

## **FUNDAMENTAL RIGHTS AND CORPORATE PERSONHOOD: VIEWS FROM THE US SUPREME COURT**

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### **Abstract**

This paper examines, through the lens of two seminal judgments by the US Supreme Court (*Citizens United v Federal Election Commission* and *Burwell v Hobby Lobby Stores*), the issues of speech and freedom of religion as corporate rights. It looks at two distinct levels of analysis, namely the content assigned to these freedoms and the theories of corporate personhood impacting on the entitlement of legal persons to specific rights. Are corporations, legally understood as ‘persons’, fully equal to human entities? Should First Amendment freedoms be recognized in the same way and to the same extent to corporate entities and natural persons or should this equal treatment reveal a dark side of the law, insofar as the principle of the equal protection of the laws would be jeopardized? This survey will address these major issues, highlighting the manifold factors and arguments underlying the Court’s decisions. A general conclusive answer to those questions may not be given; it is necessary to scrutinize the specific facts and legal points of the cases putting at the foreground the issue of corporate personality.

[Corporate personhood; exercise of religion; speech; electioneering communications; independent expenditures; health plans]

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## **Keywords**

Corporate Personhood - Exercise Of Religion - Speech; Electioneering Communications - Independent Expenditures - Health Plans

## **1. Introduction**

This paper aims to shed light on the possibility of acknowledging constitutional freedoms – such as those of speech and religion, usually only referring to natural individuals – to non-human entities, such as corporations, focusing on the issues of the content and breadth of these rights when they are claimed by legal persons. This research question is not only significant in order to deal with specific legal points, but also to address more general issues at a policy level, such as the following: is the judicial acknowledgement of corporations as owners of fundamental rights usually acknowledged as part of the natural persons' property clear evidence of their power, namely, of their ability to put significant pressure on courts when corporate interests are at stake, so endangering the autonomy of the judicial body as well as its impartiality vis-à-vis the interests subject to judgment? A positive answer to this question would reveal a dark side of the law insofar as adjudication is affected by non-legal factors putting at risk the principle of equal protection of people and corporations. Awarding the same protection granted to natural persons would reveal a preferential treatment at law to the corporations' benefit. These issues call for a thorough analysis of the concept of corporate legal personality in the US legal world on the ground of those rights which are acknowledged to legal entities.

Freedom of expression and religion clearly fulfill a remarkable role in the development and evolution of human beings, having a deep impact on their personality. Recent US cases concerning the acknowledgement of fundamental rights on behalf of corporations are worthy of attention. I will address two major questions:

A) First, is the core content of these rights the same for both natural and legal persons?

B) What is the scope of and justification for legal subjectivity bestowed on legal persons? Has this concept been consistently understood and applied throughout time, or has it undergone a substantial change?

The scope of corporate freedoms is also significant as to the extent of corporate liability. This latter aspect, however, will not be tackled in this essay.

## **2. An overview of two seminal cases: *Citizens United v Federal Election***

### ***Commission and Burwell v Hobby Lobby Stores***

Let's start with two quite recent cases decided by the US Supreme Court. The reason for choosing these cases is that they reveal a judicial outlook on corporate rights which still holds validity.

The first one is *Citizens United v Federal Election Commission*.<sup>1</sup> The case arises from the federal law prohibition – set by the Bipartisan Campaign Reform Act of 2002 § 203 (henceforth, BCRA)<sup>2</sup> through criminal sanctions – to corporations and unions to use their funds for independent expenditures financing speech amounting to ‘electioneering communication’ (i.e. in the statutory words, having for object ‘a clearly identified candidate for Federal Office’, made ‘within 30 days of a primary election’, and ‘publicly distributed’ [i.e. ‘received by 50,000 or more persons in a State where a primary election [...] is being held’]). The challenged statute does not address

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<sup>1</sup> 558 U.S. \_ (2010).

<sup>2</sup> § 203 amended the 2 U. S. C. §441b.

corporate contributions to a political action committee or direct contributions to political candidates.

The Court interprets the limitation on expenditures set by section 441b as an unconstitutional limitation on freedom of speech;<sup>3</sup> applying different rules according to the speaker's identity would give rise to discrimination to the detriment of legal persons, ending in a breach of the principle of equal treatment.

The Court finds for a strong protection of the freedom of expression in a remarkable passage:

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people [...]. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints [...]. Speech restrictions based on the identity of the speaker are all too often simply a means to control content [...]. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each [...]. The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions [...]. We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.<sup>4</sup>

Majority deemed it necessary regarding the issue of section 441b's unconstitutionality – in order to decide the claim, not deeming it possible to set aside this issue through a narrow interpretation of the text – to leave the case at stake outside the scope of

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<sup>3</sup> The dissenting judges put at the foreground the argument that even though appellants did not facially challenge the constitutionality of sec. 441b, the court decided on this ground: 'five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law' (Stevens, 6). This choice seems in the dissenting judges' view startling, being at odds with the principle of the judicial restraint and the strategic value of the *stare decisis* principle.

