevertheless corporations have been granted separate status from that of their members in practice.¹³⁴

There are several conclusions to be reached as a result of this survey of corporate personhood in national legal systems outside of the United States. First, there is significant international support for recognition of corporate personality separate and apart from founders, shareholders, managers, and directors. Second, this recognition is accompanied by a concurrent grant of rights. Although some jurisdictions may not recognize corporate rights to the same degree as the United States, there is significant international authority declaring corporations to be the near equivalent of human beings. This authority, when combined with U.S. law, supports the conclusion that corporate legal personality is an established inter-

515-16. Other Asian legal systems do not explicitly recognize corporations as persons or have not addressed the issue in substantive detail. *See, e.g.*, COMPANY LAW art. 7, ¶ 6 (1995) (Indon.) (granting limited liability companies status as legal entities but not explicitly characterizing them as separate persons). However, commentators have noted that, in practice, Indonesian limited liability companies maintain a separate existence from their members and managers and are regarded as possessing some of the same rights as human beings, including the right to own property and act independently. *See* Peter Little & Bahrin Kamarul, *Company Law in Indonesia*, in COMPANY LAW IN EAST ASIA, *supra* note 126, at 475, 482. By contrast, the issue appears to have received little consideration in Vietnam's Law on Private Enterprise adopted in 1990 or subsequent jurisprudence. Rather, natural and legal persons are deemed to derive their respective capacities through the state. *See* John Gillespie, *Corporations in Vietnam*, in COMPANY LAW IN EAST ASIA, *supra* note 126, at 297, 309. Nevertheless, this approach does distinguish between natural and legal persons for purposes of assessing liability and determining property ownership. *Id.*

131. *See* Ley General de Sociedades Mercantiles [Business Organizations Law], arts. 84-89, *as amended*, Diario Oficial de la Federación [D.O.], 6 de Juno de 1992 (Mex.); *see also* WILLIAM E. MOOZ, JR., AN INTRODUCTION TO DOING BUSINESS IN MEXICO 65 (1995).

132. *See* Paul Van Nieuwenhove, *Company Law in Argentina*, in CORPORATIONS AND PARTNERSHIPS 25 (Kluwer L. Int'l ed., 1993).

133. *See* Araque Reyna De Jesús Sosa Viso & Pittier, *Doing Business in Venezuela*, in BUSINESS ORGANIZATIONS 7-5 to 7-6 (Juris Publ'g. ed., 1999).

134. *See* Ricardo Olivera García & Alberto J. Foderé, *Company Law in Uruguay*, in CORPORATIONS AND PARTNERSHIPS 21 (Kluwer L. Int'l ed., 1997).

national tradition that supports its recognition in human rights instruments.

V. A PROPOSED STANDARD FOR RECOGNIZING CORPORATE HUMAN RIGHTS

A. Introduction

Although recognized as separate persons by corporate theory, international human rights instruments, and national legal systems, corporations should not be equated to their human counterparts. This section of the article proposes a standard for the determination of whether specific freedoms and protections set forth in human rights instruments should be extended to transnational corporations. This standard initially poses the question of whether the recognition of a specific human right as applicable to transnational corporations benefits human beings. The second part of this standard requires equivalence of the reasons for granting a specific right to human beings and its extension to transnational corporations.

B. The Non-Equivalence of Transnational Corporations and Human Beings

It is tempting to equate transnational corporations with human beings. Identification of corporations as persons “gives rise to an association between the attributes of a person and those of the corporation.”¹³⁵ Granting personhood to soulless entities¹³⁶ may be viewed as “cheapen[ing] the social meaning of humans’ legal personality.”¹³⁷ But the law does not require a soul in order to be deemed a human being let alone a legal person. Neither does it re-

135. BLUMBERG, *supra* note 11, at 47.

136. *See, e.g.*, Case of Sutton’s Hosp., (1612) 77 Eng. Rep. 960, 973 (K.B.) (in which Sir Edward Coke proclaimed corporations “cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls”).

137. Note, *supra* note 41, at 1764. The potential for cheapening human existence by granting constitutional rights to corporations was described by Justice Hugo Black as follows:

[The Fourteenth] Amendment sought to prevent discrimination by the states against classes or races. . . . Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent[] invoked it in protection of the negro race, and more than fifty per cent[] asked that its benefits be extended to corporations.

Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 89-90 (1938) (Black, J., dissenting) (footnotes omitted).

quire a body.¹³⁸ Even assuming such a requirement, corporations may be deemed to have a body¹³⁹ or at least possess attributes similar to the human body.¹⁴⁰ However, although they are legal persons, corporations are not human beings but rather mimics.¹⁴¹ As such, corporations are entitled to a lesser degree of protection than their human counterparts.

There are two primary reasons for declining to equate human beings and corporations. First, transnational corporations lack the “complete constitutional reality” of human beings.¹⁴² One method of defining this reality is through differences in the sources of legal personhood. The rights of natural persons are inherent, arising from the status of human being.¹⁴³ By contrast, the rights of corporations are derivative. Corporate rights do not arise from the company’s status but rather only from its charter and state sanction.¹⁴⁴ The law retains the right to “define and limit the scope of

138. See, e.g., ALAN HYDE, *BODIES OF LAW* 260 (1997) (noting that “[l]aw is rich in constructions of the body that emphasize its thingness, its distance from us [human beings], that treat the body as object, property, machine”); Graver, *supra* note 15, at 244 (commenting on the reluctance of law to acknowledge the connection between the human body and human existence).

