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# CORPORATE PERSONHOOD: JOURNEY INTO THE UNKNOWN

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# CORPORATE PERSONHOOD: JOURNEY INTO THE UNKNOWN

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## I. INTRODUCTION TO CORPORATE PERSONHOOD

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.[1]

The history of the United States has been fraught with debates, social unrest, and wars to determine what this phrase means and how far we will go to uphold these principles. Over the last 239 years, the United States has grown in its understanding of this creed from only recognizing the divinely-granted equality of land-holding, white men to include people of various races, genders, and socio-economic groups. Recognizing the personhood of a particular group may have been unthinkable to the empowered class years before each grant of equality; however, hindsight indicates that this extension of rights was not only logical but necessary to protect our American principles. In the modern day, the Supreme Court, through recent decisions such as *Citizens United v. FEC*[2] and *Burwell v. Hobby Lobby Stores, Inc.*,[3] has opened the way for a national discourse on whether corporate entities should receive the same rights and privileges as natural persons or if they are merely artificial beings.

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

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

[3] 134 S. Ct. 2751 (2014).

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The purpose of this Note is not to debate the wisdom of the Supreme Court's decisions in either *Citizens United* or *Burwell*, nor does this Note intend to criticize the social policy behind expanding corporate rights. This Note is meant to expound a proposition that the Supreme Court, particularly in its *Burwell* decision, has helped to shape a doctrine that allows corporations to receive the same constitutional and statutory rights as those belonging to natural persons. That proposition, in short, is this: the *Burwell* decision recognized the constitutionality of the Dictionary Act's definition of "person" to include a "corporation" to grant Hobby Lobby a free exercise exception to a federal statute.[4] Following the implication that a corporation is a "person" under constitutionally valid federal statutes, this ruling allows corporations to argue for an expansive doctrine of corporate personhood where corporate entities hold the same rights as individuals under the Constitution. Whether the Supreme Court reins in or expands the *Burwell* decision remains a question for the future, but the present Note will show that the Supreme Court has opened this door and will pose some of its potential implications.

Part II of this Note will explore the historical understanding of corporate entities in American jurisprudence before describing the relationship between closely-held corporations and other business entities as a prelude to the discussion on *Burwell*. Part III will delve into the *Citizens United* and *Burwell* decisions to describe the legal foundation that underpins this Note. Part IV.A will describe the effect full corporate personhood could have on the Constitution, how this differs from prior Supreme Court decisions, and the potential effects of this doctrine. Part IV.B will discuss some further implications of a constitutional corporate personhood doctrine before offering some concluding thoughts in Part V.

## II. THE PAST—A HISTORICAL PERSPECTIVE

Corporations have held a unique role in American jurisprudence. As corporations changed from being created by government charter to the modern system of filing articles of incorporation, the legal view of how to define a corporation has significantly evolved.[5] Business entities are not explicitly mentioned within the Constitution, and this has led to a great deal of confusion on

[4] *Id.* at 2768–69, 2785 (citing Dictionary Act of 1947, Pub. L. No. 388-278, § 1, 61 Stat. 633, 633 (codified at 1 U.S.C. § 1 (2012)).

[5] Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1661.

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the legal status of corporations.[6] Early on in American history, courts realized that business entities must be given some rights, such as the right to sue and be sued and the right to hold property, or else they would be practically inoperable.[7] However, courts have had difficulty crafting a uniform corporate rights doctrine.[8] For example, corporations have the right to be free from government takings and double jeopardy under the Fifth Amendment, but they cannot claim the Fifth Amendment right against self-incrimination.[9]

Over the years, courts have come to rely on a combination of theories to define the legal status of business entities. The original theory, which is still in use today, is that corporations are fictional persons.[10] Under the artificial entity theory, corporations are creations of state power.[11] They only have rights which would effectuate their existence and may be regulated as the legislature sees fit.[12] In one of the first cases dealing directly with corporate rights, the Supreme Court refused to allow New Hampshire to alter Dartmouth College's charter because the state had created a separate entity by contract and was constitutionally prohibited from infringing on that contract.[13] Writing for the majority, Chief Justice Marshall stated that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[14] Thus, the corporate rights of Dartmouth College

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[6] Susanna Kim Ripken, *Corporate First Amendment Rights after* Citizens United*: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 245 (2011).

[7] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 658 (1819).

[8] Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 909 (2011).

[9] *Id.* at 910.

[10] Matthew J. Allman, *Swift Boat Captains of Industry for Truth:* Citizens United *and the Illogic of the Natural Person Theory of Corporate Personhood*, 38 FLA. ST. U. L. REV. 387, 390 (2011); Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 PENN ST. L. REV. 1, 5–6 (2013).

[11] Allman, *supra* note 10, at 390–91.

[12] *Woodward*, 17 U.S. at 636.

[13] *Id.* at 625–26, 638.

[14] *Id.* at 636.