<sup>4</sup> Judge Kennedy's opinion (on behalf of majority), 23-25. In his concurring opinion, Judge Scalia adds that 'the individual person's right to speak includes the right to speak *in association with other individual persons*' (7); speech and freedom of association seem to be intertwined. Scalia's view on corporate personhood in this case will be considered *infra*.

application of the abovementioned provision.<sup>5</sup> The precedent *Austin v Michigan Chamber Commerce*, governing the same issues, is examined.<sup>6</sup> The majority looked at this case as a watershed. Older cases had prohibited restrictions to political speech regardless of the speaker's identity; *Austin* turns the tables, holding that restrictions concerning political speech may be admitted on the basis of the speaker's identity. Because of allegedly conflicting lines of precedent, the Court takes its cue from the present case to shed light on the issue.

Corporate political speech can be banned to prevent corruption. However, the majority found that putting a restriction on independent expenditures reduces the quantity of corporate expression by narrowing: a) the number of issues discussed; b) the depth of their exploration; c) the size of the audience reached. Quite interestingly, commercial speech, the most likely to be practiced by corporations because of the economic nature of their activity, is not given any consideration. Corporate speech *tout court* in its broadest sense – without any modifier – is at the center of the majority's opinion.

According to the court, possible limitations to this freedom are subject to strict scrutiny; only restrictions pursuing a compelling governmental interest may be admitted in so far as they are necessary to the protection of this latter.

In this case Kennedy, on behalf of the majority, excluded further possible grounds for restrictions of that freedom – other than the one justified by the risk of corruption – by the corporation at stake. The major one is the anti-distortion argument, endorsed in *Austin*: the immense wealth possessed by most (albeit not all) corporations may inappropriately boost the societal-political views of the persons behind them at the expense of less affluent subjects, regardless of these opinions lacking public support. According to the Court, this distinction between individuals and groups, grounded on their power of influencing the outcome of elections, is foreign to the First Amendment *rationale*. Furthermore, this approach would also prevent small and non-

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<sup>5</sup> The court interpreted the unconstitutionality issue before it as a facial challenge – occurring when the legislation is thought to be in any case unconstitutional, and therefore void – rather than an as-applied one, in which only a particular application of a statute is considered as unconstitutional.

<sup>6</sup> 494 U.S. 652 (1990). In this case, Court declared that the Michigan Campaign Finance Act banning corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices squared with the First Amendment.

profit corporations from circulating their views; by restricting free and full public discussion, the marketplace of ideas<sup>7</sup> would be poorer, undermining the First Amendment's most important goal. Neither is the argument accepted that the sacrifice of corporate First Amendment rights would be justified by the special advantages – such as that of corporations' members limited liability for contractual obligations taken in the corporations' name by persons acting as their proxy – conferred to legal entities through the corporate form. The assumption underlying the majority holding is that corporations are entities independent from states and shareholders. As speakers, they enjoy the same status as individuals and enjoy the same First Amendment protection.<sup>8</sup>

The other justifications for the curtailment of corporate speech, such as the above-mentioned necessity of fighting corruption or the necessity of protecting shareholders who do not agree with the decisions made by the management,<sup>9</sup> are dismissed as not being applicable to independent expenditures. Investing money to advocate for the success or failure of a clearly identified candidate at election and not made in cooperation or in concert with this latter – the kernel of what is meant by 'independent expenditure' – is not enough to accurately show a real risk of corruption or a weakened protection of dissenting shareholders. In conclusion, the Court overturns § 441b's restriction on corporate independent expenditures and overrules *Austin*.

This decision, far from gaining a unanimous scholarly consensus, has been criticized as 'divorced from corporate law perspective' and based on 'flawed assumptions'.<sup>10</sup>

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<sup>7</sup> The origins of this concept – but not the definition quoted in the text – date back to the well-known *dictum* by Oliver Wendell Holmes in *Abrams v United States*, 250 US 616 (1919). The concept is clearly applied to extend corporate political speech rights.

<sup>8</sup> The dissenting opinion by Stevens (28-30) highlights that 'the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality [...] Yet in a variety of contexts, [...] speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. [...] When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems [...]. The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did'.

<sup>9</sup> This argument stating that the corporations' management opinions may not find the shareholders' support is shared by Justice White in his dissenting opinion in *First National Bank of Boston v Bellotti* 435 U. S. 765 (1978).

