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# Why Personhood Matters

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## WHY PERSONHOOD MATTERS

*Tamara R. Piety\**

No aspect of the infamous<sup>1</sup> *Citizens United*<sup>2</sup> decision has galvanized public opinion as much as the perception that in this case the Supreme Court held that corporations are entitled to the same rights as human beings.<sup>3</sup> If the rallying cry of *Citizens United*'s supporters is "Corporations are people, my friend,"<sup>4</sup> that of the opposition is "Free speech is for people."<sup>5</sup> Yet many

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1. One writer has described *Citizens United* as "remarkably unpopular." Emily Bazelon, *Marriage of Convenience*, N.Y. TIMES, Feb. 1, 2015, Magazine, at 13, 14. Disapproval of *Citizens United* is also bipartisan. Linda Greenhouse, *Missing the Tea Party*, N.Y. TIMES, Feb. 25, 2010 (describing *Citizens United* as "widely disliked" "across the ideological spectrum").

2. 558 U.S. 310 (2010).

3. As discussed below, there is a sense in which this is mistaken. Nevertheless, this impression is widespread and is by no means confined to the general public. For example, one academic observer characterized the opinion as "concluding that corporate speech should be treated the same as individual speech." Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE WEST. RES. L. REV. 497, 498 (2010). Another writer who is both an academic and an esteemed jurist writes that the conservatives on the Supreme Court "have equated the for-profit corporation with flesh-and-blood Americans entitled to cast a vote." Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 390 (2015).

4. Philip Rucker, *Mitt Romney Says, "Corporations Are People,"* WASH. POST (Aug. 11, 2011).

5. The name of one of the sponsors of this conference is Free Speech for People, [Freespeechforpeople.org](http://Freespeechforpeople.org), but there are also other organizations and persons similarly lobbying and organizing around the proposition that this aspect of *Citizens United* needs to be overturned, often by constitutional amendment. See, e.g., [Movetoamend.org/other-amendments](http://Movetoamend.org/other-amendments) (collecting examples of proposed constitutional amendments in reaction to *Citizens United*).

knowledgeable commenters, including many legal scholars,<sup>6</sup> tell us that this public perception is mistaken. Corporate personhood is not the problem, they say. Nothing turns on the legal fiction of corporate personhood. So efforts to amend the Constitution, or to otherwise “overturn” *Citizens United* are misguided, even mischievous, because the personhood fiction is a “useful fiction,”<sup>7</sup> one necessary to accomplish all sorts of worthy objectives,<sup>8</sup> objectives which would be undermined if we did away with corporate personhood.<sup>9</sup>

In this Essay I want to reject the suggestion that personhood is not important. Although it is true that corporate personhood has been around long before *Citizens United*,<sup>10</sup> the public’s

6. Including some participants of this symposium. See, e.g., Kent Greenfield, *Let Us Now Praise Corporate Persons*, WASH. MONTHLY (Jan./Feb. 2015); Kent Greenfield, *Why Progressives Should Oppose a Constitutional Amendment to End Corporate ‘Personhood,’* HUFFINGTON POST (Jan. 26, 2012, 5:22 PM). Other law professors weighing in on the same theme include: Stephen Bainbridge, *The Moronic Campaign Against Corporate Personhood*, PROFESSORBAINBRIDGE.COM (Nov. 5, 2011, 6:58 PM); Garrett Epps, *Don’t Blame “Corporate Personhood,”* THE AM. PROSPECT (Apr. 16, 2012); Brandon Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014); Eric Posner, *Stop Fussing Over Personhood*, SLATE (Dec. 11, 2013, 10:09 AM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html); Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE L. REV. 863 (2007). See also Eric Williamson, *In the Wake of Wall Street Protests, Professors Illuminate ‘Corporate Personhood,’* UVA LAWYER (Fall 2011), <http://www.law.virginia.edu/html/alumni/uvalawyer/f11/personhood.htm> (collecting observations from various professors, none of whom suggest that corporate personhood is determinative). Non-academics have made similar arguments, sometimes in academic journals. See, e.g., Ilya Shapiro & Caitlyn W. McCarthy, *So What if Corporations Aren’t People?*, 44 J. MARSHALL L. REV. 701 (2011) [hereinafter *So What?*]. The personhood issue arose again in *Hobby Lobby* and once again some observers suggested that corporate personhood is not the important issue. See, e.g., Matthew Yglesias, *5 Mistakes Liberals Make About Corporate Personhood and Hobby Lobby*, VOX (July 1, 2014, 11:50AM), <http://www.vox.com/2014/7/1/5860742/5-mistakes-liberals-make-about-corporate-personhood-and-hobby-lobby>.

7. Shapiro & McCarthy, *So What?*, *supra* note 6, at 708.

8. See, e.g., Greenfield, *Let Us Now Praise Corporate Persons*, *supra* note 6; Greenfield, *Why Progressives Should Oppose a Constitutional Amendment to End Corporate ‘Personhood,’* *supra* note 6; Shapiro & McCarthy, *So What?*, *supra* note 6, at 708–10.

9. See, e.g., Epps, *supra* note 6; Shapiro & McCarthy, *So What?*, *supra* note 6; Posner, *supra* note 6; Bainbridge, *supra* note 6; Greenfield, *Let Us Now Praise Corporate Persons*, *supra* note 6.

10. Corporations have been juridical “persons” for some purposes since at least the nineteenth century and perhaps longer. See *supra* note 6. Many have remarked on this fact in reports on the case. See, e.g., Adam Liptak, *In Arguments on Corporate Speech, the Press Is a Problem*, N.Y. TIMES, Feb. 7, 2011, at A12 (noting that corporate personhood is an “old and established rule”). However, as many scholars, lawyers and judges have observed, the extension of constitutional rights to business corporations was undertaken “without exposition or explanation.” William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 737 (1949).

perception that the Court did something important with the concept is correct and we are continuing to see the consequences of that interpretation unfold in cases like *Hobby Lobby*. What the Court did was to cast the corporation into the role of a “disfavored” speaker. It suggested that the campaign finance limitations were discriminatory because they only applied to corporations and that such “discrimination” was unconstitutional. This rhetorical move has been repeated in subsequent cases substituting “marketing”<sup>11</sup> for “corporation” and “free exercise of religion”<sup>12</sup> for “freedom of expression.”<sup>13</sup> This framing exploits our tendency to condemn discrimination between persons in order to make these controversial decisions seem self-evidently correct and neutral.<sup>14</sup> The personhood metaphor distracts from the underlying, theoretical vacuum. The Court has never said that corporations enjoy all of the same rights as persons.<sup>15</sup> But it hasn’t

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11. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (declaring statute which singles out “marketing” for regulation unconstitutional).

12. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Religious Freedom Restoration Act [RFRA] covers for-profit corporations and offers corporations a basis for requesting exemption from some aspects of the Affordable Care Act’s mandate that employers cover some birth control which the plaintiffs objected to providing).

13. It is important to note that although *Citizens United* and *Sorrell* were decided on explicitly constitutional grounds, *Hobby Lobby* was not. Ostensibly, the Court was merely interpreting RFRA; but the interpretative move is the same and seemingly indistinguishable from the process by which the Court would find a constitutional free exercise right, since it seems, as a preliminary matter, one needs to be able to *have* a religious belief and seek to practice it for RFRA to be applicable.

14. See, e.g., Lawrence Solum, *Legal Theory Lexicon: Persons and Personhood*, LEGAL THEORY BLOG (Jan. 11, 2015), [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/03/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_2.html) (“[T]he claim that corporations are moral persons would be controversial.”).

15. Garrett, *supra* note 6, at 97–98 (noting that corporations cannot vote, are not “citizens” under the Fourteenth Amendment, do not enjoy the protection of the Privileges and Immunities Clause, rights against self-incrimination, or Due Process Clause liberty rights). The explanation for when a corporation should enjoy the same rights as human beings and when it should not is generally described as undertheorized. Professor Garrett attempts to address this gap by proposing a theory that derives from the requirements of Article III standing. This theory is certainly plausible and I find it attractive in many respects. It is a masterful effort, but it nevertheless runs up against one of the usual problems of such a unifying project; there are some cases that don’t fit. For example, he finds *Hobby Lobby* departs from his schema rather dramatically. *Id.* at 102–03. Moreover, to some extent, if what we want to know is when, and on what basis, the Supreme Court will extend constitutional rights to corporations, he assumes the question when he writes “some constitutional rights are individual-centered and not plausible as rights of corporations.” *Id.* at 98. Thus, he finds it “unsurprising” that the Court has not recognized a corporate right to “serve on juries, run for public office, marry, procreate, or travel.” *Id.* at 98. But I daresay that until the Court’s decision in *Hobby Lobby*, most observers might well have included a First Amendment right of free exercise of religion in this list. The fact that the Court is drawing the line in a particular place *today* provides only limited reassurance about where it will draw it tomorrow. See Winkler, *supra* note 6, at 869

offered much explanation for the distinctions. As many scholars have observed the Supreme Court has failed to articulate a theory for corporate rights, relying instead on what could (at best) be described as “case-by-case adjudication”<sup>16</sup> and (at worst) as something less charitable.<sup>17</sup> What we have instead of a rationale is an *ipse dixit*. “[R]emarkably, the Court has never offered a sustained argument as to why corporations merit constitutional rights. . . . strictly speaking, the question has never been decided but merely presumed decided.”<sup>18</sup> There is a blank spot where a rationale should be.