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as a fictional entity were limited to those agreed-upon rights conferred by the state.[15]

This doctrine made sense at a time when businesspersons had to beseech the government for a charter to define the entity's responsibilities, but this restriction is more unwieldy now that any entity following state procedural rules can be incorporated. The evolution of corporate personhood theories has, in some ways, mirrored the evolution of the corporate form.[16] Now that business entities are created pursuant to state general incorporation statutes rather than by royal charter, the judicial view of corporations is no longer anchored solely by the artificial entity theory.[17]

As large corporations became more popular in the latter nineteenth century, courts started to adopt the aggregate theory of corporations.[18] This theory treats corporations as an extension of those making up the corporate entity.[19] As a result, corporations are to be protected under the Constitution to protect the rights of its members. Chief Justice Marshall also expounded this view in ruling that a corporation whose members were all from Pennsylvania had diversity jurisdiction in a suit against a Georgia defendant.[20] Marshall noted that the corporation was a legal fiction but also wrote that "this invisible, incorporeal creature of the law may be considered as having corporeal qualities."[21] The Court granted diversity jurisdiction because the corporation was merely a representative of its constituent members, and since each individual could sue, it would be unfair to prevent the aggregate of individuals from suing through the corporation.[22]

Finally, courts have relied on a theory of corporate personhood that views corporations as entities that exist as a separate "person" from any of its constituent parts.[23] This real entity theory extends the rights of corporations much further than

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[15] *Id.*

[16] Ripken, *supra* note 6, at 218–21.

[17] Pollman, *supra* note 5, at 1661.

[18] Miller, *supra* note 8, at 928.

[19] *Id.* at 928–29.

[20] Bank of the United States v. Deveaux, 9 U.S. 61, 74 (1809).

[21] *Id.* at 89.

[22] *Id.* at 91.

[23] Reuven S. Avi-Yonah, Citizens United *and the Corporate Form*, 2010 WIS. L. REV. 999, 1007.

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the other two.[24] In dissent from the Court's ruling that a corporation is presumed to authorize its decisions even without written evidence, Chief Justice Marshall wrote that a corporation was "distinct from the individuals who compose it."[25] While still believing the corporation to be an aggregate of its members and a creation of the state, Marshall would have held that the corporation, in the context of corporate actions, should have been treated as a separate entity from its membership.[26] Even though the aggregate and real entity theories did not gain widespread judicial approval until the late nineteenth century, it is apparent from these opinions, all written by Chief Justice Marshall, that jurists have been wavering between these theories for a long time. The failure of future courts to clarify how these theories interact has created substantial judicial confusion.

The watershed moment for corporate constitutional rights came in 1886 with the Supreme Court's decision in *Santa Clara County v. Southern Pacific Railroad Company*.[27] Up until this point, the Supreme Court had been restrained in granting corporations any rights.[28] The Court had followed the theories of corporations most in line with chartered entities, namely that corporations were extensions of either state power or the individuals making up the entity.[29] The *Santa Clara* case arose based on county taxes placed on railroads that were involved in building the transcontinental railroad.[30] The railroads challenged these taxes under the Fourteenth Amendment because the taxes treated multi-county railroads differently than natural persons and single-county railroads.[31] The Court ultimately found for the railroads on the grounds that the tax was improperly assessed rather than on a constitutional basis.[32]

The importance of this case comes from dicta that Chief Justice Waite's clerk added to the opinion's heading. It stated simply:

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[24] *Id.* at 1005.

[25] Bank of the United States v. Dandridge, 25 U.S. 64, 91–92 (1827) (Marshall, C.J., dissenting).

[26] *Id.*

[27] 118 U.S. 394, 396 (1886).

[28] Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 737–38 (2011); Ripken, *supra* note 6, at 222.

[29] Ripken, *supra* note 6, at 218–21.

[30] *Santa Clara*, 118 U.S. at 402–08.

[31] *Id.* at 409.

[32] *Id.* at 411–12, 416.

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> 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 these corporations. We are all of opinion that it does.[33]

This comment stemmed from testimony before the Court from Roscoe Conkling, a former congressman and member of the Joint Congressional Committee that drafted the Fourteenth Amendment.[34] Conkling explained to the Court that the drafters had intended the word "person" to include corporations.[35]

This legislative history has been severely scrutinized.[36] This reading of the Fourteenth Amendment is unexpected considering the Constitution never uses the word "corporation" and is a *non sequitur* from the purpose of the Reconstruction Amendments to end the racial structures that supported slavery.[37] The journal that Conkling used as evidence of the legislative intent was never printed by Congress; it resides only as a memorandum and has been called a "'brazen forgery.'"[38] In addition, this point was never challenged before the Court and was not incorporated into a Supreme Court opinion until it was accepted two years later without further ado.[39] Despite its questionable origins, the Court's acceptance of corporate

[33] *Id.* at 396.

[34] *Roscoe Conkling*, U.S. HIST., http://www.u-s-history.com/pages/h706.html (last visited Mar. 10, 2015).