<sup>10</sup> Anne Tucker, 'Flawed Assumptions: a Corporate law Analysis of Free Speech and Corporate Personhood in *Citizens United*', (2010) 61 Case W. Res. L. REV. 497, 520-521, who remarks that '[a]pplying a corporate law

In my opinion, a deep analysis of speech should take into account the major role allegedly played by money in making this freedom actual.<sup>11</sup> Money may affect speech in different ways:

1. money may provide incentives to speak;
2. money may facilitate speech;
3. spending money may be seen as a way of expressing one's own opinion. In general, spending money may be assigned a constitutional value when conceived of as a way of exercising a given constitutional right depending on a good distributed through the market mechanism.<sup>12</sup> The Court clearly sees in this case a ground for the application of the third option, considering the spending of money to lie within the penumbra of the freedom of expression. Putting a cap on independent expenditures on speech would take electioneering away from the market, ultimately having repercussions on the exercise of the freedom of expression.

The second case is *Burwell v Hobby Lobby Stores*.<sup>13</sup> In this case, at stake are the regulations issued by the Health and Human Services (henceforth, HHS) under the *Patient Protection and Affordable Care Act* of 2010, which requires specified employers' group health plans to furnish 'preventive care and screenings' for 'women without any cost sharing requirements' (the cases of preventive care having not been specified by the Congress, their specification has been delegated to a component of HHS). These regulations impose on employers (in this case, corporations) to cover the cost of some contraceptives. The corporations involved – Hobby Lobby, Conestoga Wood Specialties and Mardel, whose nature is that of closely-held corporations (i. e.

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perspective to the *Citizens United* debate, five points for discussion emerge: (1) the economic motivation of corporate speech, (2) the lack of a single corporate voice, (3) the threat of compelled speech, (4) the prevalence of existing regulation of corporate speech, and (5) the applicability of the equalization rationale to corporate speech?

<sup>11</sup> For the understanding of money spending as 'a form of Modern Property', since 'it is frequently in the corporation's interest to spend money for political purposes', Carl J Mayer, 'Personalizing the Impersonal: Corporations and the Bill of Rights', (1990) 41 *Hastings L. J.* 577, 616.

<sup>12</sup> Deborah Hellman, 'Money Talks but it isn't Speech', (2011) 95 *MINN. L. REV.* 953, 985-986, who thinks that a system of circulation of goods different from market is not foreclosed by the constitution.

<sup>13</sup> 573 U.S. \_ (2014).

in the hands of few persons, unlike publicly traded corporations, who jointly exercise ownership and control) – were entirely owned by very religious individuals believing that life starts at conception and thus opposing paying for four contraceptives having the effect of preventing an already fertilized egg from developing any further. There were two main legal issues: whether for-profit corporations might avoid these regulations; and who – individuals or corporations in their own name – has the standing to sue. In this case, in fact the owners and not the companies sued HHS and other federal agencies, seeking to enjoin the mandate requiring (corporations) to provide coverage for the above recalled contraceptives. The abovementioned statutory instrument provides that, in the case of a breach of a statutory duty, a penalty is imposed on the employer whose entity depends on the number of persons deprived of such coverage. The Court dismissed the argument that freedom of religion may be affirmed only by individuals or exempted subjects, such as churches or religious non-profit corporations, consistently with what the HHS regulations' provisions in force stated at the time when *Hobby Lobby* was decided. Even for-profit corporations may claim this freedom. This solution is, according to the court, the one which effectively protects the freedom of persons behind corporations, who otherwise would be forced to choose between the judicial protection of their religious liberty as individuals – and not through corporations – or giving it up. The Court grounds the solution on the Religious Freedom Restoration Act (henceforth, RFRA) enacted in 1993, which prohibits the Government from placing a burden on the person's exercise of religion 'even if the burden results from a rule of general applicability', unless the Government 'demonstrates that application of the burden to person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest'. RFRA was enforced in order to heighten the protection of the freedom of religion.

According to the Court, the businesses at stake should be considered as 'persons' under the federal legislation (in the meaning disclosed by the Dictionary Act, the governing legislative source since the RFRA does not provide a specific definition in its own terms).<sup>14</sup> This case, therefore, though appearing analogous to *Citizens United*

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<sup>14</sup> Alan J. Meese & Nathan B. Oman, 'Hobby Lobby, Corporate Law, and the Theory of the Firm: Why for-Profit Corporations are RFRA Persons', (2013-2014) 127 HARV. L. REV. F. 273, 277 adopt the same stance endorsed by the Court, relying on 'corporate law's enormous flexibility. The structure of corporate governance is contingent and contractual, enabling shareholders of closely held corporations to unify ownership and control and exercise the same prerogatives as owners of non-corporate businesses, such as partnerships. While such



(in both cases corporations are involved), shows a distinctive feature; it was not decided on constitutional grounds as a case of infringement of the First Amendment, but on a statutory basis, namely the federal law in force. The standard of protection then depends on the Congress.

