

***Growing up Corporate: The Dangerous Broadening Scope of
Corporations' Rights***
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For Charles Mangel

*You fought for social justice with the power of the typewriter and
impressed upon everyone around you the astronomical
importance of education. Thank you.*

The rights of every man, woman, and child are held to be sacred in American political culture. Every person is entitled to certain political rights and to be free from certain arbitrary and capricious bars on their exercise of liberty. These protections include all those contained in the First Amendment to the United States Constitution, such as freedom of speech and the exercise and establishment of religion. Liberty protections also encompass rights not explicitly mentioned in the Constitution, like privacy rights drawn from the penumbras and emanations of other rights detailed in *Griswold v. Connecticut* (1965). Prior to the 14th Amendment, these protections were only guaranteed by the federal government. Since the 14th Amendment however, states have had to play by the same rules. They could no longer “deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws” (U.S. Constitution, 14th Amendment). On the whole, the 14th Amendment and the protections it provided have been a boon for civil rights and civil liberties since it was ratified in 1868. The spirit of the 14th Amendment though, that persons cannot be deprived of certain rights without due process, no longer applies to the same population as it was originally intended.

Over the course of the nation’s history, the scope of subjects receiving constitutional protections and the rights being protected have expanded. Overall, the spreading of rights to more people and broadening of protections can be a valuable development, paving the way for a more just society. In some ways though, protections are given in ways that are not logical, and to recipients that do not need them. These recipients are not individuals. Rather, these recipients are people only in the legal sense. While technically legal persons for business-related purposes, corporations have increasingly been given constitutional protections logically reserved for individuals.

The current line of corporate rights jurisprudence is normatively troubling at its best and extremely unfair in the context of the political system at its worst. In this paper, I will seek to outline the history of corporate rights jurisprudence in America, analyze that jurisprudence from a legal and political perspective, and offer some normative arguments to fix the problem of overzealously-distributed corporate rights. In the first section, I will detail the historical developments of

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corporate rights and the idea of corporate personhood. The second section will contain an explanation of corporate rights and personhood by scholars from the fields of political science, legal studies, and economics. The third section will explore the proposed policy paths of legal scholars, economist, and legislators for the future of corporate rights. Finally, the last section will offer policy solutions based on the analysis done up to that point. It will also contain predictions for the future of corporate rights and political activity in the United States in light of the political and legal climate.

The rise of the American corporation

The corporation is an exceedingly valuable legal invention. According to the US Small Business Administration (SBA), a corporation is “an independent legal entity owned by shareholders. This means that the corporation itself, not the shareholders that own it, is held legally liable for the actions and debt the business incurs” (2015). The corporation is entirely separate from the shareholders and other owners, administrators, and employees that work for it. The benefits of incorporating a business lie in facilitating economic growth in the private sector.

The legal separation of the corporation from the individuals involved in it allows for many advantages. The US Small Business Administration, an arm of the United States government, outlines some of the following benefits of a corporation: limited liability, the ability to generate capital, corporate tax treatment, and the attraction of potential employees. The limited liability benefit is probably the most topical in the discussion of corporate rights, because it is the primary manifestation of the corporate veil, the legal idea that keeps a corporation separate from its owners. If a business is incorporated, “shareholders can generally only be held accountable for their investment in stock of the company” (SBA, 2015), meaning they do not have to fear that a business they invest in performing poorly will hurt them financially any more than they willingly paid into it in the form of stock. For owners of a corporation, this mitigates a lot of the personal financial risk of starting a business, and in turn, stimulates economic growth.

The other major benefit of incorporation that is relevant to the discussion of corporate rights is the corporation’s separate tax system. Corporations are taxed as separate entities from their owners and shareholders and they are taxed at lower rates. This separate tax scheme also serves the valuable purpose of incentivizing new business ventures to sustainably grow the economy, so it is not inherently a problem. The significant aspect of maintaining separate tax systems for corporations and the individuals that comprise them, is, once again, the idea of separation, of the corporate veil between owner and business.

The evolution of corporate rights as Americans know them today can be traced to the early years of government under the United States Constitution. In 1819, the Supreme Court of the United States handed down an opinion on the case of *Trustees of Dartmouth College v. Woodward* 17 U.S. 518 (1819). The issue in this case revolved around the relationship between the private Dartmouth College and the state of New Hampshire. Members of the New Hampshire state legislature sought to amend the charter of Dartmouth College, which had been

operating as a private corporation under King George III's charter since 1769. In June of 1816, the New Hampshire state legislature passed a law with the general purpose to "amend the charter, and enlarge and improve the corporation of Dartmouth College" (*Trustees of Dartmouth College*, par. 24). The problem in this case, according to Daniel Webster, representing Dartmouth College, is "whether the acts ... are valid and binding on the rights of the plaintiffs, without their acceptance or assent" (*Trustees of Dartmouth College* par. 54). In a more general sense, the question to be answered by the Court was whether or not the charter between the Trustees of Dartmouth College and King George III enacted in 1769 constituted a contract between private parties, and thus, fell under the jurisdiction of the Contract Clause of the United States Constitution. The Court's answer is a resounding yes.

In determining the validity of the acts under the constitution, Chief Justice Marshall applied the Contract Clause, which prohibits states from passing any "Law impairing the Obligation of Contracts..." (*U.S. Constitution*, Article 1, Section 10). The rationale for this ruling is based on the changes to Dartmouth College's structure and function enacted by the laws of the New Hampshire legislature. In addition to changing the number of trustees governing Dartmouth College, the acts also changed the name and objectives of the corporation established in the Charter. The acts imposing these changes, Marshall argues, go too far and even become "repugnant" to the United States Constitution. Marshall reads the Contract Clause from a narrow perspective, interpreting it to restrict the government in matters of private property, not political and civil function (*Trustees of Dartmouth*, par. 110). Based on this principle, Marshall found the Charter granted by King George III to constitute a contract in which the state of New Hampshire could not interfere.