[35] U.S. CONST. amend. XIV, § 1; Stephen Bainbridge, Citizens United v. FEC*: The First Amendment Rights of Corporate "Persons,"* PROFESSORBAINBRIDGE.COM (Jan. 21, 2010, 8:35 AM), http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-the-first-amendment-rights-of-corporate-persons.html.

[36] This may have led Justice Sotomayor to suggest "that perhaps the Court had made an 'error to start with, not [in] Austin or McConnell'; but rather, when 'the Court imbued a creature of State law,' the corporation, 'with human characteristics.'" Miller, *supra* note 8, at 897 (citing Transcript of Oral Argument at 33, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205)). *See also* Saru M. Matambanadzo, *The Body, Incorporated*, 87 TUL. L. REV. 457, 482 (2013) (noting that "constitutional entitlements for corporations, 'was nowhere to be found in American legal thought' before the case was decided" (citation omitted)).

[37] Ripken, *supra* note 6, at 222–23 (2011); Edward T. Lee, *Should Not the Fourteenth Amendment be Amended?*, NEW CHAUTAUQUA (Nov. 20, 1936), *available at* http://www.nancho.net/corperson/14amend.html (last visited Mar. 9, 2015).

[38] Lee, *supra* note 37; Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CENTER FOR JUSTICE (Apr. 7, 2014), http://www.brennancenter.org/blog/hobby-lobby-argument.

[39] Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 189 (1888); Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

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constitutional rights has been extensive, even if doctrinally muddled and used in an "inconsistent way."[40]

Further complicating the doctrine of corporate rights, courts have had to contend with how to treat a given corporation due to increasingly complex regulatory and bureaucratic institutions. Unlike the classic publicly-held corporation that trades shares on large-scale stock exchanges, closely-held corporations are more restricted in how they operate.[41] Closely-held corporations are defined by having a "small number of stockholders; . . . no ready market for the corporate stock; and . . . substantial majority stockholder participation in the management, direction and operations of the corporation."[42]

Closely-held status has been recognized to address the unique situation that occurs in tight-knit corporations where individuals within the corporation have problems with the leadership of the business but no way out of the situation.[43] Because of the corporate structure, the minority member generally has no recourse when problems develop with the majority party, and, because of the lack of a free market for the shares, the minority member lacks the way out of selling his or her interest in the business.[44] It has fallen on the courts and further legislation to correct this problematic scenario by imposing additional duties on the majority party or forcing the sale of the minority party's shares for a fair price.[45] Due to this combination of corporate structure and enhanced fiduciary duties, closely-held corporations bear many similarities to publicly-held corporations and partnerships and can, in some cases, be quite large entities.[46] Closely-held corporations still

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[40] Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 504–05 (2010).

[41] Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975).

[42] *Id.* at 511.

[43] *Id.* at 513.

[44] *Id.* at 513–15.

[45] *Id.* at 520–21.

[46] *Id.* at 512 ("As thus defined, the close corporation bears striking resemblance to a partnership . . . [and] is often little more than an 'incorporated' or 'chartered' partnership." (citation omitted)); *see* Galler v. Galler, 203 N.E.2d 577, 584 (Ill. 1964) ("[C]ourts have . . . relaxed their attitudes concerning statutory compliance when dealing with close corporate behavior, permitting 'slight deviations' from corporate 'norms' in order to give legal efficacy to common business practice."); *see also* Berreman v. W. Publ'g Co., 615 N.W.2d 362, 366 (Minn. Ct. App. 2000) (determining the corporation to be closely-held where it had over two hundred employees and a $300 million acquisition fund).

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retain the fundamental benefits of incorporation, such as perpetual life, limited liability, and the protection of the business judgment rule.[47]

## III. THE PRESENT—CORPORATE PERSONHOOD IN *CITIZENS UNITED* AND *BURWELL*

American courts have always been aware of the need to give corporations certain personal rights, such as the ability to sue and own property, but the Supreme Court has generally been reluctant to extend corporate rights to the full extent that a natural person would receive.[48] To understand the recent push the Supreme Court made towards full corporate personhood, we must first look to its decision in *Citizens United v. FEC*.[49]

Citizens United, a multimillion dollar non-profit corporation, filed a declaratory action to allow it to advertise and show its election documentary, funded in part by for-profit corporations, about Hillary Clinton on a video-on-demand service.[50] Then-current law, the Bipartisan Campaign Reform Act of 2002, prohibited corporations and unions from using their funds to contribute directly or indirectly to a candidate running for office in a federal election.[51] This ban extended to "electioneering communications" that were "publicly distributed" in the thirty-day period preceding a primary election or the sixty-day period preceding a general election.[52] However, the law *did* permit corporations to make an independent fund, called a political action committee or PAC, to participate in "express advocacy or electioneering communications."[53] Citizens United claimed that the Bipartisan Campaign Reform Act of 2002 impermissibly infringed on its First Amendment free speech right to show its documentary in the days leading up to the 2008 federal primary.[54]

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[47] Cramer v. Gen. Tel. & Elecs. Corp., 582 F.2d 259, 274 (3d Cir. 1978); Pollman, *supra* note 5, at 1661.