The crucial argument in the majority's reasoning is the fact that the legal persons involved were closely-held corporations; the business is family-run. Individuals' religious beliefs should not be weeded out because of the corporate shield.

According to the majority, 'exercise of religion' (under the RFRA) involves not only belief and profession but the performance of (or abstention from) physical acts: 'business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition'.<sup>15</sup>

The principles stated in *Braunfield v Brown*,<sup>16</sup> laying down the rules to apply when a law interfering with a person's religious practice may be held compatible to the US Constitution, were set aside by the RFRA. In *Braunfield*, an individual – an Amish proprietor who complained that he was forced by a state law to close on Sunday – claimed the violation of the First Amendment's free exercise clause, being forced to choose between not abiding by his religious beliefs (providing to shut his business on Saturday) or suffering an economic loss keeping his business closed even on Sunday. The court stated that when a law is generally applicable, not targeting religious practices but having only indirect effects on them, it does not violate the First Amendment.<sup>17</sup> Nobody is therefore relieved of the obligation to comply with such a valid and neutral law. This legal principle has, in the majority's opinion, to be considered overturned from RFRA.

The majority deemed that the veil of corporate personhood may be pierced to give the floor to the freedoms of the persons who own those freedoms. The court also

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closely held firms retain limited liability and entity status, neither attribute justifies denying shareholders of such entities the right to advance religion while earning a profit'.

<sup>15</sup> 21.

<sup>16</sup> 366 U.S. 599 (1961).

<sup>17</sup> In the wake of *Braunfield*, see *Employment Division, Department of Human Resources of Oregon v Smith* 494 U.S. 872 (1990).

adds that ‘modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so’.<sup>18</sup> The example of corporations supporting a variety of charitable causes is expressly considered.

In this case, however, the religious belief of owners allows corporations to avoid a cost. The women’s free choice and cost-free access to the challenged contraceptive methods show the existence of a compelling governmental interest; yet the Court states that the least-restrictive means test has not been satisfied by the appellants, insofar as they were not able to clearly show the lack of alternative options to that of burdening employers holding sincere religious beliefs.

It is interesting to remark that even if no free exercise of religion clause under the First Amendment is at stake, an understanding of this freedom does not seem to find in practice a limit in the women’s well-being and health, therefore curtailing or foreclosing for the women who can’t afford those expensive contraceptives the ability to make recourse to them. This argument is at the core of Judge Ginsburg’s dissenting opinion.

### **3. A look at the main US theories of corporate personhood**

The conceptual framework used by the Court to adjudicate these cases results from two distinct, albeit deeply interrelated grounds. The first one – to which specific remarks will be devoted in the concluding paragraph – is a broad understanding of the two freedoms consecrated by the First Amendment, as a bulwark against possible governmental interferences to the benefit of either physical or legal persons. It implies a long-time and consolidated concern; or it would be better to say, a mistrust of governmental action pursuing the aim of redistributing wealth. Judges, in this conceptual frame, would be the gatekeepers of a ‘natural’ order that should not be upended by political choices.

The second ground is that of legal theories governing the issue of the legal person’s subjectivity. Three approaches are worth recalling. They may be considered, to a certain extent, as different steps in an evolutionary process, in which, however, older

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<sup>18</sup> 23.

theories – i.e., those dating back to a less recent past – have not disappeared once and for all. Some cases show they are still alive.<sup>19</sup>

The oldest doctrine is the so called ‘artificial entity theory’ (also called ‘grant/concession theory’). Its underpinnings are clearly expounded in *Dartmouth College v Woodward*<sup>20</sup>: a corporation is an ‘artificial being, invisible, intangible, and existing only in contemplation of the law’, to be kept distinct from the natural persons behind it, having ‘those properties which the charter of its creation confers upon it’. Therefore, since corporations are creatures of the state (their existence being conditioned to an explicit acknowledgement by this latter), it may cut down their autonomy at will. Legal personality has the nature of a granted privilege allowed in order to ensure the safeguard of a public interest. The term ‘privilege’ is a keyword for a deep understanding of this doctrine, for it expresses the idea that limited liability of persons behind corporations is a derogation from the general principle of the unlimited liability usually incurred by individuals for the obligations assumed. The powers enjoyed by corporations – as the flipside of the duties imposed on them – were grounded from this theory on the charter of incorporation and limited to those expressly recognized; the corporation would be endowed with a special legal capacity. In this regard, *ultra vires* doctrine is the artificial entity theory’s linchpin. Their freedom, as the by-product of a previous concession by the government, must be exercised within the sphere marked by the state.<sup>21</sup> Within this framework, the interests which might be claimed were only those that were tangible (i.e., having an economic content), the intangible ones, such as free speech, privacy and personal security, being reserved for human beings. The argument of exclusive institutional competence (according to which only the government has the power to establish corporations) is brought forward to justify this conclusion; in the wake of *Dartmouth*, this solution

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<sup>19</sup> For an in-depth analysis of these theories, Darrell A. H. Miller, ‘Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights’, (2011) 86 N. Y. U. L. Rev. 887, 914-931.

