

## Citizens United, Corporate Personhood, and Corporate Power: The Tension between Constitutional Law and Corporate Law

Susanna Kim Ripken

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# **CITIZENS UNITED, CORPORATE PERSONHOOD, AND CORPORATE POWER: THE TENSION BETWEEN CONSTITUTIONAL LAW AND CORPORATE LAW**

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## I. INTRODUCTION

In *Citizens United v. Federal Election Commission*, the Supreme Court invalidated strict federal campaign finance laws and upheld the First Amendment right of corporations to use general treasury funds to support or oppose candidates in political election campaigns.<sup>1</sup> The case sparked controversy and outrage from the moment it was decided. President Obama called the case “a major victory for big oil, Wall Street banks . . . and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”<sup>2</sup> He denounced the decision as a “ruling [that] strikes at our democracy itself.”<sup>3</sup> Polls showed that the vast majority of Americans opposed the ruling.<sup>4</sup> The Supreme Court

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\* Professor of Law, Chapman University School of Law. B.A., Stanford University; J.D., UCLA School of Law. This article was prepared for the “Citizens United v. FEC Symposium” held at the University of St. Thomas School of Law in March of 2012. I would like to thank the Journal of Law & Public Policy and the University of St. Thomas School of Law for the kind invitation to be part of this symposium. I am grateful to Devon Pollard and Oriana Kim-Rajab for helpful research assistance. I owe special thanks to Randy Ripken for support throughout all stages of this project.

1. 558 U.S. 310 (2010).

2. Robert Barnes & Dan Eggen, *Court Rejects Corporate Political Spending Limits*, WASH. POST, Jan. 22, 2010, at A1.

3. Sheryl Gay Stolberg, *Obama Turns Up Heat Over Ruling on Campaign Spending*, N.Y. TIMES, Jan. 24, 2010, at A18. In his State of the Union address, with members of the Supreme Court present, President Obama attacked the decision, saying the case “will open the floodgates for special interests . . . to spend without limit in our elections.” Robert Barnes, *Alito Dissents on Obama Critique of Court Decision*, WASH. POST, Jan. 28, 2010, at A6; see also Adam Liptak, *A Rare Rebuke, In Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12 (noting the unusually public nature of President Obama’s criticism of the Supreme Court’s decision).

4. A Washington Post–ABC News poll indicated that “among Democrats (85 percent opposed . . . the ruling), Republicans (76 percent) and independents (81 percent).” Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010, 4:38 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/>

was accused of partisanship and judicial activism in favor of corporate interests.<sup>5</sup> Many people were angry with the Court for deciding that corporations are “persons” for purposes of the First Amendment and entitled to the same rights as human persons in the expression of political speech.<sup>6</sup>

However, a careful reading of the opinion reveals that the Supreme Court never explicitly stated that because corporations are persons, they must be treated like individuals for purposes of the First Amendment. Instead, the Court framed the issue in terms of whether the *speech* is the type of speech the First Amendment protects, not whether the *speaker* is the type of person who can claim First Amendment rights.<sup>7</sup> It did not matter whether the speaker was a corporation or a human being because the political speech at issue in the case—a documentary film that reflected negatively on Hillary Clinton’s candidacy for the 2008 Democratic Presidential Nomination—was covered by the First Amendment. The personhood of corporations was not the basis of the Court’s decision; the Court did not focus on corporate personhood anywhere in its opinion. However, critics argue that the unstated premise of the case is that corporations are persons that enjoy the same free speech rights as human citizens.<sup>8</sup> Critics contend that the Court may have “avoid[ed] saying

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17/AR2010021701151.html.

5. See, e.g., Tim Rutten, *A Partisan Court Unmasked*, L.A. TIMES, Jan. 23, 2010, at A27 (arguing that *Citizens United* “demonstrates that this is a partisan court, willing to hand down sweeping decisions that ignore decades of jurisprudence based on five Republican votes”); see also Erwin Chemerinsky, *Who Are the Judicial Activists Now?*, L.A. TIMES, Jan. 22, 2010, at A29 (accusing the conservative justices of “using judicial review to advance the traditional conservative ideological agenda”).

6. See, e.g., Nancy Price & David E. Delk, *Corporations Are Not People*, THE ALLIANCE FOR DEMOCRACY, <http://www.thealliancefordemocracy.org/brochure.pdf> (criticizing the Court’s decision “that corporations, as ‘persons,’ enjoy free speech rights”) (last visited July 16, 2012); Matthew Rothschild, *Corporations Aren’t Persons*, THE PROGRESSIVE (Apr. 20, 2010), <http://www.progressive.org/mrapril10.html> (criticizing the Court’s declaration that corporations cannot be treated differently under the First Amendment simply because they are not “natural persons”).

7. See *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring) (“The Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker . . . . We are therefore simply left with the question whether the speech at issue in this case is ‘speech’ covered by the First Amendment.”). This distinction between speech and the speaker draws on the Court’s reasoning in *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783–85 (1978).

8. See Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 498 (2010) (asserting that the “evolution of corporate personhood culminat[ed] in *Citizens United*,” and “[c]orporate personhood is central to the determination of corporations’ claim to First Amendment free speech rights”); Erwin Chemerinsky, *The Most Important Decision of the Term*, TRIAL, May 2010, at 54, 55 (noting that one of the “key premises” of *Citizens United* is that “corporations have the same free speech rights as citizens”).

‘corporate personhood’ out loud,” but the “‘personification’ of corporate entities pervades the case,” and any recognition of First Amendment rights by a corporate entity “results in recognition . . . of a corporate Constitutional person.”<sup>9</sup> It is this notion that corporations are persons that is so controversial.

One of the most dramatic reactions to the *Citizens United* case has been the launch of a grassroots popular movement to strip corporations of their status as persons under the law and thereby eliminate the standing of corporations to claim any constitutional rights. The movement, called “Move to Amend,” calls for an amendment to the United States Constitution establishing that money is not speech and that human beings, not corporations, are the only persons entitled to constitutional rights.<sup>10</sup> Move to Amend is an outgrowth of several activist organizations that have been in existence for some time and have expressed a commitment to “ending corporate rule, and building a vibrant democracy that is genuinely accountable to the people, not corporate interests.”<sup>11</sup> Nationwide, well over 250 grassroots community-based civil rights and social justice groups have joined the Move to Amend coalition, including the National Lawyers Guild, the Alliance for Democracy, the Green Party, and the Women’s International League for Peace and Freedom.<sup>12</sup> Many of these progressive groups despise the dominance of corporate power in modern society. They believe large multinational corporations, with their vast concentrations of wealth and their enormous size, have amassed economic and political power sufficient to control our government and society. These activists view the relentless pursuit of corporate profit as the greatest cause of political, economic, and ecological injury around the world.

The grassroots organizations behind the Move to Amend project trace the roots of this corporate power to the legal doctrine of corporate personhood.<sup>13</sup> Under the law, a corporation is a legal person with the same

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9. Jeff Clements, *Citizens United and Corporate Personhood: Jeff Clements Responds to Kent Greenfield’s Washington Post Op-ed*, FREESPEECHFORPEOPLE.ORG (Jan. 23, 2012), <http://freespeechforpeople.org/node/315>.

10. MOVE TO AMEND, <http://www.movetoamend.org/> (last visited July 16, 2012).

11. *MTA Coalition*, MOVE TO AMEND, <http://www.movetoamend.org/about-us> (last visited July 16, 2012).

12. *Endorsing Organizations*, MOVE TO AMEND, <http://www.movetoamend.org/organizations> (last visited July 16, 2012).

13. While “corporate personhood” is a legal doctrine familiar to those formally trained in the law, most non-lawyers are unfamiliar with the term. However, after *Citizens United*, the phrase “corporate personhood” has found its way into popular culture and mainstream media. For example, *Philosophy Talk*, a popular radio show hosted by two Stanford philosophy professors, aired a show discussing the personhood of corporations in the aftermath of *Citizens United*. The title of the show was “The Corporation as a Person,” featuring Robert A.G. Monks, shareholder activist and author of *CORPORATE GOVERNANCE* (2008). *The Corporation as a Person*, PHILOSOPHY TALK (June 20, 2010), <http://www.philosophytalk.org/shows/corporation-person;>

capacity as a human being to participate in various legal interactions and incur legal obligations. The law categorizes the corporation as a person really out of convenience to facilitate commerce and enterprise. By calling the corporation a person, the law grants it the standing to enter into contracts, to hold property, to sue and be sued, and ultimately to carry on business in the corporate name.<sup>14</sup> This legal step is not particularly troublesome, but it arguably leads us down a slippery slope. Activists warn that once the law recognizes the corporation as a person, it does not take much to decide corporations then have legal status as persons, enabling them to claim the same basic rights and privileges that natural persons have.<sup>15</sup>

Indeed, in a series of cases over the last 125 years, the Supreme Court has held corporations are persons entitled to numerous constitutional protections, even though the word “corporation” does not appear anywhere in the Constitution. For example, the Court has found that corporations as persons have rights to due process and equal protection under the Fourteenth Amendment,<sup>16</sup> as well as Fourth Amendment rights against unreasonable searches and seizures,<sup>17</sup> Fifth Amendment protection against

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see also “What Is the Basis for Corporate Personhood?”, NATIONAL PUBLIC RADIO (Oct. 24, 2011), <http://www.npr.org/2011/10/24/141663195/what-is-the-basis-for-corporate-personhood> (NPR host Melissa Block interviews John Witt, professor of law and history at Yale Law School, regarding the topic of corporate personhood).

14. See, e.g., MODEL BUS. CORP. ACT § 3.02 (2011) (“[E]very corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including . . . power: (1) to sue and be sued, . . . (4) to . . . own, hold, improve, use, and otherwise deal with, real or personal property, . . . (7) to make contracts and guarantees . . .”). This Article focuses on the personhood of corporations as a matter of legal standing. However, corporate personhood is complex, with legal standing representing only one aspect of it. I have described elsewhere the multi-dimensional nature of corporate personhood and the value of evaluating it from multiple disciplinary angles. See Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97 (2009) (examining the multi-faceted nature of corporate personhood).

15. The term “natural person” refers to human beings. See Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 *HASTINGS L.J.* 369, 373 (2007) (“‘Natural person’ is the term used to refer to human beings’ legal status.”).

16. See *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); see also *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) (“It is well settled that corporations are persons within the provisions of the [F]ourteenth [A]mendment of the [C]onstitution of the United States.”); *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896) (“It is now settled that corporations are persons, within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”).