It is worth contemplating this empty spot. Although we condemn discrimination between persons as invidious, there is a sense that we do so based upon a recognition of our shared humanity and that human beings exist whether the law recognizes them or not, but that for law to have a claim to moral legitimacy it must recognize them.<sup>19</sup> However, there is no such prior existence of corporations. A corporation is a legal fiction. It has

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(pointing to *Austin* and *McConnell*, cases overruled by *Citizens United*, as proving that it is “easy to exaggerate the importance of *Bellotti*” [*Bellotti* is the case the Supreme Court relied on in *Citizens United* to overturn those cases.]).

16. Shapiro & McCarthy, *So What?*, *supra* note 6, at 705.

17. See Garrett, *supra* note 6, at 99 (reviewing criticisms).

18. David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J.L. & CTS. 221, 223–24 (2013). This analytical vacuum dates back at least to the infamous *Santa Clara* case in which the Supreme Court assumed that a corporation was a person for purposes of the Fourteenth Amendment. *Santa Clara Cty. v. S. Pac. Railway Co.*, 118 U.S. 394 (1886). The “holding” did not even appear in the case, but only in the headnotes prepared by the reporter. “For such a momentous decision, the opinion in the *Santa Clara* case is disquietingly brief—just one short paragraph—and totally without reasons or precedent.” Morton J. Horwitz, *Santa Clara Revisited: The Development of the Corporate Theory*, 88 W. VA. L. REV. 173, 173 (1985) (emphasis added). See also Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523 (2009). Apparently, the groundwork had been laid for this conclusion three years earlier, in a similar case where the lawyer arguing for the railroad was involved in the drafting of the Fourteenth Amendment and thus spoke from a position of some authority as to what the drafters of the Amendment intended. For a fascinating discussion of the alleged “conspiracy” to give corporations rights under the Fourteenth Amendment, see Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938), Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment: 2*, 48 YALE L.J. 171 (1938). For additional insight into this series, see Mark DeWolfe Howe, *A Footnote to the “Conspiracy Theory,”* 48 YALE L.J. 1007 (1938). For additional observations about the absence of support for the decision see Douglas, *supra* note 10.

19. I touch here on a question which itself is the subject of much jurisprudential and philosophical debate as to which living creatures (animals) or organisms (fetuses), merit legal status as persons, a debate which I cannot even begin to address, let alone resolve, in this limited space. Suffice it to say that we do not need to resolve this question to observe that corporations are not living things.

the attributes the law gives it, no more, no less.<sup>20</sup> There does not seem to be any good reason that the entity, as such, needs protection for freedom of expression or freedom to exercise a religion. Nor does it seem that there should be any philosophical, moral or political necessity for a commitment to the equal treatment of all fictional entities. Quite the reverse; such a commitment would make it more difficult to tax various entities differently or to regulate some industries more heavily than others.<sup>21</sup> This is the sort of regulation that the end of the *Lochner* era appeared to settle.<sup>22</sup>

Yet hostility to such distinctions is what *Citizens United* and its progeny reflect. This hostility seems based on eliding the moral statuses of the juridical versus the human “person” and that elision facilitates a broadly deregulatory agenda,<sup>23</sup> one that lays the foundation for attacking securities laws, labeling and disclosure laws, licensing laws, pharmaceutical marketing regulation, truth-in-lending laws, and countless others.<sup>24</sup>

This effect is reflected in some of the arguments made in the trial courts and the decisions emerging from them. Challenges to all manner of regulations, from a law requiring a license for dealers in precious metals,<sup>25</sup> to the FDA’s new graphic warning

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20. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 655 (1926). This Essay is *not* an inquiry into the “essence” of a corporation; quite the reverse. I mean to highlight that a corporation is legal construct. See Joanna M. Meyer, *The Real Error in Citizens United*, 69 WASH. & LEE L. REV. 2171, 2182–86 (2012) (describing inquiries into the corporate essence as circular). The critique of the legal treatment of corporations as persons is one of longstanding. See, e.g., Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990); Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

21. Compare I.R.C. § 501(c)(3) to I.R.C. § 527.

22. Geoffrey R. Stone, *Citizens United and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485 (2012). Of course, this may be an example of simply expressing disapproval. See Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 682–84 (2005) (describing *Lochner*’s status as for many years part of the “anti-canon” but gradually losing that status in recent years).

23. Tamara R. Piety, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010).

24. See, e.g., Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165 (2015) (discussing *Edwards v. District of Columbia* and how the new free speech jurisprudence seems to open the way to reevaluation of regulatory power thought to be settled since *Lochner*); *Edwards v. Dist. of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (invalidating, on First Amendment grounds, licensing requirement for D.C. tour guides).

25. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014) (rejecting a First Amendment challenge to state licensing requirement for dealers in precious metals).

366      *CONSTITUTIONAL COMMENTARY* [Vol. 30:361

labels on cigarettes,<sup>26</sup> from whether an employer has to post notices concerning what the law is regarding a union,<sup>27</sup> to whether country-of-origin labeling regulations are constitutional,<sup>28</sup> and from a law setting a minimum wage,<sup>29</sup> to a proposal for a law providing that only “environmentally responsible” companies receive special tax treatment.<sup>30</sup> In short, there is almost no case that can’t, with creative lawyering, be turned into a First Amendment case and many of these cases depend upon some version of the equal protection argument.<sup>31</sup> Plaintiffs have won some and lost some, but the Supreme Court’s continued adherence to this interpretive strategy suggests that, for the foreseeable future, businesses will win more than they lose because the personhood metaphor seems to compel courts to reject “discrimination” against corporations.

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26. See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012) *overruled in part by* *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

27. *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

28. *Am. Meat Inst. v. USDA*, 760 F.3d at 27 (D.C. Cir. 2014).

29. Order on Pls.’ Mot. Prelim. Inj., *Int’l Franchise Assoc., Inc. v. City of Seattle*, Case No 2:14-CV-00848-RAJ. For a summary of the case and supporting briefs from the U.S. Chamber of Commerce, see <http://www.chamberlitigation.com/international-franchise-association-inc-et-al-v-city-seattle> (raising equal protection challenge to Seattle law raising minimum wage for fast food workers which excluded franchisees from small business exception).

30. Memorandum & Order on Request for Preliminary Injunction, *Mary Elin Noel v. Bd of Elec. Comm’rs*, No. 1422-CC00249 (May 27, 2014). For more on this case, including a link to the final order, see Lindsay van Dyke, *Statement Regarding Court Decision in Noel v. Board of Commissioners*, FREESPEECHFORPEOPLE.ORG (May 28, 2014), available at <http://www.freespeechforpeople.org/node/684> (raising equal protection argument to ballot proposal for law to deny tax breaks to unsustainable energy producers).

31. See, e.g., *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015) (upholding in part and invalidating in part FTC order forbidding POM Wonderful’s unsubstantiated claims of a health benefit from drinking pomegranate juice against a First Amendment challenge); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359 (D.C. Cir. 2014) (striking down SEC disclosure rule on “conflict minerals” required by Dodd-Frank as violating the First Amendment); *Law School Admission Council v. State*, 222 Cal. App. 4th 1265 (Ct. App. 2014) (finding that a law prohibiting LSAC from flagging students who took the LSAT with accommodations and requiring that all scores be reported in the same way did not violate LSAC’s “fundamental rights” to freedom of speech, protection against compelled speech, and equal protection).

Personhood matters.<sup>32</sup> It “tilts” the outcomes.<sup>33</sup> Part I of this Essay reviews the arguments offered for why we shouldn’t care about corporate personhood and finds them unconvincing. Part II then focuses on why the personhood metaphor does matter. The chorus of voices insisting that personhood doesn’t matter is bit like the Wizard of Oz: “Pay no attention to the man behind the curtain!” Dorothy is told. But it is only by looking behind the curtain that we can see the levers in action.

## I. PAY NO ATTENTION TO CORPORATE PERSONHOOD

### A. “EVERYBODY KNOWS CORPORATIONS AREN’T PEOPLE!”

The first line of attack on the significance of corporate personhood is a dismissive reassurance that the public is wrong in thinking that in *Citizens United* the Supreme Court granted corporations the same First Amendment rights as human beings. I encountered this reaction first hand.