139. See Graver, *supra* note 15, at 246-47. Graver contends bodies possess three attributes: interiority, exteriority, and autonomy. *Id.* at 246. According to Graver, corporations possess each of these attributes and thus have bodies. Corporations demonstrate interiority—the volitional mechanisms and motivating forces that lead to observable behavior—through the mandates of the corporate charter and fiduciary duties as well as the duty to maximize profit that compel management to act in a particular manner. *Id.* Corporations demonstrate exteriority through their separate legal existence from their incorporators, their ability to bind themselves contractually with other businesses and individuals, their management of media image through self-publicity, the means by which they disseminate their goods and services, and their effect on people within and outside of their organizations. *Id.* Autonomy is demonstrated through the constant interaction and communication between corporations and the environments they inhabit. *Id.*

140. See *supra* note 119 and accompanying text.

141. Graver, *supra* note 20, at 249. *But see* CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 172 (1977). Lindblom describes corporations as “a kind of public official.” As a result, corporations do not share the same position as individual citizens in relation to their national governments. *Id.*; see also Iwai, *supra* note 26, at 585-87, 593-98. Iwai contends that corporations have a dual role as persons and things. *Id.* at 585, 593. Corporations are not persons to the extent they are subject to ownership by human beings, the result of which would return national legal systems to “the slave economy of the ancient past.” *Id.* at 587. However, corporations are persons to the extent they have been endowed with certain human attributes by legislatures and courts. *Id.* at 593, 597. As a result, a corporation is “neither fully a person nor merely a thing.” *Id.* at 594. According to Iwai, a corporation’s ability to be owned by others makes it less of a person than a human being, but its right to own other property imbues it with a status not shared by mere things. *Id.*

142. Graver, *supra* note 15, at 239.

143. See, e.g., Iwai, *supra* note 26, at 603 (stating that “[a] natural person can become a person not because she or he is a creature of Nature but because she or he can be recognized as a person naturally”).

144. *Id.*; see also Addo, *supra* note 29, at 190; BLUMBERG, *supra* note 11, at 26; Klappers, *supra* note 26, at 42 (noting that “[t]he legal person has no will, no mind, and no ability to act, except to the extent that the law imputes such will and ability to the legal person in question”). This distinction was described by Chief Justice Rehnquist, who noted that corporations are creatures of the state and not the product of the higher powers of nature

the rights of corporations [as] a predictable consequence of the fact that corporations are a legal creation while human beings are not.”¹⁴⁵

Second, such an equation obscures the inherent personhood of human beings. Human behavior is impelled by several different motivations such as benevolence, charity, guilt, humanity, love, and shame.¹⁴⁶ These motivations inspire acts of generosity as well as restrain immoral, reckless, and selfish behavior. Human beings sift through their emotions in a life-long quest for self-knowledge. Based upon these emotions and the self-knowledge gained through experience, human behavior and world views may change over time.¹⁴⁷

By contrast, transnational corporations are constrained by their sole devotion to profit maximization within the bounds of the law. Corporations cannot change this motivation lest they violate their most fundamental duty to investors. Corporate decisions must necessarily lack emotional influence. As a result, a corporation can “divide itself into pieces, avoid taxes by moving its mailing address offshore, leave its hometown and lay off employees without shedding a tear.”¹⁴⁸

responsible for human beings. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 828 (1978) (Rehnquist, J., dissenting).

145. Addo, *supra* note 29, at 190.

146. *See, e.g.*, WILLIAM G. BISHOP & WILLIAM H. ATTREE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE NEW YORK COMMISSION FOR CONSTITUTIONAL REFORM 222 (1846), in which the authors stated:

An incorporation . . . is impelled on to action by the same motives of gain which impel private citizens, but it is not restrained by the same motive of benevolence and of humanity, and of fellow feeling, which exists in the mind of every individual person, and which restrains his selfish propensities in the acquisition of gain. Nor were they restrained by those prudential considerations which prevent individuals from embarking their capital rashly, in the desperate hope of gain, reckless of loss.

Id.; *see also* Litowitz, *supra* note 36, at 818-19.

147. *See, e.g.*, Graver, *supra* note 15, at 247 (noting that freedom permits human beings to make changes in how they view the world and their behavior).

148. Litowitz, *supra* note 36, at 819; *see also* Robert C. Hinkley, Neither Enron Nor Deregulation (May 19, 2002), <http://www.commondreams.org/views02/0519-07.htm>:

[C]orporations are institutions not people. They have no conscience, morals nor sense of right and wrong. They have no sense of living in community. They have none of the human traits and characteristics that restrain people in ways that laws cannot and make living in community possible. Although corporations act only through people, these people are forced to play roles that in some ways make them more like machines than human beings. . . . Protecting the public interest is not part of their job description.

Id.