17. *Hale v. Henkel*, 201 U.S. 43, 76 (1906); see also *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (observing that a corporation has a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings for purposes of the Fourth Amendment).

double jeopardy,<sup>18</sup> the Seventh Amendment right to a trial by jury,<sup>19</sup> and as *Citizens United* confirmed, First Amendment rights to free speech and freedom of the press.<sup>20</sup> Laws that infringe on these corporate rights are impermissible. Activists argue that with the shield of constitutional corporate personhood, corporations can resist the enforcement of laws that are intended to regulate corporate operations and protect human beings from corporate harm. They fear the corporate creation has now become more powerful than its human creators, and the only way to remedy this is to take personhood away from corporations through a constitutional amendment.

The Move to Amend campaign has succeeded in bringing awareness to the corporate personhood topic. The concept of corporate personhood has entered the national debate, causing many average Americans to question the legitimacy of corporations' legal personhood status. When Mitt Romney famously stated, "Corporations are people" at the Iowa State Fair in 2011, he stepped into the center of the controversy, drawing ridicule and scorn from opponents who accused him of bias toward corporations over ordinary people.<sup>21</sup> During the Occupy Wall Street movement, angry protesters waved banners that read "End Corporate Personhood" and "Corporations Are Not People."<sup>22</sup> On the second anniversary of the *Citizens United* decision, activists protested in "Occupy the Courts" demonstrations nationwide with posters and fliers calling for the revocation of corporate personhood.<sup>23</sup>

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18. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 572 (1977). However, the Fifth Amendment privilege against self-incrimination has been denied to corporations on the grounds that it is a purely personal right applying only to natural persons. *United States v. White*, 322 U.S. 694, 698 (1944).

19. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).

20. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978) (noting that the inherent worth of speech does not depend on the identity of its source, whether corporation or individual); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 251 (1936) (recognizing the fundamental nature of First Amendment rights).

21. See Devin Dwyer, *Elizabeth Warren Slams Mitt Romney*, ABC NEWS (June 25, 2012, 9:28 PM), <http://abcnews.go.com/blogs/politics/2012/06/elizabeth-warren-slams-mitt-romney/>; Philip Rucker, *Mitt Romney says 'corporations are people' at Iowa State Fair*, WASH. POST (Aug. 11, 2011), [http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html).

22. See, e.g., Sam Lewis & John Farley, *Protest Like an Egyptian: An Occupation of Wall Street*, METROFOCUS (Sep. 19, 2011), <http://www.thirteen.org/metrofocus/2011/09/protest-like-an-egyptian-an-occupation-of-wall-street/> (displaying photo of protestor holding a sign reading "End Corporate Personhood"); Jim Hightower, *Organize in 2012*, OTHER WORDS (Jan. 9, 2012), [http://www.otherwords.org/articles/organize\\_in\\_2012](http://www.otherwords.org/articles/organize_in_2012) (displaying photo of Occupy Wall Street sign reading "Revoke Corporate Personhood"); Kara Scharwath, *The Fight to End Corporate Personhood Heats Up*, TRIPLE PUNDIT (Dec. 16, 2011), <http://www.triplepundit.com/2011/12/fight-corporate-personhood-heats/> (displaying photo of Occupy L.A. banner reading "Corporations Are Not People").

23. Erica W. Morrison, *Occupiers wag fingers at Supreme Court over political donation rule*, WASH. POST (Jan. 20, 2012), <http://www.washingtonpost.com/local/occupiers-wag-fingers-at->

Today, *Citizens United* has become a rallying point for this growing social movement. Building upon the frustration and discontentment that many people feel about the prolonged economic recession, the Move to Amend campaign appears to gain increasing popular support. It holds out the hope that the system can be fixed if the nation adopts a constitutional amendment abolishing the personhood of corporations once and for all.

The academic literature has been slow to focus significantly on this modern activist movement.<sup>24</sup> This Article seeks to analyze and critique the movement's strategy and goals in light of important constitutional and corporate law constraints. Progressive groups disagree on whether the push for a constitutional amendment is a good idea. There are many problems with the amendment strategy, not the least of which is the formidable challenge of persuading Congress to pass the amendment with a two-thirds majority in both houses.<sup>25</sup> This Article identifies the problems associated with the Move to Amend approach and suggests that activists cannot necessarily achieve their goal with a constitutional amendment alone. Corporate personhood and power do not find their origin exclusively in constitutional law, but in long-standing corporate law doctrines. An attempt to curb corporate power in the constitutional realm does not address the systemic features of corporate law that allow corporate entities to obtain great economic and political power.

The discussion proceeds in the following parts. Part II will begin with an overview of the Move to Amend project. It will highlight the scope of the movement, the increasing popularity of its message, and the strides it has made in mobilizing legal support at the federal, state, and municipal levels. The voices of the Move to Amend activists are finding audiences prone to listen, and many people are starting to jump on the anti-corporate personhood bandwagon.

Part of the problem with this strategy, however, is that it places too much weight on the corporate personhood designation. The Move to Amend campaign assumes that a constitutional amendment abolishing the personhood of corporations will effectively diminish the power of corporations and dramatically transform society. Part III reveals that this is a mistaken assumption because the personhood concept is largely indeterminate and often irrelevant. Legal history shows that the personhood

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supreme-court-over-political-donation-rule/2012/01/20/gIQAriu0EQ\_story.html (noting that demonstrators at the Supreme Court held posters that read "Corporations are not people").

24. I have written recently about the Move to Amend project and analyzed in depth its scope, purpose, and value in the context of the law's expressive function and our system of constitutional change. See 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. PENN. J. BUS. L. 209 (2011).

25. U.S. CONST. art. V.

label has long been arbitrarily applied in constitutional law cases, suggesting that the label itself does not dictate necessary outcomes. The Move to Amend supporters place all their eggs in the corporate personhood basket, but corporate personhood simply does not carry the force and meaning that they assume.

A more significant problem lies in the popular belief that the Supreme Court and constitutional law are largely to blame for the rise of corporate power and influence in society. While judicial development and interpretation of constitutional law has played a role in elevating the status of corporations, it is corporate law that has permitted the empowerment of large corporate entities. Parts IV and V explain that fundamental corporate law doctrines and deeply entrenched norms, such as shareholder primacy, profit maximization, the business judgment rule, and the separation of ownership and control, have shaped the role that corporations play in our society and political system. The combination of these corporate law doctrines work together to create an environment where corporations can achieve exactly what the activists do not want corporations to have—enormous drive and power to accumulate and spend money—and thereby significantly influence our economic, social, and political spheres. This suggests that a constitutional amendment to revoke corporate personhood and reverse the effect of *Citizens United* will not accomplish what people think because it is more than just a constitutional law/free speech/First Amendment issue. It is about the core fundamentals of the corporate law regime. It is embedded into the very structure of corporate law itself. To ignore the tensions that corporate law raises in this regard is to miss the deeper origins of corporate ascendance in the modern world.

## II. THE CORPORATE ABOLITIONISTS AND “MOVE TO AMEND”

The overriding mission of the hundreds of grassroots activist organizations behind Move to Amend is to overthrow what they perceive to be “corporate rule” in our society.<sup>26</sup> These groups include local community associations and national networks, religious and secular groups, and organizations committed to a broad range of social justice issues.<sup>27</sup> Many of

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26. Barbara Clancy, *National Meeting Builds Move to Amend Coalition*, MOVE TO AMEND (May 20, 2010), <http://movetoamend.org/national-meeting-builds-move-amend-coalition>; Jan Edwards & Molly Morgan, *Abolish Corporate Personhood*, RECLAIM DEMOCRACY (May 20, 2004), [http://reclaimdemocracy.org/personhood/edwards\\_morgan\\_corporate.html](http://reclaimdemocracy.org/personhood/edwards_morgan_corporate.html).

27. These groups include Alliance for Democracy; Democracy Unlimited; Green Party; Independent Progressive Politics Network; Liberty Tree Foundation; Program on Corporations, Law and Democracy; ReclaimDemocracy; Ultimate Civics; and Women’s International League for Peace and Freedom. *Endorsing Organizations*, MOVE TO AMEND, <http://movetoamend.org/organizations> (last visited July 16, 2012). This list of organizations is not exhaustive. It is merely illustrative of the range of activist groups that are concerned about the role and power of



them share similar mission statements and goals: to “bring[] people together to build a progressive populist movement to end the corporate domination of our economy, our government, our culture, our media and the environment.”<sup>28</sup>

I call these activist groups Corporate Abolitionists<sup>29</sup> because they see their work as similar to that of the early abolitionists who demanded an end to slavery.<sup>30</sup> One of their widely used slogans resonates with this theme: “Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.”<sup>31</sup> The Corporate Abolitionists believe that, like the abolition of slavery, the abolition of corporate personhood is supported by a moral imperative. They assert that the early abolitionists of the nineteenth century did not go to Congress to seek a Slavery Protection Act, or a Slavery Regulatory Agency, or a voluntary code of conduct for slave owners.<sup>32</sup> The abolitionists viewed the institution of slavery as fundamentally and morally wrong, and therefore, “the whole thing had to go.”<sup>33</sup> In the same vein, the Corporate Abolitionists argue not

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corporations in society.

28. *About Alliance for Democracy*, THE ALLIANCE FOR DEMOCRACY, <http://www.thealliancefordemocracy.org/about.html> (last visited July 16, 2012).

29. The name ‘Corporate Abolitionists’ is my term, not theirs. I have grouped many of these organizations together under that label because they share a common interest in revoking the power and status of large corporations by abolishing corporate legal personhood. However, many of these activist groups also have other objectives that are primary to their specific causes, e.g., promoting women’s rights, preserving the environment, or restoring local democratic rule.

30. In fact, Corporate Abolitionists view their work as similar not only to that of the abolitionists who successfully labored to end slavery, but also to that of the suffragists who championed women’s rights, the civil rights activists who opposed racial discrimination, and even the American Revolutionaries who resisted political oppression in the name of democratic rule. See Kaitlin Sopoci-Belknap, *Citizens United v. FEC: Supreme Court Sides with Large Corporations*, DEMOCRACY UNLIMITED OF HUMBOLDT CNTY. (Feb. 28, 2010, 4:30 PM), <http://www.duhc.org/profiles/blogs/citizens-united-v-fec-supreme> (“It’s time to follow the lead of the America Revolutionaries, the abolitionists, the suffragists, the trade unionists, and the Civil Rights activists and to build a broad-based, multi-partisan democracy movement in the United States.”); *Defend Democracy: Join with Us to Abolish Corporate Personhood*, WOMEN’S INT’L LEAGUE FOR PEACE AND FREEDOM, <http://www.wilpf.org/SupremeCtCitizenUnitedDecision> (last visited July 16, 2012) (“[Abolishing corporate personhood] is as important and challenging as the efforts for Women’s Suffrage and the work done to end slavery.”); Barry Yeoman, *When Is a Corporation Like a Freed Slave?*, MOTHER JONES, Nov. 2006, <http://motherjones.com/print/15057> (“People fighting corporate personhood like to think of themselves as heirs to the American Revolution.”).

