CORPORATIONS ARE (WHITE) PEOPLE: HOW CORPORATE PRIVILEGE REIFIES WHITENESS AS PROPERTY

*Amanda Werner**

I. INTRODUCTION

In 1993, renowned legal scholar and Critical Race theorist Cheryl Harris's *Whiteness as Property* examined how property rights interact with and reinforce race.[1] Harris documents how the American property regime developed in tandem with conceptions of race to inhere the white identity with protected legal value, shaping historical patterns of domination and continuing to "reproduce subordination in the present."[2] This paper attempts to build on this canon by considering the role of the corporation—and, particularly, the expansion of corporate privilege—in reinforcing these same property interests. I explore how legal conceptions of the corporation developed alongside whiteness as property, evolving and expanding with modern "colorblind" jurisprudence to reify white domination through an ostensibly race-neutral mechanism.

Part II begins with a discussion of Harris's *Whiteness as Property*, which lays the intellectual foundation for my analysis. I next consider how whiteness as property has persisted despite the gains of the civil rights movement and related remedial efforts, suggesting that the expansion of corporate privilege has played a major role in enabling ongoing inequities in access to opportunity and resources. Part III explores this connection more deeply, offering a fuller explanation of corporate privilege's shifting functions in enforcing white domination and recounting the curious beginnings of corporate privilege in *Santa Clara County v. Southern Pacific*

* Graduate of UCLA School of Law, as part of the David J. Epstein Program in Public Interest Law and Policy and the Critical Race Studies specialization. The first incarnation of this Article was presented at the 7th Annual Critical Race Studies Symposium at UCLA School of Law, *Whiteness as Property: A Twenty Year Appraisal*. I am indebted to Cheryl Harris, Tendayi Achiume, Devon Carbado, Laura Gomez, Frances Olsen, Sharon Dolovich, Cathy Mayorkas, and Adam Winkler for their many helpful conversations and comments throughout the development of these ideas. I am deeply grateful to the UCLA Critical Race Studies program for the symposium platform, particularly Jasleen Kohli, who made my participation possible. Finally, this Article could not have been written without the invaluable mentorship of my dear friend, Sadath Omar Garcia.

1. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).
2. *Id.* at 1714.

Railroad Co.[3] Part IV offers a detailed history of the expansion of corporate privilege and its interplay with race, tracing this evolution from Reconstruction and the *Lochner* era to the retrenchment of corporate interests following advances in civil rights, and finally to the recent controversies surrounding the global financial crisis and groundbreaking *Citizens United*[4] decision.

Part V focuses more explicitly on corporate privilege's inextricable connection to the white identity. First, I consider how corporate privilege benefits whites over people of color, both in terms of disproportionate material gain and through its reification of the property interests in whiteness. Next, I examine how corporate privilege creates property interests of its own, perhaps even instantiating a new "tiered political personhood"[5] structure where corporations reign as "the new Whites."[6] Finally, I conclude in Part VI by echoing Harris's call to de-legitimate the property interests in whiteness and urging that, to fully achieve racial justice, we must de-legitimate corporate privilege as well.

II. WHITENESS AS PROPERTY

A. *Discussion of* Whiteness as Property *Scholarship*

Twenty years ago, Cheryl Harris published the incredibly influential *Whiteness as Property*,[7] which has "framed the debate on race and property ever since its publication."[8] Harris's article examines how property rights interact with and reinforce race, charting how these "historical forms of domination have evolved to reproduce subordination in the present."[9] She traces the origins of whiteness as property through the "parallel systems of domination of Black and Native American peoples. . . ."[10] The boundaries of whiteness evolved in tandem with early conceptions of property rights, and Harris suggests that "it was the *interaction* between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination."[11] Most blatantly, race interacted with property in declaring white ownership of enslaved blacks and Native Americans. In this way, "[w]hiteness both allowed ownership of property and insulated those considered white from becoming the property of others."[12]

The concept of whiteness as property is distinct from—though related to—what has been otherwise analyzed as white privilege, notably charac-

3. 118 U.S. 394 (1886).
4. 558 U.S. 310 (2010).
5. Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 749 (2011).
6. john a. powell & Caitlin Watt, *Negotiating the New Political and Racial Environment*, 11 J.L. SOC'Y 31, 45 (2009) [hereinafter powell & Watt I].
7. Harris, *supra* note 1.
8. Bela August Walker, *Privilege Revealed: Past, Present, & Future: Privilege as Property*, 42 WASH. U. J.L. & POL'Y 47, 52 (2013).
9. Harris, *supra* note 1, at 1714.
10. *Id.*
11. *Id.* at 1716.
12. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2158 (2013).

terized by Peggy McIntosh as "an invisible package of unearned assets [whites] can count on cashing in each day, but about which [they are] 'meant' to remain oblivious."[13] Harris analyzes how courts established white privilege as a form of property by granting it legal status and protecting it as a vested interest. As she explains, "law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status)."[14] Whiteness as property, then, reifies white privilege—but the two are not one in the same.

As Harris goes on to examine, whiteness meets several classical features of property: 1) rights of disposition, 2) right to use and enjoyment, 3) reputation and status property, and 4) the absolute right to exclude.[15] It is this right to exclude that serves as the "conceptual nucleus"[16] of property and whiteness and most clearly differentiates the white racial identity from all others—making whiteness "unadulterated, exclusive, and rare."[17] Accordingly, as enforced by our legal structure, just "one-drop" of non-white blood can irreparably contaminate it.[18] This is so even as whiteness remains a shifting target with no clear definition. For example, in 1922, the Supreme Court rejected a Japanese man's claim that he fit the social expectations of white identity and thus should be permitted to naturalize, emphasizing instead a pseudo-scientific and ethnological paradigm of whiteness;[19] yet, the very next year, the Court rejected an Indian man's ethnological claim to whiteness in favor of amorphous societal perceptions of racial identity.[20] Nancy Leong suggests that, by rejecting any consistent conception of whiteness, "[w]hite individuals and institutions had the power to police their own boundaries . . . excercis[ing] the essential property right of exclusion."[21]