This seminal decision by the Marshall Court laid the groundwork for the rights that would develop later. *Trustees of Dartmouth College v. Woodward* entrenched the right to contract in the United States constitutional system. However, contracts and private property were only the thin edge of the wedge. With corporate contract and property rights established, Supreme Court Justices and other corporate groups would secure more rights as the nation grew.

One of the first expansions and clarifications of corporate rights came in *Santa Clara County v. Southern Pacific Railroad Company* 118 U.S. 294 (1886). The dispute in this case stemmed from the Californian Santa Clara County imposing taxes on the fences built by the Southern Pacific Railroad Company. The County argued it was within their authority to impose this new tax because it was allowed to tax added value on land, which, according to a California statute, included value added by fences. The company refuted this claim. The Court ruled in favor of the Southern Pacific Railroad Company, saying the taxes assessed were not allowable under the Californian Constitution and statutes concerning taxation of railroads (*Santa Clara County* 118 U.S. 394, page 416).

The significance of *Santa Clara County* does not, however, lie in the minutiae of 19th century Californian railroad taxation. Instead, it lies in the words spoken by Chief Justice Waite prior to oral argument. His famous declaration of the rights of corporations is not mentioned explicitly in the opinion, but it creates a clear standard of jurisprudence for corporate rights that continues to this day.

In response to a lengthy argument in the defendant's brief, Chief Justice Waite declared: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does" (*Santa Clara County*, Prior History). Though not binding legal precedent, the spirit of Chief Justice Waite's words has permeated the Court's corporate rights jurisprudence to this day. Even though the Fourteenth Amendment to the United States Constitution is not cited explicitly in more modern cases, such as *Citizens United v. FEC* 558 U.S. 310 (2010) and *Burwell v. Hobby Lobby* 573 U.S. ____ (2014), the weight of Chief Justice Waite's words is still evident.

Free speech, as enshrined in the First Amendment to the Constitution, is a right commonly thought of as belonging to individual people. Freedom of speech, which has grown over the years into freedom of expression, encompasses spoken and written words, as well as many forms of film, photography, and even videogames. Political speech is one of the many constitutionally protected forms of expression, including volunteering, donating to campaigns, and spending money on political advertisements. The latter form of political speech was greatly expanded in the 2010 Supreme Court decision *Citizens United v. FEC*. According to Justice Kennedy's majority opinion, the question confronting the Court in *Citizens United* revolved around a 1990 case, *Austin v. Michigan Chamber of Commerce* 494 U.S. 652, and the more recent *McConnell v. Federal Election Commission* 540 U.S. 93 (2003). *Austin* had previously held that "political speech may be banned based on the speaker's corporate identity" (*Citizens United* 319). The ruling in *Citizens United* was a 180 degree turn away from *Austin* that deregulated the amount of money individuals, corporations, and political action committees could spend on advertisements independent of campaigns.

Under *Citizens United*, corporate entities, including for profit and non-profit companies, have the right to spend as much money on issue advertisements and donations to Super PACs as their treasuries allow. Some regulations remain intact, such as disclosure, and limitations on ads directly supporting or detracting from a particular candidate. However, the dangerous precedent set by *Citizens United* greatly expanded the rights of corporations in regards to political speech, putting them on an equal footing with human persons.

Only one year after *Citizens United*, the Roberts Court reversed a lower court decision that bestowed corporations with the right to privacy when it comes to disclosure of documents from a federal law enforcement agency. *Federal Communications Commission v. AT&T Inc.* 562 U.S. 397 (2011). By an impressive unanimous vote of 8-0 (Justice Kagan recused herself), the Court held that corporations do not have a right to personal privacy that would otherwise prevent the federal government from releasing public records about the corporation. The question revolved around the interpretation of the Freedom of Information Act's "Exemption 7(c)," which prevents the release of public records that "constituted an unwarranted invasion of personal privacy" (*AT&T Inc.* 12). AT&T argued that because "person" had been defined to include corporations

earlier on in the statute, “personal,” the adjective form of person, must also include corporations. The Roberts Court strongly disagreed.

After the Court expanded First Amendment speech rights to corporations in 2010, they bestowed closely-held corporations with the right to religious exercise. *Burwell v. Hobby Lobby* 573 U.S. ____ (2014), asked the question: can closely-held corporations (not publicly traded, owned and operated by a small group of people), using the Religious Freedom Restoration Act of 1993 (RFRA), seek a religious exemption from the Department of Health and Human Services’ (HHS) mandate that corporations of a certain size provide health insurance that covers certain forms of contraception? The family that owns Hobby Lobby, a craft supply store, believes a few of the forms of birth control outlined in the mandate constitute abortion, which they argued was against their religious beliefs.

The Court, by an ideologically divided margin of 5-4, held in favor of Hobby Lobby. Justice Alito, speaking for the majority, wrote “that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest (*Hobby Lobby* 1). The Court found that since other non-profit organizations, such as religious hospitals, were granted exemptions from the HHS contraception mandate, it was not evenly applied to deny the same benefit to religiously operated for-profit corporations. Alito maintained: “HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections” (*Hobby Lobby* 3). With these rationales for the holding in *Hobby Lobby*, the Roberts Court has greatly expanded First Amendment rights for corporations and further enshrined those protections with more exacting levels of scrutiny required to regulate them. Overall, the historical trend for corporate rights has proceeded onward and upward.

The arc of corporate jurisprudence seems to be bending toward the expansion of rights. These rights are not just economic in nature, like the right to contract exhibited in *Trustees of Dartmouth College*. With *Santa Clara County* came the explicit inclusion of corporations under the equal protection clause of the Fourteenth Amendment, and First Amendment rights of political speech and religious expression came from *Citizens United* and *Hobby Lobby* respectively. The only recent limitation on corporate personhood is the rather narrow restriction that corporations do not have “personal privacy,” when it comes to disclosure of federal documents. Through examining some of the landmark corporate rights cases of the Supreme Court of the United States, one can see the legal protections granted to the artificial person have grown nearly unimpeded since the 19th century. The next section will go on to discuss corporate personhood and corporate rights from the perspectives of social scientists, economists, and legal scholars.