31. Molly Morgan & Jan Edwards, *Abolish Corporate Personhood*, 59 GUILD PRAC. 209, 214 (2002).

32. *Id.* at 213; *Citizen Outrage to Citizen Reform*, ULTIMATE CIVICS, <http://www.ultimatecivics.org> (last visited July 16, 2012) [hereinafter *Citizen Outrage*]; Yeoman, *supra* note 30.

33. Morgan & Edwards, *supra* note 31, at 213; see also William Meyers, *The Santa Clara Blues: Corporate Personhood versus Democracy* 24 (November 13, 2000), [http://reclaimdemocracy.org/pdf/primers/santa\\_clara\\_blues.pdf](http://reclaimdemocracy.org/pdf/primers/santa_clara_blues.pdf) (“The abolition of corporate personhood is part of the abolition of slavery . . . . This is not an optional campaign.”).

that large corporations must be more socially responsible nor that we should adopt stricter laws to regulate corporate behavior and reign in corporate power. Instead, the Corporate Abolitionists believe the abolition of corporate personhood is an issue of human rights, like the abolition of slavery. The whole institution is inherently oppressive and must be dismantled if there is any hope of achieving democracy and equal rights. It is an all or nothing proposition. According to the Corporate Abolitionists, “[a]s long as superhuman ‘corporate persons’ have rights under the law, the vast majority of people have little or no effective voice in our political arena, which is why we see abolishing corporate personhood as so important to ending corporate rule and building a more democratic society.”<sup>34</sup>

A familiar theme running through the Corporate Abolitionist literature is that corporations have deceived citizens into believing that what is good for corporations is good for America and that corporations are the benevolent sources of jobs, prosperity, liberty, security, and progress.<sup>35</sup> Activists argue, on the contrary, that large corporations are actually the cause of devastating social, environmental, and financial harms, and that they are really “[h]omicidal profit-seeking . . . corporate serial killers,” rarely held sufficiently accountable for their wrongdoings.<sup>36</sup> Corporate Abolitionists say they are tired of trying to work within the existing legal structure and fix things with regulatory reform. Their sentiment is that it is futile to spend any more “strength, time, and hope . . . in such dead ends”<sup>37</sup> as the pursuit of “corporate responsibility, corporate accountability, corporate ethics, corporate codes of conduct, good corporate ‘citizenship,’ corporate crime, corporate reform, consumer protection, fixing regulatory agencies, or [promoting] stakeholder [interests].”<sup>38</sup> To the Corporate

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34. Edwards & Morgan, *supra* note 26.

35. See Richard L. Grossman, *Wrestling Governing Authority from the Corporate Class: Driving People into the Constitution*, 1 SEATTLE J. SOC. JUST. 147, 155–56 (2002) (criticizing the perception that corporations are the source of jobs and progress); Scott McLarty, *Democracy for Humans! Fighting Corporate Power in the Wake of the Supreme Court’s Citizens United Ruling*, COMMON DREAMS (Feb. 13, 2010), <http://www.commondreams.org/view/2010/02/13-5> (arguing that Americans have been “duped . . . into believing that what’s good for insurance companies, Wall Street firms, defense contractors, and other behemoths is good for America”); see also LEE DRUTMAN & CHARLIE CRAY, *THE PEOPLE’S BUSINESS: CONTROLLING CORPORATIONS AND RESTORING DEMOCRACY* 3 (2004) (arguing that corporations “are not the inherently benevolent institutions that they would have us believe that they are” but rather are “very dangerous institutions, capable of causing great harm to society, particularly when left largely unregulated”).

36. Bruce A. Dixon, *Time for a Corporate Death Penalty*, BLACK AGENDA REPORT (June 9, 2010, 10:35), <http://blackagenda.com/print/content/time-corporate-death-penalty>.

37. Richard L. Grossman & Frank I. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation* 15 (1993), available at <http://www.ratical.org/corporations/TCoB.pdf>.

38. Community Environmental Legal Defense Fund et al., Model Brief of *Amici Curiae*, Preface (2003), <http://www.ratical.org/corporations/demoBrief.pdf>. Especially in the wake of

Abolitionists, these are all “compromises [that attempt] to make things a little less bad,” but they do not address the real root of the problem.<sup>39</sup> It is not corporate *behavior* that must be restricted; it is corporate *power*.

The Corporate Abolitionists trace the origin of this corporate power to the moment the Supreme Court first declared that corporations were persons under the Constitution. According to the Corporate Abolitionists, that was the tool corporations needed to shift themselves “from the duty side of the line, where they’re accountable to the people, to the rights side, where they get protection from government. . . .”<sup>40</sup> With the status of personhood, corporations can claim the same basic constitutional rights of human persons and combat legislation burdening their interests.<sup>41</sup> The Corporate Abolitionists believe that these constitutional rights, combined with corporations’ immense wealth, allow corporations to overpower individual citizens who consequently become second-class persons with little ability to oppose or resist corporate power.<sup>42</sup> The only way to remedy this problem is to return to the source of corporate power, i.e., corporate personhood, and revoke it. They believe “[w]e must radically rethink our belief that giant corporations are legitimate parts of our society and return them to their rightful place as subordinate institutions to a sovereign, democratic people.”<sup>43</sup>

In mobilizing the grassroots Move to Amend campaign, Corporate Abolitionists feel now is the time for a popular uprising to end the dominating influence of corporations. In essence, their movement calls for the complete nullification of corporate legal personhood and the unraveling of over a century of constitutional jurisprudence. By orchestrating a

*Citizens United*, the Corporate Abolitionists argue that regulatory reform is not the answer: “Some members of our sadly dysfunctional Congress are calling for a new campaign finance fix. But we’ve had a century of campaign finance fixes, and look what the Supreme Court has systematically done to them.” Ben Manski & Lisa Graves, *Amend the Constitution to Rein in Corporations*, MOVE TO AMEND (Feb. 12, 2010), <http://www.movetoamend.org/manski-and-graves-amend-constitution-rein-corporations>.

39. *Citizen Outrage*, *supra* note 32.

40. Edwards & Morgan, *supra* note 26.

41. Doug Pibel, *Real People v. Corporate “People”: The Fight Is On*, 54 YES! MAGAZINE (May 27, 2010), <http://www.yesmagazine.org/issues/water-solutions/real-people-v.-corporate-people-the-fight-is-on> (noting that although corporations “cannot be jailed” and “have no conscience,” they nonetheless “enjoy virtually all the rights that humans have”).

42. See Meyers, *supra* note 33, at 17–18 (“Because of corporate personhood and corporate constitutional rights, the ordinary, natural person has become a second-class person in the eyes of the law.”). This argument finds some support in corporate law scholarship. See, e.g., Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 658 (1990) (arguing that “the extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals”).

43. Molly Morgan, Women’s Int’l League for Peace and Freedom, *Critique of Carly Fiorina*, in ORGANIZING PACKET FOR THE CAMPAIGN TO ABOLISH CORPORATE PERSONHOOD 18 (Nov. 7, 2001), <http://www.wilpf.org/docs/ccp/corp/ACP/acp-packet.pdf>.

nationwide initiative to add a twenty-eighth amendment to the Constitution, the Corporate Abolitionists hope to “slay the dragon of corporate personhood once and for all.”<sup>44</sup> The Move to Amend organizers have adopted this petition as the centerpiece of their campaign: “We, the People of the United States of America, reject the U.S. Supreme Court’s ruling in *Citizens United*, and move to amend our Constitution to firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights.”<sup>45</sup> Citizens nationwide are asked to sign the petition and endorse the effort to retract all constitutional rights from corporate entities.

The arguments of the Corporate Abolitionists are intriguing. On the one hand, critics might dismiss these anti-corporate activists as extremists, utopian radicals, or fringe segments of society that condemn large corporations and oppose modern capitalism. Their protests, marches, and rallies are nothing to take too seriously because their goals are extreme and there is little likelihood they will achieve their ultimate objective. On the other hand, the voice of the Corporate Abolitionists is getting louder, and they are gaining more converts to their cause. They have begun to capitalize on the growing anger that average citizens feel over the struggling economy, the loss of jobs, excessive executive compensation, and the faltering financial markets. The complaints of the Corporate Abolitionists strike a chord with many Americans whose resentment toward large corporations and Wall Street has only been heightened by the Supreme Court’s decision in *Citizens United*.

Occupy Wall Street and other Occupy movements around the country are an outgrowth of some of that resentment.<sup>46</sup> Occupiers have come out in significant numbers to express their dissatisfaction with what they perceive to be gross inequalities and corporate corruption in politics and the

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44. Rothschild, *supra* note 6; see also JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE 145–54 (2012) (arguing that a constitutional amendment declaring corporations are not people will restore freedom, democracy, and republic government).