[48] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

[49] 558 U.S. 310 (2010).

[50] *Id.* at 319–21.

[51] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (codified as amended at 2 U.S.C. § 441b(b)(2) (2012)); *Citizens United*, 558 U.S. at 319–21.

[52] *Citizens United*, 558 U.S. at 321.

[53] *Id.*

[54] *Id.*

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The majority opinion ruled out all non-constitutional grounds for adjudicating the case. Citizens United's documentary fell within the statutory language and was not encompassed by any of the law's exceptions.[55] PACs are considered a "burdensome alternative" since they are expensive and extensively regulated.[56] Additionally, PACs, as independent bodies, could not rectify the "outright ban" on direct corporate speech.[57] The Court then identified competing lines of precedent, one that emphasized the need for open and free communications in elections and another that focused on the justifiable government interest in mitigating political corruption and preventing the distortion of the public's views.[58] A similar restriction on individual campaign contributions had been struck down in *Buckley v. Valeo*.[59] However, the more recent case of *Austin v. Michigan Chamber of Commerce* held that the government's anti-distortion interest in preventing corporations from funding political groups that do not reflect the beliefs of individuals involved or invested in the corporation was sufficient to outweigh the loss of corporate speech.[60]

The Court ultimately struck down the provisions preventing corporations from using corporate funds to indirectly support candidates leading up to federal elections.[61] The government's anti-distortion rationale from *Austin* was held to be unpersuasive since it disregarded the interest in the First Amendment's protection of corporate speech and since corporations were still capable of influencing politics through lobbying efforts, which were not banned.[62] The anti-corruption interest was dismissed on the grounds that the law contained certain exceptions, such as an exemption for media corporations, which made little sense in a law meant to prevent the corrupting influence of wealthy corporations on elections.[63] Considering the lack of strong evidence supporting either of these interests, the

[55] *Id.* at 322–29.

[56] *Id.* at 337–38.

[57] *Id.*

[58] *Id.* at 345–48.

[59] *Id.* at 345–46 (discussing Buckley v. Valeo, 424 U.S. 1 (1976)).

[60] *Id.* at 348 (discussing Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310).

[61] *Id.* at 365.

[62] *Id.* at 349, 355–56.

[63] *Id.* at 352–53.

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total ban on speech the law created was found to be unwarranted.[64] The Court concluded by upholding a disclaimer and disclosure requirement that obligated Citizens United to identify itself as the creator of its documentary and advertisements as a "less restrictive alternative" to a complete ban on speech.[65]

*Citizens United* did not establish that corporations have rights equal to that of living, breathing people; however, Justice Kennedy's opinion at times recognized and at other times disregarded the distinctions between corporations and human beings.[66] First, Kennedy agreed that corporations should not necessarily be treated differently because they were not "natural persons."[67] He then noted that the First Amendment prevented Congress from infringing on the speech rights of "citizens" or "associations of citizens," which would follow closely from the distinctions developed by the aggregate theory of corporations.[68]

Nonetheless, these caveats were undercut as the Court continued to frame the First Amendment issue as not being about the speaker's identity.[69] The Court quickly dismissed the argument that corporations should be analyzed differently due to their state-granted advantages since those would not justify a total speech ban, which infringed on First Amendment values.[70] Early in the Court's analysis, Justice Kennedy noted that the restriction on electioneering communications would have been unconstitutional as applied to an individual with the implication that this should apply equally to corporations.[71] The point was that corporations should not be treated differently simply because they are not natural persons. However, this does not logically imply that corporations must be treated exactly the same as natural persons, as Justice Kennedy suggests.

Justice Stevens' dissent points out many of the Court's problems in framing and deciding the issue. Along with challenging the Court on nearly every one of its

[64] *Id.* at 356–61.

[65] *Id.* at 366–69.

[66] *See id.* at 343, 351.

[67] *Id.* at 343 (citation omitted).

[68] *Id.* at 349.

[69] *Id.* at 347, 350.

[70] *Id.* at 351.

[71] *Id.* at 339.

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conclusions, Stevens' dissent goes to the matter of corporate personhood directly.[72] Stevens' argument on the First Amendment issue is that not only are certain categorical restrictions on speech permissible but that "the distinction between corporate and human speakers is significant."[73] Corporations do not share the same interests as citizens because they neither vote nor run for office.[74] Additionally, corporations can be controlled by anyone in the world, thus creating worries over who is being represented, whether it be American citizens or foreign nationals.[75] To Stevens and the other dissenters, these differences are crucial to how the Court should look at corporate rights even where the text of the Constitution omits what class receives a given right.[76] As Stevens remarked, there are genuine differences between individuals and corporations that the Court refused to take into account that can justify separate treatment.[77]

Perhaps the stray utterances dismissing or ignoring the differences between individuals and corporations in the Court's majority opinion merely reflect the language of the Free Speech Clause, which prohibits Congress from controlling speech as opposed to affirmatively granting the freedom of speech to a particular group.[78] Still, the erosion of the line between corporation and person became far more pronounced in the recent *Burwell* decision.