In 2014, at the University of Tulsa, I had the pleasure of participating in a Federalist Society debate about corporate personhood. There, Ilya Shapiro of the Cato Institute told the assembled students that “of course” everyone knows that corporations are “not real people!” His tone implied that all of this uproar about corporate personhood is a tempest in a teapot. This talk echoed the same point he had made in an earlier article: “It is a misconception that the concept of ‘corporate personhood’ has played a central role in shaping corporate speech rights in American jurisprudence. No court has ever said that corporations are ‘real’<sup>34</sup> people.”<sup>35</sup>

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32. Many others legal observers believe likewise, but one of the earliest, strongest, most persistent, and most prescient voices has been Professor Daniel Greenwood. *See, e.g.*, Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 309 (1997); Daniel J.H. Greenwood, *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875 (2007); Daniel Greenwood, *FCC v. AT&T: Impersonal Privacy and the Idolatry of Corporations*, 2011 HARV. L & POL’Y REV. ONLINE (2011). Professor Greenwood’s work has deeply influenced my own views.

33. In his famous *Santa Clara* article, Professor Horwitz argued that certain legal formulations can “have ‘tilt’ or influence in determining outcomes.” Horwitz, *supra* note 18, at 176.

34. Note how much of the work is being done with this word “real.” To what does “real” refer?

35. Shapiro & McCarthy, *So What*, *supra* note 6, at 703 (citing Winkler, *supra* note 6, at 863). It is curious that Shapiro & McCarthy would rely on this passage. Professor Winkler published that article in 2007, before *Citizens United* was decided. The relevant



Many legal academics identified as conservatives<sup>36</sup> have similarly weighed in to assure us that the corporate personhood issue is simply no problem at all. Eric Posner tell us to “stop fussing over personhood”<sup>37</sup> and Steven Bainbridge describes the campaign against corporate personhood as “moronic.”<sup>38</sup> They suggest that the public’s impression that personhood was an important feature of *Citizens United* simply reflects a lack of legal sophistication.<sup>39</sup>

But this attitude is not confined to conservatives. Many identified with the left also take (or have taken)<sup>40</sup> this position. Thus, Garrett Epps tells us not to “blame” corporate personhood for the outcome in *Citizens United*<sup>41</sup> and Kent Greenfield, a participant in this symposium, argues that corporate personhood is a “red herring” which obscures more important issues.<sup>42</sup> Indeed, Greenfield believes progressives<sup>43</sup> should embrace corporate

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passage is the following: “[T]he notion of corporate personhood—has not played the central role in shaping corporate speech rights that some believe. Corporations have free speech rights, *but they are more limited than those held by individuals.*” *Id.* (emphasis added). The cases Winkler cited for the proposition that corporations’ speech rights were more limited than those of human beings, *Austin* and *McConnell*, Winkler, *supra* note 6, at 870, were the very ones *Citizens United* overruled. So this passage would not seem to be a particularly reassuring basis for concluding that the distinction remained.

36. Labels like “liberal” and “conservative” are often unhelpful, but they are particularly unhelpful in the First Amendment context. In contrast to the days when Chief Justice Rehnquist, a noted conservative, was a commercial and corporate speech skeptic, today it seems most conservatives support robust protection for both. See Tamara R. Piety, “A Necessary Cost of Freedom”?: *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 32, 45–47 (2012).

37. Posner, *supra* note 6.

38. Bainbridge, *supra* note 6.

39. See *supra* notes 6–9 and accompanying text. This suggestion overlooks the fact that many legal scholars have gotten the same impression, including some corporate law scholars. For example, Chief Justice Leo Strine, Jr., of the Delaware Supreme Court, and his co-author Nicholas Walter write that the Supreme Court has “equated the for-profit corporation with flesh-and-blood Americans entitled to cast a vote.” Strine & Walter, *supra* note 3, at 390.

40. It is possible that some may have changed their minds.

41. Epps, *supra* note 6.

42. Greenfield, *Why Progressives Should Oppose a Constitutional Amendment to End Corporate ‘Personhood,’* *supra* note 6.

43. I share some of Professor Bainbridge’s reservations about the word “progressive.” See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 857 n.1 (1997). But I also can’t think of a good alternative. See also David Yosifon, *The Citizens United Gambit in Corporate Theory: A Reply to Bainbridge on Strine and Walter*, Santa Clara University Law School Working Paper No. 4-14, at 3–4 (Oct. 2014) (calling for clarity in terminology).

personhood as a path toward corporate social responsibility.<sup>44</sup> The overall message is that those who think corporate personhood is a significant issue either lack legal training or are unsophisticated, “naïve metaphysicians.”<sup>45</sup>

If, as Shapiro argues, “everyone” knows that corporations should not have the same rights as natural persons, it is not clear who he means by that “everyone.” Many legal academics *do* seem to believe that in *Citizens United* the Court did something very like treating corporations as if they were entitled to all the rights of natural persons.<sup>46</sup>

Certainly, many corporate litigants have enthusiastically pressed the claim that corporations ought to have the same rights as human beings.<sup>47</sup> They have not always been successful, but the

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44. Greenfield, *Let Us Now Praise Corporate Personhood*, *supra* note 6. See also Lyman Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 *BUS. LAW.* 1 (2015) (same). Others believe *Citizens United* makes CSR reforms more plausible. See Strine & Walter, *supra* note 3, at 379–90.

45. *John Carney on Corporate Personhood and the Incoherent Argument Against It*, PROFESSORBAINBRIDGE.COM (June 30, 2014, 8:45 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2014/06/john-carney-on-corporate-personhood-and-the-incoherent-argument-against-it.html> (Those who are concerned about corporate personhood are “naïve metaphysicians.”) (It is not clear from Bainbridge’s post which “John Carney” he is referring to, but it may be the Carney who reports on Wall Street for CNBC.) Interestingly, Carney seems to claim something Shapiro and others do not, that it would be *incoherent* to make distinctions between corporations and other types of persons. *Id.*

46. Strine & Walter, *supra* note 3; Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech* (2015) UNLV School of Law Scholarly Works. Paper 901; see, e.g., Tucker, *supra* note 3.

47. For example, post-*Citizens United*, AT&T argued that the company ought to enjoy a personal privacy right under the Freedom of Information Act [FOIA] in order to prevent public disclosure of some internal emails and memoranda, materials which it had turned over to the government pursuant to an investigation and which were the subject of a FOIA request. “For at least 140 years,” AT&T argued, “it has been ‘well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.’” *FCC v. AT&T*, 131 S. Ct. 1177 (Respondent’s Brief at 9). Given that the FOIA statute’s reference to “persons” had been interpreted to include corporations, AT&T argued that the word “personal” in the statute should likewise be interpreted to “refer[] to both individuals and corporations, because the noun from which it is formed also includes both individuals and corporations.” *Id.* Lyle Denniston, writing for SCOTUS blog, saw this argument as raising the corporate personhood issue “again,” apparently reflecting that he *also* found the personhood issue significant. Lyle Denniston, *Argument Preview: Corporate “Personhood” – Again*, SCOTUSblog, (Jan. 18, 2011, 11:02 PM), <http://www.scotusblog.com/2011/01/argument-preview-corporate-personhood-again>. Perhaps surprisingly, the Supreme Court did not agree. It unanimously rejected AT&T’s argument. The vote was 8-0. Kagan recused herself, presumably because she was the Solicitor General when the case began. *FCC v. AT&T, Inc.*, 131 S. Ct. at 1180. In an opinion eerily similar to *Hobby Lobby* (Part III of Opinion of the Court), but coming to the opposite result, the Supreme Court found the FOIA exception an easy case *against* AT&T. The contrast between the *AT&T* and *Hobby Lobby* highlights a point made below,

arguments have been made. Some legal academics have likewise argued that corporations should receive the same First Amendment protection as natural persons.<sup>48</sup> Professor Michael Kagan has argued that *Citizens United* and its progeny opened up a new “speaker discrimination” jurisprudence.<sup>49</sup> And obviously the general public is clearly not a part of this “everyone” who knows that legal personhood does not mean equal treatment with human beings. Rather, as discussed above, personhood seems to be *precisely* what has galvanized public opposition to the case.

It is true, however, that the Supreme Court continues to adhere to the proposition that corporations do not have the full panoply of rights that natural persons do;<sup>50</sup> but, as will be discussed further below, the case law does not inspire confidence about how the Court will rule on any particular question in the future.

#### B. “. . . A USEFUL FICTION. . .”

Somewhat paradoxically, many of those who argue that corporate personhood is “just” a fiction and therefore we shouldn’t get too worked up about it, nevertheless *also* argue that corporate personhood is *critical* to the proper functioning of the legal system and to the economy. Doing away with this fiction through a constitutional amendment, such as that proposed by Free Speech for People<sup>51</sup> or Move to Amend,<sup>52</sup> would, they warn darkly, wreak havoc with corporate law and on civil society.