The difference noted by Hinkley between human beings acting in their individual and corporate capacities was aptly summarized in Morton Mintz's description of managers at A.H. Robins with respect to its marketing of the Dalkon Shield. Mintz described Robins' management as consisting of “human being[s] who would not harm you on an individual, face-to-face basis, who [are] charitable, civic-minded, loving, and devout, [but] will wound or kill

This devotion to profit maximization also means that corporations are not engaged in the process of self-discovery. Rather, corporations are imbued with self knowledge from the moment of chartering.¹⁴⁹ A corporation “is the ultimate self-concerned ‘person’ who exists to benefit its own bottom line and disregards others.”¹⁵⁰ Unlike human beings, there are few negative consequences attached to this excessive self-devotion. Other than suffering a decline in profits, corporations cannot be harmed in the same manner and extent as human beings. Corporations are thus truly different and are not entitled to the identical degree of protection afforded to natural persons by human rights instruments. Different degrees of protection for human beings and transnational corporations recognize “that the concept of legal personality is not a static, uniform concept” but rather is flexible and can be conferred in various gradations.¹⁵¹ Unlike human beings, the manner in which corporations are regarded differs depending upon the training and point of view of the observer and the “effectiveness of the tasks which the law recognizes corporations as capable of undertaking.”¹⁵²

C. A Proposed Standard for Recognizing Corporate Human Rights

One method of capturing these differences is through utilization of a two-part test in order to determine the human rights protections that should be extended to corporations. The first element of the test focuses on the degree to which according transnational corporations a particular right would benefit human beings. This test recognizes that, although they are artificial in nature, corporations are organized and operated by, and for the benefit of, groups

you from behind the corporate veil.” MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALKON SHIELD* xiv-xv (1985).

149. Graver, *supra* note 15, at 247. Graver notes that, to the extent corporations engage in self-discovery, they have a distinct advantage over their human counterparts given their perpetual life. *Id.*

150. Litowitz, *supra* note 36, at 828.

151. *See, e.g.*, Addo, *supra* note 29, at 190-91 (noting that “where corporations are acknowledged to have rights, the scope of the law is often determined by the same regime of analysis used for human beings, although where necessary, this may be modified to suit the corporate context”); Jägers, *supra* note 52, at 262; Klabbers, *supra* note 26, at 47.

152. Dewey, *supra* note 41, at 655; *see also* MALCOLM N. SHAW, *INTERNATIONAL LAW* 136-37 (3d ed. 1991) (stating that “international personality . . . will always involve a test of judgment and perception of the situation at hand and the overall context of the current nature and requirements of the international community at large”); TOMASIC, *BOTTOMLEY & MCQUEEN*, *supra* note 46, at 52 (noting “the manner in which lawyers, judges, economists, accountants, regulators, politicians, and corporate insiders talk about corporations, corporate law, and corporate activity reflects different assumptions about the nature of the corporation, the role of the corporation in society and the degree to which corporate activity should be regulated”).

of human beings.¹⁵³ The extent to which human rights protections are granted or denied to these entities has a direct effect on the human ownership and management or those directly impacted by their operations. A blanket denial of human rights protections to transnational corporations would imprudently limit the primary purpose of human rights law to remedy only direct violations perpetrated solely upon human beings.¹⁵⁴ Effective protection mandates that human rights be extended to transnational corporations in appropriate circumstances.¹⁵⁵

However, care must be exercised in the application of this standard. The identity of those human beings benefited by the extension of a specific human right to a corporation must be ascertained. The size of the benefited group, the nature of the benefit to be received, and the detrimental impact on other groups of human beings must be determined. Furthermore, attempts to differentiate between types of corporations must be handled with caution. Admittedly, there are a wide variety of motivations underlying corporate actions depending upon their organizational principles. Thus, as has been noted by one commentator, “[c]ommercial corporations wish to maximize profits; labor unions wish to enhance the rights and wealth of workers; ideological organizations champion various social or ethical causes; charitable organizations support certain groups or issues; [and] government institutions forward particular mandates.”¹⁵⁶ As a result, different rights and degrees of protection may be extended to corporations depending upon these principles.¹⁵⁷ Although such approach is reality-based to the extent it recognizes the lack of corporate homogeneity, it must be carefully tailored to avoid violation of the right to equal protection.

153. Addo, *supra* note 29, at 188. Addo identifies these groups as shareholders, managers, directors, employees, and consumers. *Id.* at 188 nn.5- 6.

154. *Id.* at 189.

155. *Id.*

156. Graver, *supra* note 15, at 247.

157. *Id.* at 250. Graver concludes that:

[a] corporeal analysis suggests that juxtaposing the interests of two fictional persons, the public utility and the public interest organization, without regard to the nature of their bodies is not the best way of preserving or enhancing the rights of natural persons. Instead, one needs to determine what rights particular kinds of fictional bodies need in order to bestow their benefits upon human beings. . . . Rather than accord the same constitutional rights to all artificial persons, a theory of corporeality allows us to grant and withhold rights in order to make the bodies of these artificial persons most supportive of the constitutional rights of human beings.

Id. Graver’s conclusion does not address U.S. Supreme Court precedent recognizing equal protection rights for corporations or how a motivation-based theory of corporate constitutional rights would be reconciled with such precedent.

The second part of the test provides that transnational corporations be granted a particular human right only if the reason for extending the protection to corporations is identical to that for granting the protection to human beings.¹⁵⁸ This determination requires examination of the specific right at issue “in light of the values and policies that are thought to underlie it.”¹⁵⁹ This examination ensures that the purpose of the right would not be compromised if its application was extended beyond human beings.¹⁶⁰ The background and purpose of each individual human right is crucial to this determination.¹⁶¹

D. Human Rights Possessed by Transnational Corporations

Several of the rights set forth in the International Bill of Rights may be extended to transnational corporations. For example, transnational corporations should be entitled to equal protection of the law.¹⁶² This entitlement benefits natural persons who would otherwise forfeit equal protection of the law as a condition for the conduct of their business affairs in a collective manner. The size of the benefited group and the benefit received are large to the extent the group consists of all human beings whose interests may be affected should equal protection of the law be denied, including investors, officers, directors, and employees. The benefits may be increased if the shared interest of all human beings in the preservation of equal protection of the law is included in this calculation.¹⁶³

158. Krannich, *supra* note 14, at 64. This test closely resembles that utilized to determine the extent of corporate rights pursuant to the Bill of Rights contained in the South African Constitution. See *supra* note 122 and accompanying text.