Harris next employs the legal narratives of *Plessy v. Ferguson*[22] and *Brown v. Board of Education*[23] to demonstrate how the property interests in whiteness have been "transformed, but not discarded, in the Court's new equal protection jurisprudence."[24] As Harris chronicles, it was Homer Plessy's attorney, Albion Tourgee, who first proposed the theory of whiteness as property, arguing that the railroad had deprived Plessy of his reputation as a (7/8ths) white man.[25] Tourgee argued that "the reputation of belonging to the dominant race . . . is property, in the same sense

13. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 1990 INDEP. SCH. 31, 31 (1990).
14. Harris, *supra* note 1, at 1725.
15. *See id.* at 1731–37.
16. *Id.* at 1714.
17. *Id.* at 1737.
18. *See, e.g.*, An Act to Preserve Racial Integrity, Act of March 20, 1924, ch. 371, 1924 Va. Acts 534.
19. Ozawa v. United States, 260 U.S. 178 (1922).
20. United States v. Thind, 261 U.S. 204 (1923).
21. Leong, *supra* note 12, at 2159.
22. 163 U.S. 537 (1896).
23. 347 U.S. 483 (1954).
24. Harris, *supra* note 1, at 1714.
25. *See id.* at 1747.

that a right of action or inheritance is property."[26] Indeed, he went even further, imploring the Court that "the reputation of being white . . . is . . . the most valuable sort of property, being the master-key that unlocks the golden door of opportunity[.]"[27] The Court declined to consider this claim, not because it found no reputational property inhered to the white identity, but because it refused to hold that Plessy was actually white.[28] Demonstrating this fundamental right of exclusion, the Court used its discretion to keep the "master-key" out of Plessy's reach.

While most legal scholars consider *Plessy* and *Brown* to be at fundamental odds with one another, Harris argues that *Brown* merely "dismantled an old form of whiteness as property while simultaneously permitting its reemergence in a more subtle form."[29] In short, "[w]hite privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed."[30] By failing to challenge the substantive inequities created and reinforced by legally-protected white privilege over time, *Brown* effectively enshrined white domination as a "legitimate and natural baseline," creating a property interest in the racially-biased status quo.[31]

Building on this framework, Harris considers how this new form of whiteness as property works to reconstitute subordination while masking its presence in colorblind platitudes.[32] Her principal focus here is whiteness as property's role as the "unspoken center"[33] of the backlash against affirmative action, as illustrated by *Regents of the University of California v. Bakke*,[34] *City of Richmond v. J.A. Croson & Co.*,[35] and *Wygant v. Jackson Board of Education*.[36] In these cases, the Court's approach suggests that "the parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites."[37] Thus, the property interest in whiteness presents a virtually impenetrable barrier to any substantive remediation. To remove this barrier and de-legitimate whiteness as property more generally, Harris concludes that we must implement properly structured affirmative action programs that "challenge the characterization of the unfettered right to exclude as a legitimate aspect of identity and property."[38]

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26. Brief for Plaintiff in Error at 8, *Plessy* (No. 210).
27. *Id.* at 9.
28. *See Plessy*, 163 U.S. at 549–52.
29. Harris, *supra* note 1, at 1753.
30. *Id.*
31. *Id.* at 1714.
32. *Id.* at 1715.
33. *Id.*
34. 438 U.S. 265 (1978).
35. 488 U.S. 469 (1989).
36. 476 U.S. 267 (1986).
37. Harris, *supra* note 1, at 1768.
38. *Id.* at 1715.

B. Whiteness as Property Today

Though Harris documents the many valuable property interests still inhered in white racial identity, many of the legal protections historically conferred to whites were, to some extent, eroded by the civil rights and related movements. While *Brown* "failed to expose the problem of substantive inequality in material terms produced by white domination and race segregation,"[39] the Civil Rights Act of 1964[40] and the Voting Rights Act of 1965[41] extended protections beyond prohibiting purely state-supported discrimination to target broader social practices, norms, and prejudices that oppressed people of color.[42] Though both of these statutes have been substantially weakened in recent years, their implementation—along with affirmative action and other race conscious remedies—helped produce a measurable change in conditions, including an increase in wealth among families of color.[43]

However, this trend has not endured; in just the last 25 years, the wealth gap between blacks and whites has nearly tripled.[44] At present, the Federal Reserve Board estimates that for every dollar of wealth owned by the median white family in the U.S., Latino families have twelve cents and black families a dime.[45] Accounting for gender disparities makes these numbers far more discouraging: single black and Latino women own just one penny of wealth for every dollar claimed by men of their respective race—and only a fraction of a cent compared to white men.[46]

The failure of formal equality and the persistence of whiteness as property, as characterized by Harris, deserve much of the blame for these ongoing inequities, particularly to the extent that these property interests were invoked to weaken civil rights protections and gut most attempts at affirmative action. One can hardly expect any serious leveling of the playing field when the "existing distribution of social goods that was

39. *Id.* at 1752.

40. 42 U.S.C. § 21 (1964) (declaring that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance").

41. 42 U.S.C. § 1973 (1965) (prohibiting attempts "to deny or abridge the right of any citizen of the United States to vote on account of race or color").

42. john a. powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 85 (2012).

43. *Nine Charts about Wealth Inequality in America*, URBAN INSTITUTE, *available at* http://datatools.urban.org/Features/wealth-inequality-charts/ (last visited Feb. 23, 2015), *archived at* http://perma.cc/CZF2-G5QE.

44. Tami Luhby, *Wealth inequality between blacks and whites worsens*, CNN MONEY, (Feb, 27, 2013, 12:09 AM), http://money.cnn.com/2013/02/27/news/economy/wealth-whites-blacks/index.html, *archived at* http://perma.cc/7QXZ-CJQW.