Corporations in the eyes of the beholders

Naturally, people from different fields are going to take different perceptions and experiences into any analysis of the status of corporations and the legal culture surrounding them. Experts within a given field and across

different areas of study disagree about the best way to legally construct corporations. Some think that corporations are not people in the physical or philosophical sense, and so should not be given any legal rights in the personal sense. Their opponents counter that argument by citing the corporate concept's extreme significance in American economic development, and advocate for personal rights of corporations as essential to the continued economic health of the nation. This section explores the fault lines where the economic, legal, political, and philosophical fields conflict with each other, as well as the various places these fields can come to a semblance of agreement.

From a legal perspective, there are as many views on the personal rights of corporations as there are legal scholars who study the phenomenon. One of these scholars, Larry Ribstein, details three archetypical views of the corporation in today's legal world. The first, Ribstein says, is the "corporate person," which "views the corporation as a distinct bundle of rights and obligations" and "substitutes an artificial legal entity for the underlying individuals who act through the corporate form" (1995, p. 96). Upon initial examination, it seems this is the theory *Citizens United* and *Hobby Lobby*. However, the version of the "corporate person" explained by Ribstein also entails "pervasive government power to regulate corporations," because corporations are, in fact, created by the government (1995, p. 96). Under this interpretation of corporate personhood, there are few mechanisms impeding government regulation of the corporation. Rita C. Manning, another legal scholar, agrees that corporations have some rights as persons, but are also subject to regulation under this different type of personhood.

Manning explains the relationship between corporate personhood and moral and legal accountability. In describing her thoughts on holding corporations accountable for their actions, Manning writes: "one need not argue that a collective is a metaphysical person in order to ascribe fault responsibility or accountability to it" (1984, p. 83). In other words, corporations can still be held accountable for their actions, whether they are financial, legal, or otherwise, without being labeled as persons. This argument rings true because the use of the word "person" for corporate legal status seems to be a term of arbitrariness or convenience, not necessity.

The second major theory of the corporation detailed by Ribstein is the "contractual theory." He indicates the contractual theory of corporations "is understood as a set of contractual arrangements, which ought to be no more regulated than other contracts" (1995, p. 100). On its face, this theory exudes a neoliberal economic tilt. It would maintain that governments "create" corporations as they "create" any contract, through enforcement. Every other feature of corporations, such as limited tort liability, stem from the contracts and agreements corporations make, and do not justify government regulation (Ribstein, 1995, p. 100). The right to contract has been established in the Constitution and strengthened through various Supreme Court rulings, such as *Dartmouth* and *Lochner v. New York* 198 U.S. 45. Though the right to contract, and thus to corporate rights under this theory, is not unlimited, Ribstein poses few limitations on the workings of corporations under the contract theory.

Ribstein's final theory of corporate legal structure is the "unconstitutional conditions" model. Expounded by Richard Epstein, the unconstitutional conditions structure of corporate legal theory holds "incorporation and a corporation's transaction of business outside of its incorporating state as privileges or subsidies states grant to business" (Ribstein, 1995, p. 106). Epstein's "unconstitutional conditions," though, runs afoul of several tenets of both the corporate personhood theory and the contractual obligations theory. Unconstitutional conditions theory requires the state's role in incorporation, as per corporate personhood, but decries constitutional regulations of the corporation as inefficient and even unnecessary, as per the contract theory. This view is contradictory in nature and less than ideal for a framework of realistic government oversight of corporate legal activity.

From a business ethics perspective, one of the primary pieces of the corporate personhood discussion is just how to hold corporations responsible for the actions of those who run them. The question of corporate responsibility is inextricably tied up in this discussion. If the corporation is its own legal entity, can it be held responsible for its actions? If the corporation is not its own legal entity, who is held liable for the corporation's wrongdoing or losses?

As explained above, the legal idea of incorporation in the United States holds the corporate entity to be financially independent from its shareholders or owners. However, the ethics of this process are called into question by various legal scholars, economists, and philosophers. Arun A. Iyer explores many different conceptions of corporate ethics. He contends that corporate personhood, when viewed as a contract between the corporation and society, is too simple to truly capture the corporate-social relationship (2006, p. 397). Iyer distills the arguments of both corporate personhood supporters and critics into the language of contracts. In either case, the corporation enters a social contract with the society in which it exists. For the supporters of corporate personhood, it is the corporation as its own entity that enters into this agreement. For the critics of corporate personhood, it is the individual shareholders that constitute the corporate funds (Iyer, 2006, p. 404). While Iyer continues to argue that social-corporate relationships are too dynamic to lump into contracts like that, the idea of liability and ethics is what matters here.

Those ethics and responsibilities boil down to the question of whether or not a corporation, regardless of whether it is a legal person, is a moral agent. A moral agent is someone or something that can be "held responsible in a moral sense for their actions and omissions" (Henriques, 2005, p. 91). In this way, the moral agency of a corporate person is paramount to the prosecution of corporate criminal wrongdoing. Recognizing the corporate entity as separate from the individuals it is composed of allows law enforcement the flexibility to punish the corporation, instead of the individuals that may have had no knowledge or hand in the criminal action. This distinct corporate liability cuts both ways though, as the individual decision-makers in the corporate structure are then harder to prosecute because of this separation. In the vein of corporate personhood though, moral agency for the corporate entity further contributes to the idea of

separateness. If a corporation can be held accountable for the actions taken in its name, it is wholly separate from its investors and decision-makers.

