

The Expansion of Corporate Constitutional Rights in the United States and Its Impact on Human Rights

Establishing a Mode of Thought within the Supreme Court
Based on the Corporate Aggregate Entity-Theory

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Abstract

Over the course of the past few decades, constitutional rights normally given to natural persons have increasingly been granted to corporations within the United States. Most of these changes started in the decade of the 1970s, as that was the time that corporations started to appeal to First Amendment rights in order to protect their interests in the face of governmental regulation and mounting criticisms from the public. This (steady) expansion of corporate rights under the concept of corporate personhood has been possible because of the Supreme Court, who voted in favor for corporations (both for-profit and non-profit) on multiple occasions whenever an appeal was made to the freedom of speech - and later religion - under the First Amendment. On first glance this seems to be a ludicrous trend, but a trend it has become nonetheless. Even more striking is the fact that it has been taking place by the graces of the highest court of the nation, which has been tasked to interpret the US Constitution in the face of complex and/or controversial cases - the single most important body of law within the United States. Despite the fact that the corporation, as an entity, is not mentioned once in this document, the Court has seen fit to attribute this actor with the freedom of speech (and later freedom of religion) under the First Amendment. These rights are not only constitutional, but also double as human rights which are normally attributed to persons of life and limb "purely by virtue of being human." Logically, this expansion of corporate rights also has far-reaching implications for the protections of the same rights for natural persons, given the obvious asymmetrical dimensions of influence and power between the individual and the corporation. Therefore, this thesis asks the following question: How and why has corporate personhood advanced so strongly under the Supreme Court since the 1970s, and how does this impact the protections of freedom of speech and religion for natural persons? In order to answer this question, this thesis employs the aggregate-entity theory as a framework from which both the legal and ideological dimensions of decision making of the Supreme Court can be analyzed, and attempts to identify a specific mode of thought through which the subject of corporate personhood is approached and judged. This mode of thought is then used to analyze the possible implications for human rights enforcement within the United States itself.

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Introduction

Corporations¹ have not always pursued constitutional protections as vigorously as they are doing now – in the grand scheme of the United States' history since its inception, it is a fairly novel development. Starting off at the 20th century's final decades (1970-present), this period signaled the start of several challenges to the current and future generation(s) of governments, policy-makers and academics. One of the most notable challenges pertains to the structure, evaluation and practice of (transnational) corporations within the borders of the United States: over the past few decades, corporate nature has evolved to such an extent that it is completely antithetical to its conceptions in previous years. Prior to these developments, corporate activity was arguably restricted to local regions in the 19th century and states maintained strict regulations on its size and scope. Since the latter part of the 19th century, however, corporations began to grow in size and power. The implications of this corporate growth for social and economic well-being did not go unnoticed by the states and these responded accordingly through several regulatory acts.² For the greater part of the 20th century, corporations were kept under tabs, were regulated when needed by the U.S. government and kept to their own internal affairs – corporate interests rarely extended beyond the scope of its own and it was considered taboo to meddle in politics and political affairs.

This development of increased corporate activity in the field of politics and – by manner of speech – rights-hunting has not gone unnoticed by scholars and journalists alike. Most notably, its problematic nature and the consequences for human rights protections and enforcement have been scrutinized extensively. Rather than being well-regulated and controlled, as stated above, it has been found that since the late 20th century corporations evolved away from their public function. They became increasingly active in the field of politics and pursued their own interests. The US government found it increasingly more difficult to keep tabs on the activity of corporations.³ Others have elaborated

1 One of the major steps to take in this thesis is to provide the reader with a modicum of understanding on how the modern corporation is defined. In this case, it is very possible to follow the reasoning of other scholars, who focus on aspects of its character: a transnational, publicly-held for-profit business entity. This in general amounts and refers to banks, oil companies, technology companies such as Samsung and Microsoft, and other corporations aimed at resource extraction in the US and abroad. It is difficult to decipher whether existing research followed this definition or preceded it – the previous years of scrutinizing oil-companies and banks, and the public for-profit characterization of corporations fit well with one another. However, developments concerning corporate personhood in recent years seem to extend to both non-profit and for-profit closely held corporations (in which ownership is limited to family and stocks are not publicly traded) as seen in the *Hobby Lobby* (2014) and *Zubik v Burwell* (involving the Little Sisters of the Poor, 2016) cases. In addition, the Supreme Court appears to be paying less attention to the nature and/or purpose of the corporation - let alone the for-profit distinction - when it comes to attributing rights under corporate personhood. Therefore, the modern corporation can be defined as a “well-established (business) entity, large enough to be able to make a lasting impact on the way citizens shape their daily lives.” This definition allows for the conglomeration of businesses such as Wal-Mart and Shell, who operate both on the national and international level, as well as Hobby Lobby Stores Inc, who operates only within the United States. To illustrate the impact corporations can have nowadays on the daily lives of citizens, the work of David P. Forsythe offers some understanding. In *Human Rights in International Relations* (Cambridge 2012), on page 279, he provides a table in which he compares the GDP revenue of states and corporations. In the places 22 through 25, he shows that corporations such as Wal-Mart, BP Oil, Exxon Mobil and Shell have only slightly less than Austria and a greater revenue than Saudi-Arabia and Norway. With all of them being oil-companies, they have extensive influence over the citizens' ability to commute and spendings (among others).

2 M. Lipton, “Corporate Governance in the Age of Finance Corporatism”, *University of Pennsylvania Law Review*, Vol. 136, No. 1 (November 1987), 3-5.

3 J. Bakan, *The Corporation* (2003). When the aforementioned view is compared to the current state of affairs considering corporate activity, the contrast could not be more stark. This 2003 documentary illustrates an extended corporate reach in the fields of human rights, environmental health, journalism and transnational activity. If anything, it displays that the

on the new problematic nature of the corporation. In recognizing the central role that corporations play in sustaining the life that many of us are accustomed to, they have found that the modern corporation is a Frankenstein-monster – a creation of modern society that it is unable to control any longer. In response to this conclusion, they stress the importance of prioritizing values over profits in an effort to reform the current neoliberal paradigm to a more sustainable and less profit-driven system.⁴ The problematic nature of the modern corporation on the legal, economic and political level appears to be widely recognized. As such, while the work of some focuses on identification of the issues surrounding the corporate entity, most of academic research focuses on curbing the threats that it poses to matters such as (social and economic) human rights, democracy and the environment. These place the emphasis on concepts such as corporate social responsibility (CSR) in order to fix the disconnect between law and practice when it comes to corporations and human rights. Specifically, they have found that the existing compliance mechanisms are limited to soft law and that the existing legal framework is sufficiently unclear to allow corporations to pursue their own interests over human rights laws.⁵ In this system, the cost of non-compliance is lower than that of compliance. Others have argued that, as a result of this void on the legal level, those affected negatively through corporate policy – be it pollution, hazardous working conditions, or exploitation of labor – have limited options to attain justice. The best option in such cases is to sue corporations through and with help from the US

corporation had evolved beyond its role as an institution fulfilling a specific public function. Since the 1980s, (transnational) corporations have increasingly directed their efforts towards the acquisition of short-term profits and placed more emphasis on shareholder-value – making sure the shareholders get the most out of their investment. At the same time, government regulation began to falter as the larger transnational corporations in particular assumed their new position of influence. Meddling in national U.S. politics became commonplace through the practice of lobbying, through which the corporate entity actively pursued and protected its own vested interests.

4 C. Mayer, *Firm Commitment: Why the corporation is failing us and how to restore trust in it* (Oxford University Press 2013), 146. Mayer considers it to be a marvel, as our lives are ever increasingly dominated by a single entity that provides housing, food, technology, etc. At the same time, however, it has a darker side that has had dire consequences not only for the environment but also for society. Through recent developments, the “corporation” has become a Frankenstein-monster that ravages the modern man and is unable to be controlled. As Mayer identifies how this could be happening and why it happens, he argues for a new approach in which morals and values are injected into the modern corporation. Here, he suggests that values should play a central role in the activity of the corporation in order to restore credibility and trust. In short, he proposes the centrality of morals and values above profits and personal corporate interests (ergo, they should be their top priority), to appoint a board of trustees to act as custodians of these values and to enhance control for the shareholders, who can ultimately choose to invest in more long-term interests and profits rather than short-term. Consequently, he also suggests far-reaching governmental and world-wide institutional reforms to facilitate this new approach. Although this approach is well-argued by Mayer, it is highly idealistic and appears to be hardly feasible as it requires a complete paradigm shift on multiple societal levels across the globe. Especially considering the position of the U.S. in this matter, this would take at least several decades.