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court crafted an exception to the Patient Protection and Affordable Care Act to allow for-profit corporations to opt-out of paying for contraceptive services if such drugs disturbed the owners' sincerely-held religious beliefs.[79] The owners of various closely-held corporations, Hobby Lobby being the largest, challenged the law's mandate to provide insurance, including contraceptive services, or else pay a fine as violating

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[72] *Id.* at 414–15 (Stevens, J., concurring in part and dissenting in part).

[73] *Id.* at 394, 420.

[74] *Id.* at 394.

[75] *Id.* at 465–67.

[76] *Id.* at 393–94.

[77] *See id.* at 394.

[78] "*Congress* shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I (emphasis added); *see* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected.").

[79] 134 S. Ct. 2751, 2762–64 (2014); Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended at 42 U.S.C. §§ 300gg to gg-95 (2012)).

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the Religious Freedom Restoration Act of 1993 ("RFRA") and the First Amendment's Free Exercise Clause.[80] The RFRA prevents the "'[g]overnment [from] substantially burden[ing] a *person's* exercise of religion[']  . . . unless the Government 'demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"[81] The Supreme Court took up the matter after a circuit split developed—the Third Circuit deciding that for-profit corporations were not capable of exercising religious rights, and the Tenth Circuit granting an injunction because of the corporation's status as a "'person[]' within the meaning of the RFRA."[82]

On the primary substantive question, the Court held that the government's interest in a uniform application of the healthcare law that provides contraceptive medicines to female employees was insufficient to permit the "substantial burden" on the corporation's sincerely-held religious beliefs of a $2,000 fine for each employee.[83] Ultimately, the government lost on the least restrictive means portion of the RFRA because having the government foot the bill or bringing for-profit corporations into an exemption for non-profit corporations to certify out of the insurance payments were considered less restrictive methods of providing contraceptive services to female employees.[84] The Court refused to address the First Amendment claim because the RFRA ruling fully decided the case.[85]

Before reaching the crux of the case, the Court had to decide whether the corporations had standing to sue under the RFRA and the First Amendment. The Department of Health and Human Services, representing the government, had argued that the corporations could not sue under the RFRA because the owners were regulated as for-profit corporate entities, not as individuals protected by the Act.[86] The Court, acknowledging the legal limitations on corporate rights, opened its discussion with a concise overview of this topic: it referred to the status of

[80] U.S. CONST. amend. I; RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012)); *Burwell*, 134 S. Ct. at 2764–66.

[81] *Burwell*, 134 S. Ct. at 2767 (quoting RFRA § 3).

[82] *Id.* at 2764–66 (citation omitted).

[83] *Id.* at 2775.

[84] *Id.* at 2780–82.

[85] *Id.* at 2785.

[86] *Id.* at 2767.

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corporations as being a "legal fiction" to protect the individuals making up the corporation.[87] The Court went on to remind readers that the reason rights are extended to corporations is to protect the persons making up the corporation, "including shareholders, officers, and employees."[88]

While the thought was proper and well-intentioned, the Court, as the opinion continued, started to lose its appreciation for the difference between corporations as people and corporations defined as people to protect the individuals comprising the entity. The RFRA protects the religious exercise of a "person."[89] Because the Dictionary Act defines a corporation as being a "person" for purposes of statutory interpretation, the Court believed that it was Congress's intention to include corporate entities within the protections of the RFRA.[90] Due to the exception for non-profit corporations, the Court refused to entertain the idea that a "person" within the statutory language could include one type of corporation while excluding another.[91] Finally, the majority reasoned that extending free exercise rights to corporations would serve to protect the constitutional rights of individuals within the corporations.[92]

It is in this last link that the Court makes its imprudent statement. The ultimate holding of *Burwell* on the rights of closely-held corporations is that the owners, and only those owners who have control over the corporation, will be able to exercise these rights.[93] Throughout this portion of the opinion, the majority seems to forget that there are important differences between corporations and individuals the law has recognized to prevent the legal fiction from becoming a legal reality.[94] In part, the Court justified its reasoning because it had extended free

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[87] *Id.* at 2768.

[88] *Id.*

[89] RFRA, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to bb-4 (2012)); *Burwell*, 134 S. Ct. at 2768.

[90] *Burwell*, 134 S. Ct. at 2768.

[91] *Id.* at 2769.

[92] *Id.*

[93] *Id.* at 2771.

[94] *See, e.g.*, Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. 497, 558 (1844) ("[A] corporation . . . is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person.").