159. DAN-COHEN, *supra* note 14, at 86; see also Krannich, *supra* note 14, at 64.

160. Krannich, *supra* note 14, at 106.

161. *Id.* at 105-06; see also BLUMBERG, *supra* note 11, at 26 (noting that “‘nature, history and purpose’ not constitutional terminology and theories of corporate personality control” in this area). Inquiry into the background and purpose of each individual right not only has support within the applicable literature but also within U.S. Supreme Court precedent. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (“Whether or not a particular guarantee is ‘purely personal’ or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision”); *United States v. White*, 322 U.S. 694, 698 (1944) (refusing to apply the self-incrimination privilege contained within the Fifth Amendment to an unincorporated labor union on the basis that the nature, history, and purpose of the privilege was to protect natural persons from abuse of the legal process through “torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence”).

162. International Covenant on Civil and Political Rights, *supra* note 2, arts. 14(1), 26 (stating, in part, that “[a]ll persons shall be equal before the courts and tribunals” and “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law”); Universal Declaration of Human Rights, *supra* note 2, art. 7 (stating, in part, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law”).

163. All human beings have an interest in the equal application of the rights, privileges, and duties extended by the law to all persons. To contend otherwise could serve to

The reason for extending this right to human beings--specifically, the recognition of equality of all such persons before the law--is also applicable to transnational corporations. It is an indisputable principle of human rights law that all human beings are entitled to equal protection of the law regardless of their diversity, including race, color of skin, national origin, indigenous status, gender, religious affiliation, age, and disability. These factors do not disappear nor are less worthy of protection simply because the people possessing them elect to conduct their affairs through a corporation. Similarly, there are many types of corporations possessing a diversity of characteristics, including publicly traded, privately held, or state-owned; domestic, foreign, or alien; and national or transnational. There are also differences in structure, governance, capitalization, and fields of operation. In a manner identical to the recognition of equality before the law with respect to human beings, no corporation should be denied application of national law or equal treatment within the international legal system based solely upon ownership, nationality, organizational, financial, or management differences with other corporations. Although perhaps less diverse than their human counterparts, corporations nevertheless possess a sufficient degree of variance that must be protected by equal protection of the law. These considerations of fundamental fairness and equality under the law also mandate extension of human rights associated with civil and criminal judicial processes to transnational corporations, including entitlement to an effective remedy, a fair and public hearing in a civil context¹⁶⁴, and the presumption of innocence and freedom from ex post facto laws in a criminal context.¹⁶⁵

excuse the exclusion of a particular group of people from rights and privileges as well as unfairly burden such group with duties without the concomitant benefit of protections afforded by law.

164. International Covenant on Civil and Political Rights, *supra* note 2, art. 14(1) (stating, in part, that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”); Universal Declaration of Human Rights, *supra* note 2, arts. 8, 10 (stating “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” and “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”).

165. International Covenant on Civil and Political Rights, *supra* note 2, arts. 14(2), 15 (providing “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law” and “[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”); Universal Declaration of Human Rights, *supra* note 2, art. 11(1-2) (stating “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence” and “[n]o one shall be held guilty of any penal offence on account of any act or omission which did not

The right to be free from double jeopardy should also be extended to transnational corporations.¹⁶⁶ This prohibition benefits natural persons as forfeiture of this right should not be a condition for the conduct of one's business affairs in corporate form. The size of the benefited group and the benefit received are significant and consist of all human beings whose interests may be affected by repeated criminal prosecution, including investors, officers, directors, and employees. The number of benefited people and the size of the benefit are significantly larger if the shared interest of all human beings in the preservation of the fundamental fairness underlying the prohibition upon double jeopardy is included in this calculation. These persons have an interest not only in the fair administration of justice exemplified by this prohibition, but also in the responsible expenditure of public funds spent on repeated prosecutions.

Furthermore, the reason for extending this freedom to human beings is equally applicable to transnational corporations. The prohibition upon double jeopardy, at least in the American context, has been interpreted to protect human beings from further peril to life and limb as well as spare further embarrassment, attributes which may not ordinarily be associated with corporations. A broader interpretation of protected interests encompasses transnational corporations and is supported by precedent in the United States as well as the International Covenant on Civil and Political Rights, which makes no reference to the preservation of life and limb as an underlying reason for the prohibition.¹⁶⁷ In any event, although they do not possess human attributes that may be placed in peril by repeated criminal prosecution, transnational corporations and human beings do share financial harm that may occur as a result of such prosecution. This harm consists of costs and fees associated with litigation, which may be burdensome to even the largest transnational corporation. Repeated prosecution may in fact have a greater effect upon corporations to the extent share value, creditworthiness, and other indicia of financial well being are negatively impacted. Additionally, corporations may also suffer embarrassment in a manner similar to human beings through pub-

constitute a penal offense, under national or international law, at the time when it was committed").

166. International Covenant on Civil and Political Rights, *supra* note 2, art. 14(7) (stating that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country").