For example, Professor Bainbridge notes that “[a]lthough the corporation’s legal personality obviously is a fiction, it is a very useful one.”<sup>53</sup> Without this fiction, he writes, the corporation

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that the Court has failed to offer a theory which would explain why it reaches the results it does in one case versus another. One wonders, given the proximity of *Citizens United* and the backlash it engendered, if in *AT&T* the Court intended to reassure the public that it would *not* give corporations all the same rights as natural persons. For a theory that this sort of calculation may sometimes take place in the crafting of opinions, see Bazelon, *supra* note 1.

48. See, e.g., Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J. L. & PUB. POL’Y 639 (2011); Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109 (1992).

49. Kagan, *supra* note 46.

50. See Garrett, *supra* note 6, at 98.

51. *The People’s Rights Amendment*, FREE SPEECH FOR PEOPLE, <http://www.freespeechforpeople.org/node/527> (last visited Mar. 28, 2015).

52. *Other Amendments*, MOVE TO AMEND (Nov. 5, 2014), available at [www.move-to-amend.org/other-amendments](http://www.move-to-amend.org/other-amendments).

53. Bainbridge, *supra* note 6.

would not be able to own land, contract, sue and be sued.<sup>54</sup> Moreover, the freedom of advocacy organizations to participate in political speech or of newspapers and blogs to publish would be at an end since they too are corporations.<sup>55</sup>

But it is not at clear why this should be so. With all due respect to Bainbridge, other corporate law scholars have observed that corporate “legal personality” “is not in *itself* an attribute that is a necessary precondition for the existence of any—or indeed all—of these rules [limited liability of shareholders for corporate wrongs or debts, shelter of corporate assets from shareholders’ personal creditors, and authority to enter into contracts and the like], but merely a handy label for a package that conveniently bundles them together.”<sup>56</sup>

Convenience should not be confused with necessity. Presumably a different label could be used to accomplish many of these functions. Indeed, with respect to ownership of land, there is some evidence that organizations have been able to hold property in the name of the organization, even when unincorporated.<sup>57</sup> That suggests that juridical personhood may not be essential to accomplish some of the functions said to be desirable attributes of corporate personhood.

“Personhood” is not a description of reality, it is metaphor for the functions. Moreover, using this metaphor as a placeholder for the rights which have been arrogated to the corporation should not be confused with conferring on the corporation the qualities of the thing from which the metaphor is drawn. As one respected corporate law scholar puts it: “[A]lthough it is common in the legal literature to extend syllogistic deduction from the premise of legal personality to the existence of characteristics beyond the three foundational features [of corporations] . . . no functional rationale . . . compels this.”<sup>58</sup>

Other authors not only do *not* find that corporate personhood compels us to treat a corporate person as possessing

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54. *Id.* See also Posner, *supra* note 6.

55. This is a concern which Greenfield also focuses on. See Greenfield, *Let Us Now Praise Corporate Persons*, *supra* note 6. See also Nick Bentley, *Surprise! Citizens United Legal Reasoning Doesn’t Rely on Corporate Personhood*, RECLAIM DEMOCRACY (Nov. 11, 2012), <http://reclaimdemocracy.org/citizens-united-corporate-personhood/>.

56. REINIER KRAAKMAN, ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 9 (2d ed. 2009) (emphasis added).

57. Richard R. B. Powell, *Land Capacity of Natural Persons as Unincorporated Groups*, 49 COLUM. L. REV. 297 (1949).

58. KRAAKMAN, ET AL., *supra* note 56, at 9.

the same rights as human beings, they warn that “reification is a device for making something that is in fact complex seem simple, and that can be dangerous.”<sup>59</sup>

Other countries, some with vastly differing political regimes, provide roughly the same benefits for business entities without using the fiction of the corporate person.<sup>60</sup> So why would doing away with corporate personhood prevent legislatures from coming up with some *other* label to accomplish some of these same goals which are not so controversial, such as holding property or being sued, without dragging along either the constitutional or the rhetorical baggage of “personhood”? To be sure, such a change could involve rewriting or reinterpreting a great deal of law. But the Supreme Court seems to have already put us on that path. And given the hurdles inherent in the amendment process,<sup>61</sup> if a constitutional amendment succeeds, “inconvenience” doesn’t make for a very compelling objection.

### C. PROTECTING THE “REAL” PEOPLE

These first two observations are, however, but warm-ups; there are two more substantive arguments used to steer us away from attributing significance to legal personhood. The first of these is the argument that what the Supreme Court recognized in *Citizens United* (and perhaps even more explicitly in *Hobby Lobby*) was the interests of the real human beings who stood *behind* the corporation. “A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, *the purpose is to protect the rights of these people.*”<sup>62</sup>

For example, although Shapiro and McCarthy acknowledge that a corporation is not a real person, they propose, as an idea “on which most people of all ideologies and jurisprudential

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59. WILLIAM A. KLEIN ET AL., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 118 (11th ed. 2010).

60. Teemu Ruskola, *What is a Corporation? Liberal, Confucian, and Socialist Theories of Enterprise Organization (and State, Family, and Personhood)*, 37 SEATTLE U. L. REV. 639 (2014). It is also worth mentioning that investor-state tribunals have extended international human rights guarantees to corporate claimants. See Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights* (unpublished manuscript on file with author).

61. See, e.g., Heather Gerken, *The Right to Vote: Is the Amendment Game Worth the Candle?*, 23 WM & MARY BILL RTS. J. 11 (2014) (expressing skepticism about the wisdom of pursuing a constitutional amendment to provide an affirmative right to vote).

62. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

backgrounds can agree,”<sup>63</sup> that “the individuals who make up those corporations—*officers, directors, employees, shareholders*—are”<sup>64</sup> actually people and therefore, “[i]t would be a mistake to deny constitutional rights to those individuals on the grounds that a corporation itself is not a real person.”<sup>65</sup> In what is presumably an intentional attempt to draw parallels to the language in another famous First Amendment case,<sup>66</sup> Shapiro and McCarthy write that these individuals “do not shed their own constitutional rights at the office-building door.”<sup>67</sup>

Actually, most employees, even most public employees, *do* surrender their freedom of expression, even their freedom of political expression, maybe *especially* political expression, at the workplace door.<sup>68</sup> And it is ironic in the extreme to see defenders of these decisions sweeping “employees” into the ambit of the corporation in order to justify giving the corporation the right to deprive employees of a benefit that the law is intended to provide to them! But it also conflates denying *the corporation* rights with denying rights to the human beings:

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63. Shapiro & McCarthy, *So What?*, *supra* note 6, at 707.

64. *Id.* (emphasis added).

65. *Id.*

66. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

67. Shapiro & McCarthy, *So What?*, *supra* note 6, at 707. An employer’s suppression of speech is usually not precluded by the First Amendment unless the government is the employer, and sometimes not even then. *Connick v. Myers*, 461 U.S. 138 (1983). For an extended discussion of this issue which is still relevant, see Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 *CARDOZO L. REV.* 729 (1989). See also Alina Tugend, *Speaking Freely About Politics Can Cost You Your Job*, *N.Y. TIMES*, Feb. 20, 2015, at B4.

68. One response to this observation is that the First Amendment is a negative liberty with application only against the government, not private parties. (“Congress shall make no law. . . .”) When a private employer fires you because of your bumper sticker there is no “state action” to which the First Amendment would apply. However, this interpretation overlooks the government’s role in allocating private rights by either providing or denying a right of action, an insight which traces back to Wesley Hohfeld, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917) (discussing courts’ tendencies to elide the right/privilege distinction and to create duties in situations where there ought to be, at best, what Hohfeld described as a “no right”), and the fact that one of the landmark First Amendment cases, newly beloved by corporate and commercial speech’s defenders, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is an example of a case where the Court found the necessary state action, and thus offense to the First Amendment, in a state’s allowing a private cause of action for defamation. See Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 *HARV. L. REV.* 2234, 2253 (2014) (“It [*New York Times v. Sullivan*] should be found in two places in standard constitutional law casebooks, once in the section on the First Amendment and once in the section on the state action doctrine.”).

[O]bviously an association of people cannot have all the same rights as the individuals who make it up, such as the right to vote . . . , but the question “Which rights does it derive from its individuals?” cannot be answered with ““The same rights its individuals are entitled to.””<sup>69</sup>

This is a circular inquiry.

It does not follow from the proposition that Hobby Lobby *as an entity* does not have free exercise rights that its owners, the Greens, do not. The Greens’ rights, *as individuals*, to practice their religion would have been unimpaired had the Court ruled the other way. The problem is, does that free exercise involve using a corporation in particular ways? What the Greens were arguing for can hardly have been described as a time-honored use of the for-profit corporate form or it would have been an easy case in Hobby Lobby’s favor. But it was not. Despite Justice Alito’s contortions to show otherwise, the case law is threadbare.<sup>70</sup>

Perhaps the most significant problem with this “look to the people behind the corporation” argument is that it is in some tension with corporate law. One of the purposes of the formal, separate entity in corporate law is precisely to permit courts *to disregard* those human beings behind the corporate form.<sup>71</sup> This separate entity status is tied up with limited liability, a feature which makes the corporate form so attractive to investors and which, it is said, to be so critical to a dynamic and democratic form

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69. Meyer, *supra* note 20, at 2217–18.