45. *Move to Amend Petition*, MOVE TO AMEND, [http://salsa3.salsalabs.com/o/50137/p/dia/action/public/?action\\_KEY=6883](http://salsa3.salsalabs.com/o/50137/p/dia/action/public/?action_KEY=6883) (last visited July 16, 2012). Move to Amend has also crafted formal language for a proposed constitutional amendment which states that “[t]he rights protected by the Constitution of the United States are the rights of natural persons only” and that “[a]rtificial entities, such as corporations, limited liability companies, and other entities . . . shall have no rights under this Constitution.” *Move to Amend’s Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <http://www.movetoamend.org/democracy-amendments> (last visited July 16, 2012). The proposed amendment also clarifies that “[t]he judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.” *Id.*

46. See Nathalie Rothschild, *Occupy Wall Street: a crowd of misfits protesting against everyone and everything*, THE TELEGRAPH (Oct. 13, 2011, 8:27 PM), <http://www.telegraph.co.uk/news/worldnews/us-politics/8824534/Occupy-Wall-Street-a-crowd-of-misfits-protesting-against-everyone-and-everything.html> (“Occupy Wall Street has evidently tapped in to a widespread sense of frustration and disgruntlement.”).

economy. The Occupy Wall Street movement has included many general messages of protest, such as “We are the 99%,” “Stop Corporate Greed,” and “Stop Corporate Bailouts,” but interestingly, the specific call to “End Corporate Personhood” and the slogan that “Corporations Are Not People” have also been prevalent throughout the Occupy demonstrations.<sup>47</sup> In fact, the one theme that seems to have persisted while others have waned is the demand to abolish the personhood of corporations.<sup>48</sup> Analysts have observed that the Occupy movement often appeared “leaderless” and void of a clear message or direction, but one goal that frequently emerged to unify the protests was that of revoking corporate personhood through a constitutional amendment.<sup>49</sup> It seems to offer people a concrete, practical solution, a clear objective and a method for fixing a system that they feel is broken.<sup>50</sup> A message like “Stop Corporate Greed” is so general and amorphous that it is impractical. The call to amend the Constitution to “End Corporate Personhood,” however, has appeal because it gives activists a defined route to take. It is something people believe they can take steps to try to accomplish. Corporate Abolitionists have seen a boost to their cause because so many average citizens are now saying there is something wrong with the system and they want to see change. They view the abolition of

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47. See Eliza Newlin Carney, *Advocacy Groups Seek to Curb Corporations*, ROLL CALL (Nov. 29, 2011), [http://www.rollcall.com/issues/57\\_65/Advocacy-Groups-Seek-to-Curb-Corporations-210594-1.html](http://www.rollcall.com/issues/57_65/Advocacy-Groups-Seek-to-Curb-Corporations-210594-1.html) (describing Occupy Wall Street protesters chanting “Corporations are not people”); Morrison, *supra* note 23 (describing Occupiers at the Supreme Court holding posters that read “Corporations are not people”); Katrina vanden Heuvel, *Stanching [sic] the flow of corporate dollars into campaigns*, WASH. POST (Nov. 8, 2011), [http://www.washingtonpost.com/opinions/stanching-the-flow-of-corporate-dollars-into-campaigns/2011/11/04/gIQAy2cR1M\\_story.html](http://www.washingtonpost.com/opinions/stanching-the-flow-of-corporate-dollars-into-campaigns/2011/11/04/gIQAy2cR1M_story.html) (reporting that many regional Occupy movements “have already made a constitutional amendment ending corporate personhood one of their key demands”).

48. See Gene DeNardo, *Corporate Personhood and the Occupy Wall Street Movement*, NOLAN CHART (Oct. 15, 2011), <http://www.nolanchart.com/article9034-corporate-personhood-and-the-occupy-wall-street-movement.html> (observing that none of the demands of the Occupy Wall Street protesters has had the same “popularity and enduring quality” as the demand to rescind corporate personhood).

49. Josh Silver, *Wall Street Protests: A Right-Left Movement Must Emerge*, HUFFINGTON POST (Oct. 2, 2011, 1:53 PM), [http://www.huffingtonpost.com/josh-silver/occupy-wall-street-protests\\_b\\_991163.html](http://www.huffingtonpost.com/josh-silver/occupy-wall-street-protests_b_991163.html) (“While the protests are proudly decentralized and leaderless, the unifying theme is ‘revoking corporate personhood’ . . . that would reverse the . . . Citizens United Supreme Court decision.”); see also Rothschild, *supra* note 46 (describing the Occupy movement as “leaderless” and “about anything and everyone”).

50. See Carney, *supra* note 47 (noting that the idea of a constitutional amendment “offers Occupy activists some tangible goals beyond simply sleeping in parks”). “For the first time, this is more than just hopeful chatter about a nationwide movement. We’re seeing concrete, determined action on the local level.” Dylan Ratigan, *On Our Way to Climbing Everest*, HUFFINGTON POST (Dec. 15, 2011, 1:26 PM), [http://www.huffingtonpost.com/dylan-ratigan/on-our-way-to-climbing-ev\\_b\\_1151433.html](http://www.huffingtonpost.com/dylan-ratigan/on-our-way-to-climbing-ev_b_1151433.html) (discussing Occupy Wall Street’s role in inspiring the drive to amend the Constitution).

corporate personhood as a viable solution. In connecting with the energy of the Occupy Wall Street movement, the Corporate Abolitionists actually see a silver lining in the *Citizens United* case: it has become a rallying point for legal reform and a means of igniting the public to take action.<sup>51</sup>

The Corporate Abolitionists are well aware that the requirements for formally amending the Constitution are stringent. Article V of the Constitution provides that it may be amended in one of two ways: (1) Congress can pass an amendment with a two-thirds majority in both houses, and then have three quarters of the states ratify it, or (2) two-thirds of the states can call a constitutional convention, and then have three quarters of the states ratify the amendment.<sup>52</sup> Requiring such a high majority of Congress and the states to agree on any issue poses a seemingly insurmountable challenge. One might be inclined to predict that a constitutional amendment abolishing the legal personhood of corporations stands very little chance of ever passing. Surprisingly, however, the idea seems to be gaining traction. What started as a grassroots activist movement has begun to make its way into mainstream legislative channels at the federal, state, and municipal levels.

For example, at the federal level, members of Congress have introduced various bills proposing an amendment to the Constitution that would eliminate corporate personhood for purposes of constitutional rights and prohibit corporations from political spending. Rep. Ted Deutch introduced the Outlawing Corporate Cash Undermining the Public Interest in our Elections and Democracy (OCCUPIED) Amendment, which specifies that only natural persons, not corporations, have constitutional rights, and bans corporate contributions or expenditures in all political elections.<sup>53</sup> Rep. James McGovern introduced the People's Rights Amendment, which clarifies that the term "person" in the Constitution excludes corporations

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51. See Pibel, *supra* note 41 (suggesting that *Citizens United* has become a "rallying point" and noting that people's "interest has skyrocketed" and they are "eager to volunteer, to organize, to meet, to do anything to reverse the Court's decision"); see also Lisa Danetz, Senior Counsel – Dēmos, *Speech: Lisa Danetz on Anniversary of Citizens United Ruling*, DEMOS (Jan. 23, 2012), available at <http://www.demos.org/press-release/speech-lisa-danetz-anniversary-citizens-united-ruling> ("We see that, in the national discourse, people throughout the country are starting to make the connection between the economic pain they are feeling and the deficits in our democracy embodied by the *Citizens United* decision.").

52. U.S. CONST. art. V.

53. H.J. Res. 90, 112<sup>th</sup> Cong. (2011); see also Ashley Portero, *House Democrat Introduces OCCUPIED Constitutional Amendment to Ban Corporate Money in Politics*, INT'L BUS. TIMES (Nov. 22, 2011, 11:15 AM), <http://www.ibtimes.com/articles/254139/20111122/house-democrat-introduces-occupied-constitutional-amendment-ban.htm> (reporting that the OCCUPIED Amendment proposed "a new constitutional amendment that would ban corporate money in politics and end legal protection for corporate personhood"). Senator Bernie Sanders has introduced the same amendment in the Senate. S.J. Res. 33, 112<sup>th</sup> Cong. (2011).

and affirms that constitutional rights are for natural persons only.<sup>54</sup> Several other lawmakers have each introduced their own versions of a constitutional amendment to regulate corporate political spending in elections and reverse the effect of *Citizens United*.<sup>55</sup> Many federal legislators have made public statements in support of amending the constitution to end corporate personhood.<sup>56</sup>

At the state level, legislators have also been actively working toward a constitutional amendment. Recently, the Vermont legislature passed into law a resolution calling for a constitutional amendment to abolish the corporate personhood doctrine and to overturn the *Citizens United* ruling.<sup>57</sup> Similar resolutions have been passed in New Mexico and Hawaii.<sup>58</sup> Resolutions calling for a constitutional amendment have been approved in at least one legislative chamber in California, Alaska, and Iowa, and lawmakers have introduced similar resolutions in twenty other states.<sup>59</sup>

The Move to Amend campaign has been quite successful at the municipal level with the passage of numerous local city and municipal ordinances supporting a constitutional amendment to revoke corporate personhood and to authorize the regulation of corporate political spending. Los Angeles, Kansas City, Portland, and St. Paul, as well as hundreds of

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54. H.J. Res. 88, 112<sup>th</sup> Cong. (2011); see also *Congressman McGovern Introduces the People's Rights Amendment*, FREESPEECHFORPEOPLE.ORG, <http://freespeechforpeople.org/McGovern> (last visited July 16, 2012) (asserting that Rep. McGovern's "People's Rights Amendment marks a major breakthrough in the growing movement across the country to end corporate personhood and restore democracy to the people").

55. See, e.g., H.J. Res. 92, 112<sup>th</sup> Cong. (2011) (Rep. Keith Ellison introduced this resolution proposing a constitutional amendment to regulate the disbursement of funds for political activity by corporations); H.J. Res. 82, 112<sup>th</sup> Cong. (2011) (Rep. Theodore Deutch introduced this resolution proposing a constitutional amendment to regulate any expenditures by a corporation in connection with elections); H.J. Res. 78, 112<sup>th</sup> Cong. (2011) (Rep. Donna Edwards introduced this resolution proposing a constitutional amendment to regulate the expenditure of funds for political activity by corporations).

56. See, e.g., Rep. Earl Blumenauer, *Fixing Our Broken Government: Ending Corporate Personhood*, HUFFINGTON POST (Feb. 28, 2012, 1:00 PM), [http://www.huffingtonpost.com/rep-earl-blumenauer/fix-our-political-system\\_b\\_1307263.html](http://www.huffingtonpost.com/rep-earl-blumenauer/fix-our-political-system_b_1307263.html) (Rep. Blumenauer stated: "[I]t's important that we advance a constitutional amendment that would eliminate the notion of corporate personhood, explicitly stating that the rights of natural persons may only be afforded to real people, not corporations.").

57. Public Citizen, *Vermont Legislature Calls for a Constitutional Amendment to Overturn Citizens United*, COMMON DREAMS (Apr. 19, 2012, 6:43 PM), <http://www.commondreams.org/newswire/2012/04/19-13>; Kaitlin Sopoci-Belknap, *Vermont Legislature Calls for a Constitutional Amendment to End Corporate Personhood and Doctrine of Money as Speech*, MOVE TO AMEND (Apr. 20, 2012), <http://movetoamend.org/press-release/vermont-legislature-calls-constitutional-amendment-end-corporate-personhood-and>.

58. Paul Blumenthal, *Citizens United Constitutional Amendment Backed By Vermont Legislature*, HUFFINGTON POST (Apr. 19, 2012, 6:31 PM), [http://www.huffingtonpost.com/2012/04/19/citizens-united-constitutional-amendment-vermont\\_n\\_1439002.html](http://www.huffingtonpost.com/2012/04/19/citizens-united-constitutional-amendment-vermont_n_1439002.html).