167. *See, e.g.*, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (noting that the prohibition upon double jeopardy applies to corporations in order to shield them from "embarrassment, expense and ordeal"); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).

lic shaming and damage to reputation and brand image. Finally, the principle of fundamental fairness prohibiting repeated criminal prosecution for the same offense once jeopardy has attached is identical whether the defendant confronting the government is a solitary human being or a transnational corporation.

Transnational corporations should possess the right to privacy to an extent similar to that of human beings.¹⁶⁸ The extension of the right to privacy to transnational corporations, including freedom from unreasonable search and seizure, benefits human beings to the extent that incorporators and management may be ensured of the ability to operate their businesses without undue interference by the government. Such rights to conduct one's affairs free from unreasonable government intrusion should not be forfeited as a result of collectivization of business efforts. The general public is also benefited by the extension of the right to privacy to corporations to the extent it acts as a limitation upon the arbitrary exercise of governmental power and ensures the fair administration of justice by imposing requirements upon law enforcement prior to the seizure of non-public information.

The affinity of human and corporate interests with respect to privacy leads to the conclusion that the reason for the extension of this right to both interests is identical. As noted in *Marshall v. Barlow's, Inc.*, privacy protections, including freedom from unreasonable search and seizure, date back to the colonial era and were adopted to protect not only human beings in their private residences, but also businesses in their commercial premises.¹⁶⁹ The reason underlying this equation of human and business privacy rights is identical: the safeguarding of personal and commercial interests against arbitrary invasion by governmental officials. Although individual privacy may be more pressing and fragile given the often sensitive nature of personal information, the constant pressure by government to amass increasing amounts of such information and the difficulties encountered by individuals in resisting such inquiries, the stakes are no less important for business. These stakes may in fact be even greater than those generally associated with matters of personal privacy to the extent businesses are already subjected to comprehensive government regulation or

168. International Covenant on Civil and Political Rights, *supra* note 2, art. 17 (1-2) (providing, in part, that "[n]o one shall be subjected to arbitrary . . . interference with his privacy . . . or correspondence . . . [and] [e]veryone has the right to the protection of the law against such interference or attacks"); Universal Declaration of Human Rights, *supra* note 2, art. 12 (providing, in part, that "[n]o one shall be subjected to arbitrary interference with his privacy . . . or correspondence . . . [and] [e]veryone has the right to the protection of the law against such interference or attacks").

169. 436 U.S. 307, 311-12 (1978).

may be seeking to preserve confidentiality with respect to proprietary information in which they have invested extensive resources and which may be of considerable interest to their competitors. Thus, given the history, the inclusive language within the International Bill of Rights, and the absence of any national or international efforts to differentiate between human beings' personal and commercial affairs, it may be fairly concluded that the principle underlying privacy--the right to be left alone in the conduct of one's life--extends equally to human beings as well as transnational corporations.

Property rights, including those associated with intellectual property, should also be extended to transnational corporations.¹⁷⁰ Any limitation upon corporate rights regarding property ownership improperly penalizes business associations to the detriment of their management and shareholders. The general public also benefits from the extension of property rights to corporations. For example, the recognition and preservation of corporate rights associated with real property may result in commercial development that benefits the community at large by enhancing community standing, providing employment opportunities, and increasing property and sales tax revenues. Recognition and protection of corporate intellectual property rights provides the impetus for continued research and development, which may ultimately lead to the discovery or invention of products, processes, and techniques that benefit the health and welfare of the general public. Businesses may lack the incentive to conduct research and development without such recognition and protection, thus depriving the community of potential benefits.

The identical nature of the reasons for extending property rights to human beings and corporations is expressly recognized in the Universal Declaration of Human Rights, which grants protection of property rights to "everyone . . . alone as well as in association with others."¹⁷¹ The identical nature and reasons for extending property rights to transnational corporations, however, also means that they are no greater than those possessed by human beings. Additionally, they are subject to the same limitations im-

170. International Covenant on Economic, Social and Cultural Rights, *supra* note 2, art. 15(1)(c) (granting "everyone" the right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"); Universal Declaration of Human Rights, *supra* note 2, arts. 17 (1-2), 27(2) (stating "[e]veryone has the right to own property alone as well as in association with others . . . [and] [n]o one shall be arbitrarily deprived of his property" as well as "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author").

171. Universal Declaration of Human Rights, *supra* note 2, art. 17(1).

posed by government (such as environmental regulation, zoning and building codes, and eminent domain), as well as privately imposed restrictions with respect to real property and conditions applicable to the grant, maintenance, and utilization of intellectual property rights.

Perhaps most controversially, transnational corporations should possess the right to freedom of speech.¹⁷² The extension of free speech rights benefits human beings by preventing individuals from being required to surrender such rights upon associating with others. The size of the benefited group and the benefit received are large to the extent the group consists of all human beings whose interests may be affected should their speech rights be denied upon the initiation of their collective business efforts. The number of benefited people and the size of the benefit are further increased if the shared interest of all human beings in the preservation of speech rights is included in this calculation.