45. INSIGHT CTR. FOR CMTY. ECON. DEV., LAYING THE FOUNDATION FOR NATIONAL PROSPERITY: THE IMPERATIVE OF CLOSING THE RACIAL WEALTH (Introduction) (Mar. 2009), *available at* http://www.insightcced.org/uploads/CRWG/LayingTheFoundationForNationalProsperity-MeizhuLui0309.pdf, *archived at* http://perma.cc/94E4-Y68S; *see also* FEDERAL RESERVE BD., 2007 SURVEY OF CONSUMER FINANCES, FULL PUBLIC DATA SET, *available at* http://www.federalreserve.gov/econresdata/scf/scf_2007survey.htm, *archived at* http://perma.cc/5PF6-3BR6.

46. FEDERAL RESERVE BD., *supra* at note 45.

originally determined by whiteness continues to define the normative baseline."[47] Worse still, by "disassociating white privilege from past and present economic exploitation and adopting an emphasis on race-neutrality,"[48] the legal system and larger cultural narrative forcibly angle our necks to make the playing field look perfectly level—and to make it appear that its many casualties are jumping rather than being pushed. These mechanisms are very real, and their damaging effects are only magnified as they interact; yet there is another insidious mechanism entrenching continued white domination, which has scarcely been addressed in Critical Race scholarship: the proliferation and legal ratification of corporate privilege.

III. EMERGENCE OF CORPORATE PRIVILEGE

A. *Defining Corporate Privilege*

Harris shows how law has been used to create and perpetuate whiteness as property both overtly and covertly, moving from an explicitly subordinating legal regime in *Plessy* to an implicitly subordinating legal baseline after *Brown*. Corporate privilege has contributed significantly to this dynamic, and exploring its function in this history offers a fuller picture of how the law has constructed whiteness as property over time. When white supremacy was explicit in law, corporate privilege played a supporting role, reaffirming the Jim Crow regime and allowing whites to maintain economic dominance in a post-slavery world. Yet as white supremacy was forced into an implicit role with the advent of formal legal equality, corporate privilege filled this void by transforming into something far more pervasive and much more explicit.

As people of color and women formed major grassroots movements to dismantle legal subordination, corporate advocates—to be clear, wealthy white men—embarked on their own movement for greater corporate privilege. Dating back to the end of the Civil War, elite business leaders pushed for deregulation and novel legal doctrines to protect the power and resources already in their possession, while simultaneously lobbying to increase this influence by privatizing elements of the public sphere. In the century and a half since, corporate advocates have succeeded in creating a category of legally fictitious "people": people untouched by criminal prosecution and moral judgment; people unchecked in exploiting the resources and labor of the global underclass; people unrestrained in stuffing the ballot box with endless, under-taxed dollars disguised as free speech. The trouble with the current corporate legal regime, then, is not simply that we have allowed corporations to become people; instead, it may be that we have allowed people to become corporations—maintaining historical oppression from behind the corporate veil.

Today, it is white supremacy that plays a supporting role to corporate privilege, as the latter expands to entrench a system of *corporate*

47. Leong, *supra* note 12, at 2160.

48. Ryan Fortson, *Correcting the Harms of Slavery: Collective Liability, the Limited Prospects of Success for a Class Action Suit for Slavery Reparations, and the Reconceptualization of White Racial Identity*, 6 AFR. AM. L. & POL'Y REP. 71, 81 (2004).

supremacy. Though corporate supremacy is cloaked in free market platitudes that track the "colorblind" myth of meritocracy, its historical evolution has run parallel with whiteness, making corporate power similarly "unadulterated, exclusive, and rare."[49] Corporate supremacy is also similarly subordinating. The persistent reality of corporate demographics makes clear that this system was created by and for wealthy white men, effectively transferring the property interests in whiteness to another, less detectable form. To play on Peggy McIntosh's framing of white privilege, corporate privilege might be understood as an invisible package of unearned assets corporate actors can count on cashing in each day, but about which *the public* is meant to remain oblivious.[50]

B. Creating Corporate Privilege

Though the expansion of corporate rights and the stagnation of civil rights in the wake of Reconstruction are rarely discussed in the same classroom, this post-War period marks the historical center of both the corporate privilege and racial justice movements. Reconstruction was, of course, a time of extreme tumult, as the legal and social order in the United States was largely upended and the path for the future remained uncharted. The eventual fate of both movements may be tied back to the split within the Republican Party following the Civil War. While radical Republicans supported the redistribution of land "both to weaken the slave owner class as well as to strengthen the free man," these priorities eventually lost out to Republicans interested in a national platform for business and not in a national platform for citizenship.[51] Given this deeply entwined history, it is impossible to get a full picture of corporate privilege without considering its interplay with racial inequity.

Central to the movement for racial justice has been a challenge to the public/private distinction, as groups that have been denied access to private resources turn to public means for the vindication of their interests. Prior to the Civil War, it was generally accepted that public law could reach private actions,[52] even as the debate raged over federal versus state supremacy. john a. powell and Caitlin Watt suggest it was not until "non-whites started to successfully make claims to participating in the public space [that] there was a move to both private space and an effort to destroy the public."[53] Because the power to exclude is so central to the white identity, when the Civil War amendments forced whites to share the public space, they responded by situating many of their interests in the private sphere and erecting the arbitrary barrier of state action to keep blacks out.