5 L. Blecher, N.K. Stafford and G.C. Bellamy, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2015). This work places the emphasis on the idea of corporate social responsibility (CSR), identified as “the social responsibility of business [encompassing] the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point of time.” They argue that, within the existing legal framework of business, society and human rights, a particular disconnect exists between law and practice. Notwithstanding the fact that governments are named as the primary protector of human rights in contemporary human rights law, the impact that corporations have on our daily lives is enormous. Human rights law is in sore need of an update given the central position of corporations in modern society, and while this is yet to occur the authors search for other ways to ensure corporate compliance to existing human rights law. Their core argument in this respect is that current steps undertaken by international legal bodies, governments and institutions to prevent acts of impunity and increase compliance are strictly contained to “soft law”: key words here being “urged”, to “respect” human rights. Through their research on treaties and legislation such as the UN Global Compact (2000), the Alien Tort Statute (1789) and several Supreme Court decisions, they point to a lacking and unclear legal framework through which corporations can continue to prioritize their own interests over human rights and accountability. Within this framework, the costs of non-compliance are lower than those of compliance, resulting in an ever existing costs-gains analysis when it comes to the subject of human rights.

government, but the latter has been identified as an unlikely champion of human rights in the face of corporate activity. Corporations actively influence US politics and make political action against them a costly affair.⁶

From this point on it can safely be concluded that the modern corporation poses a vast array of problems for US society as a whole. More specifically, what has made the corporate pursuit of constitutional protections largely possible is the concept of corporate personhood – an expression of the idea that the corporation has a legal identity separate from its shareholders. “That separateness (...) is inherent in what it means to be a corporation. The very purpose of the corporation as a legal form is to create an entity distinct in its legal interests and those who contribute capital to it.”⁷ Essentially, it is nothing more than a legal construct under which individuals can band together in pursuit of a common cause or interest. However, the “personhood” also refers to the idea that the corporation itself – separate from shareholders – enjoys several rights and protections normally only attributed to natural persons.⁸ Legally speaking, this infers that corporations are not artificial, but not real persons either.⁹ Historically, the concept of corporate personhood did not make its first appearance in 2010 with *Citizens United*. It has a long history which cannot be explained in-depth within the limits of this thesis. Therefore, a brief overview has been provided of its historical development which can be found as *Figure 1* at the end of this thesis. Using this overview, it can be discerned that up until the later 1970s, corporate activity towards the Supreme Court focused solely on the protection of its property and the ability to have fair, legal proceedings under US constitutional law – pursuit of the protections under the First Amendment (freedom of speech and religion) started from this specific period. In other words, it contained the first instances of claims to freedom of speech for corporate bodies, and active corporate interference in politics. During this decade, corporations became a lot more aggressive in defending their own interests in the face of governmental regulation.

After all this talk about corporations, it is a good question to ask why corporate personhood is so controversial to this day and age. The concept really came to the fore since the Supreme Court's decision in the *Citizens United* case, and rightly so. Previous to this decision, it is true that corporations already enjoyed protections under several Amendments to the US Constitution.¹⁰ However, these

6 T. Armaline, D. Silfen Glasberg, and B. Purkayastha, *The Human Rights Enterprise: Political Sociology, State Power and Social Movements* (Cambridge 2015), 130 and on. Even if a corporation is found guilty, more often than not they simply pay a fine. In other cases, the matter is settled out of court. Recently, several rulings made by the U.S. Supreme Court have made the attainment of justice for those with few economic means even harder while expanding the individual rights of a corporation (several of these decisions will be discussed in this thesis). These decisions have been widely scrutinized on the academic level, but these carry a distinctly legal character. The why and the how of these decisions have insufficiently been researched, as the academic focus tends to lie on the implications of these decisions for the relationship between public and corporations.

7 Kent Greenfield, “If Corporations Are People, They Should Act Like It”, *The Atlantic* (version of February 1, 2015) <http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/> (last accessed September 2, 2016).

8 Greenfield, “If Corporations Are People, They Should Act Like It”, *The Atlantic* (2015).

9 C. Kaeb, “Putting the “Corporate” Back into Corporate Personhood”, *Northwestern Journal of International Law and Business*, Vol. 35, No. 3 (Fall 2015), 595. “Instead, corporations should be perceived as having features of both associations and individuals, at least for the exercise of determining the scope of fundamental rights granted to the corporate entity.”

10 See Figure I at the end of this thesis.

protections were solely related to property and legal proceedings before the federal courts. As of 2010, corporate political speech in the form of donations to electable officials has been without any boundaries, factually equating corporations to natural persons in that specific regard. Considering the awareness of citizen, journalist and scholar alike regarding the problems of such a corporate freedom, it has the potential to cause irreparable damage to the idea and execution of democracy and democratic freedoms of natural persons (read: citizens). The spread of ideas - essentially the core of freedom of speech - will be limited for individuals outside the corporations as political discourse is manipulated to favor corporations. Officials and senators will be more inclined to pursue corporate interests over popular interests. This results in an election process in which the people have little to no influence (let alone choice) over the direction in which society is going. Even more so, the role of the state as a guarantor of human rights will be compromised in such a way that it will be even more difficult for victims of corporate abuse to obtain justice, as it will be more difficult to find persons who will aggressively push for justice in the face of corporate interests. Another major issue lies within the purpose of the First Amendment, which has as purpose to protect the expression of ideas, free expression in itself, and the pursuit of truth. The rhetoric that corporate lawyers have been employing - that of "marketing discrimination" - is aimed at the function of advertising to inform the consumer on available products, and which best suit their needs.¹¹ Of course, this has several problematic sides to it that the lawyers fail to address. It does not discuss whether the consumer -wants- this information, how manipulation and psychological conditioning of the buyer plays a central role in effective marketing, or even as to the why commercial freedom of speech is required. Furthermore, these lawyers describe governmental interference and regulation as paternalistic behavior aimed at telling the consumer what to do and what not do, and persuading them to act against corporate interests. These practices directly go against the importance of the First Amendment itself as a guarantor of the expression of ideas (individual ideas are drowned out or directed), the pursuit of truth (market manipulation and psychological conditioning of individuals) and free expression itself. However, these facts seem to be missed by the Justices of the Supreme Court.

As of the start of the Supreme Court's 2009 term under the then newly-appointed Chief Justice John G. Roberts, there has been an increasing support for business interests. One study in particular has found that many cases related to corporate interests since his tenure as Chief Justice have been decided in their favor - at its lowest point, corporate interests have been able to win near half the time.¹² More than any other Supreme Court formation before the current one under Roberts, it has decided cases in favor of corporations and undoing several well-established and respected precedents in the process. Explanations for this phenomenon have been ranging from an increasingly conservative

11 See Tamara R. Piety, "The Corporate First Amendment: Why Protection for Commercial and Corporate Speech Does Not Advance First Amendment Values", *Corporate Reform Coalition* (July 2015), 4-5. Can be found at: <https://www.citizen.org/documents/crc-corporate-free-speech-report.pdf>

12 Lee Epstein; William M. Landes & Richard A. Posner, "How Business Fares in the Supreme Court", *Minnesota Law Review*, Vol. 97 (2013), 1437-1441.

court to one that is divided, and from direct corporate influence to corporate sympathy. Regardless of the why and the how, under the Roberts Court it is likely that protections for corporations will only increase.

Having established the challenge of the modern corporation, the how and why of the corporate pursuit of rights would seem perfectly clear from the perspective of the corporations. However, what has not been established is an understanding on the level of the Supreme Court concerning said pursuit of rights. How and why has corporate personhood been able to advance so strongly under the Supreme Court since the 1970s, and how does this impact the protections of freedom of speech and religion for natural persons within the US? That is the question that lies at the core of this thesis. In order to answer this question, this thesis employs the aggregate-entity theory as a framework from which both the legal and ideological dimensions of decision making of the Supreme Court can be analyzed, and attempts to identify a specific mode of thought through which the subject of corporate personhood is approached and judged. This mode of thought is then used to analyze the possible implications for human rights enforcement within the United States itself.

Relevance of the thesis

This thesis is relevant in several ways. First, most of the existing research on the subjects of corporate personhood, human rights and the Supreme Court have been centered on the legal and ideological levels. It points to the problems with constraining and regulating the modern corporation¹³, explains the gaps in the existing legal framework between corporations and human rights protections¹⁴, the problematic nature of corporate soft law¹⁵, and has offered ways to ameliorate these shortcomings. On the level of the Supreme Court, explanations have been focused around the ideological leanings of the Justices¹⁶, possible pro-business attitudes have been considered¹⁷, and the problems their decisions have posed for democracy in US society.¹⁸ News articles that have been written on the subject often

13 The work of C. Mayer, *Firm Commitment: Why the corporation is failing us and how to restore trust in it* (Oxford University Press 2013) provides a good basis for the study of this subject. See also: T. Armaline, D. Silfen Glasberg, and B. Purkayastha, *The Human Rights Enterprise: Political Sociology, State Power and Social Movements* (Cambridge 2015).

14 Blecher et al, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association 2015).

15 K. Hamdani, and L. Ruffing, *United Nations Centre on Transnational Corporations: Corporate Conduct and the Public Interest* (Taylor & Francis 2015).