The extension of speech rights to transnational corporations expands the marketplace of ideas to the benefit of human beings. No matter how inane the message, human judgment with respect to which content to ignore or heed is more preferable than government censorship. This approach avoids difficulties associated with the identity of the speaker and the resultant adoption and enforcement of different and quite possibly arbitrary levels of protection. Rather, as noted by the U.S. Supreme Court, the message protected by the First Amendment speech clause takes primacy over the identity of the speaker.¹⁷³ These holdings recognize that corporations as well as their human counterparts “contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.”¹⁷⁴ Judgments regarding the strength of the message relative to the strength of the speaker do not serve a compelling state interest such as to deny corporations access to the marketplace of ideas.¹⁷⁵

172. International Covenant on Civil and Political Rights, *supra* note 2, art. 19(2) (granting “[e]veryone . . . the right to freedom of expression . . . includ[ing] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”); Universal Declaration of Human Rights, *supra* note 2, arts. 19, 21(1) (stating “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” and “[e]veryone has the right to take part in the government of his country”).

173. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 8 (1986); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n*, 447 U.S. 530, 544 (1980); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

174. *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (citation omitted).

175. *Id.* at 19.

International human rights instruments make no distinction with respect to protected speech based upon the identity of the speaker, its access to the market, its resources, or the resultant strength of its message. The International Covenant on Civil and Political Rights grants the right to freedom of expression to “[e]veryone” for “information and ideas of all kinds.”¹⁷⁶ Several of the aspects of this right appear to relate to modes of expression within the competency of corporations, such as the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers” and the selection of “any other media” for distributive purposes.¹⁷⁷ The Universal Declaration of Human Rights contains an identical grant of freedom of expression to everyone for expressions of all kinds.¹⁷⁸ The Universal Declaration extends this freedom further to the extent that “[e]veryone has the right to take part in the government of his country” without distinguishing between the identity of the speakers.¹⁷⁹ This implies that transnational corporations, as well as human beings, possess the right to freedom of expression with respect to political issues, including the right to address the electorate and attempt to influence the political branches of government. The Universal Declaration also references modes of expression most commonly utilized by transnational corporations, including those crossing international borders in a manner similar to the International Covenant on Civil and Political Rights.¹⁸⁰

Finally, neither of these instruments restricts freedom of expression differently depending upon the identity of the speaker. Rather, all speakers are subject to “special duties and responsibilities” and restrictions relating to “respect of the rights or reputations of others,” “the protection of national security or of public order . . . or of public health or morals,” “propaganda for war,” and “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”¹⁸¹ These provisions lead to the conclusion that the message trumps the identity of the speaker. The absence of differentiation between human and corporate speakers in international human rights instruments also supports the conclusion that the reasons for extending free speech rights to corporations are identical to those with respect to human beings.

176. International Covenant on Civil and Political Rights, *supra* note 2, art. 19(2).

177. *Id.*

178. Universal Declaration of Human Rights, *supra* note 2, art. 19.

179. *Id.* art. 21(1).

180. *Id.* art. 19.

181. International Covenant on Civil and Political Rights, *supra* note 2, arts. 19-20.

E. Human Rights Not Possessed by Transnational Corporations

There are human rights to which transnational corporations should not be entitled. These rights include the rights to life¹⁸² and residence.¹⁸³ Human beings would not benefit through the extension of the right to life to transnational corporations. Such a result would too closely equate corporations with human beings. In addition, recognition of a corporate right to life would unduly interfere with necessary state regulation of corporations. National, state, and local governments may be hampered in their efforts to suspend or revoke the charters of corporations delinquent in the payment of taxes or fees or in making required filings. Perhaps more importantly, revocation of the charters of corporations engaged in fraud or other abuses of the corporate form of business would be hindered to the extent that corporations are entitled to the same protection of their existence as human beings. The most extreme consequence of extending the right to life to corporations would be elimination of state registration and chartering laws altogether as incorporators could contend that the entities they create exist regardless of state action based upon an inherent right to life.

Furthermore, the reasons for extending the right to life to transnational corporations are not identical to those with respect to human beings. To the extent transnational corporations are deemed to have "lives," they can hardly be equated to human life, the most highly cherished and protected status in the law. Unlike their corporate counterparts that live in perpetuity and are subject to judicial process prior to the revocation of their charters, individual human life is subject to random and spontaneous extinction. Furthermore, human beings may be positively or negatively impacted by a multitude of "micro-events" associated with their daily lives whereas corporations are more likely to be affected by an entirely different set of "macro-events." Corporations are largely impervious to the micro-events that impact the lives of their individual human counterparts. Corporate life lacks the frailty of human life, which thus requires special protection. To the extent corporations are more robust persons, they do not require the full panoply of protections extended to human life in international human rights instruments.

Transnational corporations also should not possess the right to residence to the same extent as human beings. Granting corpora-

182. Universal Declaration of Human Rights, *supra* note 2, art. 3 (providing, in part, that "[e]veryone has the right to life").

183. Universal Declaration of Human Rights, *supra* note 2, art. 13(1) (stating, in part, that "[e]veryone has the right to freedom of . . . residence within the borders of each State").

tions the right to freedom of residence within the borders of any state too closely equates corporations with human beings. The creation of an absolute right to residence for corporations unduly interferes with state regulation, including the establishment of rules with respect to corporate domicile. Although corporate residence is perhaps of diminishing importance in the modern global economy, federal and local governments nevertheless retain the right to establish and enforce standards by which such entities may be deemed residents. Recognition of a right to residence for corporations equal to that possessed by human beings would entitle corporations to establish such residence and enjoy the benefits thereof with minimal, if any, state regulation.