Normative constructions of the corporation

Embracing personhood as a means of accountability

Boston College law professor Kent Greenfield maintains an interesting liberal view of the corporate personhood doctrine. Instead of corporate personhood causing the scourge of unchecked corporate rights, he argues the cause is rather a lack of true personhood for corporations. He explains that “corporations are separate in order to facilitate investment. So, when I invest in General Motors, I’m insulated from liability of that company” (Greenfield, 2015). This corporate veil that keeps private investors legally separate from the entity in which they invest is paramount to United States’ economic progress. Greenfield argues that a separate corporate “person” protects individual investors. They do this by aggregating the risk into one entity with deeper pockets and the ability to persist for extremely long spans of time: the corporation.

The key distinction Greenfield draws, though, rests in the type of legal protections granted to the corporate person. Greenfield first explains that being a legal person allows one to sue and to be sued, which is important for holding corporations accountable to the public, as well as each other. The parallel between individual personhood and corporate personhood is the kinds of rights granted outside the courtroom. According to Greenfield (2015):

When it comes to First Amendment speech matters, I think there are situations in which corporations should be protected in saying things that are germane to their business and are important in the public debate. But I don’t think corporations should have the same free speech rights you and I do, because once they get far afield from their business, then it becomes much less relevant to the public debate, and it’s much more likely to be a matter of self-dealing.

This key distinction, that corporations are persons only so far as it pertains to their business, is essential to Greenfield’s normative design of corporate personhood. In other words, the corporate veil separating the corporation from its shareholders and managers (and those individuals’ beliefs and ideologies) still exists.

In an amicus brief to the Supreme Court in the case of *Burwell v. Hobby Lobby*, Greenfield and other corporate lawyers argued that corporate personhood, the doctrine that led to Hobby Lobby’s victory, should actually have led to its defeat. Hobby Lobby should have lost “because of that idea of separateness. The family that owns Hobby Lobby incorporated Hobby Lobby in order to protect them from legal liability in order to separate the family from the business of the company” (Greenfield, 2015). In the Supreme Court’s ruling on *Hobby Lobby*, the owners of the company got to have their cake and eat it too. They kept the legal distinction that keeps their own wealth and liability separate from the corporate coffers, and they gained the ability to impose their own religious beliefs as if they were the company’s. In Greenfield’s eyes, the Court got it wrong. They should have recognized that shareholders are people, and Hobby

Lobby is a person, as well as that they are separate people. It is in this complete separateness that Hobby Lobby then would lose its religious exercise rights.

Corporate personhood as the bane of democracy

Democratic Senator Al Franken of Minnesota takes quite a different position than Professor Greenfield on the issue of corporate personhood. In a statement made on the floor of the US Senate on January 26, 2012, the second anniversary of the *Citizens United* ruling, Senator Franken painted an extremely bleak picture of the ruling's impact on American politics. He said: "the Supreme Court handed down the landmark decision, *Citizens United*, and with it, they gave corporations a blank check to utterly destroy our political system" (Franken, 2012, "Statement on the Anniversary of *Citizens United*"). As can be evinced by the fact that American politics is still functioning as of this writing, Senator Franken's warning seems a bit hyperbolic. In Franken's eyes, and the eyes of many critics of the *Citizens United* decision, the evil of corporate money in politics stems not from the ideal of corporations exercising free speech, but from the favors, and ultimately, corruption, corporate money could inspire.

Much to Franken's dismay, the Court disagrees with his diagnosis of the political problem. In the Court's opinion on *Citizens United*, Justice Anthony Kennedy wrote: "we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" (2010, p. 42). The conventional wisdom that exorbitant amounts of money in politics is the equivalent of buying favors from politicians may stand up to a cursory examination of its logic, yet political science research does not entirely support this conclusion.

One experiment conducted by Daniel Houser and Thomas Stratmann in 2008 was one of the first empirical tests of campaign finance theories in a laboratory setting. They concluded that "while high-quality candidates are almost always elected in publicly-financed campaigns, this is not the case when campaigns are financed by quid-pro-quo special interests" (Houser and Stratmann, 2008, p. 234). In Franken's argument, corporations in the post-*Citizens United* world manifest Houser and Stratmann's "quid-pro-quo special interests." However, the real political relationship between candidates and interest groups, independent funding and vote choice while in office, is more complicated than simple quid pro quo. The appearance of quid pro quo corruption though, is just as serious as actual corruption, as it undermines public faith in the democratic process (*Buckley v. Valeo* 424 U.S. 1).

Harvard law professor Lawrence Lessig concurs that money in politics degrades the overall quality and integrity of American democracy. Lessig details his views on the dangers of campaign financing as it currently stands, and the role corporate speech plays in it, in his 2011 book *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*. For Lessig, the degradation of American democracy has two primary elements: bad governance and a loss of public trust in the democratic system (2011, p. 8-9). The bad governance element harkens back to the existence of quid pro quo bribery and the idea of moneyed donors receiving access to legislators the bulk of the constituency does not. The loss of trust can be justified as a serious problem because the Supreme Court has

maintained, as they did in *Buckley v. Valeo*, that it is a compelling government interest to stamp out even the appearance of corruption.

In discussing the loss of public trust in the American democratic system, discussions of “special interests,” or at least, perceived “special interests” is imperative. Many of these “special” interest groups (a negative moniker meant to vilify any organization with a policy agenda) are corporations or industries, such as “Big Oil,” or “Big Tobacco,” but interest groups can also include labor organizations or single-issue political organizations such as the National Rifle Association. The Supreme Court’s *Citizens United v. Federal Election Commission* ruling in 2010 allows these interest groups to spend as much money as they want on political advertisements, which, according to Lessig, has greatly contributed to the loss of public faith in the democratic system.