16 A. Bailey, Michael, "Measuring Ideology on the Courts", *Draft prepared for the 2016 Southern Pacific Science Association Meetings* (January 2016), pp. 1-40. **See also:** Timothy J. Capurso, "How Judges Judge: Theories on Judicial Decision Making", *Law Forum*, Vol. 29, No. 1, Article 2 (1998), pp. 5-15., **and** Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices", *The American Political Science Review*, Vol. 83, No. 2 (June 1989), pp. 557-565.

17 Ralph Gomory & Richard Sylla, "The American Corporation", *Daedalus*, The Journal of the American Academy of Arts & Sciences, Vol. 142, No. 2 (Spring 2013), pp. 102-118. **See also:** M. Hall, *Attacking Judges: How Campaign Advertising Influences State Supreme Court Elections* (Stanford University Press 2014).

18 N. Chomsky, "The Corporate Takeover of U.S. Democracy" (January 24, 2010). Can be found at: <https://chomsky.info/20100124/>. **See also:** Lee Drutman, "How Corporate Lobbyists Conquered American Democracy", *The Atlantic* (version of April 20, 2015) www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/ (last accessed September 2, 2016).

serve as an outlet for outrage¹⁹, to place question marks on the legitimacy of the Supreme Court²⁰, or to incite resistance rather than to explain it. To some degree, the Supreme Court, corporations and politics have been turned into beacons of criticism. Although this in itself is not to be considered a bad thing, it is a bad thing to the extent that other perspectives and/or clear explanations as to the why and how are currently overshadowed. Decisions made by the Supreme Court have been thoroughly analyzed, but these have all been done on a case-by-case basis. In the grander scheme of things, historical connections between corporate activity, the Supreme Court and human rights are lacking.

Second, the general opinion is focused on Lewis F. Powell Jr. as the main culprit for this expansion of corporate constitutional rights, due to him having written his Powell Memorandum (1971) which displayed a clear bias and sympathy towards corporations.²¹ While not disregarding his part in the advances of corporate aggression in protecting its own interests, this thesis will argue that other dynamics have also been at play to facilitate its expansion. It therefore attempts to provide a more nuanced view of the catalysts behind its development.

Third, the focus on the subject of human rights has more often than not been placed on its instrumental value: human rights enforcement, the protection of possible victims at the hand of corporate activity and exploitation in and outside the United States, the drowning out of individual beliefs and ideas due to corporate manipulation of political discourse - to name but a few. This posits that the existing research on the relationship between corporations and human rights has been written from the perspective of a distinct instrumentalist view.²² This thesis rather chooses to look at the (changing) role of human rights and consequences for its historical meaning and application.

19 Joe Pinsker, "How Corporations Took Over The First Amendment", *The Atlantic* (version of April 1, 2015) <http://www.theatlantic.com/business/archive/2015/04/how-corporations-took-over-the-first-amendment/389249/> (last accessed September 2, 2016).

20 E. Segall, "Supreme Court Justices Looked to Personal Views Rather Than Legal Arguments for Hobby Lobby Decision", *The Daily Beast* (version of July 1, 2014) <http://www.thedailybeast.com/articles/2014/07/01/supreme-court-justices-looked-to-personal-views-rather-than-legal-arguments-for-hobby-lobby-decision.html> (last accessed August 10, 2016).

21 Bill Blum, "The Right-Wing Legacy of Justice Lewis Powell and What It Means For The Supreme Court Today", *The Huffington Post* (version of August 16, 2016) www.huffingtonpost.com/bill-blum/the-rightwing-legacy-of-j_b_11521804.html (last accessed August 30, 2016).

22 By its very nature, human rights law has been envisioned as an instrument to protect natural persons from oppression by another entity in any form. In other words, it has been designed to alter behavior - here we can think about the discouragement of particular actions against natural persons or to encourage acting in the natural persons' interest. When we think about human rights (law), the first thing that usually comes to mind are the treaties such as the International Covenant on Civil and Political Rights or the Universal Declaration of Human Rights. These treaties often serve as the basis for measuring the effectiveness of human rights, as well as their enforcement. It is at this point that we start to consider the role of corporations: the concept of Corporate Social Responsibility (see John W. Houck & Oliver F. Williams, *Is the Good Corporation Dead: Social Responsibility in a Global Economy* (Rowman & Littlefield 1996)); research on corporate malpractice (see Stephen Hymer, "Multinational Corporations and the Law of Uneven Development", in J.W. Bhagwati, ed., *Economics and World Order* (New York 1971), 113-140); research on regulation of the corporation (see C. Mayer, *Firm Commitment: Why the corporation is failing us and how to restore trust in it* (Oxford University Press 2013); and even the ability to bring corporations before the International Criminal Court (see Graff, Julia. "Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo." Human Rights Brief 11, no. 2 (2004): 23-26). At each and every one of these subjects, academic thought on how to protect human rights and natural persons, and how to hold corporations accountable for violations of these rights stand at the very centre. Again: law in general, and especially human rights law, is designed to alter behavior. When we consider corporations, it can often be seen that human rights law fail to alter behavior. This is why academics often do research on how to best address this problem, and that is why the instrumental value of human rights lies as the core of academic research. It is considered a safeguard against corporate malpractice, a means to address the grievances of natural persons, and a framework in the study of corporate action.

Fourth and last, this thesis attempts to move beyond criticisms, judgments of right and wrong, moral considerations and suggestions, and a purely instrumentalist view of human rights in the face of modern corporate activity. It will not be a sole legal interpretation of the problem. Neither will it posit a theory of my own on how to “solve” the problem of corporate personhood or to elevate human rights to the position it has been legally and morally ascribed. Its sole purpose is to identify a specific mode of thought derived from ideological and several legal key issues on the level of the Supreme Court regarding corporate personhood, and to provide a different perspective and/or understanding on the implications for the enforcement of human rights within U.S. boundaries. Its sole purpose lies within the field of clarification, not prescription. Its value lies in providing a different perspective, the identification of a mode of thought on the level of the Supreme Court, and to look at the function and importance of human rights in modern US society.

Thesis structure

Part I is dedicated to the explanation on the methodology used within this thesis for the purpose of identifying a specific mode of thought within the Supreme Court on the subject of corporate personhood. It discusses the framework set by the use of the corporate aggregate-entity theory: what it is and how it historically developed, why this particular theory has been chosen for this work, and how the theory has been used within the Supreme Court in cases where corporate personhood is involved. This section will serve as the foundation of the arguments used within this thesis.

Part II will focus on the ideological level of decision making within the Supreme Court. It will first contain an analysis of the variables within the process of decision making itself to provide an understanding of the dynamics through which decisions are made. Second, it will feature an analysis on how ideological considerations (conservatism and liberalism, etc.) affect the Justices' decision making so as to provide a more nuanced view on the role of ideology within the Court. Third and last, considering the subjects discussed in the first two parts, a discussion on the role that should be attributed to conservative attitudes among the Justices and the Powell Memorandum will be featured.

Part III is conversely dedicated to the legal level of decision making within the Supreme Court. Like in the previous section, here too the variables within the decision making process of the Court will be analyzed. Second, the most prevalent legal issues concerning corporate personhood will be discussed (such as the context of the First Amendment to the US Constitution, the textual framing of the freedom of speech and religion, and the problematic nature of the framing of freedom of speech and religion as negative rights). Third and last, an attempt will be made to identify a thought pattern on the legal level through the concept of *judicial regimes*. The main reason for this choice of subject is due to the central importance of the idea of freedom within the United States – as will become clear in this section, for corporations the concept of freedom is equalized with non-intervention on the part of the government.

Part IV will be a summary section. Here, the aforementioned mode of thought on the level of the Supreme Court will be identified, clarified and structured. It will then be employed to identify the impact that this manner of thought will have on the protection and exercise of human rights in the following section.

Part V will be the final section of this thesis (apart from the conclusion) and will contain the impact of the Supreme Court's framework of decision making on the protection and enforcement of the freedom of speech and religion for natural persons. Also analyzed within this section is how the historical meaning and use of human rights contrasts with its attribution to modern corporations, the dangers this manner of thought implies and the impact of the identified mode of thought on the ability of the government to act as a guardian of human rights.

Resource Justification

Over the course of the writing of this thesis, several primary and secondary sources have been instrumental in making this thesis possible. In this subsection, an explanation will be offered on why I selected these particular sources, their significance and how they have been used within this thesis.

First, the Supreme Court decisions in the *Bellotti* (1978), *Citizens United* (2010) and *Hobby Lobby* (2014) cases. These are the primary sources for analysis through the aggregate theory of the corporation. These three cases and the decisions therein have all been crucial in the expansion of corporate rights under the First Amendment and are the subject of much debate in academic literature. Furthermore, these cases have set controversial precedents that have consistently been invoked in cases linked to corporate rights under the U.S. Constitution – not one of these cases goes by without either *Bellotti*, *Citizens United* or *Hobby Lobby* being either directly cited or having their reasoning adopted into the case under review by the Supreme Court. In addition, these three cases contain highly relevant ideas and perspectives of the Justices in office concerning the subject of the thesis, which can be translated into legal and ideological values through the aggregate theory. If any mode of thought on the level of the Supreme Court is to be identified, it can be found within these three case decisions.