<sup>20</sup> 17 U.S. 518 (1819).

<sup>21</sup> Miller (n 19), 920 sees in the artificial entity theory ‘a doctrinal device that the court uses to justify regulation of corporations to a degree different than individuals’.

was adopted in *Bank of Augusta v Earle*.<sup>22</sup> According to some scholars,<sup>23</sup> even *Santa Clara County v Southern Pacific Railroad*,<sup>24</sup> regarded as a trailblazer for a new era in corporate rights, was no different under a theoretical viewpoint from the above recalled precedents. In Santa Clara, the issue was whether corporate property may be subject to taxation differently from that of natural persons. The answer, grounded on the applicability of the 14<sup>th</sup> amendment even to corporations, was in the negative. This theory progressively lost ground – suffering an erosion of its scope of operation from the 1880s onwards – since corporations were increasingly conceived of as a normal way of carrying out business and not as exceptions to be looked at with skepticism; the premise of their oddity – singularity – was no more tenable. However, sometimes – and throughout the 20<sup>th</sup> century – it is still employed. A clear example may be found in Rehnquist’s dissenting opinion in the already mentioned *First National Bank of Boston v Bellotti*, a case involving issues showing similarities to those covered by Citizen United.<sup>25</sup> In this case two national banking associations and three corporations expressed their opposition to a referendum proposal aimed at amending the Massachusetts Constitution to authorize the legislature to enact a graduated personal income. The appellants brought this action challenging the constitutionality of a Massachusetts criminal statute inhibiting contributions and expenditures by specific corporations aiming at influencing the vote on issues submitted to voters. This statute at the same time provided that ‘no question submitted to voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation’. The Court constructed the First Amendment as referring to the activity of addressing a topic of the utmost importance for the public opinion and therefore worthy of being

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<sup>22</sup> 38 U.S. 519 (1839).

<sup>23</sup> Morton Horwitz, *La trasformazione del diritto americano. 1870-1960* (Il Mulino 2004), 109-117 [*The Transformation of American Law 1870-1960* (OUP 1992)].

<sup>24</sup> 118 U.S. 394 (1886).

<sup>25</sup> Rehnquist in his dissenting opinion argues against the idea of a general freedom of expression assigned to corporations beyond the realm of their business and property interests. Rehnquist pointed out that restrictions on such speech had been approved by Congress and over thirty states. In the Judge’s view, corporate speech should be safeguarded when linked to commercial interests: ‘although the Court has never explicitly recognized a corporation’s right of commercial speech, such a right might be considered necessarily incidental to the business of a commercial corporation. It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes’ (825).

debated, rather than to a subject, who claims the right to express their opinion. Emphasis was therefore laid on speech as such, rather than on speakers.<sup>26</sup> Judges found that the criminal statute violated the First Amendment; corporations meant to express their views on an ‘issue of public importance’ and there was no overwhelming interest at stake for citizens that would legitimate restricting the freedom of expression of corporations.

The second theory in order of time is the ‘aggregation’ one. According to this doctrine, a corporation may be seen as a web of contracts. Corporations are therefore similar to partnerships, since natural persons are co-owners of them, and there is no distinct legal entity other than the persons acting through them.<sup>27</sup> To sum up, corporations should be seen as an aggregation of natural persons having legal rights, being corporate rights derivative of the individuals’ ones. Corporations do not depend on a decision made by the political power, but on a choice made by private persons to exploit their free will and give rise to corporations. Within the conceptual