70. The opinion relies heavily on *Braunfeld v. Brown*, 366 U.S. 599 (1961), the case of Orthodox Jewish merchants who objected to Sunday closing laws. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767–70 (2014). However, the merchants in that case were not corporations. If the issue had actually been well settled, presumably *Hobby Lobby* would have been less controversial. The proliferation of articles in the academic literature suggests that the issue of whether for-profit corporations were covered by RFRA was far from well settled. *See, e.g.*, Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014) (arguing that RFRA covers corporations); Spencer Churchill, Comment, *Whose Religion Matters in Corporate RFRA Claims After Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?, 38 HARV. J. L. & PUB. POL’Y 437 (2014) (arguing that the *Hobby Lobby* decision protects the rights of persons beyond owners of the firm);

71. The idea of a separate corporate entity is part of the justification for the limited liability of shareholders for corporate debts. Reaching shareholders requires “piercing the corporate veil.” Piercing and reverse piercing is the subject of much scholarly debate. It is often trenchantly criticized. Stephen Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001). For an argument that veil-piercing case law is more coherent than it appears, see Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99 (2014).

of capitalism<sup>72</sup> and, at least in large, publicly traded companies, economic efficiency.<sup>73</sup>

Of course, as Steven Bainbridge has argued, corporate law also provides for “piercing” and “reverse piercing” of “the corporate veil.”<sup>74</sup> Piercing the corporate veil allows the corporation’s creditors to reach the assets of the shareholders and reverse piercing allows the shareholders’ creditors to reach the assets of the corporation in which the debtor may have an ownership interest. Piercing involves disregarding “the corporation’s separate legal personality.”<sup>75</sup> And like the question of when corporations have constitutional rights, there is little clarity around the question of when the corporate veil may be pierced. Lawyers and judges have long bemoaned the chaotic nature of the case law on piercing.<sup>76</sup>

Still, the *Hobby Lobby* case *could have been* decided with resort to this body of law. Professor Bainbridge helpfully offered a roadmap to the Court for how it might decide in *Hobby Lobby*’s favor through the application of the piercing doctrine.<sup>77</sup> If the Court had followed that roadmap, the invocation to “the persons behind” the corporation might make more sense, even if one thought *Hobby Lobby* did not present an appropriate case for such such piecing. But the Court did not appear to be inclined to follow Professor Bainbridge’s suggestions.<sup>78</sup>

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72. See, e.g., Stephen B. Presser, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148 (1992).

73. JEFFREY D. BAUMAN, CORPORATIONS LAW AND POLICY 259–60 (7th ed. 2010) (quoting FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW*, 41–44 (1991)).

74. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 235 (2013).

75. *Id.*

76. See, e.g., Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1037–38 (1991) (describing the dissatisfaction in the legal community with the lack of coherence in the doctrine).

77. Bainbridge, *supra* note 74.

78. This may be why Alito didn’t cite him. See Stephen Bainbridge, *Glad Hobby Lobby Won But Wish Alito Had Cited Me!*, PROFESSORBAINBRIDGE.COM (June 30, 2014, 8:12 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/06/glad-hobby-lobby-won-but-wish-alito-had-cited-me.html>. It would have been a more defensible opinion if Alito *had* followed Bainbridge’s blueprint. As Bainbridge himself is at pains to point out, the Court doesn’t even define what constitutes a “closely held” corporation for purposes of this opinion, (assuming we confine its application to its facts). See Stephen M. Bainbridge, *What Is a “Close Corporation” for Purposes of the New Hobby Lobby Rule?*, PROFESSORBAINBRIDGE.COM (July 1, 2014, 11:00 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html>. But it seems, in Bainbridge’s view, not to be limited to closely held corporations as statutorily defined by various states’ laws. I fear Bainbridge’s



In fact, despite littering the opinion with lots of references to Hobby Lobby and Conestoga as “closely held” corporations, thereby suggesting that their closely held status was germane to the decision, Justice Alito rather pointedly *rejected* the proposition that the Court’s decision was dependent upon Hobby Lobby’s status as a closely held corporation.<sup>79</sup> “No known understanding of the term ‘person’ includes *some* but not all corporations,”<sup>80</sup> he wrote. And he dismissed concerns about the application of the Court’s holding to large, publicly traded companies by observing that it “seems unlikely” that these sorts of “corporate giants” would “often assert RFRA claims.”<sup>81</sup> That is not the same thing as saying that they cannot do so.

Finally, the observation that a corporation is made up of people and lumping together of all the various people associated with a corporation, including employees, without any discussion of how one chooses *which* of these groups’ “speech” the corporation’s speech reflects, simply engenders a new problem. As many corporate law scholars are at pains to point out, shareholders in a corporation are not normal “owners” and thus enjoy almost none of the ordinary benefits of ownership. Rather they have extremely limited rights of control of the corporation in general and none over its speech.<sup>82</sup> The exercise of these rights are so thoroughly controlled by the corporation’s management that it

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skepticism about the Supreme Court’s “institutional competence in areas of corporate law” may be justified. *See also* Ellen Aprill, *Hobby Lobby and the Tax Definition of Closely Held Corporation*, THE CONGLOMERATE (July 16, 2014), <http://www.theconglomerate.org/2014/07/hobby-lobby-and-the-tax-definition-of-closely-held-corporation.html>.

79. In fact, as noted above, more than one commentator has pointed out that the opinion is vague about what it means by “closely held” and that this limitation (if it even exists, which I don’t think it does) is problematic for a number of reasons. *See supra* note 78.

80. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) (emphasis added). Note too that this quote rather decisively negates the proposition that the holding in *Hobby Lobby* was in fact “limited” to closely held corporations as was so widely reported. *See, e.g.*, Steven Davidoff Solomon, *In Hobby Lobby Ruling, A Missing Definition Stirs Debate*, N.Y. TIMES, Sept. 2, 2014, at B7.

81. *Hobby Lobby*, 134 S. Ct. at 2774 (2014).

82. This is why *Citizens United* has inspired many corporate law scholars to call for better disclosures or other reforms that would protect shareholder interest or better align the law with practice. *See, e.g.*, Strine & Walter, *supra* note 3, at 363–79; Lucian A. Bebchuck & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Tucker, *supra* note 3. And indeed the alarm was raised some time ago with respect to the First Amendment, corporate speech, and shareholder protection. *See* Victor Brudney, *Business Corporations and Stockholders’ Rights Under the First Amendment*, 91 YALE L.J. 235 (1981).

is exceedingly difficult for shareholders to even propose fairly basic issues like the terms of executive compensation.

These are the “procedures of corporate democracy”<sup>83</sup> that the *Citizens United* Court thought would suffice as an answer to the objection that corporate managers are using other people’s money for their own political speech when they direct the corporation to spend money on political or issue advertising. Corporations aren’t democracies governed by one person, one vote. They may not even reflect one share, one vote since there may be categories of stock which have preferred voting status.<sup>84</sup>

Apart from the procedures of “shareholder democracy,” shareholders’ other remedy, if management is spending money on speech with which shareholders disagree, is exit, which means, selling their shares. But in today’s environment that remedy is more theoretical than real. “[T]he practical realities of stock market ownership have changed in ways that deprive most stockholders of both their right to voice and their right to exit.”<sup>85</sup> “Most Americans have become ‘forced capitalists’ who must give over a large portion of their wealth to the stock market to fund their retirements and their children’s educations.”<sup>86</sup>

Thus, protecting the corporation’s speech hardly seems to protect the rights of the shareholders behind the corporation. Who else might the corporation represent? From the perspective of who actually makes the decisions, the better candidates might be the managers, directors, and executives. Yet they too are awkward choices from a corporate governance perspective.

Legally, managers are *agents* of the corporation not its principals. As agents they have a duty of loyalty to the corporation which should guide any decision-making about what speech to fund. “Under conservative corporate theory, the only legitimate reason for a for-profit corporation to make political expenditures

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83. *Citizens United v. FEC*, 558 U.S. 310, 362 (2010).

84. “[I]n some corporations one or more classes of common stock is non-voting and in many corporations preferred stock has limited voting rights.” BAUMAN, *supra* note 73, at 204.

85. Strine & Walter, *supra* note 3, at 370 (noting that most Americans are compelled to invest through retirement funds which have many limitations on exit and which provide limited information on the precise holdings). See also Elizabeth Pollman, *Citizens Not United: The Lack of Shareholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009), available at <http://yalelawjournal.org/pdf/823-pa5w1bp2pdf>.

86. Strine & Walter, *supra* note 3, at 370. See also Leo Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079 (2008).

will be to elect or defeat candidates based on their support for policies that the corporation believes will product the most profits.”<sup>87</sup> In no sense then can the corporation’s speech be said to reflect that of its managers or directors, unless by good fortune they coincide.