Second, further included in this thesis are several statistical studies on the ideological nature of the Supreme Court (see Epstein et al; Miller; Segal; Songer & Lindquist; and Bailey). These studies, performed by better and more experienced scholars than myself, all focus on some aspect of the Justices' decisionmaking within the Supreme Court: the ideological values of the Justices and how these find their way into decisions; how ideologies change over the course of the years; and the translation of ideological values into Justices' votes are but a few examples. These studies have been selected due to the fact that these demonstrate the primacy of ideological values in the Supreme Court's decision making process. It has been through the works of these scholars that I have been able to write this thesis in the first place – making their work of the utmost significance. Aside from this, these studies mainly serve to justify and illuminate the arguments made on the ideological level of the

Supreme Court's decision making process throughout this thesis.

Third and last, some words on the use of several news articles. Over the course of the writing of this thesis, I have also chosen to incorporate a small number of news articles (albeit indirectly and only to support arguments found in academic literature) – notably from the Atlantic and the New York Times. There are two reasons for this selection: the first is that these news articles serve to illustrate the fact that the problems around the concept of corporate personhood are not restricted to academia and the courts. This also means that the people aware of corporate personhood have the possibility to voice their own opinions and ideas on the matter – a subject also discussed within this thesis. The second reason for this incorporation of news found in The Atlantic and The New York Times is due to the fact that it is my opinion that these news outlets offer some of the most objective, unbiased news on the subject when compared to Fox News, for example. While not distinguishable as academic sources, works written under the banner of these news outlets can serve to support academic arguments and conclusions on the subject of corporate personhood, especially where the public view of corporations is concerned.

Part 1: Methodology, Theory and Concepts

1.1 The aggregate entity-theory: development, definition and history

Corporate theorists developed corporate personality theories for several reasons. First of all, these theories have been developed due to the fact that corporate personhood has no foundation in U.S. Law - it has no "systematic jurisprudence for corporate constitutional rights because it has no systematic jurisprudence for corporate personhood".²³ Second, the U.S. Constitution regulates the relationship between the government and the individual, and makes no mention of the corporation as any sort. Due to this fact, interpreting the "rights" of the corporation within the US Constitution is particularly difficult without some kind of framework. Here, corporate personality theory provides a necessary framework - developed by judges and scholars alike - through which the case of corporate personhood can be addressed.

In order to identify a particular mode of thought on the Supreme Court when corporate personhood is involved, this thesis employs the aggregate entity theory (also known as the "nexus of contracts"-theory). Part of the existing corpus of corporate personality theory²⁴, the aggregate entity-theory views the corporation as an aggregate of individuals who have chosen to band together in order to pursue a common interest, and can therefore claim protection under the Fourteenth Amendment.²⁵ The rationale behind the decision to use this theory as opposed to others needs some illumination.²⁶ The main reason as to why this particular theory has been selected for this thesis is due to the fact that the three most critical Supreme Court decisions discussed herein all demonstrate ideas, conceptions and perspectives commonly found within the aggregate theory. As such, it offers the most suitable theoretical framework from which to analyze these Court decisions and identify a mode of thought within the Supreme Court. The choice of the aggregate theory is not to exclude other explanations or theories and their viability, nor to provide a finite perspective on the Supreme Court's functioning in light of corporate personhood. As an analytical tool, it is simply the most promising.

Modern aggregate entity-theory views corporations as "individual rights holders acting through fiduciaries".²⁷ They are neither real entities nor fictions, but a nexus of contracts made by free individuals that act on their own interests. Moreover, "whether the person's motive to associate is to promote monetary gain or to act as a "catalyst for self-realization" (or both), the corporation is (...) formed by the free will and for the benefit of its contractors and others. Regulation that interferes with those choices - however broadly defined and for whatever reason - (...) intrude[s] upon individual

23 Darrel A.H. Miller, "Guns Inc.: *Citizens United*, *McDonald*, And The Future Of Corporate Constitutional Rights", *New York University Law Review*, Vol. 86 (October 2011), 914.

24 Corporate personality theory was developed between judges, scholars and lawyers in order to fill the explanatory gap left behind by Justice Waite in the *Santa-Clara* case of 1886. It was intended to serve as a framework in order to explain the reasoning of the Justices and to provide analysts and lawyers with a means to both justify and oppose corporate interests.

25 Miller, *Guns Inc.*, 914-930. **See also:** D. Millon, "Theories of the Corporation", *Duke Law Journal* (1990), pp. 201-262.

26 See Chapter 1.2 (p. 10) of this thesis for a detailed, in-depth explanation.

27 *Ibidem*, 929.

autonomy."²⁸ When speaking in a more straightforward manner, this theory states that the corporation exists as an artificial entity, but that the shareholders make up its body and allow it to function by using their own free will to pursue their interests, whether its for monetary gain or self-fulfillment. The corporation is no more than the sum of individuals associating under its name. For this reason alone, the corporation as a construct is deserving of protections under the Constitution, and any form of regulation is quickly seen as interfering with individuals' freedom. What's more, due to "shareholder-primacy", the corporation as a construct is treated as an association of individuals and is therefore able to forgo any discussion on the nature of the modern corporation – ergo, corporate personhood is already established within the theory itself.

The aggregate entity-theory first made its appearance within the Supreme Court at the end of the 19th century during the Railroad Tax Cases (1882). Here, Justice Field held that corporations can claim equal protections under the Fourteenth Amendment due to the fact that they represent the aggregation of individuals pursuing a common interest.²⁹ It made its entrance during a time when the artificial entity-theory (corporations are not real persons and exist by the graces of the state) was in decline and the real entity-theory (corporations are persons and as such deserve constitutional protections) was on the rise. Therefore, it comes as no surprise that the aggregate entity-theory features characteristics of both. This theory, however, failed to take hold due to several developments.³⁰ The relationship between management and shareholders changed, with the latter being transformed from entrepreneurs to passive investors that delegate control of their economic interest to professional managers. Furthermore, corporations grew in size, share ownership was dispersed and as such separated ownership and control. Future and/or possible mergers were decided through majority shareholder approval rather than unanimously. This form of majoritarianism was not compatible with an individualist conception of share ownership. Lastly, basically all power ended up in the hands of the directors of the corporation, which made it difficult to think of it as a partnership. It re-emerged since 1930, and in the second half of the 20th century it had evolved into the more sophisticated nexus of contracts-theory which is currently more common.³¹

With regards to human rights, the core of the aggregate theory can be described in several ways. One way is that its aim is to equalize the allocation of the right to freedom of speech – political and commercial – among the members of it's society. As can be found within the case jurisprudence over the years, several Court Justices expressed their opinion of the corporation as favorable. They do not only exist to increase profits for their shareholders, but also pursue humanitarian and charitable

28 Ibidem, 929.

29 The Railroad Tax Cases, 13 F. 722, 742, 747-748 (C.C.D. Cal. 1882). The Justice stated that a corporation "consist[s] of aggregations of individuals united for some legitimate business." Furthermore, he proclaimed that "[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporations of their property or to lessen its value (...) [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name."

30 D. Millon, "Theories of the Corporation", *Duke Law Journal* (1990), 214-216.

31 Millon, "Theories of the Corporation", 214 and on.

causes. In a sense, this is a view of the corporation as community leader, and is therefore indispensable. This equalizing function of corporate personhood under the First Amendment regards corporations simply as yet another member of society aside from the people and the government. Conversely, it describes the position of corporations, rather than equalizing the judicial relationship between corporations and the people, as something unique. Under the concept of corporate personhood, however, this conception of the corporation and its rights and duties is internally conflicting. It describes the corporation as unique, entitled to protections under the Bill of Rights, yet it offers no rationale for its personhood. It attributes to it the right of limited liability and perpetual life, yet views its rights and duties as those of individuals. It completely ignores its economic and political power, and its role in society.

1.2 Justification for and clarification of the use of aggregate entity-theory

There are several very good reasons as to why I have chosen this particular theory for the identification of a specific mode of thought within the Supreme Court on the subject of corporate personhood. Aside from various purely analytical considerations, it is my opinion that this theory provides the best analytical framework for this thesis. It carries both ideological and legal implications on the level of the Justices on the Court, and allows the best understanding of the corporation as a construct within modern US society and in the eyes of the Justices as it has frequently been invoked in cases relating to corporate personhood. Furthermore, it is the theory that is currently most commonly used to justify the Court's decisions. In the next part of this section, I will comment on these decisions and reasons in more detail.