59. *Id.*

other large and small towns and cities in half the states, have passed these resolutions.<sup>60</sup> The text of the resolution passed by the city council of Seattle, Washington, typifies the language in these municipal resolutions nationwide: “The City of Seattle calls on . . . Congress to . . . amend the United States Constitution [to] clearly state that: (1) Corporations are not human beings, and only human beings are endowed with Constitutional rights. (2) Contributions and expenditures for political purposes are not Constitutionally-protected speech . . . .”<sup>61</sup> Voter ballot measures that similarly call for a constitutional amendment to strip corporations of constitutional rights have succeeded in various localities including Boulder, Colorado, and Madison and Dane County Wisconsin.<sup>62</sup> All of these grassroots resolutions and referenda may be only symbolic in nature, but more people are gradually embracing the proposition that corporations should not have personhood status under the Constitution, and they are moving forward with the goal of a constitutional amendment to eliminate that status.

The Corporate Abolitionists have made strides with their Move to Amend campaign, but the movement has certain weaknesses. The goal of ending the legal doctrine of corporate personhood may not accomplish all that the Corporate Abolitionists hope. People believe the personhood of corporations gives corporations constitutional rights, but the truth is, the personhood label carries relatively little significance. As the following section explains, the personhood label is not as important and determinative as it appears.

### III. THE IRRELEVANCE AND INDETERMINACY OF CORPORATE PERSONHOOD

Corporate Abolitionists believe that a constitutional amendment abolishing corporate personhood will mean corporations can no longer hold the elevated status of persons under the Constitution, and therefore, no longer be entitled to any constitutional rights. This in turn will drastically diminish the power of corporations in society and produce a more robust

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60. See *Resolutions and Ordinances, MOVE TO AMEND*, <http://www.movetoamend.org/resolutions-map> (last visited July 16, 2012) (listing hundreds of cities where municipal resolutions have passed or are in progress and providing links to the texts of the resolutions); see also Kate Linthicum, *L.A. calls for an end to 'corporate personhood'*, L.A. TIMES (Dec. 6, 2011, 1:54 PM), <http://latimesblogs.latimes.com/lanow/2011/12/corporate-personhood-la-constitutional-amendment.html> (reporting that the resolution was passed at a packed Los Angeles City Council meeting with members of Occupy L.A. present).

61. Seattle City Council Res. No. 31380, May 14, 2012, [http://clerk.seattle.gov/~archives/Resolutions/Resn\\_31380.pdf](http://clerk.seattle.gov/~archives/Resolutions/Resn_31380.pdf).

62. See *Resolutions and Ordinances, MOVE TO AMEND*, <http://www.movetoamend.org/resolutions-map> (last visited July 16, 2012) (listing areas where citizens' initiatives have passed).



democracy that is free of the dominating influence of corporations. The underlying assumption of this viewpoint is that once we call something a “person,” certain rights must follow, and as soon as we revoke that label, that entity will no longer possess those rights. It assumes that personhood is a concept heavily laden with meaning. This belief is mistaken. Just because we call something a person does not mean it is automatically entitled to certain rights. Legal history shows that the personhood designation has been inconsistently applied in constitutional law cases, revealing that the label itself does not dictate results. The extension of constitutional rights to corporations has not been controlled by personhood terminology at all, but by a rather incoherent, ad hoc approach to corporate rights.

The Supreme Court has held corporations are persons for purposes of some constitutional protections but not for others. For example, the Court has extended Fifth Amendment double jeopardy rights to corporations,<sup>63</sup> but has declined to extend the Fifth Amendment privilege against self-incrimination to corporations. According to the Court, “[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.”<sup>64</sup> The Court has never clearly explained why a corporation is a person for purposes of the double jeopardy clause of the Fifth Amendment, but not for purposes of the self-incrimination clause of the same amendment.<sup>65</sup> In fact, the use of the term “person” in both clauses is analytically indistinguishable. The self-incrimination clause follows immediately after and is grammatically part of the double jeopardy clause, so it is difficult to understand why the self-incrimination privilege is purely personal while the double jeopardy protection is not. It appears constitutional corporate personhood means one thing in one context and something else in another.<sup>66</sup> This disparate treatment is based simply on the Court’s policy judgments regarding the different rationales for the double jeopardy and self-incrimination protections.

At times, the Supreme Court has applied this selective approach to

63. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (reasoning that a corporation has the same interests as a natural person in avoiding “embarrassment, expense and ordeal and . . . liv[ing] in a continuing state of anxiety and insecurity”).

64. *United States v. White*, 322 U.S. 694, 698 (1944).

65. The Court has tried to reconcile this inconsistency by asserting in conclusory terms that certain “purely personal” guarantees like the privilege against self-incrimination are unavailable to corporations because the “historic function” of the particular right has been limited to the protection of individuals. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (internal quotation marks omitted).

66. This selective application of the personhood designation in the context of the Fourteenth Amendment prompted one Supreme Court Justice to remark, “It requires distortion to read ‘person’ as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment.” *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting).

corporate personhood and constitutional rights even within the same case. For example, in *Hale v. Henkel*, the Court held corporations are persons entitled to protections from unreasonable searches under the Fourth Amendment, but the Court simultaneously held corporations are not persons for purposes of the self-incrimination clause of the Fifth Amendment.<sup>67</sup> Therefore, the very same case both supported and rejected constitutional corporate personhood at the same time for purposes of analyzing different rights under the Constitution.

Another example can be found in the First Amendment. Corporations are persons entitled to First Amendment free speech rights, as *Citizens United* affirmed. Corporations have rights to engage in political speech, to spend corporate money to support or oppose political candidates, and ultimately to have their voice heard in the marketplace of ideas.<sup>68</sup> In this regard, corporations may not be distinguished from individuals who have the same rights to express their political views and to participate fully in the electoral process. But the Supreme Court has never held that corporations are persons who have the right to vote, even if they can do everything an individual can do to influence others' votes.

How can a corporation be a person for one constitutional right, but then stop being a person for another? The answer is because the personhood label is not all it is cracked up to be. The term does not carry as much weight as one might expect. Applying corporate personhood in certain contexts and not in others is a matter of policy and expediency, not a matter of logic or consistent reasoning.<sup>69</sup> The bottom line is that the Supreme Court has never developed a unified theoretical justification for concluding that corporations are persons under the Constitution. Thus, there is no coherent, consistent way of defining corporate constitutional rights. The effect is a corporate personhood jurisprudence that often seems purely result-oriented.<sup>70</sup> Corporate personhood is therefore a conclusion, not a question or a starting point from whence conclusions are made. If this is true, then it does not really matter what we call the corporation. Instead of labeling it a person, we could just as easily refer to it as a "right-and-duty-bearing unit"

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67. *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906), *overruled in part by* *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

68. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

69. See William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1503 (1989) (noting the Supreme Court has followed a "situational practice in dealing with questions of corporate constitutional rights for more than a century").

70. Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 64 (2005); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1754 (2001).

and give it all the same rights and liabilities it currently carries.<sup>71</sup> “[I]t becomes [merely] a verbal matter whether we call [corporations] all ‘persons,’ or whether we . . . abandon the use of the word entirely.”<sup>72</sup> In other words, the personhood designation is not determinative and is arguably irrelevant.

While Corporate Abolitionists might believe that once you call something a person, you must give it the rights accorded to persons, it turns out it is really the other way around. We choose to extend corporations certain rights under the Constitution, whether it be First Amendment free speech rights or Fourteenth Amendment equal protection rights, and in doing so, we then conclude that corporations are persons under the Constitution for purposes of those rights. In this sense, the term person signifies whatever the law makes it signify.<sup>73</sup>

If the personhood label does not matter much and carries so little weight, then the Corporate Abolitionists’ call to revoke corporate personhood under the Constitution may be misplaced. Corporate personhood, because it is so indeterminate, is not as powerful a doctrinal force as the Corporate Abolitionists seem to believe. Therefore, abolishing the legal concept of corporate personhood may not accomplish what they are hoping. In focusing their efforts on instigating a popular movement to adopt a constitutional amendment to end corporate personhood, the Corporate Abolitionists have attached a level of meaning to the personhood designation that does not appear to be there.

In addition, abolishing constitutional corporate personhood does not address a more significant source of corporate power that has little to do with constitutional jurisprudence. As the next Part reveals, long established doctrines of corporate law are responsible for shaping the role that corporations play in our society, and any attempt to curb corporate power must take into account the obstacles presented by corporate law itself.

#### IV. CORPORATE LAW DOCTRINES, NORMS, AND CORPORATE POWER

The Corporate Abolitionists, like many average Americans who were upset about the result in *Citizens United*, blame the Supreme Court because

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71. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (quoting 3 FREDERIC WILLIAM MAITLAND, *THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND* 307 (1911)).

72. *Id.* at 662.

73. Richard Tur, “The ‘Person’ in Law,” in *PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY* 116, 121 (Arthur Peacocke & Grant Gillett eds., 1987) (arguing that “the concept of legal personality is wholly formal. It is an empty slot that can be filled by anything that can have rights or duties.”).

they believe the Court is responsible for giving corporations tremendous power in our society. They attribute that corporate power to the Supreme Court's 125 years of constitutional law jurisprudence granting personhood status to corporations. But the reality is that constitutional analysis plays only a partial role. The real conflict lies in the nature and structure of *corporate law*, not constitutional law. What people find so unnerving is that corporations have been allowed to amass great wealth and power under our legal system, and they fear that corporations use that wealth and power to dominate our economy, our politics, and our culture. Even if that were true, it is not necessarily the fault of constitutional law. It is corporate law that allows corporations to be structured and operated in a way that affords corporate entities the types of rights and powers that make Corporate Abolitionists so angry. Deeply entrenched corporate law doctrines and norms dictate how corporations act and function, and it is these features of corporate law that shape the role of corporations in our society.

#### *A. Shareholder Primacy and Profit Maximization*

For example, corporate law has long embraced the principles of shareholder primacy and profit maximization.<sup>74</sup> The fundamental purpose of the corporation is to increase firm value and maximize profits for the shareholders.<sup>75</sup> While corporations are composed of many different constituencies, including employees, creditors, customers, and suppliers, it is the shareholders whose interests are typically primary under corporate law.<sup>76</sup> Managers of the company owe a fiduciary duty to act in the best long-term interests of the shareholders, and that interest is ultimately defined as maximizing shareholder wealth.<sup>77</sup> Milton Friedman famously

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74. See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 646–47 (2006) (explaining that the shareholder primacy principle is widely accepted as a dominant theme of corporate law).