Managers are bound by law, at least in theory, to advance *the corporation’s interests*, not their own. So it would be awkward, to say the least, to characterize the corporation as a vehicle for *their* self-expression. That might be what is actually happening, but if so, it is precisely the sort of self-dealing which much of corporate law is concerned with *preventing*. It hardly seems to offer an attractive argument to say that managers of a corporation have a constitutional right to express *themselves* with the corporation’s money.

And as previously noted, lower level “employees” certainly cannot be the “real people” whose interests are vindicated if we protect corporate speech because they in no way control the corporation’s exercise of the corporation’s constitutional rights, whether of speech or religion. Indeed, in *Hobby Lobby*, the corporation’s rights were *displacing* employees’ rights under the statute. And for all of the grand rhetoric about interest in freedom of speech, corporations are notoriously less protective of their *employees’* freedom of speech than they are of their own.<sup>88</sup>

In short, none of the real persons Shapiro and McCarthy describe seem to be good candidates for the rights-bearing individuals whose rights are being recognized when the Court protects the corporation’s right.

#### D. LISTENERS’ INTERESTS

The fourth gambit is to rest protection for corporate speakers on the rights of listeners. Corporate speech like that of Citizens United, or any corporate speaker, is protected, so the argument goes, not so much because the corporation *itself* is a protected speaker, but because such speech may contain valuable information for *listeners*. “By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their

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87. Strine & Walter, *supra* note 3, at 383.

88. See, e.g., Fischl, *supra* note 67.

interests.”<sup>89</sup> The idea is that it is in the public interest to offer broad protection to speech to ensure that “the marketplace of ideas”<sup>90</sup> is enriched by all ideas.<sup>91</sup>

But the marketplace of ideas argument is a particularly weak one in this context. In a sense, attempting to justify corporate speech rights by virtue of *listeners’* interests seems to be a concession that the argument in favor of a right residing *in* the corporate speaker is not terribly compelling (or perhaps non-existent). And, although this rationale enjoys a distinguished pedigree in First Amendment jurisprudence, the principle it appears to state, that an open “marketplace of ideas” will produce the truth,<sup>92</sup> is clearly wrong—at least unless we take such a long view that we might question whether that fact is of use to anyone.

There are all sorts of reasons to expect that there will be market failures in the speech “marketplace” just as there are in the economic one,<sup>93</sup> market failures that suggest that if your goal is increasing information and protecting the rights of listeners, the marketplace of ideas justification will not get you very far.

All sorts of bad ideas are “accepted” by the public and it is by no means certain that the best ideas will “win” in the long run.<sup>94</sup> Horoscopes are very popular. Yet we should not deduce from that fact that astrological predictions are sound. The marketplace of ideas proposition—that protecting one person’s speech benefits us all because it increases the chances that the good ideas will win

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89. *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

90. See, e.g., Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 *LOY. L.A. L. REV.* 181 (2007) (discussing the “marketplace of ideas” trope).

91. It is not clear that there is a similar “marketplace of ideas” justification for the exercise of religion; that is, free exercise doesn’t seem to be protected because a multiplicity of religions is a per se good or produces the most truth. Rather, it seems to me to be more straightforwardly connected to the protection of the individual conscience, a feature which makes application to a corporation especially awkward.

92. The classic expression of this is Justice Holmes’ dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market”).

93. See Piety, *supra* note 90.

94. For excellent argument on why the market cannot be expected to reliably maximize truth, see Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 *LEGAL THEORY* 1 (1996).

380            *CONSTITUTIONAL COMMENTARY* [Vol. 30:361

out<sup>95</sup>—reflects the fallacy of composition, *i.e.* that what is good for one member of a unit is good for all of them together.<sup>96</sup>

This reliance on the listeners' interest is particularly unhelpful in resolving situations where it does not appear that hearing the speech is in the listeners' interest, such as when the listeners assert that they do not want to hear it or where speech causes some harm.<sup>97</sup> *Post-Citizens United*, the asymmetry of resources to *produce* speech almost guarantee market failures. As Chief Justice Strine and Nicholas Walter observe,

Conservative corporate theory [ ] accepts the fundamental economic reality that rational economic actors have an incentive to keep as much of the profits of their activity for themselves as they can while seeking to shift the costs of their economic activity to others if possible. The 'tragedy of the commons' is the academic label often used to illustrate this phenomenon, and the real world tragedy of pervasive environmental wreckage caused by capitalist behavior in the nineteenth and twentieth centuries is evidence of this reality.<sup>98</sup>

The response to this problem, Strine and Walter write, has been "to have the legitimate instruments of the people's will, reflective of their desire, set the boundaries for corporate conduct by regulating the externality risk in the public interest."<sup>99</sup>

But the ability of government to regulate business will be undermined in an environment where so much of the support for

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95. Or, more to the point, what is good for General Motors is good for all. See Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

96. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 816–17 (1935) (citing RALPH M. EATON, *GENERAL LOGIC* 340 (1931)) (noting that unfair competition law creates wealth by allowing the first user of a term to exclude others).

97. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (arguing that interpreters of the First Amendment too often did not give enough weight to the harm done by racist speech and that traditional civil libertarian approaches to free speech conflict with other constitutional guarantees). It is depressing to contemplate that we have not made much more progress on this front, but rather have added new categories of and platforms for hate speech at the same time as some of the world's most powerful entities have gained protection for their speech by expropriating the language of the civil rights movement. Professor Owen Fiss long ago pointed out that vigorous protection of speech could end up chilling speech and that free speech jurisprudence had taken a libertarian turn that may give insufficient weight to other interests. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996).

98. Strine & Walter, *supra* note 3, at 380–81.

99. *Id.* at 381.

2015]                      *WHY PERSONHOOD MATTERS*                      381

political campaigns comes from those who would be the targets of regulation.

Almost by definition, this [corporate political participation along the lines authorized by conservative corporate theory] will increase the danger of externality risk, because corporate expenditures will be made with the singular objective of stockholder profit in mind, and therefore will be likely to favor policies that leave the corporation with the profits from their operations, while shifting the costs of those operations (including excessive risk taking or safety shortcuts) to others.<sup>100</sup>

Put another way, the structure and incentives of a for-profit corporation suggest that corporate political speech is likely to *harm* the public, not benefit it.<sup>101</sup> Tolerating this harm in fidelity to some abstract notion of listener benefit seems unwarranted.

## II. CORPORATE PERSONHOOD MATTERS BECAUSE

### A. MIND THE GAP

A good deal of the argument for why focusing on personhood matters is captured in the above rejoinders to the arguments that it *doesn't* matter and that we should stop talking about personhood. However, there are some affirmative arguments in favor of focusing on personhood.

In the first place, declining the invitation to skip over the personhood question puts the focus back where it should be: on asking the Court for a *justification* for giving corporations, particularly business corporations, constitutional or statutory rights previously believed to be the preserve of human beings. The closest anyone has come (in my view) to offering a justification for conferring constitutional rights on corporations is the argument, discussed above, that protecting the corporation protects the rights of the human beings *in* the corporation.

But as we have seen, that justification is unsatisfactory. Trying to explain corporate rights by virtue of “the people” connected with the corporation simply begs the question: “Which people?” So far, the Court has not supplied a clear answer. Ultimately, the “look to the people” argument is muddled and unpersuasive.

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100. *Id.* at 383.

101. A good deal of commercial speech would fall into this category.

What might be more helpful is to focus on what sort of entity the corporation is and what function it is meant to perform. By this I do not mean the sort of “transcendental nonsense” that would attempt to investigate its “essence.”<sup>102</sup> Rather, I mean asking whether we are dealing with what political scientist David Ciepley calls “incorporations of people” or “incorporations of property.”<sup>103</sup>

Early corporations were almost entirely of the first type. Indeed, “[e]verywhere . . . corporations were considered agencies of the government . . . for the furtherance of community purposes.”<sup>104</sup> For example, Ciepley writes, “[m]ost medieval corporations were incorporations of people, including towns, monasteries, cathedral chapters, universities, and guilds.”<sup>105</sup> These sorts of corporations are a species of political organization, not what comes to mind when we use the word “corporation” today. And they differ in significant ways from corporations formed solely to conduct a business.

The idea that organizations of people, whether in the corporate form, or in some other form, (*i.e.* trust, partnership, etc.) ought to be subject to different rules depending on their purpose is a very old one. For example, a 1949 article dealing with the power of unincorporated groups to own property, by Richard Powell, in the *Columbia Law Review*, observed:

Group activity has been a constant ingredient in human life from its earliest known days. The recognition of group rights and duties with respect to things regarded as valuable has been an inescapable consequence. . . . *The extent of legal recognition of capacity does and should differ according to the nature of the group in question.* When a group activity (a) serves a desirable social end and (b) is facilitated by the possession of land rights, the recognition of capacity of such group to acquire, to hold and to transfer interests in land becomes socially requisite. As either of these factors shades down, the necessity diminishes.