On the analytical level as a whole, it provides a very clear framework for the analysis of the Justices' decisions. Given my current understanding on the subject of corporate personhood, it is to be concluded that it has no set precedent, it has no underlying (legal) rationale, and that it is a legal fiction based on assumptions on what constitutes the corporate nature. Over the years, the Supreme Court has used different theories on corporate personhood in either concurring or dissenting a case-opinion, and in some instances even during the same case (such as *Citizens United v FEC* (2010)). The lack of sufficient legal doctrine and solid, argued precedent has resulted in a high level of unpredictability of Court-votes in cases on corporate personhood. The only thing that can be concluded here is that the artificial entity theory is often used by the dissent, and aggregate theory by the concurring Justices. Certain links can be made between ideological and political philosophies, but those are as of yet murky. Cases concerning corporate personhood are highly dependent on context – precedent is playing an increasingly stale role. As such, given the lack of judicial and ideological predictability of the Court, using the aggregate theory would offer the best framework. Not only does it explain the rationale behind the advancement of corporate personhood, but it also offers various angles to analyze the rationale from. Real entity simply states that corporations are persons, and artificial states that they

are not. At the very least, it offers one rationale that can provide differing viewpoints and explanations.

On the ideological level, the theory fills the legal gap left open by the Justices. Ideology is commonly defined as a system of opinions, beliefs and/or ideals of an individual or group. Given the absence of one particular legal rationale for the continuing advancement of corporate personhood, personal attitudes and convictions can be of sufficient explanatory significance. Adherents of the aggregate theory display above average faith in American free-enterprise, prioritize freedom above any other right, and some form of confidence in the corporate entity to regulate itself and adhere to law. More than anything, these supporters can be considered ardent believers in American ideals and value self-determination as well as entrepreneurship. Opponents of the theory less so – they appear to be more realistic on the position and capabilities of the modern corporation, and as such stress its artificiality and the necessity of regulation. Although also believers in the ideal of freedom, they attribute a specific task to the US government to act in the interests of the citizen. Through the aggregate theory, several values can be discerned for analysis. This is especially so in the case of corporate personhood, which is based on and ruled by irregular thinking.

There have also been numerous considerations on the legal level in the justification of the use of this theory. Given the multitude of perceptions on the subject, the fact that I am not a legal historian or well-versed in law, the thesis needs some direction. In addition, since the 1970s (and especially more presently) the aggregate theory has increasingly been used to justify corporations' protections under the First Amendment – for both the freedom of speech and (more recently) that of religion. What has been found so far is that various arguments, and non-arguments, have been employed – the right to freedom of (political) speech cannot be denied based on the speakers' identity, no question on the nature of the corporation should be asked – instead, it should be deliberated whether the corporate identity of the speaker prohibits the enjoyment of the protections under the First Amendment³², and in other cases the debate on the nature, role and impact is wholly ignored. An analysis by using the tenets of the aggregate theory allows me to circumvent outlying issues and part of the debate, and to frame a particular mindset of the Court on corporate personhood, the importance of the Constitution and the human rights embedded therein.

1.3 Use of the aggregate entity-theory within the Supreme Court.

Having established the reasons for the use of theory and its applications within the meaning of this work, we now turn to locating the uses of the theory within relevant cases brought before the Supreme Court. For the purposes of this thesis several core cases have been selected: *First National Bank of Boston v Bellotti* (1978), *Citizens United v Federal Election Commission* (2010), and *Burwell v Hobby Lobby Stores Inc.* (2014). The reason for this selection is that they all have been central cases in the

32 *First National Bank of Boston vs. Bellotti*, 435 U.S. 778 (1978). In the words of Powell: “The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection.”

expansion of First Amendment rights for corporations – *Bellotti* was the first instance in which commercial freedom of speech was decided to be protected under the First Amendment, *Austin* then upheld a ban on (exuberant) commercial speech for corporations only to be overturned later in *Citizens United*, which held that corporations are free to donate to electable officials on their own discretion, and lastly corporations had received the right to refuse obligations under Obamacare whenever it clashes with their religious beliefs in *Hobby Lobby*. Within all of these cases, aggregate entity-theory has been used to both justify and refuse the attribution of the rights to speech and religion to corporations.

In order to identify the use of the aggregate entity-theory within these cases, several core tenets have been translated to expressions and sentences that can be searched for within key passages of the case files. As such, this subsection will focus on locating the following: (1) shareholder primacy, (2) separation of the corporation and shareholders, (3) the corporation as an association of individuals, and (4) denunciations of governmental interference. Other relevant expressions relate to (5) assertions of the corporation as a natural person before the US Constitution and (6) a belief in the internal regulative capabilities of the corporation in order to prevent corruption and other abuses.³³

The first case to be discussed is the case of *First National Bank of Boston v Bellotti* (1978), in which the Court considered whether a state statute restricting corporate funds spent for the purpose of influencing voters was constitutional under the First Amendment. Within this case, the Court decided that the protections under the First Amendment “always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause.”³⁴ Within this reasoning, the corporation has already been attributed the rights to freedom of speech and religion due to the fact that during the *Santa Clara*-case (1886) they counted as persons before the provisions of the Fourteenth Amendment, under the Due Process Clause.³⁵ In other words, it has forgone the reasoning on the nature of the corporation. Building on this argument, Justice Powell (who wrote the majority opinion) has stated that in “the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. (...) If a legislature may direct business corporations to “stick to business,” it also may limit other corporations -- religious, charitable, or civic -- to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.”³⁶ Here, the limit set on corporate freedom of speech - commercial or otherwise - is declared unconstitutional. What is striking here, however, relates to Powell's idea that corporations are capable of “expression” - a trait normally only attributed to natural persons. Further

33 By 'shareholder primacy' I refer to the body of shareholders within the corporation as the subject of the highest value from which the merits of the corporation as a legal construct are judged. It serves as the main argument for granting corporations protections under the First Amendment, as well as the basis for all other reasoning.

34 *First National Bank of Boston vs. Bellotti*, 435 U.S. 780.

35 *Santa Clara County vs. Southern Pacific Railroad Co.*, 118 U.S. 394-395 (1886).

36 *First National Bank of Boston vs. Bellotti*, 435 U.S. 785.

on in the case, he states that “[a]ssuming (...) that protection of shareholders is a “compelling” interest under the circumstances of this case, we find “no substantially relevant correlation between the governmental interest asserted and the State’s effort” to prohibit appellants from speaking.”³⁷ What Powell does here is to equate the protection of the shareholders – a deciding factor in granting corporations freedom of commercial speech – with the corporations’ ability to “express” itself. While not stressing the separation of corporation and shareholders, in his line of reasoning the shareholders play a decisive role, any discussion on the nature of the corporation is not featured, and the government’s decision to limit corporate freedom of speech is seen as interference rather than regulation. This is a strong indication of aggregate entity-theory reasoning.

The second core case is that of *Citizens United v Federal Election Commission* (2010). In this case, the Court decided with a majority of five-to-four that corporations were free to spend their economic resources on supporting electable officials in the form of donations.³⁸ No limits were set on the donations – corporations could donate as much as they liked. Here, “Justice Kennedy equated the constitutional dignity of natural persons with that of corporations. He wrote that “[i]f [the] [Bipartisan Campaign Reform Act] applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect. ‘ To Kennedy, corporations, no less than individuals, enjoy the same right to speech because “[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content. ‘ Corporations and other associations, no less than individuals, are participants in the marketplace of ideas.”³⁹ Here, again, the government (who passed the BCRA) enjoys the unfavorable view as a an entity that merely means to control and suppress the freedom of expression. What’s more, he passes by the complete identity of the corporation as an entity with great political and economic influence, simply equating it as part of US society, and confirms (much like *Bellotti*) that corporations are capable of expression because they are an association.⁴⁰ Justice Scalia, in concurrence with Kennedy, stated that “the individual person’s right to speak includes the right to speak in association with other individual persons.” A corporate claim to freedom of speech is equalized with speaking in association with other individuals, and cannot be abridged on “the simplistic ground that [the corporation] is not ‘an individual American.” In his conclusion, he wrote that the “[First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals (...) ”.⁴¹ Much like Kennedy, he forgoes any discussion on the corporate nature, and rather than considering a

37 *First National Bank of Boston vs. Bellotti*, 435 U.S. 795.

38 *Citizens United vs. Federal Election Commission*, 558 U.S (2010).

39 Miller, *Guns Inc.*, 898-899.

40 Here, the statement “corporations and other associations (...)” implies that Kennedy views the corporation as an association of individuals rather than an artificial construct.

41 Miller, *Guns Inc.*, 898-899.

conceptual gap in law (read: the lack of the mentioning of corporations) as something that needs to be at least considered or amended, Scalia extends the freedom of speech to any entity comprising of one or more individuals. This is roughly translated to anyone in any capacity. If anything, the individual freedom to pursue their interest according to their own utility calculus appears to be the core of Scalia's reasoning. Furthermore, rather than attributing the freedom of speech to corporations, he attributes it to the association of individuals it consists of. Also again, here we see an emphasis on the rights of shareholders rather than the corporation itself.