75. ROBERT C. CLARK, *CORPORATE LAW* 677–80 (1986).

76. Although some states have adopted so-called stakeholder or constituency statutes to allow directors to consider the interests of other corporate constituents in making business decisions, these statutes do not require directors to place constituent interests above those of shareholders. See, e.g., N.Y. BUS. CORP. LAW § 717(b) (McKinney 2003); 15 PA. CONS. STAT. ANN. § 1715(a), (b) (West 1995). Shareholders are considered different from bondholders, suppliers, employees, customers and others because non-shareholders are presumably protected by contracts and other safeguards, while the shareholders are left to bear the preponderance of the risk. See John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What's So Special About Shareholders?*, 4 BUS. ETHICS Q. 393, 395 (1994).

77. See *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders.”); see also STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 53 (2008) (“[T]he shareholder wealth maximization norm . . . indisputably is the law in the United States.”); Kenneth B. Davis, Jr., *Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain – A Survey of, and Commentary, on*

asserted that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits . . . .”<sup>78</sup>

The law of corporations is based on this premise that corporations exist to make a profit. They do not exist to be charitable organizations. Every law student who takes a basic corporations law course learns the foundational pronouncement of the court in *Dodge v. Ford Motor Co.*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.<sup>79</sup>

The responsibility of the corporation’s board is to make money for the shareholders. Any corporate act, decision, or expenditure of money is, or legally should be, intended directly or indirectly to promote that end.

How do these bedrock principles of corporate law relate to corporate speech? The corporation’s predominant aim is to enhance profitability, and that objective inevitably affects the nature and the purpose of its speech. As an economic actor, the corporation’s speech will always have a tendency to be economically motivated. Corporations engage in speech in instrumental terms to enable them to succeed in the economic market. As with any corporate act, the goal for engaging in corporate speech is to maximize profits. Corporate advertising and commercial speech clearly reflect that goal. But corporate political speech reflects that goal as well.<sup>80</sup> When a

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*the U.S. Corporate Law*, 13 CAN.-U.S. L.J. 7, 8 (1988) (“The bedrock principle of U.S. corporate law remains that maximization of shareholder value is the polestar for managerial decisionmaking.”). *But see* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) (“Corporate managers have never had an enforceable legal duty to maximize corporate profits.”); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 168–74 (2008) (challenging the idea that corporations exist only to make money for shareholders).

78. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962).

79. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

80. In fact, some commentators argue that “all speech by a for-profit corporation is commercial” in nature because such corporations have “no legitimate purpose other than commerce.” Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2645 (2008); *see also* Tom Bennisson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 395 (2006) (“[A]ny speech financed by a for-profit corporation . . . is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.”); Carl E.

corporation spends money to influence the political realm, whether it be through lobbying or supporting political candidates, the corporation is also motivated by the bottom line.<sup>81</sup>

Corporations have a vested “interest and need to participate in political speech.”<sup>82</sup> Corporate political speech is ultimately driven by the profit maximization principle. Corporations spend millions of dollars annually lobbying for political influence in government.<sup>83</sup> The corporation engages in political spending to curry political favor or to influence the political environment to make it more business friendly.<sup>84</sup> The corporation’s political speech may be designed to reduce burdensome regulation on the corporation’s activities, or to promote favorable legislation that affords corporations more freedom to act in ways that maximize profits for the shareholders and shift costs onto others.<sup>85</sup> The corporation tends to be a “one-sided participant[ ] in the political debate,” using its money consistently to promote one particular goal, i.e., increasing share values.<sup>86</sup>

Emerging empirical research suggests that corporate political spending is profit-maximizing and benefits shareholders. A recent report found that corporate political activity appears to have a generally positive effect on firm value, as reflected in excess market returns.<sup>87</sup> For publicly traded

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Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227, 1259 (1986) (suggesting that corporate speech is always commercial speech because it is motivated by pursuit of profit). *But see* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United*, 89 N.C. L. REV. 1197, 1226–27 (2011) (arguing that profit is not always the sole motivation of corporate speech).

81. See Michael R. Siebecker, *A New Discourse Theory of the Firm after Citizens United*, 79 GEO. WASH. L. REV. 161, 177–78 (2010) (“[C]orporations exert political power through lobbying, direct advocacy, political advertising, and financial contributions to particular candidates or causes.” In doing so, “many corporations . . . utilize the political process to enhance profitability.”).

82. Roger Coffin, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 HASTING BUS. L.J. 103, 107 (2012).

83. Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1605–07 (2006).

84. See Piety, *supra* note 80, at 2657 (“For-profit corporations have an interest in supporting whatever legal or political regime guarantees the most congenial environment in which to generate profits.”).

85. See Coffin, *supra* note 82, at 107 (noting that corporations have a deep interest in participating in political speech in order to influence government regulation which can significantly affect the corporation’s strategy and economic success); Yosifon, *supra* note 80, at 1203 (“Because regulation threatens to diminish profits, and because directors are given the fiduciary obligation to pursue profits, combating the development and implementation of regulation becomes an important aspect of the firm’s work.”).

86. Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1051–52 (1998).

87. Robert J. Shapiro & Douglas Dowson, *Corporate Political Spending: Why the New Critics Are Wrong*, MANHATTAN INST. FOR POL’Y RES., Legal Policy Report (June 2012), [http://www.manhattan-institute.org/html/lpr\\_15.htm](http://www.manhattan-institute.org/html/lpr_15.htm).

companies, the benefits of political lobbying have been reported in stronger financial performance and greater stock market returns. Corporations that lobby intensively tend to outperform their benchmarks to larger degrees.<sup>88</sup> Over the long term, politically connected firms can outperform their peers by 2–3 percent per year.<sup>89</sup> One study found that the economic value of a \$1 business campaign contribution in terms of lower state corporate taxes is approximately \$6.65.<sup>90</sup> Corporations that participate in politics tend to gain advantages that help corporations make more money and benefit shareholders.<sup>91</sup>

By and large, this is what shareholders want. They invest in corporations for the most part to make money. The shareholders of a particular corporation may not necessarily agree with all of the political causes or candidates supported by that corporation, but if the corporation is providing the shareholders with a hefty return on their investment, they may not care where the corporation's political expenditures go. "Given the choice between a successful growing company supporting a candidate with whom the shareholder has a disagreement and a company whose stock is sinking but one who may back the same candidate, the rational investor would choose the company whose stock is on the rise."<sup>92</sup> This is the point where the corporation's duty to maximize profits ends and where the shareholder's interest as an investor ends as well. The fact that we do not see overwhelming shareholder objection to corporate political speech, or the emergence of incorporation statutes that make such speech *ultra vires*, suggests that corporate political speech tends to benefit shareholders by increasing their share value, and this is what they ultimately seek.<sup>93</sup>

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88. *Id.*

89. *Id.*

90. Robert S. Chirinko & Daniel J. Wilson, *Can Lower Tax Rates Be Bought? Business Rent-Seeking and Tax Competition Among U.S. States* 20, Federal Reserve Bank of San Francisco Working Paper Series, Paper 2009-29 (June 2010), available at <http://www.frbsf.org/publications/economics/papers/2009/wp09-29bk.pdf>.

91. There is some academic debate on whether corporate political spending truly benefits shareholders. Some empirical studies indicate that corporate political spending correlates with lower shareholder value. See Shapiro & Dowson, *supra* note 87 (describing and criticizing three separate studies that argue corporate political activity harms shareholders); see also John C. Coates & Taylor Lincoln, *Fulfilling the Promise of 'Citizens United'*, WASH. POST (Sep. 6, 2011), [http://www.washingtonpost.com/opinions/fulfilling-the-promise-of-citizens-united/2011/09/02/gIQAa4np7J\\_story.html](http://www.washingtonpost.com/opinions/fulfilling-the-promise-of-citizens-united/2011/09/02/gIQAa4np7J_story.html) ("[S]everal studies suggest that companies seeking political advantage may not be doing their shareholders any favors . . . . Politically active public companies are less valued by the market, and companies with better corporate governance . . . are less politically active."). But contrasting empirical work "does not find support for concluding political spending is harmful to shareholders." Coffin, *supra* note 82, at 104–05.

92. Coffin, *supra* note 82, at 158.

93. Yosifon, *supra* note 80, at 1229. One might argue, however, that real shareholders have many conflicting values and their desire for profits may not always be primary. See Greenwood, *supra* note 86, at 1040–43, 1049–55 (describing the concept of the unidimensional, exclusively

Shareholder primacy and profit maximization are key principles of corporate law that urge corporations to do what they are best at: innovating, taking risks, creating new products, and making money in the economic sphere. The drive to make as much money as possible is the underpinning for the whole structure of corporate law and defines the nature of corporate activity in society. Corporations are so highly motivated to engage in political speech, precisely because such speech facilitates the legally defined goal of shareholder wealth maximization.

*B. The Separation of Ownership and Control and the Business Judgment Rule*

Another set of very important doctrines in corporate law involves the separation of ownership and control, and the business judgment rule. Corporations are economically and legally structured so that shareholders own the equity interest in the company, but managers are the ones who exercise control of the business.<sup>94</sup> Large publicly held corporations have numerous, widely dispersed shareholders who lack the incentive and ability to coordinate with one another to manage the affairs of the company.<sup>95</sup> Highly diversified shareholders may invest their capital in hundreds of different corporations through mutual funds and have little desire to closely monitor how each is managed on a daily basis. “The simple fact is that one invests not to create a company or even run it, but . . . to gain a decent return.”<sup>96</sup> The owners of the corporation remain inactive, trusting that corporate directors and officers with business expertise and talent are far more capable of running the business to the shareholders’ ultimate advantage.

Corporate law both reflects and produces this division between ownership and control by giving corporate directors the exclusive power to manage the business. State corporate law makes clear that the “business and affairs of every corporation . . . shall be managed by or under the direction

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profit-oriented “fictional shareholder” whose economic interest supersedes all others).

94. Adolf Berle and Gardiner Means first thoroughly analyzed the separation of ownership and control as one of the defining characteristics of public corporations in the 1930s. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 84–89 (1932). Their work has been described as perhaps “the most influential book ever written about corporations.” BAINBRIDGE, *supra* note 77, at 4–5.