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<sup>26</sup> According to Mayer (n 11) 650, the trend highlighted in the text is the result of a ‘pragmatic, antitheoretical approach to corporate rights’ defined as ‘Constitutional Operationalism’, not depending on a specific theory of corporate personhood. ‘[A] corporation is only entitled to the guarantees of a certain amendment if, by so awarding the protection, the amendment’s purposes are furthered. Therefore, the corporation is defined by the operation it performs’. For a historical insight into the pragmatic approach to the issue of the legal personality of legal persons (detached from any reference to their entitlement to constitutional freedoms), John Dewey, ‘The Historic Background of Corporate Legal Personality’, (1926) 35 YALE L. J. 655, 673 lays emphasis on the legal concept of ‘person’ as a ‘duty-and-rights bearing unit’. This definition is not grounded on a given ‘substance’ of the entities to which is referred, having rather to be based on the consequences assigned to their acts by a given legal system. According to Dewey, this method is appropriate in order to get rid of the ‘mass of traditional doctrines and remnants of old issues’ which ‘needlessly encumbered’ ‘the entire discussion of personality’. Dewey remarks that theories concerning the corporate legal personality are not worthy of attention since they are extremely manipulable, being able to serve opposite ends depending on the specific legal problems at stake. Dewey’s stance is criticized by Horwitz (n 23), who observes that legal concepts and theories’ scopes depend on the historical contexts in which they are established.

A similar approach is followed by Bryant Smith, ‘Legal Personality’, (1928) 37 YALE L. J. 283, 296 who fully rejects any effort of theorization aimed at seizing the essence of corporate legal personality. Legal personality is in his terms ‘the capacity for legal relations’ (283). Being qualified as a legal person means simply being ‘the subject of rights and duties’ (ibid.). Smith’s survey seems to be marked by a sort of legal agnosticism. In this regard, a seminal passage devoted to better explain that author’s viewpoint may be found in the following page: ‘[...] the function of legal personality [...] is not alone to regulate the conduct of the subject on which it is conferred; it is to regulate also the conduct of the human beings toward the subject or toward each other. [...] The broad purpose of legal personality [...] is to facilitate the regulation, by organized society, of human conduct and intercourse’.

<sup>27</sup> This assumption underlies the essay by Max Radin, ‘The Endless Problem of Corporate Personality’, (1932) 32 COLUM. L. REV. 643, 666 who suggests that ‘the corporate entity is thought of as a name or symbol which facilitates reference to a complicated group of relations, but adds nothing to them’.

framework of the aggregation theory, corporate identity would be a conceptual means of simplification, achieved by replacing the real owners of rights and parties to complex relations with a unitary entity. A recent application of this theory is made by Scalia's concurring opinion in *Citizen United*, where corporations are clearly viewed as an incorporated association of individuals. Among US scholars, there are some, even today, who think that the true beneficiaries of the protection are the natural persons behind the corporations. In my opinion, this theory attempts to distance itself from the artificial entity theory and may be considered as a bridge to the most recent doctrine, the so-called 'real entity' one, to the extent that it acknowledges the crucial role displayed by human decisions as to the creation of corporations, by-products of the individual entrepreneurial initiative and not of states.

According to this latter, a corporation is to be considered a real (and separate) entity, not just the sum of its parts (the physical persons behind it), with its own will and well-defined interests.<sup>28</sup> In the legal literature, the first case in which this doctrine was applied was *Hale v Henkel*,<sup>29</sup> stating that the 14<sup>th</sup> Amendment applies to corporations. This theory is a reaction against the states' interference in the economy; for this reason, state police power is restrictively understood. As a result of the corporation's autonomy from the shareholders' persons, managers are not anymore considered the shareholders' proxies, and are instead considered to be the corporations' ones.<sup>30</sup> The gradual overcoming of the *ultra vires* doctrine (fulfilled by the parallel widening of the corporations' implied powers) prompted the transition from the two theories previously recalled to this latter. Under the cloak of the 'real entity' theory, viewed as a typical apparatus of the 'Modern Regulation era',<sup>31</sup> the Bill of Rights was transformed 'from the most cherished palladium of personal liberties to one of

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<sup>28</sup> Kostantin Tretyakov, 'Corporate Identity and Group dignity', (2016) 8 WASH. U. JUR. REV. 171, 182 understands the three theories on corporate personhood as 'narratives', i.e. stories concerning the legal status of corporations. According to Tretyakov, the real entity theory is based on the assumption 'that corporations are capable of formulating and advancing their own will (in the forms of choices and judgments) through the interaction between their members. In this respect, the real entity theory presupposes corporations' *personal identity* and, consequently, their personhood'.

<sup>29</sup> 201 U.S. 43 (1905).

<sup>30</sup> Horwitz (n 23) 124.

<sup>31</sup> This framework is used by Mayer (n 11).

organizational prerogatives'.<sup>32</sup> It was used as a unifying basis for corporate interests to oppose social regulations aiming at the protection of labor, consumer and public interest groups.

Both the aggregate and the real entity theory show that corporations exist independently from a state decision<sup>33</sup>; they may be recognized but are not created by the state.<sup>34</sup> A logical consequence of this premise is that rights are not awarded to corporations by the state, having an autonomous foundation.