The expansion of corporate power has worked in the opposite direction—transforming what were historically state-created entities beholden to the public interest into amorphous aggregations of individual legal

49. Harris, *supra* note 1, at 1737.
50. McIntosh, *supra* note 13, at 31.
51. john a. powell & Caitlin Watt, *Corporate Prerogative, Race, and Identity Under the Fourteenth Amendment*, 32 CARDOZO L. REV. 885, 894 (2011) [hereinafter powell & Watt II].
52. powell & Menendian, *supra* note 42, at 85.
53. powell & Watt I, *supra* note 6, at 42.

rights singly beholden to private interests. For the first several hundred years of its history, the corporate form was limited to state-chartered entities, which were endowed with special legal advantages that enabled them to serve a broader public objective.[54] For instance, many early corporations performed municipal and public utility functions more closely associated with governmental obligations.[55] Even after incorporation became an increasingly popular form of private business venture, the dominant assumption "that the state conferred the privileges of incorporation not simply for the private benefit of the incorporators, but also to further the general welfare" endured for the majority of the corporation's history.[56] The idea that corporations could be private entities entitled to individual legal protections did not make its way into mainstream discourse until the end of the 19th century.[57]

Though the *Citizens United* decision thrust the "corporations are people" doctrine into the public consciousness, the doctrine's origin can be traced to this push for privatization, which came on the heels of the Fourteenth Amendment. With the tempting prospect of equal protection under the laws, advocates began to argue that corporations were real entities independent of the state and thus entitled to the same protection from government intervention guaranteed to individuals.[58] The Supreme Court did not address this radical proposition until 1886, in *Santa Clara County v. Southern Pacific Railroad Co.*[59] Even so, the Court's path to the doctrine of corporate personhood is highly unusual and arguably suspect.

A few years earlier, Roscoe Conkling argued in front of the Court on another railroad case that ultimately led to *Santa Clara*.[60] Conkling, a U.S. Senator from New York, had served on the Joint Committee on Reconstruction that drafted the Fourteenth Amendment.[61] In a presentation to the Justices, he read from the Journal of the Joint Committee's deliberations, which had yet to be published.[62] Historians suggest that Conkling quoted selectively from the journal to create the false impression that the Framers of the Fourteenth Amendment chose the term "person" with the specific intent of protecting corporate rights.[63] Conkling emphasized to the Justices that at the time the Fourteenth Amendment was ratified, corporate leaders were lobbying for "congressional and administrative protection against invidious and discriminating State and local taxes"—neglecting to mention that the Reconstruction Congress decidedly rebuf-

54. David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201, 207 (1990).
55. *Id.*
56. *Id.*
57. *Id.* at 211.
58. *Id.* at 213.
59. *Santa Clara*, 118 U.S. at 394.
60. Davis H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643, 660 (2011).
61. *Id.*
62. *Id.*
63. *Id.*

fed these appeals.[64] It was not until many years later that Conkling's serious misrepresentations came to light.[65]

Yet, even with Conkling's priming, the text of the *Santa Clara* opinion never addressed the matter of corporate personhood. Instead, in another dubious set of circumstances, the pronouncement that corporations were "people" entitled to Fourteenth Amendment protection appeared only as an aside in the case's headnotes—inserted by an overzealous court reporter who extrapolated this conclusion from an offhand remark by the Chief Justice in oral argument.[66] Though a majority of the Court never actually ruled on corporate personhood, *Santa Clara* continues to be cited as declaring corporations legal persons entitled to constitutional protection.[67] Corporate personhood was then used to set the stage for a much greater expansion of corporate rights.

IV. EXPANSION OF CORPORATE PRIVILEGE

A. *Reconstruction and the* Lochner *Era*

Since 1886, the Due Process Clause of the Fourteenth Amendment has emerged as "[o]ne of the principal mechanisms for using the Constitution to protect excessive corporate prerogative."[68] During the same period that the Supreme Court decimated the promise of equal protection for blacks, it employed the Fourteenth Amendment to proliferate corporate rights. Between 1890 and 1910, 288 equal protection cases addressed corporations; only nineteen involved descendents of slaves.[69] In 1938, Justice Black lamented that, in the years since *Santa Clara*, more than half of Supreme Court cases applying the Fourteenth Amendment addressed corporate equal protection while only *one-half of one percent* considered the rights of blacks.[70]

Perhaps the most famous of these corporate cases is *Lochner v. New York*, which invalidated a New York law regulating working hours, sanitation, and labor conditions in bakeries—ushering in the era of "substantive due process."[71] In the thirty years following *Lochner*, the Court struck down nearly two hundred labor laws, minimum wage laws, and economic regulations, all under the auspices of protecting corporate constitutional rights.[72] Of course, this same period saw the height of Jim Crow laws and black codes, which the Court upheld as a matter of states' rights. As powell and Watt suggest, *Lochner* and *Plessy* enforced "states' rights as

64. *Id.*
65. TED NACE, GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY, 106 (2005).
66. Court records show that Chief Justice Waite told the attorneys that the Court did not wish to hear argument addressing whether the Fourteenth Amendment applies to corporations, because the Justices were "all of the opinion that it does." However, this purported unanimity never made it into *Santa Clara*'s majority decision. For greater detail, *see id.* at 102–09.
67. *Id.* at 102.
68. powell & Menendian, *supra* note 42, at 68.
69. *Id.*
70. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 90 (1938).
71. 198 U.S. 45 (1905).
72. powell & Menendian, *supra* note 42, at 68 (2012).

applied to blacks and other non-whites and judicial federal protection against states' rights and Congress as applied to businesses and corporations."[73] In this way, the Court effectively subverted the Amendment designed to overturn *Dred Scott's*[74] holding of slaves as property to preserve the corporate property of many former slave owners. It was during this era that corporations ascended steadily to a place of immense wealth and power, with Jim Crow diligently guarding the back entrance.