Additionally, the reasons for extending the right to residence to transnational corporations are not identical to those with respect to human beings. Human beings most often become residents of a particular state by accident of birth, and the vast majority remain residents of their state of birth rather than change residences through immigration. By contrast, transnational corporations do not become residents of a particular state by accident. Rather, corporate residence is a conscious selection based upon a wide variety of factors, including the presence of a favorable legal and regulatory environment, a ready pool of affordable labor, favorable treatment of income (including tax consequences), risk management, and miscellaneous political, cultural, and economic considerations. Furthermore, without a right to residence, human beings are rendered stateless. By contrast, corporations are not negatively impacted from the lack of direct ties to a particular state. Rather, modern transnational corporations are increasingly distant from their home jurisdictions without seemingly suffering serious consequences. Finally, it is indisputable that human beings attach considerable personal significance to national identity. Such is not the circumstance for transnational corporations that value financial and legal considerations of residence over personal considerations of shareholders and management.

Finally, contrary to holdings of some national courts, transnational corporations should not be extended the right to be free from self-incrimination.¹⁸⁴ This right is not necessary to protect management and employees as such persons already possess a personal privilege. While perhaps beneficial to management and shareholders concerned about the negative impact of disclosure of

184. International Covenant on Civil and Political Rights, *supra* note 2, art. 14(3)(g) (guaranteeing everyone freedom from being “compelled to testify against himself or to confess guilt”); *see also supra* note 90 and accompanying text (discussing corporate entitlement to freedom from self-incrimination in Canada, New Zealand, and the United Kingdom).

corporate misdeeds, permitting transnational corporations to assert international human rights protection with respect to self-incrimination does not benefit the public at large. The existence of such a corporate privilege discourages disclosure by whistleblowers and encourages concealment of corporate wrongdoing. Members of the general public who have an interest in effective law enforcement as well as protection of their financial interests would suffer as a result of this lack of transparency. The existence of such a privilege may also hinder state regulation. As noted by the U.S. Supreme Court, the existence of a corporate self-incrimination privilege would produce a “strange anomaly” contrary to the state’s exercise of sovereignty to inquire through requests for production of documents how an entity created pursuant to its own laws had been employed or abused.¹⁸⁵ State regulation would also be hindered to the extent it is based upon a disclosure regime with respect to chartering and required filings such as offering documents, registration statements, and annual and quarterly reports.

The reasons for extending freedom from self-incrimination to transnational corporations are not identical to those with respect to human beings. As previously noted, human beings acquire life and residence through the accident of birth rather than conscious choice, as is the case with transnational corporations. Human beings are not subject to mandatory filings and accompanying disclosures in order to acquire or continue their personhood. By contrast, transnational corporations acquire and maintain personhood only through such filings and continuing state consent. Any policy that discourages candor in such filings is detrimental to state monitoring efforts necessary to determine the desirability of continuing corporate existence.

Furthermore, individual human beings often lack the power to resist government pressure asserted through law enforcement agencies. The self-incrimination privilege serves to shield human beings from the exercise of such pressure. By contrast, corporations are far better equipped to resist state coercion. Although owing their continuing existence to the state, corporations possess greater financial resources and access to influential decision-makers that may blunt the power of government, factors which may not be as readily available to their human counterparts. As noted by the U.S. Supreme Court, freedom from self-incrimination

185. *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906); *see also Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911).

must remain an essentially personal right solely applicable to human beings rather than shared with transnational corporations.¹⁸⁶

VI. CONCLUSION

Transnational corporations and international human rights law have come into increasing contact with one another in the modern era of globalization. Although the primary focus of this contact has been whether and to what extent human rights obligations may be imposed upon such corporations, the related questions of whether and to what extent transnational corporations possess rights under international instruments must also be addressed.

Transnational corporations must be recognized as rights-carrying as well as duty-bearing entities. However, this recognition must resist the equation of transnational corporations with human beings. Although sharing some similarities, transnational corporations merely mimic human beings and thus are entitled to a lesser degree of protection. The standard proposed in this article seeks to address these differences by offering a test by which to determine the circumstances in which it is permissible to extend human rights protections to transnational corporations. The focal point of this standard is recognition that the primary intended beneficiary of human rights law is human beings. Only by recognizing the "human" in human rights may the rapid expansion of corporate entitlements be limited to those instances truly essential to corporate existence and the interests of society. Failure to interrupt the steady progression of corporate rights through the implementation of reasonable limitations elevates such entities at the expense of the human beings they are intended to serve.

VII. APPENDIX

UNIVERSAL DECLARATION OF THE RIGHTS OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

Preamble

Recalling that the Universal Declaration of Human Rights, in proclaiming a common standard of achievement for all peoples and all States, provides that every individual and every organ of society, including transnational corporations and other business enterprises, shall strive by teaching and

186. *White*, 322 U.S. at 698.

education to promote respect for human rights and freedoms and, by progressive measures, secure their universal and effective recognition and observance,

Recalling that the standards regarding respect for and protection of human rights set forth in the Universal Declaration of Human Rights have been implemented in numerous international instruments specifically applicable to transnational corporations and other business enterprises, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises and the numerous international instruments listed therein as well as regional instruments such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, the American Declaration of the Rights and Duties of Man and the Convention for the Protection of Human Rights and Fundamental Freedoms,

Reaffirming that transnational corporations and other business enterprises have human rights obligations and responsibilities pursuant to the above-referenced instruments,

Recognizing however that some of the rights and freedoms granted to "individuals," "organs of society," "groups" and "persons" within the above-referenced instruments may be applicable to transnational corporations and other business enterprises as well as human beings,