#### 4. Concluding remarks

The decisions rendered in *Citizens and Hobby Lobby* may be considered as the result of several factors.

The first is the fear of governmental intervention in spheres in which private persons have to be viewed as sovereign, such as the economy. Governmental acts addressing the behavior of individuals in order to steer their aims are clearly at odds with the idea of neutrality – equidistance – which should be the main drive to governmental action. According to this paradigm, government should be far removed from the societal interests at stake and refrain from affirmative actions aimed at confronting (and decreasing) existing social inequalities, not ‘taking sides’ with the most disadvantaged community layers. Leaving the *status quo* unchanged was and is still considered in some legal quarters to be less dangerous than undertaking a positive action. According to this approach, like a sort of underground river which from time to time comes to the surface, corporate freedoms should not be considered and treated differently – as to

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<sup>32</sup> ‘Ibid’ 578. As Miller (n 19) 927 poignantly notices ‘[r]eal entity theory solved the problem of fitting the corporation into the common law system, but it did so at a price. The price was the heavy strain that constitutional adjudication placed on the personhood metaphor once corporate rights transitioned from property to liberty’.

<sup>33</sup> Miller (n 19) 931 draws a distinction between aggregation and real theories in this way: ‘[a]ggregation theory tries to reap all the benefits of the real entity theory without all of the metaphorical hocus-pocus. Corporations are not artificial; they are not real; they are a set of relationships with which government should not, or constitutionally must not, interfere’.

<sup>34</sup> For the theory that corporations may be considered ‘artificial’, but not ‘fictitious’, Arthur W. Machen, Jr, ‘Corporate Personality’, (1911) 24 HARV. L. Rev. 253, 266, who points out that ‘although corporate personality is a fiction, the entity which is personified is no fiction’.

their quality and extent – from those enjoyed by physical persons. *Lochner v New York*<sup>35</sup> is in this regard paramount, a judicial milestone which significantly foregrounded the idea that all changes in the distribution of wealth triggered by legislation – other than those made through taxation – are contrary to the substantive due clause enshrined in the Fifth Amendment, if made for purposes which, far from being of general interest, are linked to the interests of a societal group and to the aim of making this latter better off. *Lochner*'s underlying idea is that the judiciary must maintain a position of neutrality and resist the temptations of political drift. The value of neutrality finds a constitutional foundation in the due process clause and is aimed at preserving the market framework, seen as part of a spontaneous order – not the by-product of a legal construct – mirrored in the common law.<sup>36</sup> According to this paradigm, governmental intervention may raise legitimate criticism when it infringes upon individual interests, whereas its inaction does not. The decision made in *Lochner* does not address corporations; yet its reading of the Fourteenth Amendment as a significant evidence of the acknowledgement by the Constitution of the laissez-faire doctrine and as a bulwark of the freedom of contract gives to legal persons a highly persuasive argument for a strong protection of their interests. The acknowledgement of corporate rights and freedoms may be grounded on two – not necessarily opposing – reasons: either the safeguarding of legal persons' own interests or an underlying public interest (thus, a utilitarian explanation).<sup>37</sup>

In *Hobby Lobby*, the strong protection awarded to corporate rights rests upon a not complete separation – a fully-fledged barrier – between the legal person and the physical persons standing behind in spite of the fact that the legal person is a for-profit corporation.

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<sup>35</sup> 198 U.S. 45 (1905).

<sup>36</sup> This view is adopted by Cass Sunstein, 'Lochner's Legacy', (1987) 87 COLUM. L. REV. 873, 875 who suggests that 'the case should be taken to symbolize not merely an aggressive judicial role, but an approach that imposes a constitutional requirement of neutrality, and understands the term to refer to preservation of the existing distribution of wealth and entitlements under the baseline of the common law'.

<sup>37</sup> On this point, Peter Oliver, 'Companies and their Fundamental Rights: a Comparative Perspective', (2015) 64 ICLQ 661.



If the economic sphere is considered as the corporations' 'natural' realm, acknowledging the right to them of fundamental freedoms takes these latter too far<sup>38</sup>. Treating corporations as natural persons would not have negative effects if they were required at the same time to act as diligent citizens. Yet, such an expansion of the scope of corporate freedoms did not end as a result in a parallel extension of corporate liability on the international human rights ground.<sup>39</sup>

In my opinion a further reason – related to the ways US legal tradition framed the freedoms of religion and expression – prompted the Court to decide *Citizens United* and *Hobby Lobby* the way it did. The majority of judges conveyed an understanding of their core content which is strongly embedded in the US constitutional law historical background, regardless the identity of the subjects claiming their protection.