The final core case to be analyzed in brief is *Burwell v Hobby Lobby Stores Inc.* (2014). Again, with a five-to-four majority, the Court decided that a closely-held corporation can refuse to provide their workers contraceptive medicine under Obamacare if it clashes with their religious convictions.⁴² Justice Alito, the author of the majority opinion, has stated that when “rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company.”⁴³ And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.⁴⁴ [T]he Third Circuit wrote as follows: “General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.” All of this is true—but quite beside the point. Corporations, “separate and apart from” the human beings who own, run, and are employed by them, cannot do anything at all.”⁴⁵ In this one opinion, several core tenets of the aggregate entity-theory can be discerned. The first is an emphasis on the corporation as an association of individuals; second, the notion that corporations and the shareholders are separate (with the former being of an artificial nature); and third, some level of shareholder primacy as the rights of humans who control the corporation are fervently emphasized. For Alito, the idea of the corporation as an association of individuals was central to his ruling of this case.

⁴² *Burwell vs. Hobby Lobby Stores, Inc.*, 573 U.S. (2014).

⁴³ *Burwell vs. Hobby Lobby Stores, Inc.*, 573 U.S., under III-A.

⁴⁴ *Ibidem.*

⁴⁵ *Ibidem*, right before the transition to Section B-1.

Part II: The Supreme Court and Ideological Variables.

2.1 Dynamics in Decision Making

It has since long been the understanding among scholars and journalists alike that personal values, attitudes and ideas – in short: ideology – has played a decisive role in the Supreme Court's decision making.⁴⁶ This is especially the case when it concerns Court-cases regarding civil liberties, including freedom of speech and religion as these are subjects that the Justices can easily relate to.⁴⁷ However, there are several key factors that need to be taken into account when it comes to the Court's decision making on the ideological level.

To start, the unique dynamics of decision making need to be taken into account. With this I refer to procedures, internal constraining mechanisms, opposition to a Justice's opinion, and possibilities to deviate from the norm. It needs to be said here that the Court's Justices operate in a very different ideological environment when compared to Congress, for example: whereas Congress needs to take into account the wishes of their constituencies when making or opposing legislation, the Justices on the Court are limited to act in best accordance with the rulings and context of the Constitution. These unique dynamics lead to the understanding of the Court as an institution that is fairly free to act on their own perceptions of the law and their personal values. This is not to say that the Court does not carry the wishes of the public or Congress into its analysis of the cases brought before them – it only serves to clarify that, unlike Congress, the Justices act in accordance to their understanding of law rather than in accordance with the wishes of voters. Furthermore, the Court follows the rule of majority for their procedures – from the selection of which cases are controversial or complex enough, to the decisions in said cases. Given the size of the Supreme Court – normally nine Justices – this also leads to less opposition from other decisionmakers, at least in the numerical sense. When deviating from norms, such as overruling a precedent, the Justice in question needs to convince a maximum of four Justices in order to reach a majority. These factors together leave the Justices fairly free to act on their own ideologies. In order to frame these dynamics so more sense can be made about the motivations of the Justices, scholars have introduced two models in the realm of decision making: the attitudinal model, in which it is asserted that Justices follow their own values and preferences when making decisions, and the strategic model, which argues that Justices take the opinions of other Justices, Congress and the public into account.⁴⁸ Both models fall short, however, as the attitudinal model purely focuses on internal motivations, while the strategic focuses on external motivations – Justices are arguably motivated by both. Public opinion is often taken into account, for example, and

46 Donald A. Songer & Stefanie A. Lindquist, "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making", *American Journal of Political Science*, Vol. 40, No. 4 (November 1996), 1049-1063.

47 Jeffrey A. Segal and Albert D. Cover, "Ideological Values and the Votes of U.S. Supreme Court Justices", *The American Political Science Review*, Vol. 83, No. 2 (June 1989), 557-565.

48 For an excellent overview of existing models regarding the Justices' decision making, see Pacelle Jr., Richard L., Curry, Brett W., & Marshall, Bryan W., *Decision Making by the Modern Supreme Court* (Cambridge University Press 2011).

Justices consider cases from the perspective of what they find important to consider.

2.2 Problems with using ideology as a basis

Complications when using ideology as a basis when predicting or analyzing the outcome of cases also need to be taken into account when establishing a particular mode of thought concerning corporate personhood.⁴⁹ These complications can be described as changing ideological positions (“ideological drift”) and limits to political ideology (conservatism and liberalism). These two factor in any analytical model, providing a certain limitation on the use of ideology as both a predictability measure and an analytical tool.

The first complication to be discussed here is that of ideological drift. According to more recent research, the ideological leanings of Justices assigned to the Court between 1937 and 2005 have shifted over time. In a detailed study, Lee Epstein et al have found that most Justices which have served on the Court during these decades have either grown more liberal or conservative over time.⁵⁰ Most of the Justices researched have become more liberal over time, a limited amount of others more conservative, and a few have remained more or less adherents to the same ideology. During the first term, Justices have fulfilled ideological expectations by presidents, media and scholars. However, after the first term of services, the ideas and philosophies of these Justices have changed. This proves that changes in ideas and leanings are not only possible, but also likely.⁵¹ What this line of reasoning infers is that while ideologies do play a role in Justices' decision making, it would be wrong to attribute the expansion of corporate rights solely to an ongoing conservative mindset.

The second complication to be discussed is the limited scope of political ideology. Many have attributed a conservative view towards law within the Supreme Court. Several studies suggest that conservative Justices have viewed businesses in a favorable way since the 1970s, leading to a steady increase in the amount of business wins in cases brought before the Supreme Court.⁵² However, it is also apparent that being conservative does not mean that these Justices are always pro-business. In fact, there have been instances in which corporations have endured severe losses in the face of their opponents. To equate the growth of corporate personhood with conservatism is therefore faulty.

2.3 The effect of ideological considerations on the Supreme Court's decision making.

Given these considerations concerning the internal dynamics of the Court, ideology appears to be a

49 The reason as to why I am including these complications in this part of the thesis is due to the fact that there is a necessity to be as objective as possible, as well as to have considered central objections to the use of ideology when using it as a partial basis for the identification of a specific mode of thought. If it is possible to discern one despite all these complications, then it will be all the more convincing.

50 Lee Epstein; Andrew D. Martin; Kevin M. Quinn & Jeffrey A. Segal, “Ideological Drift among Supreme Court Justices: Who, When, and How Important?”, Forthcoming *Northwestern Law Review* (2007), 1-45.

51 Lee Epstein et al, “Ideological Drift among Supreme Court Justices”, 46.

52 Michael A. Bailey, “Measuring Ideology on the Courts”, *Draft prepared for the 2016 Southern Pacific Science Association Meetings* (January 2016), pp. 1-40. **See also:** John C. Coates IV, “Corporate Speech and the First Amendment: History, Data and Implications”, *Forthcoming Constitutional Commentary* (February 2015).

poor basis for the identification of a specific mode of thought regarding corporate rights and personhood. However, it has always been a given for scholars and journalists alike that personal values, attitudes and convictions have played a central role in the Supreme Court's decision making. As such, the focus in this section does not lie on the divide between liberal and conservative Justices, but rather on the identification of specific, common values and opinions among the strata of the Court. To do so, the aggregate entity-theory will posit as a framework. In the final section of the previous chapter, brief analyses of the *Bellotti*, *Citizens United* and *Hobby Lobby* cases have shown that the thinking of Justices who wrote the majority opinions fit into the aggregate-entity conception of the corporation. The following section will translate these opinions into several tenets of American conservatism, showing that while conservatism alone does not explain the expansion of corporate rights under the First Amendment, several less visible conservative ideas do play an important role.

Given the research that has been done on the landmark decisions mentioned above regarding corporate personhood, some degree of a belief in the free-enterprise system can be discerned⁵³ (...), as well as some modicum of faith in the corporations' ability to govern itself in a prudent and moral manner (...) – this can arguably be translated into a strong belief in freedom and entrepreneurship, and any governmental action that interferes with these values is quickly seen as an attempt to control corporations and dismissed, or as unconstitutional. This fits especially well within the framework of the aggregate entity theory, which stresses (1) shareholder primacy, (2) the individual's freedom to pursue its own interests and (3) the right to congregate into an association in order to do so. These values have all been found in the majority opinions of the cases mentioned earlier, which is arguably signatory of a common mindset across the liberal / conservative ideological divide.⁵⁴ This would support the identification of a particular mode of thought when it comes to corporate personhood and the associated protections under the First Amendment. Furthermore, as has been stated before, it is too much of a simplification to state that the “tyrannical conservative majority”⁵⁵ is the foundation for the expansion of corporate rights – on more than one occasion, said interests have been opposed either unanimously or by majority. Although it cannot be denied that corporate influence has grown since the 1970s and the Court has grown more partial to it since that time, linking corporate success solely to a

53 See *First National Bank of Boston vs. Bellotti*, 435 U.S. 785.

54 When dealing with cases concerning corporate personhood, the greatest proponents of protection corporations under the First Amendment are often those Justices who have either a conservative mindset or who worked in/with corporations in the past. These are typically in favor of viewing the modern corporation as an association of individuals rather than the resourceful institute it is at the same time. Justices with a more liberal mindset, notably Justice Bader-Ginsburg, tend to oppose the expansion of corporate rights because they view the modern corporation the other way around – as an institution and legal construct first and foremost. This typically results in a continuing ideological divide within the Supreme Court.