95. This reflects the “rational apathy of owners burdened by a collective action problem.” Adam Winkler, “*Other People’s Money*”: *Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871, 902 (2004). “Where ownership is dispersed among a large number of people, no single owner has sufficient incentive to invest the resources necessary to oversee management.” *Id.*

96. Lucas E. Morel, *The Separation of Ownership and Control in Modern Corporations: Shareholder Democracy or Shareholder Republic?*, 63 *WASH. & LEE L. REV.* 1593, 1594 (2006).



of a board of directors.”<sup>97</sup> The directors and their duly appointed agents possess the supreme authority to make corporate decisions and act on behalf of the corporation. The shareholders are not entitled to participate in the day-to-day management of the company. Ordinary business decisions are not the province of shareholders.<sup>98</sup> They have virtually no rights to set corporate policy or control the business and affairs of the corporation. With shareholders having very little power to initiate corporate action, corporate law creates a system in which “the board acts and the shareholders, at most, react.”<sup>99</sup> The board sits at the top of the corporate hierarchy and engages in authoritarian decision making for the benefit of the passive owners.<sup>100</sup>

The decisions of the board are protected by the business judgment rule. Absent fraud, bad faith, or conflicts of interest, the business judgment rule presumes that the directors have acted in good faith, on an informed basis, and with the honest belief that they acted in the best interests of the company.<sup>101</sup> To challenge the board’s action, the shareholders must rebut the presumption by showing fraud, illegality, or waste, which is extremely difficult to prove.<sup>102</sup> As long as the directors act with reasonable care and exercise rational judgment, the court will not substitute its judgment for that of the directors.<sup>103</sup> “The business judgment rule exists to protect and promote the full and free exercise of . . . managerial power.”<sup>104</sup> It allows

97. DEL. CODE ANN. tit. 8, § 141(a) (2011); *see also* MODEL BUS. CORP. ACT § 8.01(b) (2011) (“All corporate powers shall be exercised by or under the authority of the board of directors of the corporation, and the business and affairs of the corporation shall be managed by or under the direction, and subject to the oversight, of its board . . .”).

98. *See* Greenwood, *supra* note 86, at 1019–20 (“[I]t is black letter corporate law that shareholders have no right at all to determine ordinary business decisions.”). This rule is underscored by federal law as well. Federal securities rules allow corporate managers to exclude from annual proxy statements any shareholder proposal that “deals with a matter relating to the company’s ordinary business operations.” 17 C.F.R. § 240.14a-8(i)(7) (2011).

99. STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 72 (2d. ed. 2009). “A central and well-settled principle of U.S. corporate law is that all major corporate decisions must be initiated by the board. Shareholders may not initiate any such decisions.” Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005).

100. *See* BAINBRIDGE, *supra* note 99, at 76 (“At the apex of the corporate hierarchy stands not a single individual but a collective – the board of directors.”).

101. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

102. Ann M. Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts’ Response to Recent Corporate Scandals*, 60 FLA. L. REV. 589, 622 (2008) (“Plaintiffs may . . . rebut the business judgment rule presumption by showing that the directors failed to make a decision or that the directors’ conduct was fraudulent, illegal, or wasteful.”); *see also* BAINBRIDGE, *supra* note 99, at 226 (“[C]ases in which the business judgment rule does not shield operational decisions from judicial review are so rare as to amount to little more than aberrations.”).

103. DENNIS BLOCK ET AL., 1 *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 21–22 (5<sup>th</sup> ed. 1998) (citing cases holding that, under the business judgment rule, the court will not substitute its views for those of the board).

104. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

directors to take entrepreneurial risks and encourages innovation with the goal of maximizing shareholder value.<sup>105</sup>

The business judgment rule pervades every aspect of corporate law. It gives directors and officers wide discretion to make business decisions, including how to deploy corporate resources for the benefit of the shareholders. The managers might decide to use corporate funds to issue dividends or, alternatively, to reinvest the money back into the business.<sup>106</sup> They might decide to make corporate charitable contributions to any number of worthy causes.<sup>107</sup> Or they might decide to use corporate funds to engage in political spending, which under the business judgment rule is treated no differently than any other business decision they make in the best interests of the company.<sup>108</sup>

Constitutional law, as interpreted by the Supreme Court in *Citizens United*, may say that corporations have a First Amendment right to spend money in political elections, but it is *corporate law* that gives the managers the leeway to decide how much or how little to spend in those elections, how often to make those contributions, and which candidates or causes to support. Corporate law views those types of decisions as falling within the ordinary business decisions that managers make to advance profit maximization.<sup>109</sup>

One might argue that corporate political spending is different—more suspect, more likely to reflect the personal views of the corporation’s managers rather than the shareholders, more likely to drown out the voices of average citizens, or more likely to corrupt the political system—and therefore should not be given the same deference as other ordinary business

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105. BLOCK ET AL., *supra* note 103, at 12–15 (explaining the rationales of the business judgment rule).

106. See DEL. CODE ANN. tit. 8, § 170(a) (2011) (authorizing directors to declare and pay dividends); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807 (Sup. Ct. 1976) (deferring to the board’s business decision to issue stock dividends rather than sell the stock to preserve a tax advantage).

107. See DEL. CODE ANN. tit. 8, § 122(9) (2011) (authorizing corporate donations “for the public welfare or for charitable, scientific or educational purposes”); *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953) (finding that a corporate charitable donation to Princeton University was a valid exercise of corporate power).

108. See *Marsili v. Pacific Gas & Elec. Co.*, 51 Cal. App. 3d 313, 322–25 (Cal. Ct. App. 1975) (deferring to the corporate managers’ good faith business judgment in making a corporate political contribution).

109. See Lucian Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83 (2010) (“Under existing law, a corporation’s decision to engage in political speech is governed by the same rules as ordinary business decisions, which give directors and executives virtually plenary authority.”). Indeed, the federal securities rules take the same approach. See, e.g., *NiSource Inc.*, SEC No-Action Letter, 2002 WL 32072765, at \*1 (Mar. 22, 2002) (allowing the corporation to exclude a shareholder proposal recommending that a corporate political action committee be eliminated on the basis of the “ordinary business operations” exclusion).

decisions.<sup>110</sup> But corporate law does not make this distinction or take these considerations into account. The large public corporation “is not a New England town meeting”<sup>111</sup> where the divergent views of shareholders can be discerned and where decisions can be made by a consensus of all interested parties. Rather than being “participatory democracies,” corporations are hierarchies in which managers, not shareholders, make decisions “on a fairly authoritarian basis.”<sup>112</sup> Shareholders who object to this outcome or are unhappy with corporate political spending decisions have various remedies which may or may not provide significant relief, but they are the only remedies contemplated by corporate law.<sup>113</sup> Shareholders have no other grounds for asserting that corporate political speech is improper. Political spending is no different from other business decisions such as “which products to make, what kind of advertising to run, and which employee benefits to offer[,]” all of which require no shareholder input.<sup>114</sup> This is the nature of corporate law. It is the consequence of upholding the business judgment rule and the separation of ownership and control.

These long-standing features of corporate law are what make corporations and corporate managers so powerful. “The basic separation of ownership and control inherent in the corporate form enable[s] corporations to secure widespread public investment[,] . . . amass[] enormous capital and increase[] in size.”<sup>115</sup> As the following section explains, this ability to accumulate wealth and continually grow in size is also a fundamental aspect

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110. See Bebchuk & Jackson, *supra* note 109, at 84 (criticizing managerial control of corporate political speech and arguing that “political speech decisions are substantially different from, and should not be subject to the same rules as, ordinary business decisions”).

111. *TW Servs., Inc. v. SWT Acquisition Corp.*, CIV. A. Nos. 10427, 10298, 1989 WL 20290, at \*8 n.14 (Del. Ch. Mar. 2, 1989).

112. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 555 (2003). Some commentators suggest that the term “shareholder democracy” is a “misnomer, and perhaps a carryover from the days of town hall governance, which of course was only possible while the town remained small.” Morel, *supra* note 96, at 1598. Shareholder democracy is not possible in the modern corporation, which is too large to direct by a consensus of all shareholders. *Id.*

113. Shareholders who believe managers are engaging in corporate political speech for their own self-interest can bring a derivative suit for a breach of the fiduciary duty of loyalty, or shareholders can oust current directors and elect new ones, or shareholders can submit shareholder proposals in the proxy statement, or shareholders can sell their stock altogether. Critics argue that, by and large, these are hollow remedies. See Elizabeth Pollman, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53, 56–58 (2009) (arguing that these forms of shareholder relief are inadequate).

114. Stephen Bainbridge, *Bebchuk on Citizens United*, PROFESSORBAINBRIDGE.COM (Mar. 2, 2010, 10:18 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2010/03/bebchuk-on-citizens-united.html>.

115. Siebecker, *supra* note 81, at 170; see also Yosifon, *supra* note 80, at 1235 (noting that the separation of ownership and control is one of the elements of corporations that make them powerful).

of corporate law that contributes to corporate power.

### *C. Perpetual Existence and Unlimited Growth*

Modern corporate law places no limit on the life span of a corporation or on how large it can grow. The corporation, by its nature, has longevity, a perpetual existence that its individual members do not share. “[O]rganizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones.”<sup>116</sup> The law recognizes the corporation as an independent entity whose existence and identity remain the same, even if its human membership changes over time or is in a constant state of flux. The corporation can grow and live forever; unlike individuals, corporations are not held back by a finite life span.<sup>117</sup>

Nor is the corporation generally constrained by any legal limits on its wealth, size, or geographic reach. Large public corporations can grow to an enormous size with vast amounts of assets, billions of dollars in revenues, thousands of employees, and numerous branches, factories, and facilities in locations all over the world. The total market capitalization of public U.S. companies exceeded \$15 trillion in 2011.<sup>118</sup> The annual revenues of most major corporations far surpass the gross domestic product of many countries.<sup>119</sup> Corporate law promotes the maximization of profit and places no cap on the accumulation of corporate wealth. Corporations can expand their presence by consolidating with other business entities domestically and internationally. Corporate law provides the means for corporations to merge and acquire other corporations and thereby grow exponentially in size, instantly by operation of law.<sup>120</sup>

Historically, early corporate law took a very different approach to corporate growth and power. In the early nineteenth century, corporations required a special act of the state legislature to approve their charters on a

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116. PETER M. BLAU & W. RICHARD SCOTT, *FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH* 1 (1962).

117. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 455 (1979) (Corporations are “artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.”).

118. *Market capitalization of listed companies (current US\$)*, THE WORLD BANK, <http://data.worldbank.org/indicator/CM.MKT.LCAP.CD> (last visited July 16, 2012).

119. See Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUSINESS INSIDER (June 27, 2011, 11:27 AM), <http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6?op=1>.