While this selective enforcement of the Fourteenth Amendment carries clear racial implications, the judiciary went out of its way to avoid acknowledging them. As Richard R.W. Brooks documents, courts proclaimed corporations to be legal persons, but this personhood was deemed conspicuously colorless in an era of strict racial division.[75] Indeed, Brooks opens his article, *Incorporating Race*, by recounting how a former slave was able to circumvent a restrictive covenant barring black property ownership by purchasing the land in his (exclusively black-owned) corporation's name.[76]

It may seem counterintuitive that courts enforced Jim Crow segregation only to turn a colorblind eye to corporate actors. Yet, Brooks argues that courts chose this approach to fortify Jim Crow; attempting to attribute race to "strictly legal persons. . .would have revealed the unadorned legal construction of race and undermined the political and social regime of that period."[77] After all, "[i]t is much harder to maintain that blacks are naturally inferior to whites, and therefore subject to white control, if blacks are not naturally black, but instead made so by law."[78] Here, then, we see how the legal treatment of the corporation evolved alongside the construction of whiteness as property, each reinforcing the other. While the Jim Crow legal regime protected the property interests in whiteness overtly—tracking Harris's *Plessy* analysis— the corporate legal regime presciently adopted *Brown's* colorblind approach to reinforce white supremacy covertly, in a "more subtle form."[79]

The legal evolution of the corporation well illustrates how the private interests of corporate actors and the public interests of subordinated groups are frequently in direct tension with one another.[80] Indeed, Justice Powell—the architect of the Court's commercial speech decisions which laid the legal foundation for *Citizens United*—acknowledged these tensions in a memo sent to the Director of the Chamber of Commerce.[81] In the memo, Justice Powell frames the judicial branch as a crucial tool for

73. powell & Watt II, *supra* note 51, at 888–89.
74. 60 U.S. 393 (1857).
75. *See generally* Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).
76. *Id.* at 2024.
77. *Id.* at 2047.
78. *Id.* at 2067.
79. Harris, *supra* note 1, at 1753.
80. powell & Menendian, *supra* note 42, at 77.
81. *Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman of the Educ. Comm.*, U.S. CHAMBER OF COMMERCE (Aug. 23, 1971), *available at* http://reclaimdemocracy.org/powell_memo_lewis/ (last visited May 8, 2014) *archived at* http://perma.cc/6YBS-T8XW.

reclaiming corporate power and stresses that the success of "[l]abor unions, civil rights groups and now the public interest law firms . . . often [come] at business' expense."[82]

This conflict between public and private arose frequently throughout the corporate-friendly *Lochner* era. Even when *Lochner* was finally invalidated by 1938's *Carolene Products*,[83] the opinion strengthened the inverse connection between corporate interests and racial justice. Though the dispute in *Carolene Products* had little to do with race, the Court's famous "footnote four" simultaneously lowered the level of scrutiny for economic regulations and instated a higher level of scrutiny for laws aimed at "discrete and insular minorities."[84]

B. Post-Civil Rights Developments

Perhaps unsurprisingly, it was this post-*Lochner* era that saw the most substantial progress in racial justice, developing alongside a robust system of federal regulation of corporate behavior. Rachel F. Moran notes that "the Supreme Court's references to corporate personhood waned, just at the moment that the [Fourteenth] Amendment was reinvigorated as an instrument of racial justice."[85] She suggests that it is likely that the civil rights movement "revealed how legal personhood had devolved into an abstraction that masked the dehumanization of non-Whites," making corporate personhood appear "increasingly anomalous."[86] Whether or not a causal connection can be definitively established, it is curious that the Court again shifted its approach to corporate doctrine shortly after the civil rights movement achieved significant gains in the 1960s and 70s. Beginning the following decade, the Court reversed its previous position holding corporations as race-neutral entities and began to recognize their distinct racial makeup. In 1989's *Richmond v. Croson*,[87] the Court implicitly acknowledged corporate racial identity to affirm a white-owned corporation's objection to race conscious set aside programs, without ever addressing this break from prior precedent.[88] Once again, changing corporate doctrine pitted the interests of corporations and the interests of people of color against one another.

It was during this same time that an alternate framing of the corporate form gained significant traction, one even more privatized and safely outside the realm of regulation. This "nexus of contracts" model orients

82. *Id.*
83. 304 U.S. 144 (1938).
84. "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152 n.4 (citations omitted).
85. Rachel F. Moran, *People of Color, Women, and the Public Corporation: Whatever Happened to Racism?* 79 ST. JOHN'S L. REV. 899, 923 (2005).
86. *Id.*
87. 488 U.S. 469 (1989).
88. Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1058 (9th Cir. 2004).

the corporate form as the aggregation of the "relations among managers, shareholders, and the other participants in the firm."[89] It draws heavily on neoclassical economics, eschewing government regulation in favor of "free market" forces to lead all parties to maximum efficiency. Building on earlier aggregate theories of incorporation, the nexus of contracts approach positions corporate officers as trustees of their shareholders' property, creating an affirmative legal obligation to protect and maximize shareholder interests—often to the detriment of the broader public.[90] This latest theory of the corporation entrenches the dichotomy between public and private interests even more deeply. Especially because "[c]apital is largely concentrated in the hands of men as a result of powerful historical, cultural, economic, and political norms," further privatizing the corporate form "reinforces pre-existing notions of ownership and thus the imbalance in property relations. . . ."[91]

The privatization of corporate interests can also be understood as increasing the property value of the corporation, since property is merely a "legal construct by which selected private interests are protected and upheld."[92] These property interests not only have significant social influence, but they have allowed corporations to accumulate and concentrate wealth in ways never before possible. As Justice Stevens highlights in his *Citizens United* dissent, corporations "are uniquely equipped to seek laws that favor their owners not simply because they have a lot of money but because of their organizational structure."[93] The corporate form is designed to maximize efficiencies and coordinate resources at a moment's notice, giving them a distinct advantage in "the market for legislation."[94] This dynamic allows corporate actors to pursue "a type of rent seeking that is 'far more destructive' than what noncorporations are capable of."[95]