In his crusade to raise awareness for the corrupting agents of campaign finance gone awry, Lessig cites various survey data on public trust in government. For instance, the American National Election Study (ANES) showed in 1964 that “64 percent of respondents believed the government was run for the benefit of all and 29 percent believed the government was run for the benefit of a few big interests.” In the 2008 ANES, those numbers were 29 percent and 69 percent respectively (Lessig, 2011, p. 167). Though the ANES studies predate *Citizens United*, they show quite clearly the perception of corruption or, at best, poor prioritization by elected representatives that undermines public faith in the government. Post-*Citizens United*, Common Cause, Change Congress, and Public Campaign, conducted a poll that only compounded the conclusion that the American people are losing trust in their government. According to this poll, 74 percent of respondents “agreed that special interests have too much influence,” 79 percent agreed “that members of Congress are ‘controlled’ by the groups and people who finance their campaigns,” and a paltry 18 percent of respondents “believed that lawmakers listen to their voters more than to their donors” (Lessig, 2011, p. 167). If the pre-*Citizens United* data cannot be used to conclude that corporate money creates the perception of corruption, if not actual corruption, then the post-*Citizens United* numbers are staggering. Lessig’s argument, together with Senator Franken’s campaign against *Citizens United*, create a potent moral argument against the potentially corrupting influences of money in electoral politics as allowed by *Citizens United*.

Something in between

Dr. David Ciepley at the University of Denver contends something wholly unique for the legal construction of the corporate person. His article, entitled “Beyond Public and Private: Toward a Political Theory of the Corporation,” argues that corporations “are not simply private,” because government grants corporations their private sovereignty, but “they are privately organized and financed and therefore not simply public” either (2013, p. 139). Ciepley’s desire to create a separate legal class for corporations, with its own rules and regulations, does not seem entirely new. The points he raises though, call into question the normative attitudes of society toward the corporate idea.

Ciepley points out that the corporation as a legal idea was attributed to nonbusiness entities before it took the financial and economic world by storm.

Thus, he argues, the rights of a corporation are not inherently business-related. He outlines the three rights of corporations to be “1) the right to own property, make contracts, and sue and be sued, as a unitary agent (a legal ‘person’). 2) the right to centralized management of this property; and 3) the right to establish and enforce rules within its jurisdiction *beyond* those of the laws of the land,” (Ciepley, 2013, p. 141). This interpretation of the rights and functions of the corporation, while not exclusively business-related, does not necessarily broach the level of social rights attributed to American corporations today. Though Ciepley’s definition includes the ability to “enforce rules within its jurisdiction *beyond* those of the laws of the land,” it does not allow for the right to run contrary to the laws of the land. Corporations, even under Ciepley’s definition, are still bound to the laws of the state in which they reside. So, even though corporations are made legitimate by laws and sustained by private enterprise, they still do not get a blank check on imposing their own social values.

Striking a balance between business rights and personal rights

The role of the Court

The legal and political problems stemming from the unfettered growth of personal rights for corporations requires a multi-faceted solution and the cooperation of many political and legal actors. As it is with many, if not most, legal movements in United States history, the Supreme Court needs to be involved in setting the rules for the game of First Amendment rights for corporate persons. Ideally, the Court would overturn *Citizens United* completely on the basis that corporate speech rights, though existent as far as business matters go, does not warrant unfettered political speech in the form of money. This seems extremely unlikely though, as the composition of the Court has not changed in any way that would be amenable to overturning *Citizens United*. The only alteration to the makeup of the Court since 2010 is the retirement of Justice John Paul Stevens and his subsequent replacement with Justice Elena Kagan. Justice Stevens joined the majority in part and dissented in part in *Citizens United*. Justice Kagan, based on her ideology and appointment by a Democratic president, would most likely vote the same way as her predecessor, maintaining the status quo of unfettered independent expenditures in campaign finance and political speech for corporate persons.

The likelihood of the decision being overturned in the next few years also seems uncertain, at best. The Court’s 5-4 split in favor of the Court’s conservative, Republican-appointed justices, and the hostile environment in Congress almost ensure that if an appointment is made before the 2016 presidential election, it would need to be one with a center-left ideology, as opposed to a more overt liberal one that would more likely overturn *Citizens United*, just to have a chance of passing the Senate’s confirmation hearings.

In addition to the political difficulties of overturning *Citizens United*, the court runs into self-inflicted doctrinal problems as well. Upon deciding *Burwell v. Hobby Lobby*, and conferring the rights of the Religious Freedom Restoration Act on the corporate person that is Hobby Lobby Inc., the Supreme Court painted itself further and further into a corner. If the Court wanted to overturn *Citizens United*, it would need to overturn *Hobby Lobby* as well. A single switch in

personnel on the Court could allow for these changes in jurisprudence to occur almost overnight, given a case before them. The political realities though of current divided government, uncertainty for the fate of the presidency in the 2016 election, and the Court's own recent decisions create an environment where the expansion of individual rights for corporate persons being reversed is extremely unlikely.

Should the political realities somehow be conquered, and the Court stares down a new First Amendment corporate personhood case, the Court has more than enough legal logic on its side to redefine the social and political rules of what it means to be a corporate person. The primary mistake of the Roberts Court in *Citizens United* was a fundamental misreading of the concept of political corruption and a flawed attribution of political rights to an inherently apolitical entity.

The Court held in *Buckley v. Valeo* (1975) that it was not just actual quid pro quo corruption the government had a compelling interest in curtailing, but also the public perception of corruption. As Lawrence Lessig pointed out in his book *Republic, Lost* (2011), there is no clear line of causation that a campaign contribution or independent expenditure from a company causes an individual elected official to change their policy positions. What those contributions do rather effectively however, is erode the American people's faith in the integrity of the democratic process. To reiterate the results of a post-*Citizens United* poll Lessig discusses at length, 79 percent of Americans agreed "that members of Congress are 'controlled' by the groups and people who finance their campaigns" (Lessig, 2011, p. 167). The wording of the poll discussed here, about members of Congress being "controlled" by their campaign financiers, fits perfectly the "perception of corruption" Congress is fully empowered to prevent.