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102. See Meyer, *The Real Error*, *supra* note 20 at 2182–86.

103. “Corporations may be usefully divided into two broad types: incorporations of people-and-property and incorporations of property alone.” David Ciepley, *Is the U.S. Government a Corporation? The Corporate Genesis of Modern Constitutionalism* 13 (unpublished draft on file with author). He refers to the former as “incorporations of people” for shorthand. *Id.* Ciepley argues in this paper that the U.S. Constitution may have “corporate roots,” by which he means to allude to these early examples of incorporations of people, *not* to suggest that the United States is like a business..

104. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & MARY L.Q.* 51, 55 (1993) (internal quotation marks omitted).

105. Ciepley, *supra* note 103, at 13.

*Hence it is to be expected that the law will differentiate between unincorporated associations on many bases, treating differently those existing for the economic profit of the constituents and those functioning for the promotion of religious, fraternal, social and more transient objectives.*<sup>106</sup>

Such differentiation is precisely what *Citizens United* and *Hobby Lobby* reject.

The article goes on to note that courts have tended to defer to an organization's internal rules and practices regarding procedures for self-governance and authority when determining ownership and authority to transfer property when dealing with institutions like churches,<sup>107</sup> while with respect to unincorporated businesses like trusts or partnerships court tend to look to the documents.<sup>108</sup>

The fact that even *unincorporated* groups have been deemed able to hold and transfer land<sup>109</sup> suggests that "personhood" is not a critical element to that power. And Powell's observation that the legal treatment of such groups differed depending on whether the court was dealing with a church, fraternal organization or a business, suggests that the Supreme Court's current stance, that distinctions between not-for-profit and for-profit corporations or between human beings and corporations are somehow discriminatory is of recent vintage.

Similarly, it is difficult to make an originalist case for this treatment of corporations since corporate law has changed so significantly. In the eighteenth century global conglomerates were unknown. Corporations could not own other corporations. They did not have perpetual life, nor so broad a scope for operation as

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106. Powell, *supra* note 57, at 297 (emphasis added). The institutionalist turn in First Amendment scholarship seems to be a version of this argument. Scholars in this school of thought argue we should inquire into whether the speaker is a "First Amendment institution." See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013). In addition to Horwitz there are other scholars who have proposed some sort of institutional analysis in the First Amendment, particularly for the press. See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L. J.* 821 (2008); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 *HARV. L. REV.* 84 (1998).

107. *Id.* at 305–08.

108. *Id.* at 310–19.

109. Powell suggests that this was the majority view (at least by the mid-twentieth century) when he writes, "Some courts *persist* in the viewpoint that an unincorporated group is not an entity and hence that a deed to such a group, in its collective name, is a nullity." *Id.* at 300. The word "persist" seems to indicate that the majority of courts would recognize, through a variety of paths described in the article, an unincorporated group's right to acquire, hold and transfer land, despite the fact that its lack of incorporation meant it did not have the benefit of corporate personhood.



384      *CONSTITUTIONAL COMMENTARY* [Vol. 30:361

“any lawful purpose.”<sup>110</sup> Thus, it is doubtful that any conception of the corporation from that time can be usefully extrapolated to this.

What we *can* say with some confidence is that many of the Framers expressed deep suspicions and fears of the corrupting potential of great aggregations of wealth.<sup>111</sup> Perhaps we should consider those expressions a part of Akhil Amar’s “unwritten constitution”<sup>112</sup> and as evidence that the Framers would have rejected this expansive notion of corporate personhood?

In any event, the rule announced by *Citizens United* seems to expand the dangers of the abuse of power from great aggregations of wealth. And it continues in the tradition of the *Santa Clara* decision by expanding constitutional guarantees for corporations without a sustained justification for doing so. Focusing on personhood might turn a spotlight on that analytical gap and the degree to which the Court has, thus far, relied on misdirection and elision and on advancing the claim that rules singling out corporations for separate treatment constitute improper “identity-based distinctions.”<sup>113</sup> As Justice Stevens observed; “Like its paeans to unfettered discourse, *the Court’s denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.*”<sup>114</sup> This brings us to the second reason why personhood matters, words matter.

## B. METAPHORS OVER MATTER

Personhood is a powerful metaphor. The idea that all persons should be treated equally is one of our strongest political commitments. By employing the equal protection rhetoric and

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110. See, e.g., BAUMAN, CORPORATIONS *supra* note 73 at 159–60 (discussing the withering away of the *ultra vires* doctrine in light of the prevalence of general incorporation statutes which permit broad grants of power).

111. There is, for instance, the famous quote from Thomas Jefferson to the effect that he hoped “we shall crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.” See *Citizens United v. FEC*, 130 S. Ct. 876, 949 (Stevens, J., dissenting) (quoting Letter from Thomas Jefferson to Tom Logan, in *THE WORKS OF THOMAS JEFFERSON* 42, 44 (P. Ford ed., 1905)). Since the modern corporation did not exist at the time Jefferson wrote, it is not entirely clear which corporations he had in mind. But it is fair to say that concern about concentrations of power and wealth, whatever their source, were of some concern to the Framers given what we know from a variety of sources.

112. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

113. *Citizens United*, 130 S. Ct. at 945 (Stevens, J., dissenting).

114. *Id.*

making references to a “disfavored” speaker, the Court invokes the popular philosophical, political, and moral commitment to the equality of human beings under the law, particularly with respect to fundamental rights. The personhood language exploits our impulse to reject as discriminatory distinctions between *human* persons and extends it to distinctions between human beings and corporations or between different types of corporations. But we do not have a longstanding philosophical, political or moral commitment to the equal treatment of fictional persons,<sup>115</sup> as such, without regard to their constituent parts, at least not until recently.

Metaphors are important. They may have powerful psychological impacts.<sup>116</sup> This insight drives much of politics, advertising, and public relations—all of which seek to persuade. Law too is a profession that seeks to persuade (even if it is also the case that learning to divorce words from their ordinary meaning sometimes seems like it is an integral part of legal education).<sup>117</sup> And if we are to judge from opinions like *Citizens United*, replete as they are with concern about discrimination against “disfavored” speakers, then it would seem that lawyers and judges alike are not immune to the rhetorical appeal of casting the corporation in the role of a person like any other, protestations to the contrary elsewhere notwithstanding. Certainly we know that the idea that corporations are people has galvanized the public more than any other aspect of the *Citizens United* decision,<sup>118</sup> so much so that it seems like those activists who are interested in reform should not be quick to dismiss focusing on it.

It is surely no accident that the personhood or non-personhood of a fetus has also been the locus of debate in the context of abortion and that those who oppose abortion are the ones who have latched onto the practice of describing the fetus as a “person” or that several states have passed or attempted to pass

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115. “[A]s a matter of fact, the term ‘fiction,’ as applied to a corporate person, was meant to carry over the notion of a legal fiction, which in Roman law as in English was *the deliberate assumption of the thing which was not, a definite and quite unconcealed make-believe*.” Max Radin, *supra* note 20, at 643–44 (emphasis added).

116. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980) (describing metaphors as powerful modes of structuring thought in a manner that is largely invisible to us).

117. Cohen, *supra* note 96, at 811 (characterizing lawyers as “trained by long practice in believing what is impossible”).

118. Greenhouse, *supra* note 1.

so-called “personhood amendments” which would severely limit access to abortion on the grounds that a fertilized egg is a legal person.<sup>119</sup> Calling upon the legal fiction of personhood seems a deliberate part of the litigating strategy by those like James Bopp<sup>120</sup> who push for expansive rights for corporations and restrictions on abortion.

It is also probably no accident that courts deciding cases on behalf of the powerful often cast their actions as a decision to benefit the less powerful. When the *Lochner* Court set aside the New York law regulating bakers’ working hours it did not do so by focusing on *the employer’s liberty* to set the working hours for its employees, but on *the baker’s* supposed liberty to accept them.

There is no contention that bakers as a class are not the equal in intelligence and capacity to men in other trades or manual occupations, or that they are able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.<sup>121</sup>

Framing the ruling as upholding worker dignity undoubtedly had more appeal for the public than one emphasizing the employer’s right to demand long hours from its employees.

Indeed, we might judge the personhood metaphor’s power by the sheer weight of the protestations that it has no role to play in this new First Amendment jurisprudence. Whether it takes the form of soothing reassurances<sup>122</sup> or sneering mockery,<sup>123</sup> the cumulative effect of these objections is of protesting too much.

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119. Michelle Dean, *Abortion is Not a Tragedy: An Interview with Katha Pollitt*, GAWKER (Oct. 15, 2014, 1:20 PM), <http://review.gawker.com/abortion-is-not-a-tragedy-an-interview-with-katha-poll-1646628315> (discussing KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS (2015)). See also Bryan A. Garner, *The Power of Naming*, 101 A.B.A. J. 24 (2015).