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exercise rights to individuals in similar circumstances.[95] Though corporate rights are meant to provide some safeguards for the individuals within corporations, the Court dismissed the argument that its decision would harm the interests of the corporation's non-controlling members.[96] It reasoned that, despite the potential presence of divergence among religious beliefs in a corporation, state corporate laws would decide which belief system would be recognized.[97] This not only means that the religious beliefs of the individuals and some controlling members of a corporation can be subsumed by the corporate entity—an ironic result considering the owners were challenging the oppression of *their* religious beliefs—but it separates the individuals from the corporation's constitutional rights in a way that is exceptional from the artificial entity or aggregate theoretical perspectives developed by earlier precedent.[98]

## IV. THE FUTURE?

### *A. Constitutional Ramifications*

The United States Constitution is the fundamental groundwork for our legal system and grants protections to those falling under its authority. It maintains a careful balance between the interests of the government and the people of the United States. While this balance has changed over time, the basic principles of delineated government powers and vested rights retained by the people have remained steady. Nowhere does the Constitution define what a "person" is, but throughout the text, it designates automatic privileges and rights for these "people." The Constitution places a singular emphasis on personhood, opening the preamble with: "We the people of the United States."[99] With the Supreme Court's implication in *Burwell* that the Constitution permits full corporate personhood, the Court has expanded the legal understanding of corporations and the rights they possess.[100] It will be illustrated here that certain constitutional sections present peculiar repercussions for corporations.

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[95] *Burwell*, 134 S. Ct. at 2770 (discussing Braunfeld v. Brown, 366 U.S. 599, 608–09 (1961) (extending free exercise rights to an individual in his capacity as owner of a sole proprietorship)). *Contra id.* at 2797 (Ginsburg, J., dissenting).

[96] *See id.* at 2774 (majority opinion).

[97] *Id.* at 2774–75.

[98] *Id.* at 2790 (Ginsburg, J., dissenting).

[99] U.S. CONST. pmbl.

[100] *Burwell*, 134 S. Ct. at 2768–69.

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Corporations should now be able to enjoy the full protections of the Fifth Amendment to the Constitution. Although the Fifth Amendment protects corporations from double jeopardy, government appropriation of public land, and by ensuring due process, corporations have not been protected by the Self-Incrimination Clause.[101] Previously, businesses brought before a grand jury were required to produce documents and other subpoenaed information regardless of its incriminating nature.[102] The Court justified this intrusion into the rights of corporations by holding that the right against self-incrimination is "purely personal" and that the personal right is lost in the business entity as belonging to a group.[103] Recognizing the corporation as a separate person under the real entity theory, this distinction quickly falls away because the corporation would be able to exercise its "personal" rights as a legal person. The precedent in this area relies on corporate jurisprudence that is undermined by the real entity theory.[104]

The unique corporate role in elections was only touched on by the *Citizens United* ruling. Corporations now have the right to engage in electioneering and political discourse through indirect, unlimited campaign contributions.[105] This is only a piece of what corporations may one day attain since the Constitution extends voting and representation to "the people."[106]

The Senate and House of Representatives are elected "by the people of the several States."[107] However, voting rights are not automatically granted to every person within the borders of the United States.[108] Voting rights are reserved to citizens of the United States over the age of eighteen,[109] and multiple amendments are devoted towards preventing discriminatory voting practices.[110] If corporations are in fact "people" in a constitutional sense, then the corporation could be a voting

[101] Miller, *supra* note 8, at 910.

[102] United States v. White, 322 U.S. 694, 699 (1944).

[103] *Id.*; *see also* Hale v. Henkel, 201 U.S. 43, 69–70 (1906).

[104] *See White*, 322 U.S. at 699; *Hale*, 201 U.S. at 69–70.

[105] Citizens United v. FEC, 558 U.S. 310, 365 (2010).

[106] U.S. CONST. pmbl.

[107] *Id.* art. I, § 2; *see id.* amend. XVII.

[108] *See, e.g.*, Caron v. United States, 524 U.S. 308, 316 (1998); Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

[109] U.S. CONST. amend. XXVI.

[110] *See, e.g.*, *id.* amend. XV, § 1; *id.* amends. XIX, XXIV.

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body because the Fourteenth Amendment provides that "[a]ll persons born or naturalized in the United States . . . are citizens."[111] All the corporation needs is to be in business for more than eighteen years and register to vote.

Corporate rights have been extended significantly since corporations were found not to be "citizens," and the distinctions the courts used to draw between the different corporate personhood theories have not been handled with care.[112] This extension of the Fourteenth Amendment may rely heavily on the judicial construction given to the text. A strict construction of the clause could hold that corporations are neither "born" nor "naturalized" as they are incorporated. However, this relies on defining "born" in a biological sense, and a court may be persuaded that "born" is meant to have a broader definition that includes being "brought into existence."[113] Other judges may want to probe the history of the amendment and case law to determine whether a corporation can be a full citizen. The main difficulty that judges may find with precedent on this issue is that many prior decisions relied on the fact that corporations are not natural persons and some courts limited corporate rights to jurisdictional issues.[114]

Judges may also make their decisions based on the purposes behind granting voting rights. Voting is a fundamental aspect of any democracy. In one respect, voting is a way to give the public a voice, and the United States has generally been in favor of expanding voting rights.[115] On the other hand, extending voting rights to corporations could not have been contemplated by prior generations and could create serious conflicts with other constitutional amendments. If corporations are given the right to vote, then this would, in effect, give the controlling members of the corporation an additional vote, or part thereof, even though corporations are to be treated as a separate entity.[116] This would also have the effect of giving members of a corporation pseudo-voting rights even where the individual members cannot

[111] *Id.* amend. XIV, § 1.