For this reason alone, *Citizens United* is based on faulty logic that is not in step with the times. Perhaps limiting Congressional campaign finance reform powers to fighting quid pro quo corruption was more efficacious in the days when industry magnates would leave suitcases of money in Congressional offices, but not today. The complex system of campaign finance in America today is inextricably tied up with corporate money. Though Boston College Law professor Kent Greenfield is correct that individual campaign donors and spenders, such as the Koch brothers and Sheldon Adelson, spend a lot more money than corporations on campaigns (which is its own problem that needs to be addressed), one step in the right direction would be to correct the Roberts Court's mistake in conferring the same political speech rights as individual humans on corporations. Corporations do not vote. Corporations do not run for office. Corporations only exist as an abstract idea, held together by societal norms and a common desire to aggregate liability and profits in business. The corporation has no right to empty its coffers in an arena composed of, created by, and administered for the people.

The corporate rights jurisprudence of the Roberts Court did not stop with *Citizens United* though. The more recent *Hobby Lobby* decision, which allowed small, closely held corporations to use the Religious Freedom Restoration Act to get out of supplying employees with medical insurance plans that covered various types of contraception, only led the Court more astray.

The Religious Freedom Restoration Act passed in 1993 in response to the Supreme Court decision *Employment Division of Oregon v. Smith* 494 U.S. 872 (1990). *Smith* set the precedent that “as long as a statute was generally applicable and not directed at religion, it would be upheld, regardless of whether it infringed on a religious practice” (Drinan and Huffman, 1993-1994, p. 531). Many religious groups and civil rights groups felt the Court went too far, that the precedent was too dangerous to the free exercise of religion. In response, Congress passed the RFRA of 1993, which reinstated the compelling interest test for free exercise claims that had been the basis of free exercise jurisprudence pre-*Smith* (Drinan and Huffman, 1993-1994, p. 533). It was under this test, reinstated by RFRA, that the Roberts Court judged whether or not the contraception mandate element of the Affordable Care Act was unconstitutional.

In order to pass the compelling interest test (or “strict scrutiny” as it is often referred to), the government’s actions need to meet several criteria to be deemed constitutional: the law in question must serve a compelling government interest and it must do so in the least restrictive way while pursuing that compelling government interest. According to Distinguished Professor of Law at Widener University, Alan E. Garfield, the Court was wrong to rule in favor of Hobby Lobby’s exemption from the contraception mandate. In an article published in the Columbia Law Review five months before the Court’s decision was published, Garfield outlined just why the Court should not grant the religious exercise exemptions for Hobby Lobby, a corporate person.

In addressing the issue of whether or not mandating companies to provide health insurance that covers contraception serves a compelling government interest, Garfield reflects on a few harsh political realities. Cases such as *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* 546 U.S. 418 (2006) have strengthened RFRA by requiring that not only must the government show a compelling government interest, but it must also prove that the exemption from the law being sought would undermine this compelling government interest (Garfield, 2014, p. 7). The majority of the Court found that to be the case in *Hobby Lobby*. In her dissent, Justice Ruth Bader Ginsburg admonished the majority by pointing out that “federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes” (*Burwell v. Hobby Lobby* 26). Justice Ginsburg’s argument is that the exemption status granted to religious organizations, small companies, and companies with preexisting health plans does not undermine the government’s interest of allowing affordable access to contraception for women, regardless of their employer. A key distinction regarding Hobby Lobby’s exemption claim is motivation. Small companies that may not be able to afford the coverage and companies with older healthcare regimes that need time to acclimate to the new system all have practical reasons for exemption. Hobby Lobby’s owners’ complaint is not a practical objection, but an ideological one.

The part that the Roberts Court got wrong in *Hobby Lobby* and in *Citizens United* before it is that corporations, separate from their shareholders, board of directors, or any individual in charge, do not have political preferences or the ability to exercise any religion. Garfield sums it up rather nicely when he recites an eighteenth-century quote about corporations: “Did you ever expect a

corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?” (2014, p. 3). Corporations do not exercise religion, their owners and operators do. In deciding that Hobby Lobby’s religious exercise rights were protected by the Religious Freedom Restoration Act, the Roberts Court tore asunder even more of what the corporate veil was supposed to be.

The policy remedy for ailing corporate persons

It seems the issues of corporate personhood and the individual rights bestowed on them manifest themselves twofold. First, the rights attributed to corporations stem from a fundamental misinterpretation of the purpose of incorporation as a legal and business practice, primarily that it is a profit driven venture meant to separate the individuals running the corporation from individual legal and financial liability for the corporation’s business failures and legal faults. In fact, Garfield explains “the primary benefit of incorporating is to limit liability of these other parties for the actions of the corporation” (2014, p. 3). When viewed through the lens of economic risk and financial liability, incorporation of a business makes perfect sense. What incorporation is not meant to do, however, is create an entirely separate person capable of their own decisions, political views, and religious rights. The corporate veil exists for financial purposes, not personal ones.

The second problem stems from the first. The owners of a business, whether they are massive publicly traded companies, or the small, closely held corporations like Hobby Lobby, should not be allowed to pick and choose when to remain separate from their corporations. As Garfield aptly points out: “why should these parties, who would fiercely oppose piercing the corporate veil in any other context, be able to take advantage of ignoring the corporation’s separate identity” when it comes to other elements, like religious expression? (2014, p. 4). The inherent hypocrisy of a Swiss cheese-like corporate veil is laughable, and should have been quickly dismantled by the Court and legislators.

Based on these two fundamental problems with American Supreme Court corporate personhood jurisprudence, two strategies for dealing with them become apparent. The first is to completely redefine the corporate person. This method would require massive overhaul decisions by the Supreme Court, miraculous legislation from Congress, or even a constitutional amendment. Though extremely unlikely, a redefinition of corporate personhood would definitely clear up the legal air surrounding corporate rights. The second apparent route for critics of the current corporate status quo is to address the corporate veil. The Court’s allowance for a buffet-style corporate separation, in which owners are allowed to pick and choose which financial and social elements of their lives they want separated, needs to end.