Acknowledging the universal recognition of corporate personality throughout the vast majority of national legal systems throughout the world,

Recognizing the fundamental fairness inherent in recognizing transnational corporations and other business enterprises as not only duty-bearing entities but also rights-carrying persons pursuant to international human rights instruments,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most States and in interna-

tional economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting also that the increasing role of transnational corporations and other business enterprises has resulted in the continuous emergence of new international human rights issues and concerns,

Acknowledging however that the primary intended beneficiaries of international human rights instruments are human beings and that transnational corporations and other business enterprises are not nor should be deemed the equivalent of human beings for purposes of fully enjoying the rights, freedoms and protections granted by such instruments in an identical manner,

Consequently noting that standard-setting with respect to the interrelationship of the rights of transnational corporations and other business enterprises and the freedoms, guarantees and protections set forth in international human rights instruments are required at this time and that this Declaration will contribute to the making and development of international law as to these freedoms, guarantees and protections,

Solemnly proclaims this Universal Declaration of Rights for Transnational Corporations and Other Business Enterprises and urges that every effort be made so that they become generally known and respected.

Article 1 - Personhood

Transnational corporations and other business enterprises have the right to recognition everywhere as persons before the law.

Article 2 - Non Discrimination

Every transnational corporation and other business enterprises are entitled to all of the rights and freedoms set forth

in this Declaration without distinction of any kind, including national origin, ownership of property or other status.

Article 3 - Equal Protection of the Law

All transnational corporations and other business enterprises are equal before the law and are entitled without any discrimination to equal protection of the law.

Article 4 - Privacy

1. No transnational corporation or other business enterprise shall be subjected to arbitrary or unlawful interference with its privacy, documents or correspondence.
2. Transnational corporations and other business enterprises have the right to the protection of the law against such interference.

Article 5 - Property

1. Transnational corporations and other business enterprises have the right to own property alone as well as in association with others.
2. Transnational corporations and other business enterprises have the right to the protection of their moral and material interests resulting from any scientific, literary or artistic production of which they are the author or owner.
3. No transnational corporation or other business enterprise shall be arbitrarily deprived of its property rights set forth in Articles 5(1) and (2) herein.
4. Transnational corporations and other business enterprises are entitled to respect for the freedom indispensable for scientific research and creative activity.

Article 6 - Expression

1. Transnational corporations and other business enterprises shall have the right to freedom of expression.

This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of their choice.

2. The exercise of the rights provided for in Article 6(1) carries with it special duties and responsibilities. It may therefore be subject to certain restrictions only as provided by law and as are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order or of public health or morals;
 - (c) For the prevention of the dissemination of any propaganda for war; and
 - (d) For the prevention of dissemination of any expression advocating national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 7 - Minimal Guarantees in Criminal Proceedings

1. In the determination of any criminal charge against it, or of its rights and obligations in a suit at law, a transnational corporation or other business enterprise shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of national security in a democratic society, the maintenance of the confidentiality of any trade secret or proprietary information the public disclosure of which would cause material harm to the transnational corporation or other business enterprise or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. However, any judgment rendered in a criminal case or in a suit at law shall be made public.
2. A transnational corporation or other business enterprise charged with a criminal offense shall have the right to

be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against it, a transnational corporation or other business enterprise shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail of the nature and cause of the charge against it;
 - (b) To have adequate time and facilities for the preparation of its defense and to communicate with counsel of its own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in the presence, and to defend itself through its representatives or legal assistance of its own choosing;
 - (e) To examine, or have examined, the witnesses against it and to obtain the attendance and examination of witnesses on its behalf under the same conditions as witnesses against it;
 - (f) To have the free assistance of an interpreter for use in court if necessary.
4. Every transnational corporation or other business enterprise convicted of a crime shall have the right to its conviction and sentence being reviewed by a higher tribunal according to law.
5. No transnational corporation or other business enterprise shall be liable to be tried or punished again for an offense for which it has already been finally convicted or acquitted in accordance with the law and penal procedure of each State.
6. No transnational corporation or other business enterprise shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at

the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 8 - Effective Remedies for Violations of Rights

1. Transnational corporations and other business enterprises have the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to them by the constitution, by law or by this Declaration, notwithstanding that the violation has been committed by persons acting in an official capacity.
2. Transnational corporations and other business enterprises claiming such a remedy shall have their rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.
3. Transnational corporations and other business enterprises are entitled to assurance that the competent authorities shall enforce such remedies when granted.

Article 9 - Limitations

1. In the exercise of their rights and freedoms, transnational corporations and other business enterprises shall be subject to such limitations as are determined by law for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
2. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein.

3. Nothing in this Declaration may be interpreted as implying for any transnational corporation or other business enterprise any right to engage in any activity or perform any act inconsistent with its obligations pursuant to the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.

Article 10 - Derogation

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, a State may take measures derogating from their obligations under the present Declaration to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the basis of national origin, ownership of property or other status.
2. No derogation from Articles 1 and 7(6) may be made under this provision.

Article 11 - Definitions

1. The term "transnational corporation" refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.
2. The phrase "other business enterprise" includes any business entity, regardless of the international or domestic nature of its activities; the corporate, partnership or other legal form used to establish the business entity; and the nature of the ownership of the entity. This Declaration shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation or if the impact of its activities is not entirely local.
3. The term "State" refers to a person of international law that possesses the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.