55 Ron Fournier, “Behind the Supreme Court Stalemate” (version of February 16, 2016) <http://www.theatlantic.com/politics/archive/2016/02/the-supreme-court-stalemate/463026/> (last accessed September 4, 2016). This article describes the efforts made by Republican's to prevent the appointment of Merrick Garland to the Supreme Court as replacement of Justice Scalia, one of the most conservative Justices of recent decades who passed away just before the publication of this article. Garland's appointment would mean that the Court, for the first time in decades, would have a liberal majority again. Currently, the Court has none – but under the Conservative majority, corporate personhood has made tremendous leaps.

conservative mindset is an oversimplification. What conservative values and ideals do support, on the other hand, is corporate lobbying and the pursuit of their interest versus the government. The view of the government as a possible threat to freedom; the belief in the capabilities of corporate democratic mechanisms; the belief in free-enterprise and entrepreneurship; and their presentation of the corporation as an artificial entity formed to serve the interests of the individual under the aggregate entity-theory gives corporations both incentives and angles to pursue their interests on the level of the Supreme Court and in the face of governmental efforts to regulate corporate activity.

2.4 The role of Powell's Memorandum

One other key subject to discuss in this section is the role that should be attributed to Justice Lewis F. Powell (in office from 1971 until 1987) and his so-called Powell Memorandum in the expansion of corporate activity and constitutional rights. The main reason as to why such a discussion will be included here is due to the fact that the Powell Memorandum is seen by many as the reason that corporate activity – specifically lobbying and the establishment of think tanks and pressure groups – has exploded since its publication in the 1970s. Journalists, scholars and laymen alike have put a considerable amount of the “blame” on Powell, and their perspective has strongly influenced the conception of the Supreme Court as a conservative institution when it comes to corporate interests. Opponents of the concept of corporate personhood especially aim their wrath at Powell for the part he played in the corruption of the democracy they know today. Such a view, however, makes for a fairly one-sided discussion on the the Supreme Court's decision making and leads to a focus on conservative values at the cost of other perspectives and/or possibilities. Identification of pro-business attitudes at this institution along conservative v democrat-lines seems to be lacking, and short-sighted. Therefore, other possibilities need to be considered. Is it possible that the Supreme Court is influenced / balanced through the President, who nominates a candidate whenever a seat needs to be filled? Of course this explains the presence of conservatives / liberals that favor business, but this does not take the personal attitudes of the Justices in mind. Maybe, then, corporations directly influence the Supreme Court in order to advance their own interests, and facilitate the advancement of corporate personhood. But this assumes that Justices are easily influenced within a position that requires neutrality and objectivity, and obliges Justices to act in the interests of both the rich and the poor. Such an explanation cannot simply stand in the face of academic scrutiny as it ignores multiple, yet complex dimensions, in the field of the Courts' decision making.

So, what role should be attributed to Powell, his Memorandum, and the supposed link between conservatism and the expansion of corporate rights? First, Powell did provide a boost to corporate activity in the face of the government – based on personal correspondence concerning the reception of the Memorandum, many were elevated to read that a man in Powell's position was sympathetic to

business interests.⁵⁶ Although Powell was careful not to support any kind of business-contact while in office⁵⁷, and even disqualified himself from office due to his background in business ventures⁵⁸, there is a fact that his Memorandum facilitated the founding of many think tanks and lobbying groups to serve corporate interests. Within his Memorandum he expressed worries about the position of the businesses, stating that they were the US's favorite whipping-boy.⁵⁹ To Powell, free-enterprise was crucial to the expression of individual freedom and needed to be protected fiercely – even through aggressive lobbying if necessary.⁶⁰ Powell's work was ridden with the expression of values and ideas on how businesses could thrive again, and most of the measures to be taken were of pure ideological nature.⁶¹ More importantly, he advocated for free-enterprise as the best option for renewed progress in the US and the protection of individual freedom as the alternatives “are varying degrees of bureaucratic regulation of individual freedom — ranging from that under moderate socialism to the iron heel of the leftist or rightist dictatorship.”⁶² Second, while in office, Powell proved to be (on an overall notion) to be more of a moderate than a conservative. In the *Bellotti*-case, for which he wrote the majority opinion, identified the case issue at hand as one of identity. Rather than asking whether corporations had First Amendment protections concerning speech, he changed it to whether the speaker's identity prohibits him from enjoying said protections.⁶³ Further on, he expressed a belief in the corporate (internal) democracy, and mentioned the protection of shareholders as a sufficient interest to allow them protections under the amendment.

56 A collection of personally written letters written to Lewis F. Powell Jr., describing their agreement with his ideas in the Powell Memorandum, can be found at <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellSCSFChamberofCommerce.pdf> This collection includes letters from the recipient of the Memorandum, Eugene B. Sydnor of the Chamber of Commerce; Henry J. Cappello of the National Small Business Association; and several (corporate) lawyer firms to name but a few. Although this posits no direct evidence of Powell's influence on the development of corporate personhood, these letters do illustrate the elation – and with it empowerment – of persons of rank within the corporate environment in response to Powell's ideas.

57 The same collection as mentioned above contains replies from Powell to his writers. On more than one occasion, he declined to discuss the Memorandum with anyone since he started his tenure on the Supreme Court. One such an example can be found in *Letter from Lewis F. Powell to Frank R. Barnett, President of the National Strategy Information Center, Chamber of Commerce* (dated November 20, 1972).

58 John C. Jeffries Jr., *Justice Lewis F. Powell Jr.* (Fordham University Press 2001), 2-3.

59 Lewis F. Powell Jr., “Attack on American Free Enterprise System” (August 23, 1971), under the headline “The Neglected Political Arena. Document can be found at: <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>.

60 *Ibidem*.

61 Powell identified several sources of the aforementioned attack on the free-enterprise system. However, a considerable amount of time and space was dedicated to education – Powell stated here that liberalism and progressivism overshadowed corporate realities and contributions to American Society. As such, he pleaded for more pro-business professors in universities, more pro-business speeches and even the changing of textbooks available to students to set businesses and corporations in a better light. Here, his ideas were strictly limited to the realm of ideology.

62 Lewis F. Powell Jr., “Attack on American Free Enterprise System” (August 23, 1971), under the headline “Relationship to Freedom.”

63 See *First National Bank of Boston vs. Bellotti*, 435 U.S. 778.

Part III: The Supreme Court and Legal Variables

3.1 Legal variables in the Supreme Court's decision making.

Having considered the ideological variables on the Supreme Court Justices' decision making regarding corporate personhood, we now turn to the other side of the proverbial coin: legal variables. Like its ideological counterpart, there are several legal issues and variables that need to be taken into account before we are to consider any specific mode of thought. This will serve to explain the context as well as the rationale behind the Court's decisions to expand corporate rights under the First Amendment. In this section, we will consider some variables on the decision making process itself as well as some core issues that facilitate the Court's thinking in terms of the aggregate entity-theory.

The first variable for analysis is the practice of judicial review. The core of the Supreme Court's mandate, this practice serves to both limit the scope of the Court's activities to the Constitution, as well as to expand their capabilities regarding this body of law. Simply put, it states that the Court's task is to interpret the law set in the Constitution when faced with a complex or controversial issue.⁶⁴ Here, much is left to the Justices' expertise. The reason as to why this has been selected as an important variable to the Justices' decision making, is (1) due to the use of the word "interpretation", and (2) due to the fact that this allows Justices to impose their own views of the law upon others, without a check by any other form of government.⁶⁵ Although it can be argued that the Justices chosen to fill a position in the Supreme Court are experts in the field of law and therefore eligible to serve as checks to violations of the Constitution, at the end of any line of reasoning they are still humans. Due to the fact that the word "interpret[ation]" is part of the law that grants the Justices' their mandate, allows for a subjective interpretation of the law – especially so for very controversial cases that have little to no basis in the Constitution and other law or jurisprudence, such as that of corporate personhood. Given this fact, it is no wonder that personal values and ideas are attributed a central role in scholarly and journalistic research.

The second variable is the role of *stare decisis* in the Supreme Court – a principle of rule which states that the Justices are bound to precedents in their decision making. In this conception, a precedent is a newly established rule of law by a court for a particular type of case and referred to in similar cases. An example of *stare decisis* is the recurring invocation of the *Santa-Clara* decision in the *Bellotti*, *Citizens United* and similar cases to serve as a basis for the justification of attributing the freedom of speech to corporations.⁶⁶ Aside from their direct function in the Court's decision making

64 Lawrence Alexander, "What is the Problem of Judicial Review?", *Legal Studies Research Paper Series, Research Paper No. 07-03* (September 2005), 1-3.