Redefining the corporate person could come about in many different ways. For instance, legal culture could dictate that corporations are no longer people, but rather, something else. Another way though, would be to keep corporations’ status as their own legal person, just with separately defined social and political rights from human people. For instance, adoption of the phrase “corporate person,” as the only way to refer to incorporated entities would pave the way for

completely separate rights for individuals and the corporations governed by individuals.

The precedent that corporate persons be treated differently from human, individual persons has already been set, and set by the Roberts Court no less. In *Federal Communications Commission v. AT&T Inc.* 562 U.S. 397 (2011), the Court held that “corporations do not have “personal privacy” for the purpose of exemption” from the Freedom of Information Act, which “requires federal agencies to make records and documents publicly available upon request, subject to several statutory exemptions” (*AT&T Inc.*, 2011, p. 1). *AT&T*’s argument, as mentioned above, was that because corporations are considered legal “persons” under the Administrative Procedure Act, the “personal privacy” exemption for divulging information pursuant to the Freedom of Information Act applies to the company’s data archives. The Roberts Court unanimously disagreed, stating (2011):

Adjectives typically reflect the meaning of corresponding nouns; but not always. Sometimes they acquire distinct meanings of their own. The noun “crab” refers variously to a crustacean and a type of apple, while the related adjective “crabbed,” can refer to handwriting that is “difficult to read” (*AT&T Inc.*, p. 4).

Though the differences Chief Justice Roberts points out in this piece of the opinion seem to be more rhetorical than anything else, the importance of rhetoric in writing law cannot be overstated. By taking *AT&T*’s legal argument to task, Chief Justice Roberts potentially (and maybe unintentionally) drove a wedge between the corporate person and the individual person. By creating a discrete difference between corporate persons’ privacy rights and individual persons’ privacy rights, Chief Justice Roberts has opened the door for the addition of other discrepancies in rights allocation. It is possible that, further down the road, other personal rights, such as exercising religion, or making political speech, will be more clearly defined for individual persons because words like “personal,” will be construed as belonging wholly to the individual person.

In a similar vein to the delineation of corporate rights and individual rights, one must address the declarations of Chief Justice Waite in *Santa Clara County v. Southern Pacific Railroad Company* 118 U.S. 394 (1886). His dicta that (1886):

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does.

(*Santa Clara County*, Prior History)

would be rendered irrelevant by a redefinition of “corporate person” as separate from individual persons, whom the Fourteenth Amendment was originally designed to protect. Instead, Chief Justice Waite’s attitude can be realigned to apply to corporate persons in a different way. In order to maintain the equal protections of corporate rights under the Fourteenth Amendment, the Amendment must be read differently for corporate persons and individual persons.

Two separate doctrines of interpretation for the equal protection clause of the Fourteenth Amendment, one for corporations and one for individual people, would go a long way in allowing for clear separation of the two, as well as prevent precious individual rights, like political speech and the exercise of religion, from piercing the corporate veil. If all “corporate persons” are protected equally among their corporate peers, the spirit of the Fourteenth Amendment still applies without conferring the rights of individuals on corporations that have no business claiming free exercise rights.

National policy overhaul on any controversial issue is always exceedingly difficult. While campaign finance is not an issue the average American cares about as much as religious freedom, political elites have a vested interest in maintaining the current campaign finance regime, and thus, the ability for corporations (as well as individuals) to spend as much money on politics as is in the coffers. Lawrence Lessig describes this vested interest as “systemic corruption,” a set of rules policymakers must play by in order to do their jobs. He argues policymakers abide by these rules because it is “just the way things are done,’ no one need feel guilty, or evil, by participating in this system ... a lobbyist arranging a fund-raising event for a target member of Congress is ‘just doing his job’” (2011, p. 238). The entrenchment of this system of regulatory favors for campaign funds has shaped modern policy, as well as taken the United States of America’s elected officials and forced them to spend a disproportionate amount of their time fund-raising, instead of writing legislation (Daley and Snowberg, 2011). Overcoming the challenges of such a completely intertwined system will be difficult and there are people fighting to do just that.

The second major policy route to fixing the endemic problem of the blurred line between corporate personhood rights and individual personhood rights is to address the corporate veil, the legal barrier separating the incorporated entity from the individual people that run it. The corporate veil is deteriorating in all the wrong places, preserving all the business benefits and adding new means of social control to the corporate arsenal. There should be no half corporate veil. There are two options for mending the corporate veil: preserve nothing or restore it all.

The first of two major ways to restore integrity to the corporate veil is to tear it down altogether. Instead of investors, boards of directors, and other corporate decision makers picking and choosing when to maintain the corporate veil, the legal system could just give them what they seem to want (the ability to press their own views on others through corporations), and eliminate the protections of incorporation entirely. While calling this method extreme would most certainly be an understatement, it has the potential to remind corporate decision makers of the original purpose of the corporate veil, and make them clamor for its restoration. Eliminating the corporate veil entirely would make every individual shareholder, employee, and administrator of a corporation financially liable for the corporation’s losses and legal problems. If those in favor of piercing the corporate veil for social purposes stared down the barrel of that prospect, they would probably change their tune about corporate free exercise rights. The other, more moderate argument for restoring the corporate veil and

the legal separation it provides is to backtrack jurisprudence to a pre-*Hobby Lobby* status in which corporations are wholly separated from their owners/administrators.