[112] Petrin, *supra* note 10, at 17.

[113] *Born*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/born (last visited Mar. 9, 2015).

[114] *See, e.g.*, Paul v. Virginia, 75 U.S. 168, 177 (1868) ("The term citizens as there used applies only to natural persons . . . not to artificial persons created by the legislature."); *see also* Hemphill v. Orloff, 277 U.S. 537, 548–50 (1928); Hope Ins. Co. v. Boardman, 9 U.S. 57, 59 (1809).

[115] *See* U.S. CONST. amend. XV, § 1; *id.* amend. XIX.

[116] *See generally* Gray v. Sanders, 372 U.S. 368 (1963) (establishing the doctrinal phrase, "one person, one vote").

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vote because they are under eighteen, felons, or otherwise prohibited from voting.[117] While the real entity theory solves this dilemma legally speaking, it does little to settle the problem practically, especially if *Citizens United* is expanded to cover all business entities.

These sections of the Constitution only cover those that outright mention "people" or "persons." In *Citizens United*, the Court upheld Citizens United's right to First Amendment free speech protections since the First Amendment provisions apply regardless of who is speaking.[118] Hypothetically, this could be extended to permit corporations to possess any right granted by the Constitution that is an affirmative prohibition on the government rather than a grant to particular "persons." In effect, corporations would have every benefit and privilege currently allowed by the Constitution since they would possess all the rights granted to "people" under *Burwell* and all the rights that do not rely on who is utilizing the right under *Citizens United*.

### *B. Individual Incorporation and the Limits of Corporate Personhood*

Thus far, this Note has focused on corporations absorbing certain personal rights, but this proposition also would allow individuals or groups of individuals to assume the rights of corporations. In fact, the Court struck down the indirect contribution restriction in *Citizens United* in part because of the unfairness in allowing a media corporation to be protected by the First Amendment even though a regular corporation "with an identical business interest [to a media corporation] but no media outlet . . . would be forbidden to speak" and because such "differential treatment cannot be squared with the First Amendment."[119] It appears equally unfair to allow corporations to profit from "'limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets'" while individuals are restricted from enjoying these benefits, at least in part.[120]

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[117] U.S. CONST. amend. XIV, § 2 (prohibiting laws that disenfranchise voting rights "except for participation in rebellion, or other crime"); *id.* amend. XXVI; *see, e.g.*, 18 U.S.C. § 611 (2012) (prohibiting aliens from voting for certain elected, federal positions); Ed Pilkington, *Felon Voting Laws to Disenfranchise Historic Number of Americans in 2012*, THEGUARDIAN (July 13, 2012, 11:09 AM), http://www.theguardian.com/world/2012/jul/13/felon-voting-laws-disenfranchisement.

[118] Citizens United v. FEC, 558 U.S. 310, 347 (2010).

[119] *Id.* at 352–53.

[120] *Id.* at 351 (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 658–59 (1990)).

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Although corporations are held to certain regulatory and record-keeping requirements by state incorporation laws, a meticulous individual could satisfy these requirements by such acts as maintaining minutes at family meetings and creating articles of incorporation. Would this individual have perpetual life? In the case of a family that would be treated as a corporation, what is there to stop a child from suing his or her parents for "oppression" or demanding dividends from the "company assets"? The courts may find ways to distinguish individuals from corporations in these peculiar situations, but it begs the question that if we are assuming corporations to have similar rights to individuals, then how do we justify granting privileges to one "person" and not the other? This inquiry extends far beyond a legal sense and reaches into our beliefs, such as equality under the law, as an enlightened community. It may seem unreasonable to believe that this issue will truly surface, but history is full of instances when Americans have addressed this question, in one form or another, and the answer has generally favored the class of persons that has been oppressed and denied rights.

The only true "persons" at the founding of the United States were white, property-owning males.[121] It was not so long ago that the people of the United States believed that black individuals were not only treated as three-fifths of a person but were in fact property, devoid of the rights assured to all American citizens.[122] More recent events, namely, the acceptance of universal marriage rights, have shown how traditional views on personhood continue to discriminate against certain portions of our population.[123] There may be compelling and legitimate reasons to deny full and equal rights to corporations as opponents of corporate personhood argue, but in light of American history, this should not be done without considerable debate and soul-searching to find a legitimate justification for unequal treatment between individuals and corporations.