120. See Viveca Novak, *Citizen Bopp*, THE AMERICAN PROSPECT (Jan. 2, 2012), <http://prospect.org/article/citizen-bopp> (describing James Bopp, Jr.’s work for *Citizens United* and other clients pushing for expansive First Amendment rights as well as restrictions on abortion).

121. *Lochner v. New York*, 198 U.S. 45, 57 (1905). Whether New York’s law was inspired by a desire to keep recent immigrants willing to work long hours out of bakeries or to improve working conditions is apparently a matter of some dispute. But what we know of the working conditions at the time, a period which included the notorious Triangle Shirtwaist Company fire and from which the term “sweat shop” originates, doesn’t offer much reassurance about the working conditions which the Court frames as freely chosen.

122. Posner, *supra* note 6.

123. Bainbridge, *supra* note 6.

All this rhetorical legerdemain has extremely serious consequences. This new corporate antidiscrimination approach threatens the government's regulatory powers generally. "[T]he debate can be over once the labels are assigned."<sup>124</sup> If all regulation that treats marketing or business related speech differently than political speech is "discriminatory" and subjecting a business organization to different rules than a non-business organization is likewise discriminatory, then a good deal of the existing regulatory regime is unconstitutional.<sup>125</sup> This upsets much of the power of the government to regulate in the public interest. This claim is not mere speculation. Cases making just such arguments are bubbling up in the lower courts.<sup>126</sup>

Ronald Reagan is often credited with launching a broadly deregulatory agenda in his presidency, what became known as the "Reagan Revolution." It heralded a sea change in the regulatory environment. Although there may not have been an absolute diminution of the *number* of regulations, there was a significant change in the approach from the Executive Branch. This period is generally credited with initiating a move toward deregulation. This movement was controversial in part because administrative agencies are not directly responsive to the electorate. And the operation of regulatory agencies is, by and large, not the sort of thing which makes for gripping political narrative. There are a thousand ways in which an executive, bent on undermining the purpose of a law, can uphold its letter while gutting the spirit. This is particularly true if that executive has the help of some members of Congress and lobbyists.<sup>127</sup>

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124. Garner, *supra* note 119, at 24.

125. This development is not one limited to the United States. Columbia political science professor Turkuler Isiksel writes:

The arrogation of human rights discourse by transnational business corporations is significant not simply because it recalibrates their status under international law, particularly in relation to states. *It also has the potential to destabilize the moral and political force of human rights by diverting their focus from the protection of urgent human interests towards protecting the commercial interests of large firms. Although it is tempting to dismiss as preposterous the attribution of human rights to corporations*, the settled practice of recognizing corporations as legal persons and bearers of rights in many domestic legal systems suggests that the issue is more complex.

Isiksel, *supra* note 60, at 9–10 (emphasis added).

126. See *supra* notes 25–31 and accompanying text.

127. See, e.g., Haley Sweetland Edwards, *He Who Makes the Rules*, WASH. MONTHLY (Mar./Apr. 2013), [http://www.washingtonmonthly.com/magazine/march\\_april\\_2013/features/he\\_who\\_makes\\_the\\_rules043315.php?page=all](http://www.washingtonmonthly.com/magazine/march_april_2013/features/he_who_makes_the_rules043315.php?page=all).

But if we are concerned about accountability, the Court is the least accountable branch.<sup>128</sup> We might call the Roberts Court's corporate civil rights jurisprudence the "Roberts Revolution." Not since *Lochner*,<sup>129</sup> when the Court used freedom of contract to strike down regulation, has there been such a sweeping challenge to the other branches of government. It remains to be seen whether, in the long run, like *Lochner*, the Court will end by reversing its course. In the meantime, before that happens, *if* it happens, a lot of damage may be done. It may be done incrementally, case by case, but it may be damage nonetheless, not only in cases lost, but in regulatory efforts not undertaken or not enforced for fear of running afoul of the First Amendment.<sup>130</sup> A lot can happen in a decade or so.<sup>131</sup>

### CONCLUSION

Corporate personhood is a legal fiction. It, like the corporation itself, is a useful tool. But we should not lose sight of the fact that it is merely a tool. "Law exists for [human beings] to express their relations and subserve their needs. One of these needs is to [speak] of collectivities as though they too were persons. *But an equal need is not to forget that they are not.*"<sup>132</sup>

The most successful business entities have a powerful impact on the political process. They exert powerful influence over society as well. The largest organizations are multinational and

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128. Yale law professor Alexander Bickel famously designated the Court as the "least dangerous branch." ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). The events of the last few years might call that into question.

129. *Lochner v. New York*, 198 U.S. 45 (1905).

130. See Richard J. Bonnie, *The Impending Collision Between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control*, 29 J.L. & POL. 599, 601 n.7 & 8 (2012) (describing the pessimism of some tobacco control advocates that tobacco regulations would survive constitutional scrutiny).

131. Consider the tobacco companies' success in postponing widespread awareness of the health consequences of smoking cost hundreds of thousands, if not millions, of lives. A number of books have been written detailing the industry's effort to avoid regulation, create doubt about health risks, etc. See, e.g., ALLAN M. BRANDT, *THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA* (2007) (cigarettes were one of the century's most heavily promoted products); RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* (1996) (same); ROBERT PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* (2011) (tobacco related deaths are still close to the equivalent of two jumbo jets crashing every day).

132. Radin, *supra* note 20, at 665 (emphasis added).

exert pressure on social policy on a global scale, helping to write treaties and other international accords, creating and administering legal and quasi-legal systems of adjudication for their interests and disputes, influencing legislation world-wide in a search for a set of rules most congenial to the conduct of their businesses.

In such an environment it does not seem alarmist to suggest that in order for governments to be able to maintain control over business such that its negative externalities can be minimized and that social policy can take account of what is in the best interest of *all* its citizens, not merely what is most congenial for business, the government must be able to rein in private power through appropriate regulation. Undermining the government's power to regulate in this way is a troubling development.<sup>133</sup> It may allow "the authoritarian incorporation of property—to declare its independence from the state under the flag of the private and gradually hijack the state that had sponsored and protected it."<sup>134</sup>

The twenty-first century is still young, but, fifteen years in, it appears we are experiencing a reprise of the struggles of the beginning of the last century and the end of the nineteenth. That is, we seem to be experiencing a new Gilded Age.<sup>135</sup> No doubt there are real differences between then and now, but the similarities are nevertheless striking. Then, as now, many people were concerned that industry exerted too much influence over government and society as a whole;<sup>136</sup> then, as now, income and

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133. Economist Thomas Piketty has argued that wealth inequality is growing and is a predictable outgrowth of unregulated capitalism. His cure involves greater governmental intervention, primarily in the form of taxes. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2013). The emergent equal protection for corporations and commercial speech arguments represent a substantial impediment to the likelihood of adopting such a remedy.

134. Ciepley, *supra* note 103, at 50.

135. "It has become a commonplace to say that we are living in a second Gilded Age . . ." Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS, May 8, 2014, <http://www.nybooks.com/articles/archives/2014/may/08/thomas-piketty-new-gilded-age/> (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2013)).

136. Howard Fineman, *A New Gilded Age Threatens the State of Our Union*, HUFFINGTON POST (Jan. 23, 2014, 9:38 AM), [http://www.huffingtonpost.com/2014/01/23/gilded-age-state-of-the-union\\_n\\_4647348.html](http://www.huffingtonpost.com/2014/01/23/gilded-age-state-of-the-union_n_4647348.html) (comparing the Koch brothers to railroad magnates of the nineteenth century). See also Susan B. Glasser, *The New Gilded Age*, POLITICO (July/Aug. 2014), [http://www.politico.com/magazine/story/2014/06/editors-note-108020\\_full.html](http://www.politico.com/magazine/story/2014/06/editors-note-108020_full.html). ("[T]here's no doubt that the troubling nexus of money and power is a lot of what this year's elections are about at a time of spiraling inequality, massive, unaccountable political spending and a Washington

390      *CONSTITUTIONAL COMMENTARY* [Vol. 30:361

wealth inequality contributed to political unrest and instability.<sup>137</sup> Then the country was struggling to reconcile industrialization with American democracy. Today it may be that the struggle is to reconcile capitalism (at least in its contemporary American form) with American democracy.<sup>138</sup>

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that increasingly seems dysfunctional by design.”); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L & POL’Y REV. 1 (2008).

137. Fineman, *supra* note 136; Glasser, *supra* note 136. See also LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008).

138. The enormous success of Thomas Piketty’s book and the discussions it has generated suggest that this struggle is by no means confined to the United States. See, e.g., Stephanie Flanders, *Capital in the Twenty-First Century by Thomas Piketty – Review*, THE GUARDIAN (July 17, 2014, 2:30 AM), <http://www.theguardian.com/books/2014/jul/17/capital-twenty-first-century-thomas-piketty-review>. But since this Essay deals with U.S. law, the extent to which this may be a global phenomenon will not be addressed.