As Boston College Law Professor Kent Greenfield explained in his interview from *On the Media*, one possible solution to fixing the Courts' errors in cases like *Hobby Lobby* and *Citizens United* is more corporate personhood, judiciously applied. Greenfield explains the argument he made in a brief on behalf of the government in *Burwell v. Hobby Lobby* (2015):

based on that idea of separateness... Our argument was that they should not be able to separate themselves from the company for purposes of liability, but say that they're one and the same for purposes of religious rights. So, corporate personhood should have led the court to say "Look, Hobby Lobby is one thing, the shareholders are the other, and the shareholders' religious beliefs don't really affect the company one way or the other."

This argument is one of the ideal possibilities for restoration of the corporate veil. Separateness is complete separateness, and shareholders and owners cannot compromise that view whenever they see fit.

Going forward, the people and policymakers of the United States need to ask questions about the role corporations play in society. The idea of incorporation is a boon for business people, entrepreneurs, and the public because it allows for economic expansion that would otherwise be too risky for any rational investor to participate in. Private economic venture is the heart of capitalism, which basically constitutes an ideology in America. For these reasons, incorporation is not going away in America. Getting rid of incorporation as a business and legal tool in order to solve the problems of misplaced corporate rights would be like vacuuming away oxygen to put out a fire. It would accomplish the goal, but destroy an essential entity. So, instead of replacing incorporations with an alternative, the American government can restore corporations to their rightful, economically productive place in society, instead of the social role they now play as well.

The most realistic way of achieving the goal of limiting and reversing the growth of individual rights for corporations is to restore the corporate veil. The recent decisions by the Supreme Court to allow the degradation of the corporate veil expanded the non-economic role corporations play in society. These decisions added means of social control, such as political spending, and religious exercise to the corporate repertoire, which is beyond the historical scope and purpose of the corporate person.

If any arm of the United States government is to initiate this change in the treatment of corporate rights, it would most likely need to be the courts. As Lawrence Lessig has pointed out, the current system of campaign finance and corporate interest in Washington is too ingrained in the policymaking process to yield any substantial change without overcoming some titanic obstacles. The presidency has very little direct power in deciding how to treat the issue of corporate rights, especially in an era of divided government when Congress and the president do not work together. The president's power lies instead in the

appointment of Supreme Court justices, who are the real power players in this issue. The Court as it is currently composed has a slim to none chance of overturning the *Citizens United* or *Hobby Lobby* decisions that have so expanded corporate rights.

The hope for the future of curtailing the reckless expansion of corporate rights lies instead in the Court changing, and the sitting president (who would most likely need to be a Democrat) selecting a justice more amenable to a narrower interpretation of the definition of the “corporate person.” The odds of this event are difficult to bet on. Two of the oldest members of the Court most likely to leave it dissented in *Hobby Lobby* and *Citizens United*. In that case, a liberal or center-left appointee would only maintain the status quo. This prospect would also rely on the Democratic party keeping the White House in 2016, as well as being able to secure the confirmation of a left-leaning justice in a potentially divided government. Overall, the prognosis for corporate rights in America appears to read in favor of more rights for corporate persons in more areas of life. Ultimately, this development has the potential to distort policy and politics at best, and interfere in the lives of every day Americans at worst.

Conclusion

The status of the American corporation has greatly expanded over the last few years. The Supreme Court has taken measures to augment the corporate entity in America with more rights than just limited liability for stakeholders and separate taxation. The court has heaped onto those economic rights abilities and liberties typically reserved for the individual person. *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010) and *Burwell v. Hobby Lobby* 573 U.S. ____ (2014), have greatly expanded the rights of corporations in the social arena. *Citizens United* declared that anyone (individuals, corporations, unions, etc.) can spend unlimited money on political advertisement and other expenditures, which greatly inflated the amount of money in politics. This has led to more corporate money flowing into campaign coffers, more corporate sponsored campaign fundraisers, and more (perceived, if not real) outside influence in Washington. *Hobby Lobby* expanded the Religious Freedom Restoration Act of 1993 to protect the religious exercise rights of small, closely-held for-profit corporations. These rights are typically thought of as only practiced by individuals. After all, how can an abstract entity, existing only for the purpose of limited liability and capital formation, practice religion or hold political views that warrant unfettered political speech?

These new rights corrode the American people’s faith in the democratic system, as pointed out by Harvard Law Professor Lawrence Lessig, and interfere in the private lives of employees. The only way to correct the problem of expanding corporate rights is to reverse the dangerous trend of the fading corporate veil. As Kent Greenfield argues, corporate personhood is the legal separation of the owners and the corporation, so the religious views of the family that owns Hobby Lobby Inc. should not be allowed to pass their religious views off as the company’s. The entire purpose of the corporate veil is to remain separated. If corporate shareholders and owners wish to preserve the corporate

veil for financial gain, they should be prohibited from cutting it down as a means of social control.

In the end, there are so many moving pieces in the policy-making puzzle, it is difficult to tell where American corporate rights will go next. Recent trends indicate the expansion of corporate rights in the future seems more than likely. Which rights will be conferred on corporations next is difficult to predict. Hopefully, the Court overturns its erroneous precedent soon, as to mitigate the social damage of the purely economic and abstract corporate person.

Much of this problem though, stems from a misnomer in the legal vocabulary. A separate legal entity is not inherently a person. The use of the term “corporate personhood,” to indicate legal separateness is arbitrary and vulnerable to vagueness and manipulation. Categorizing an abstract entity, given purpose and legitimacy by legal documents and a social contract, is not a person. While the actual mechanism of “corporate personhood” is vital to economic growth and entrepreneurship in America, the term “corporate personhood” is not. Instead, a company separated from its investors and directors by the corporate veil should be called what it is: a corporation, not a corporate person. In law, rhetoric is of paramount importance. Though a change of rhetoric will not change legal culture overnight, the removal of the word “person” from the corporate label returns it to the economic purpose corporations actually serve. It may be a small step in the right direction, but corporations must be treated differently from real people. Individual rights belong to individual persons, not to corporate entities, if for no other reason than corporations have “no soul to be damned, and no body to be kicked” (quoted in Garfield, 2014, p. 3).

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