The fact that in those cases protection was accorded to entities having the status of corporations is a side effect of a given reading of the First Amendment 'as an absolute',<sup>40</sup> i. e. as a legal text forbidding any possible abridgment of the rights enshrined in it, based on the plain meaning of the provision. This construction of the First Amendment's meanings may have had a hold on the way the majority saw the legal issues before them.

Criticisms of the judgements discussed above, focused exclusively on corporations' economic power (and prompted by a political commitment to fight societal inequalities), may at the end of the day be inappropriate, as ideologically biased. The issues concerning legal personality have a technical reach and meaning which need to

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<sup>38</sup> 'Ibid'.

<sup>39</sup> See e.g. *Kiobel v Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), where the Court disregarded corporate accountability on the ground of human rights' infringement. For a critical appraisal of the approach adopted in the realm of international law by the Court, Beth Stephens, 'Are Corporations People: Corporate Personhood under the Constitution and International Law: An Essay in Honor of Professor Roger S. Clark', (2013) 44 *Rutgers L.J.* 1, 5 who sharply remarks that 'the *Kiobel* majority, [...] ignored the robust corporate identity that many are quick to adopt when considering a corporation's constitutional rights'. In Stephens' words, 'the robust, multi-dimensional entity' of corporations depicted by constitutional law cases is replaced – when international law applies – by 'a one-dimensional dot'.

<sup>40</sup> Among the scholars supporting such a reading, Hugo Black, 'The Bill of Rights', (1960) 35 *N. Y. UNIV. L. REV.* 865; Alexander Meiklejohn, 'The First Amendment is an absolute', (1961) *The Supreme Court Review* 245. Against this approach, Cass Sunstein, *#republic. La democrazia nell'epoca dei social media*, (Il Mulino 2017), 240, [*#Republic: Divided Democracy in the Age of Social Media* (Princeton University Press 2017)], who considers the idea that the First Amendment is an 'absolute' a 'myth'.

be carefully taken in account. A reading of these questions exclusively through the lens of political commitment runs the risk of simplistically leading to an allegedly dark side of the law. For the sake of clarity, two general remarks have to be made before reverting to the peculiarities of the above analyzed cases.

Firstly, the recognition of some rights to natural persons behind corporations may sound astonishing if one applies the concept of ‘person’ to non-human entities as well as human ones in the same way and to the same extent. One has to bear in mind that in both cases the concept of ‘person’ has a legal nature; thus, its meanings have to be elicited from positive law.

Secondly, even if natural persons behind corporations are the ultimate and real beneficiaries of the freedoms acknowledged to corporations in those cases, a difference has to be made between the case in which these rights are invoked by persons as individuals or as members of a group.<sup>41</sup> In this latter case, these rights cannot be conceived of as entitlements owned by those persons as individuals; rather, they must be understood as referring to their status of corporations’ members and considered as functional to the achievement of the goals underlying the acts by the legal person.

In order to understand the decisions’ *rationale*, one should bear in mind that Citizen United is a nonprofit corporation, and Hobby Lobby a (for-profit) closely held company. The specific features characterizing those corporations (emphasizing the importance of their non-profit nature or that of the human component) allowed to avoid the technical conundrums brought about by the theoretical conception of corporations as real entities, clearly separate from their human members.

Furthermore, the Court’s acknowledgement of speech to corporations may be appreciated as the outcome of a conception of that freedom not just as an instrument of self-realization and active participation of individuals as citizens aimed at their self-government (these goals may be referred only to natural persons), but also as a signpost of a different quality, that of consumers. In this latter sense freedom of choice displays a major role. This second layer of meanings is the by-product of a market-oriented understanding which is the corporations’ natural framework.

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<sup>41</sup> This distinction is criticized by Tretyakov (n 28) 181.

Freedom of speech would be therefore the ground of two noticeable interpretations of the individual sovereignty: the first – the political one – emphasizing the commitment of individuals to be good citizens; the second one, highlighting their role of consumers. These two coexisting meanings of sovereignty underlying the freedom of speech were historically embodied, among the US Supreme Court's judges, by Brandeis, who pointed out the freedom of speech's role as a tool enabling the fulfilment of the citizens' duty to participate to the public debate, and Holmes, whose belief in an open marketplace of ideas (fundamentally assimilated to goods) underlined the possibility for everyone to opt for the most appreciated ones.<sup>42</sup> A realistic explanation of the judicial support of the corporate freedoms may be that Holmes' view gained momentum within the Supreme Court.

An accurate survey of these decisions asks for prudence and a thorough analysis of the legal points at stake as well as the conceptions underlying them before finding for a judicial subjection to corporations' interests disclosing a dark side of the law.

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<sup>42</sup> For the thesis that judges Holmes and Brandeis are respectively propagators of the consumer's and political sovereignty, Sunstein (n 39) 69-73.