Such corporate political advantage played out on a national stage in the late 1970s, when deregulation became a powerful bipartisan movement.[96] Over the next ten years, corporate lobbyists successfully removed scores of regulations designed to protect the public interest in the broadcasting, banking, telecommunications, oil and gas, and transportation industries.[97] The deregulation of the banking system, especially, widened the gulf between (mostly white) corporate actors and subordinated racial groups. While removing financial regulations benefitted the corporate elite, those groups with the lowest levels of wealth (mostly non-white)

89. *See* Millon, *supra* note 54, at 230.
90. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of "Nexus of Contracts" Theory*, 109 Mich. L. Rev. 1127 (2011) (reviewing Larry E. Ribstein, The Rise of the Uncorporation).
91. Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. FOR SOC. JUST. 457, 462 (2002).
92. Harris, *supra* note 1, at 1730.
93. *Citizens United*, 558 U.S. at 471 (Stevens, J., dissenting).
94. *See id.*
95. *Id.*
96. *See* Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1175–76 (2012).
97. *See id.* at 1176.

were "locked in a stiff economic struggle for jobs, resources, and expensive credit . . . paying the highest sustained real interest rates of the century."[98]

C. *Recent Controversies*

Of course, it was this same deregulation that precipitated the 2008 financial crisis, which also disproportionately affected people of color—who were more than three times more likely to have subprime loans.[99] United for a Fair Economy believes the total reduction in wealth caused by the financial collapse to be the "greatest loss of wealth for people of color in modern US history," at an estimated $164–213 billion.[100]

Perhaps the most obvious manifestation of corporate privilege lies in how the government responded to this recent crisis. Wall Street banks that plunged much of the world into the worst financial meltdown since the Great Depression were given record-breaking bailouts while the public was offered only the most meager of remedial programs.[101] Further, despite extensively documented acts of purposeful malfeasance, not one Wall Street CEO "even came particularly close to facing criminal charges,"[102] and just one banking executive has been incarcerated, six years after the collapse of the global economy.[103] The racial implications of such corporate privilege are readily apparent in a country that boasts 2.2 million prisoners—a full 65% of whom are people of color.[104] Indeed, it is a fitting coincidence that, while Wall Street bankers are overwhelmingly white, the one man facing jail time is of Middle Eastern descent.[105]

More generally, against the backdrop of growing incarceration rates, Three Strikes laws, and the steady push for leaders to be "tough on crime" that characterized the last quarter of the twentieth century, corporate criminal behavior receives clear special treatment. White collar crime tends to be framed as a private conflict to be resolved through civil suits without need for government interference. In the unlikely event that

98. Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 Brook. L. Rev. 1295, 1324–25 (1995).
99. *See* Amaad Rivera et al., *Foreclosed: The State of the Dream 2008*, UNITED FOR A FAIR ECONOMY at vii, *available at* http://faireconomy.org/files/StateOfDream_01_16_08_Web.pdf (last visited May 10, 2014), *archived at* http://perma.cc/VT9A-8KUQ.
100. *Id.*
101. For a more in-depth discussion on this topic, *see* NEIL BAROFSKY, BAILOUT: HOW WASHINGTON ABANDONED MAIN STREET WHILE RESCUING WALL STREET (1st ed. 2012).
102. Neil Irwin, *This is a Complete List Of Wall Street CEOs Prosecuted for Their Role in the Financial Crisis*, WASHINGTON POST, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/09/12/this-is-a-complete-list-of-wall-street-ceos-prosecuted-for-their-role-in-the-financial-crisis/ (last visited May 7, 2014), *archived at* http://perma.cc/GC6T-KVUP.
103. See Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html.
104. *See* The Sentencing Project, *Facts About Prisons and People in Prison*, *available at* http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf (last visited May 7, 2014), *archived at* http://perma.cc/LE6L-K5H2.
105. *See* Eisinger, *supra* note 103.

criminal liability is pursued, corporations typically face civil repercussions in the form of monetary penalties and oversight rather than more oppressive forms of criminal punishment. Far more frequently, corporations avoid criminal prosecution altogether by entering into non-prosecution or deferred-prosecution agreements with the state.[106]

Just two years after the financial crisis, the country saw renewed corporate outrage when the Supreme Court opened the floodgates to unlimited corporate spending in political campaigns with *Citizens United v. FEC*.[107] In *Citizens United*, the Court held that government restrictions on corporations' independent political expenditures violated the First Amendment.[108] This decision has many troubling implications, chief among them the concern that it "confirm[s] the ascendency of corporate interests as the dominant form of capital within our society."[109] Because the corporate entity was specially crafted for the efficient accumulation and concentration of wealth, the legal enshrinement of political spending as a type of protected speech is especially dangerous. Given this context, removing meaningful financial limits on corporations' First Amendment rights does not simply give them the right to speak—it permits them to drown out all those who disagree.

Citizens United is all but guaranteed to further entrench "[corporate] dominance over society through insuring their privilege [in] the political process."[110] Ronnie Cohen and Shannon O'Byrne emphasize the public/private tensions at play here, noting that *Citizens United* reflects a context in which corporate power expanded significantly while public power was severely reduced.[111] Though the proliferation of corporate privilege has centered on pushes toward privatization, *Citizens United* suggests that privatization is not enough; instead, corporate advocates hope to claim the rights of the public sphere and the privileges of the private sphere with minimal accountability to either.

V. CORPORATIONS ARE (WHITE) PEOPLE

A. Corporate Privilege as Whiteness

It must be emphasized that, despite early characterizations of corporations as race-neutral legal entities, corporate privilege has a clear racial allegiance—undergirding the property interests in whiteness. All of the various avenues of corporate privilege discussed in the previous section not only operate in tension with the legal interests of communities of color, but the material advantages reaped by corporations primarily benefit the white elites who own and control the vast majority of them. As

106. Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of Citizens United*, 65 U. Miami L. Rev. 1, 19–24 (2010).
107. *Citizens United*, 558 U.S. at 310.
108. *See id.* at 312.
109. Ellis, *supra* note 5, at 745.
110. *Id.* at 744.
111. Ronnie Cohen & Shannon O'Byrne, *"Can You Hear Me Now. . .Good!"® Feminism(s), the Public/Private Divide, and* Citizens United v. FEC, 20 UCLA WOMEN'S L.J. 39, 49 (2013).