An unrestricted view of the Supreme Court's decisions leaves the door open to certain intriguing possibilities. Even a narrow reading of the *Burwell* decision at the Court's direction, as only modifying statutes to include closely-held corporations as persons, will significantly impact the state of current law.[124] Nearly every statute dealing with individuals or corporations could be affected by granting

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[121] *See* Ellis, *supra* note 28, at 730.

[122] *Id.* at 723–24.

[123] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013).

[124] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014); Allman, *supra* note 10, at 409.

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particular corporations full personhood. However, the distinction between a closely-held corporation and other business entities may be small, if not non-existent in some cases, and the Court specifically refused to address the constitutional issue in *Burwell*.[125] Considering that the RFRA defined the "exercise of religion" as applying "to the maximum extent permitted by . . . the Constitution," defining corporations as "people" under the Constitution is an open question and certainly permissible from a constitutional perspective.[126]

This doctrine may also be restricted to constitutional rights that apply regardless of who is exercising the right as in *Citizens United*, but even this would automatically extend numerous constitutional rights to corporations.[127] If corporate personhood is extended to its fullest plausible extent based on the principles that are inherent from the Supreme Court's language in *Citizens United* and *Burwell*, then all business entities will be treated as people. Once corporations are declared citizens, they must be included in apportioning the House, and they also have the opportunity to run for elected office.[128] This would have a noticeable effect on a state such as Delaware, which is a popular place of incorporation for businesses.[129]

It bears noting that the Supreme Court disfavors overturning its precedent whenever practicable.[130] The implications of full corporate personhood on a constitutional scale would change many of the cases that have been discussed above. The Court has legitimized, and has likely encouraged, corporations to argue for expanding their rights to other constitutional provisions. Arguably, it will take many years and more appearances before the Court to settle this matter. When this occurs, the Court will have to decide whether the weight of our constitutional jurisprudence and history favor extending full personhood, and the rights incumbent therein, to corporations, or whether to return to the historical

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[125] *Burwell*, 134 S. Ct. at 2797 (Ginsburg, J., dissenting) (warning of "untoward effects" of *Burwell* being extended to "corporations of any size" based on "the Court's expansive notion of corporate personhood"); *see also* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 512 (Mass. 1975).

[126] RFRA, Pub. L. No. 103-141, § 5, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-2(4) (2012)); 42 U.S.C. § 2000cc-3(g) (2012).

[127] *See, e.g.*, U.S. CONST. amends. III, VIII, XI.

[128] *Id.* art. 1, § 2; *id.* amend. XIV, § 2.

[129] David Mace Roberts & Rob Pivnik, *Tale of the Corporate Tape: Delaware, Nevada, and Texas*, 52 BAYLOR L. REV. 45, 46 (2000).

[130] Citizens United v. FEC, 558 U.S. 310, 377 (Roberts, C.J., concurring).

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understanding of corporations as artificial persons that are protected only insofar as the individuals constituting the corporation need to be protected.

## V. CONCLUSION

The doctrine of corporations as people is not the law of the land. The Supreme Court has been careful to avoid making such a monumental statement. The fact of the matter remains that courts, especially the Supreme Court, have failed to scrutinize why corporations should or should not be granted certain constitutional rights. They vacillate between theories of the corporation without creating a uniform doctrinal method to classify corporate rights. The Supreme Court, through *Citizens United* and *Burwell*, has left gaps in our legal understanding of corporate rights. Future courts will look to the language of these decisions for guidance and could come out in favor of granting additional corporate rights. Even if courts refuse to take this step, the Supreme Court needs to justify its decisions that challenge reliance on the artificial entity and aggregate theories of corporations and must form a comprehensive corporate rights jurisprudence. Too much precedent relies on these theories for courts to ignore the impact of glossing over the justifications underlying corporate rights.

States may wish to forbid business entities from being treated as natural persons capable of having certain rights, but this denial of a personal right would open itself up to equal protection challenges, namely, that corporations are being treated inequitably compared to other citizens of the United States without a sufficient governmental interest.[131] If those challenges fail, it begs the question whether we should deny business entities the rights that are guaranteed to nearly every United States citizen. This country has a long tradition of expanding rights to people that were once considered second-class citizens—or less. At the time of enactment, the Civil War Amendments reflected a recognition that former slaves were people and deserved equal rights.[132] The Nineteenth Amendment reflected a recognition that women were "people" under the Constitution and thus deserved the right to vote.[133] It may not be such a stretch of the imagination that the same logic should extend to inanimate objects, including business entities.

[131] *See* U.S. CONST. amend. XIV, § 1.

[132] *Id.* amends. XIII, XIV, XV.

[133] *Id.* amend. XIX.

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From the early days of American jurisprudence, our legal system has worked hard to maintain the separation of individuals and corporate entities. Courts were originally reluctant to expand rights to corporations unless necessary to the business entity's existence. In many instances, these differences work to the advantage of corporations. In other circumstances, they benefit individuals. This balance now has to be reexamined, and when that time comes, the corporations that are advocating for expanded rights may need to be wary of a system that treats them as equals of individual American citizens.

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