120. See, e.g., DEL. CODE ANN. tit. 8, § 251 (2011) (authorizing the merger of any two or more corporations pursuant to an agreement of merger complying with the statute). See generally STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* (3d ed. 2012) (discussing the law and dynamics of corporate mergers and acquisitions).

case-by-case basis.<sup>121</sup> States typically granted corporate charters for enterprises that served a public function and met specific social needs, e.g., public utilities, banks, insurers, transportation services, and water works.<sup>122</sup> Corporate charters were granted sparingly and only “for limited periods and for limited public purposes.”<sup>123</sup> State law played a decisive role in circumscribing corporations within certain spheres of activity. Early charters often contained specific provisions maintaining some measure of control over corporations.<sup>124</sup> Laws kept corporate size and power in check by placing limits on the maximum amount of authorized capital and indebtedness, restricting the life span of corporations to a fixed number of years, and prohibiting corporations from holding stock in other corporations.<sup>125</sup> These constraints were imposed out of fear that corporations, if left unbridled, would grow so large and amass such power that they would become oppressive and coercive.<sup>126</sup>

Corporate law today no longer imposes these restrictions on corporate life span and growth. Therefore, corporations are free to become large corporate conglomerates and accumulate immense wealth. These advantages attach to the corporate form through corporate law. The fact that

121. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW 188–201* (2d ed. 1985) (discussing the evolution of the state legislature’s role in granting corporate charters during the nineteenth century).

122. See JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970* 17 (1970); Bratton, *supra* note 69, at 1484.

123. Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 *BUFF. L. REV.* (SPECIAL EDITION) 1453, 1475 (2006).

124. See, e.g., Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 *U. CHI. L. REV.* 1441, 1444 (1987) (states often strictly regulated banking activity through limited powers granted in bank charters and “through strict construction of those charters by the courts”); see also McCluskey, *supra* note 123, at 1478 (“Some legislatures structured corporations to ensure equal voting power for smaller investors; to require favorable treatment of the poor; or to ensure that investors and managers retained private individual responsibility for corporate debts and liabilities.”). At times, states even regulated the prices that corporations could charge and the rate of return that investors could earn. McCluskey, *supra* note 123, at 1476. Courts also tended to support broad state powers over corporations. See, e.g., *Leep v. St. Louis, Iron Mountain & S. Ry. Co.*, 25 *S.W.* 75, 81 (Ark. 1894) (holding that even though legislatures lacked power to dictate how natural persons paid their employees, legislatures had the power to do so with corporate employers).

125. *Louis K. Liggett Co. v. Lee*, 288 *U.S.* 517, 548–56 (1933) (Brandeis, J., dissenting in part); see also 1 WILLIAM M. FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 6 (perm. ed., rev. 2006) (noting that while a corporation has a “continuity of existence,” it could be “limited in duration to the period stated in its charter or the act authorizing the granting of it”); Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 *WIS. L. REV.* 999, 1022 (2010) (noting that, prior to 1896, there were “long-lasting prohibition[s] against corporations owning stock in other corporations”).

126. *Louis K. Liggett Co.*, 288 *U.S.* at 548–49. There was “[f]ear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly . . . There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.” *Id.*

corporations can grow so big and generate so much money is what makes corporations so economically and politically powerful.

#### V. CORPORATE LAW v. CONSTITUTIONAL LAW AS THE SOURCE OF CORPORATE POWER

As Part IV discussed, long-standing corporate law doctrines and norms—shareholder primacy and profit maximization, the separation of ownership and control, the business judgment rule, perpetual existence, and unlimited growth and accumulation of assets—define the nature of large public corporations today. These fundamental features of corporate law work together to cultivate an environment where corporations can gain great economic and political power. This power is ultimately what so many people find unsettling. They resent the vast amounts of money controlled by corporate entities. They resent how powerful that money makes the leaders of corporations. The crux of the unease is the fear that corporations with their enormous wealth will so dominate the political sphere that the voices of ordinary citizens will be muted. This dismay over corporate influence is why *Citizens United* continues to provoke such strong reaction. No one fears the little family-owned corporation or the small non-profit organization that engages in various forms of campaign advocacy. It is the large multinational corporation that worries most people because such corporations enjoy perpetual existence, control billions of dollars, and are so strongly driven by the profit motive. But corporate law is structured to allow this to happen. It creates a world where large public corporations can thrive and achieve exactly what the Corporate Abolitionists do not want corporations to have: tremendous drive to make and accumulate money, and then spend that money to influence and engage in the political realm.

If this is true, then it is *corporate law*, not just *constitutional law*, that is at the core of what bothers Corporate Abolitionists so much, although they may not realize it. Corporate power is not necessarily rooted in the personhood status of corporations under constitutional law. Rather, it is the result of corporate law's conception of the property rights of shareholders to make as much money as they can and want. Corporate money is shareholder money.<sup>127</sup> Under our system of economic rights, it would be unthinkable to suggest that the law limit or cap how much money can be

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127. Shareholders are considered the owners of the corporation, although there has been academic debate over how little their ownership rights resemble traditional property rights. Compare, e.g., Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825–26 (1999) (arguing that shareholders are owners of the corporation even though they may not carry all the standard incidents of ownership) with Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002) (arguing that “shareholders do not, in fact, own the corporation,” but rather own stock and have no right to control corporate assets).

earned and accumulated by shareholders who use the corporate vehicle as a means of investment. Corporate law's focus on shareholder primacy and profit maximization is bolstered by these strong concepts of individual property rights to pursue economic gain.

All of this implies that a constitutional amendment to abolish corporate personhood will not achieve what people are hoping because corporate power is not merely a matter of constitutional law, free speech, and personhood. It is about the fundamental features of the corporate law regime. It is embedded into the very structure of corporate law itself. Constitutional law alone does not explain why corporations are so powerful. To address corporate power in the comprehensive manner that the Corporate Abolitionists wish, they would need to dismantle core corporate law doctrines and norms, and that is an entirely different battle.

Perhaps corporate law could be revamped completely to alter the nature and structure of corporate institutions. Various elements of the corporate form, such as the ability to accumulate immense wealth, could be eliminated or state legislatures could revert to limiting the life span of corporations to strictly defined periods in corporate charters. Perhaps "Congress could forbid corporations altogether. Or Congress could forbid those elements of . . . corporat[ions] . . . that make them powerful—for example, the separation of ownership and control. Or Congress could tax corporate operations until capital, labor, and consumers prefer to deal with each other in small partnerships rather than . . . [corporations]."<sup>128</sup>

The risk of taking such "corporation-weakening responses," however, is that society would lose the efficiencies and the "economies of scale that . . . [large-scale] corporate organization provides."<sup>129</sup> Corporations provide goods and services of value that benefit our society—goods and services that we would find it difficult to live without in our technological day and age. "Many of the things we buy are much more complicated to manufacture and bring to the marketplace than the products of an earlier generation."<sup>130</sup> Without the large-scale operations of corporate organizations, many of the complex needs of modern society may go unmet.<sup>131</sup> The "corporate

128. Yosifon, *supra* note 80, at 1235.

129. *Id.*

130. Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 AVE MARIA L. REV. 1, 27 (2006); see also Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. (SPECIAL EDITION) 1369, 1370 (2006) ("In the course of a typical day each of us consumes the products and employs the services of innumerable corporations . . . My normal progress through the day would be unsustainable without these creatures that routinely deliver unimaginable prodigies of organization and performance.").

131. See Kennedy, *supra* note 130, at 27 ("In general, our economic lives, as well as our private lives, have become more complicated. Individual producers, whether farmers, craftsmen, or professionals, can rarely satisfy the needs of the community.").

structure allows corporations to do a singularly good job” of producing innovative products at a good price without all of the inefficiencies that burden government agencies.<sup>132</sup> The large corporation enables human beings to accomplish, through concerted action, many things that no individual could achieve alone.<sup>133</sup> The same corporate law that enables corporations to produce all of these advantages for us is also the source of the enormous corporate power that distresses so many people. These elements of corporate law are so intertwined that any decision to weaken portions of the governing structure to address corporate power will necessarily come at a cost.

## VI. CONCLUSION

*Citizens United* sparked such strong responses precisely because many people are worried about excessive corporate power. That worry is not going to go away anytime soon. People are angry at the Supreme Court for affirming corporate power in *Citizens United*. Many are focusing their anger on attacking the doctrine of constitutional corporate personhood. The point of this Article is to suggest that their anger may be channeled in the wrong direction. *Citizens United* cannot be analyzed and understood in isolation as merely a case about campaign finance law, the First Amendment, or constitutional law. Corporate law plays a critical role in how we evaluate the implications of *Citizens United*. Even if we could abolish corporate personhood and restrict corporations from political spending, it most likely would not eliminate their political power because their political power stems from their economic power, and that economic power is derived from corporate law itself. As long as corporate law remains the way it is, and as long as there are many good reasons for keeping it as such, corporations will continue to hold power, whether or not they are called persons for purposes of constitutional rights.

Perhaps the Corporate Abolitionists recognize all of this, but feel they have to start somewhere. They know that a constitutional amendment to abolish the personhood of corporations is a formidable challenge, but in

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132. Greenwood, *supra* note 86, at 1050 (noting that there is “no reason to give up these enormous advantages”).

133. See Galanter, *supra* note 130, at 1370 (“[Corporations] have proved a tool for complex and coordinated action of a scale, consistency, and perseverance vastly beyond the range of biological individuals or informal gatherings.”). Peter Drucker argued that the “bigness” of large integrated corporations is enormously advantageous not only because it produces things more cheaply and efficiently, but because it contributes to social stability and healthy social functioning in ways that small business could never do. See PETER F. DRUCKER, CONCEPT OF THE CORPORATION 223–29 (1972) (explaining several reasons why “bigness” is an asset and not a liability).



some ways it presents a much more straightforward and clearly defined route than attempting to take on all of corporate law as a governing structure. Supporters of the amendment may agree it is “not a panacea,” but they argue that it nonetheless presents “an organizing vision”<sup>134</sup> and that it “offer[s] extraordinary value as a tool for education and mobilization.”<sup>135</sup> Even so, it is important to acknowledge that corporations are complex, multi-faceted creatures, and their ascendance arises from more than their personhood status. Corporate law has gone a long way toward creating the powerful position that corporations hold in our legal system and society. To ignore the significance of corporate law in this regard is to overlook the deeper origins of corporate influence in the modern world.

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134. Michael Beckel, *After 'Citizens United,' is Constitutional Amendment Needed?*, NAT'L L. REV. (May 25, 2012), <http://www.natlawreview.com/article/after-citizens-united-constitutional-amendment-needed> (quoting Sen. Jamie Raskin).

135. vanden Heuvel, *supra* note 47.