Atiba R. Ellis suggests, "the more important political person after *Citizens United*—indeed, the now-privileged class—is apparently the corporation and the people who control it."[112] The persistent reality of corporate demographics and continued white dominance ensure that any expansion of corporate power "fundamentally . . . shifts power away from communities of color (and women) notwithstanding their increased voting power."[113]

Despite token efforts at diversity, the highest echelons of corporate America are overwhelmingly white and male. White men account for just 31% of the U.S. population[114] yet hold 67.9% of board seats in Fortune 100 companies, with women collectively at 19.8% and people of color at 16.3%.[115] Women of color hold only 3.9% of these board positions.[116] Executive leadership is skewed even more dramatically. Last year, well over 90% of Fortune 500 companies were headed by white men, with only 22 women, 6 African Americans, 8 Latinos, 8 Asian Americans, and 0 Native Americans serving as CEOs.[117] More generally, while 21% of all business enterprises use the corporate form, only an estimated 12% of Latino-owned companies and 8.8% of black-owned companies are incorporated.[118] In this way, corporate privilege effectively reifies the property interests in whiteness, capturing many of the entitlements historically conferred by the white identity through an ostensibly race (and sex-) neutral mechanism—fitting perfectly within the Supreme Court's current "colorblind" regime.

Yet even these raw demographics highlight an apparent tension in equating corporate privilege with whiteness: while a vast majority of corporate actors are white, the vast majority of whites are not corporate actors. However, as Harris suggests, whites need not have access to significant power and resources to benefit from whiteness as property. This is because the "material benefits of racial exclusion and subjugation" have long functioned to "stifle class tensions among whites."[119] With the property interests in whiteness so deeply entrenched, middle and working class whites generally do reap relative economic benefits from their broader racial dominance. For example, on average, poverty-level whites control nearly as many net financial assets as the highest-earning blacks—

112. Ellis, *supra* note 5, at 747.
113. *Id.* at 748.
114. Nia-Malika Henderson, *White men are 31 percent of the American population. They hold 65 ercent of all elected offices.*, WASHINGTON POST, *available at* http://www.washingtonpost.com/blogs/the-fix/wp/2014/10/08/65-percent-of-all-american-elected-officials-are-white-men/ (last visited Apr. 27, 2015).
115. ALLIANCE FOR BD. DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 2 (2013), *available at* http://theabd.org/2012_ABD%20Missing_Pieces_Final_8_15_13.pdf (last visited May 11, 2014). *archived at* http://perma.cc/GD7E-GJXH.
116. *Id.*
117. Bruce Covert, *Only White, Male CEOs Make The Big Bucks*, THINKPROGRESS (Oct. 22, 2013, 11:28 AM), *available at* http://thinkprogress.org/economy/2013/10/22/2816041/white-men-ceos/ (last visited May 10, 2014), *archived at* http://perma.cc/Z7LZ-7KUC.
118. Brooks, *supra* note 75, at 2035.
119. Harris, *supra* note 1, at 1741.

$26,683 and $28,310, respectively.[120] But even without these economic benefits, W.E.B. Du Bois theorizes that whiteness also offers an important "public and psychological wage" to less privileged whites.[121]

Similarly, powell and Watt propose that whites now "occupy the middle stratum between the corporations, as the elites to whom they owe allegiance, and the non-whites over whom they dominate."[122] This slightly altered power structure confers similar benefits on whites as the overt white supremacy of old—in the form of economic advantage, as well as an "invested ontological identity in whiteness, which allows them to associate with other elites and to not associate with non-whites, especially blacks."[123] powell and Watt go on to note that "[i]t could be suggested that whites in America increasingly concede to corporate power and identify with it as part of whiteness," as an extension of the "ability to exclude, control, and dominate that defines their racialness."[124] This would explain why "the new Republicans—and the Tea Party—have coalesced around the idea of low taxes, no government control over corporations, and defiance of healthcare that is not corporate-controlled . . . voting and acting directly against their economic interests in favor of corporate prerogative."[125]

B. Corporate Privilege as Property

Corporate privilege not only reifies the property interests in whiteness, it also carries significant property interests of its own. Just as "[a]ccording whiteness actual legal status converted an aspect of identity into an external object of property, moving whiteness from privileged identity to a vested interest," the doctrine of corporate personhood converted corporations from state-governed entities to independent actors protected against state intervention. While the legal structures erected to protect these property interests in corporate privilege have been explored at length above, it is also useful to analyze corporate privilege as property more generally, specifically through its right to exclude. Just as the right to exclude forms the "conceptual nucleus" of whiteness as property,[126] it serves a parallel and central function in the construction of corporate privilege.

Unlike whiteness, the corporate identity is technically open and available to all. This purported accessibility and equal opportunity reinforce the myth of meritocracy that legitimizes the post-*Brown* iteration of whiteness as property. Yet, just as our ostensibly level playing field is tilted in favor of whites, corporate privilege is heavily skewed in favor of white elites. On its own, the corporate form does offer notable legal privileges,

120. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 103 (2006).
121. Harris, *supra* note 1, at 1741 (quoting W.E.B. Du Bois, BLACK RECONSTRUCTION at 700 (1935)).
122. powell & Watt II, *supra* note 51, at 899.
123. *Id.* at 900.
124. *Id.* at 903.
125. *Id.*
126. Harris, *supra* note 1, at 1714.

chief among them a shield against civil (and criminal) liability and favorable tax codes. However, the major mechanisms for power and influence detailed in Part IV are solely the province of big business—not just corporations, but corporate empires. The right to exclude in the corporate context, then, can be thought of in terms of the advantages created by economies of scale, as well as the significant barriers to entry created by pervasive wealth inequality and oligarchic norms.

There is the occasional exception to the rule—the corporate Horatio Alger that makes its way to the top of the ladder by the skin of its bootstraps—but the vast majority of corporations that reach this level of power and influence can only do so via large amounts of wealth amassed over generations. Indeed, many would-be Horatio Algers end up either pushed out of the market by their big business competition or bought out as a matter of course. As Ellis suggests, "the definitions of personhood and property not only define privilege but they also grant access to the most effective means of influence and power . . . allow[ing] those who possess political personhood to amass capital and wealth to re-enforce and replicate their own status."[127] When theory meets practice, "[c]orporations, like whites, are in a position that is defined in large part by control and domination over, or exclusion of, the other."[128]

Ellis frames the expansion of corporate privilege—particularly *Citizens United*—as the establishment of a new tiered personhood structure, reminiscent of that which existed between whites and blacks in times of overt white supremacy: "As *Dred Scott* empowered slaveholders, and *Plessy* privileged the separate white society over African American society, perhaps the ramification of the Court's latest personhood analysis is the privileging of corporate power over the traditional political power curried by parties and individuals."[129]

Though much of Ellis's analysis centers on the power disparities between artificial corporate persons and living, breathing citizens, he also suggests that "this story is, once again, explicitly about race, gender, and class stratification."[130] Once more underscoring the conflict between corporate interests and the push for racial justice, powell and Watt note that "[a]s with *Dred Scott*, *Lochner*, *Plessy*, *Slaughter-House*, and *Santa Clara*," the Court's decision in *Citizens United* "represent[s] the expansion of corporate rights at the same time as the reduction of civil rights, especially the civil rights of blacks."[131] As is the case with many major expansions of corporate privilege, it is curious timing that the Court dealt such a major blow to public democratic interests just two years after record-breaking voter turnout among people of color,[132] who are expected to

127. Ellis, *supra* note 5, at 736.
128. powell & Watt II, *supra* note 51, at 899.
129. Ellis, *supra* note 5, at 747–48.
130. *Id.* at 748.
131. powell & Watt II, *supra* note 51, at 901.
132. UNITED STATES CENSUS BUREAU, VOTER TURNOUT INCREASES BY 5 MILLION IN 2008 PRESIDENTIAL ELECTION, U.S. CENSUS BUREAU REPORTS, *available at* https://www.census.gov/newsroom/releases/archives/voting/cb09-110.html (last visited May 11, 2013), *archived at* http://perma.cc/37DR-V884.

compose a majority of the U.S. population in the next few decades.[133] Yet again, an expansion of corporate privilege may have come just in time to break whiteness as property's fall; given the current trend of growing corporate influence, Ellis posits that "[b]y 2050, political, economic, and social power may be concentrated in the hands of a minority of mostly white, mostly male powerbrokers who may effectively be an oligarchy in relation to the majority-minority population."[134]

powell and Watt take this analysis one important step further.[135] They argue that in American society, race is "not about skin color, but about the production of group identity with the power to exclude, control, and benefit." Given the erosion of whiteness' property value and the concomitant expansion of corporate power since the Civil War, they suggest that "when viewing race as a system of powers to exclude and control," corporate privilege not only reifies whiteness as property, but corporations themselves "are clearly the new Whites."[136]

VI. CONCLUSIONS AND RECOMMENDATIONS

Twenty years ago, Cheryl Harris characterized the property interests in whiteness as "resilient and adaptive to new conditions."[137] She noted that "[o]ver time it has changed in form, but it has retained its essential exclusionary character and continued to distort outcomes of legal disputes by favoring and protecting settled expectations of white privilege."[138] Ongoing power and resource disparities support Harris's contention that *Brown* did not eradicate white dominance. Instead, the mechanisms that enforce these interests appear to have gone undercover. As this paper has suggested, this latest iteration of whiteness as property has taken the form of expansive corporate privilege. Corporate privilege plays the dual role of reinforcing white racial dominance and creating a new privileged identity of its own: the corporate ruling elite. The corporate form offers an ostensibly race-neutral mechanism to maintain historical subordination—making corporate privilege the ideal tool to reify whiteness as property in the "colorblind" age that has followed *Brown*.

Fortunately, the corporate form has one major weakness: it is, at its heart, an "unadorned legal construction."[139] Just as Brooks suggested that "[i]t is much harder to maintain that blacks are naturally inferior to whites, and therefore subject to white control, if blacks are [only] made so by law,"[140] it is difficult to reinforce corporate supremacy when corporations are merely artificial legal entities. Ellis asks "whether *Citizens United* marks the beginning of an era where this country makes plain the existence of tiered political personhood, where the individual citizens' in-

133. Ellis, *supra* note 5, at 749.
134. *Id.*
135. powell & Watt I, *supra* note 6, at 45.
136. *Id.*
137. Harris, *supra* note 1, at 1778.
138. *Id.*
139. Brooks, *supra* note 75, at 2047.
140. *Id.* at 2067.

terests are sublimated to the interests of corporate artificial persons."[141] The sustained outrage over *Citizens United's* endorsement of corporations as people suggests that it may indeed be. Unlike the deep entrenchment of racial divisions in this country, there seems to be much broader agreement that corporations have been empowered by law, and thus may be disempowered by law.

Harris argues that to begin to approach racial justice in the American context, we must de-legitimate the property interests in whiteness.[142] Race conscious remediation and properly constructed affirmative action programs are essential to this process; but to fully de-legitimate whiteness as property, we must also de-legitimate corporate privilege. Against the backdrop of the global financial crisis and broad outcry over *Citizens United,* there may be no better time than the present to dismantle corporate privilege—and destabilize whiteness as property at the same time.

141. Ellis, *supra* note 5, at 749.
142. Harris, *supra* note 1, at 1779.