65 Robert Yates, writing as Brutus in the *Federalist Papers* (1788) wrote: "The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court, there is no appeal." (under XI, on January 31, 1788).

66 See *First National Bank of Boston vs. Bellotti*, 435 U.S. 765, *supra* note 15. **See also:** *Citizens United vs. Federal Election Commission* 558 U.S., B-1, where Justice Kennedy stated that political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." Here, he cites *Bellotti*, which built the case in part around the *Santa-Clara* decision of 1886. Apart from this indirect reference to

process, it also serves both as a limitation to deviation from norms (as discussed in the former chapter) and as a guiding principle when deciding other cases as it diminishes the effective room for individual subjective interpretation in the case of judicial review. During the actual decision making process, however, precedents can be understood in multiple ways depending on the question(s) asked during the discussed case. Here, context of past and present is crucial. As such, precedents can both be used to support and reject the same question / decision at hand. Furthermore, once established, a precedent becomes part of existing jurisprudence.

With judicial review and *stare decisis*, decision making on the level of the Supreme Court is highly sensitive to context and arguments. If we are to consider the reasoning of the Court regarding corporate personhood and the core tenets of the aggregate entity-theory framework, this is highly problematic – especially considering the fact that the court views the position of the modern corporation to be just another part of society comprised of individuals. We now turn to these and other issues.

3.2 Notable legal issues concerning corporate personhood.

Aside from the variables discussed above, there are several notable legal issues when it comes to corporate personhood and its expansion under First Amendment rights. These are (1) outdated bodies of law in the form of the US Constitution; (2) the fact that the Supreme Court can create and adjust legislation under *stare decisis*; (3) and the textual framing of the freedom of speech and religion as negative rights.

First, there is the context of the US Constitution to consider. Here, it has to be acknowledged that the laws it contains are outdated in the face of corporation, and has been written in a different context compared to how it has been used to this day – this is especially the case for the freedoms of speech and religion. Historically, the Constitution has been written in a post-revolutionary time in which it was sought to limit the powers of the state regarding the individuals' freedoms. When considered in this sense, the Second Amendment (the right to bear arms) makes sense – the perception of the American people at the time was that they fiercely opposed oppression by the state in any form, and this was in effect an expression of resistance to state dominion. This historical context also explains the freedom of speech and religion – two distinct individual rights that also serve to express resistance to authoritarianism and monotheism. The language and the order of rights is testament to the fact that the document mainly serves to protect the citizen from the “threat of the state”. Simply put, the US Constitution was designed to govern the relation between the individual and the US government. Corporations are not mentioned once in the entire document, and within this historical context the corporation formally has neither rights nor duties before the Constitution. And yet their rights are now established and growing. Any ruling on corporate personhood, as mentioned

Santa-Clara, this also displays the influence that one precedent can have on the decision making in another, related case.

before, factually has no basis in constitutional law. Due to this, the Court consistently relies on “fictional” precedent to justify corporate protections under the Constitution.

The second issue is linked to *stare decisis* as a principle of rule, as it allows the Court to create law and adjust legislation put forward by Congress. When we are to consider the case of corporate personhood, this allows precedents to function as justifications for the expansion of corporate rights – and with those freedom of speech and religion. At the same time, they can serve as objections to it. This is illustrated by the fact that proponents of corporate rights often cite *Santa Clara*, while opponents cite *Dartmouth* (which stated that corporations are artificial entities who exist by grant of the state).⁶⁷ Their continued use in related cases prevent the establishment of any unanimous conception of the corporation, keeping such cases controversial and liable to be accepted by the Court for review. In addition to this divisive effect, continued use also leads to what I call the “dead horse-syndrome” - a subject or argument has been brought up so many times for discussion that the Justices tend to forgo any mention of it. This is particularly dangerous when it comes to corporations, as their nature – and with it the resources they possess as well as their influence – is glossed over for review. This is one of the tenets that has been discerned from the aggregate entity-theory.

The third issue is the framing of the rights under the First Amendment as negative rights. The law dictates that the freedom of speech and religion cannot be encroached upon or abridged by another. It stresses inaction towards another person's behavior, rather than action. Furthermore, since it does not enshrine what actions should be taken – they only dictate what should not be done - in the event of any violations the Court is free to determine the context of the violation and the response to it. At this point, ideology, personal ideas and attitudes start to play a role. This can lead to biased decisions, the overturning of precedents and legally unfounded arguments. In this sense, the idea of freedom enshrined in negative rights can prove to be more of a problem than a blessing. Another point that needs to be taken into account is that the freedom of speech, in special circumstances, can be restricted.⁶⁸ Under normal conditions, freedom of speech can be restricted if said speech amounts to hate speech or harassment (for example). In some cases a special significance can be attributed to freedom of speech, as “the importance that is granted to protecting even offensive words, is explained by our sense that human progress comes when ideas can be challenged and authority can be questioned.”⁶⁹ If we are to consider an individual exceeding his right to freedom of speech, it is easy to envision him being fined, jailed, or tasked with community service. Is it possible to say the same of corporations, who have limited liability and far more say in US society than a single individual? Their

67 Anne Tucker, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497, 511 (2011): “The Court’s application of these common arguments—as either an attack against or support for corporate political speech restrictions—depends on both the Court’s constitutional conceptualization of corporations and its assumptions about the roles, rights, and responsibilities of corporations in our economic and legal society.” **Quoted in:** Stefan J. Padfield, “The Silent Role of Corporate Theory in the Supreme Court’s Campaign Finance Cases”, *Journal of Constitutional Law, Volume 15, No. 3* (January 2013), 846.

68 A. Clapham, *Human Rights: A Very Short Introduction* (Oxford University Press 2015), 110.

69 Clapham, *Human Rights: A Very Short Introduction*, 111.

framing as negative rights serves as a focal point in terms of aggregate entity theory-reasoning, as it essentially dictates non-action; non-intervention. The theory's emphasis on the unconstitutionality of intervention in shareholder affairs serves as an ample base for this.

From the above, it can be concluded that the framing of negative rights outside the corporation makes it substantially easier to apply constitutional rights to corporations using aggregate entity reasoning.

3.3 Does Law Matter?: A Jurisprudential Regime.

Having established the variables and issues with the legal dimension of corporate personhood, we now have come to an important part of the chapter and the thesis as a whole – the question whether the law even matters in the Justices' decision making. This is not to say that the law does not matter at all – the analyses above clearly demonstrate otherwise. What I am referring to with the above is the question we can derive any value from the law as a structuring mechanism in the Court's decision making, if it is possible for the law and existing jurisprudence to constrain (or even trump) the Justices' preferences towards the expansion of corporate rights. Here I argue that it does, especially when we consider the rationale employed under the aggregate entity-theory.

This argument is based on the use of the concept of “jurisprudential regimes” - “stable patterns of case decisions in a given area before and after key precedents are established.”⁷⁰ A jurisprudential regime is said to “structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are to employ in assessing case factors (i.e., weighing the influence of various case factors)”.⁷¹ More importantly, in the event such a regime can be identified, it will go directly against the dominant view that ideology is the most important factor to analyze in the Court's decision making – something that has been established earlier in the second chapter. From this understanding of the concept, three crucial factors can be discerned: (1) the structuring of the Court's decision making; (2) relevant case factors for decision making; and (3) setting the level of scrutiny the Justices employ to assess said case factors. These factors are discussed below.

First, what both *Bellotti* and *Citizens United* appear to have in common is their dependence on the precedent of *Santa-Clara* (corporations are persons for the purposes of the Fourteenth Amendment) to justify the expansion of corporate rights; conversely, the opposition frequently relies on the use of *Dartmouth* (corporations are artificial entities) to counter the trend.⁷² These have become precedents that have served to structure argumentation for and against said expansion, and to serve as a basis in the same. The artificial reasoning set therein has been invoked during high profile cases such

70 Jeffrey R. Lax & Kelly T. Rader, “Legal Constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?”, *The Journal of Politics*, Vol. 72, No. 2 (April 2010), 273.

71 Lax & Rader, “Legal Constraints on Supreme Court Decision Making”, 274.

72 *Trustees of Dartmouth College vs Woodward* 17 U.S. 636 (1819). “A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possess only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.”

as *Bellotti* and *Citizens United*.⁷³ As such, it is to be expected that the rulings contained within them will be used in future cases concerning the corporate freedom of speech. Second, considering the rationale used in the above cases several recurring case factors can be identified: shareholder primacy; the conception of the modern corporation as an association of individuals; the governing idea that everyone is protected under the First Amendment as long as an individual or association of individuals is involved (barring obvious violations of law). Each of these have demonstrated to possess enough influence in the majority of the Justices' rationale and to be carried over into the assessment of future cases.⁷⁴ Third and last, in the discussion of the level of scrutiny employed to assess the case factors, it has become apparent that any infringement upon the rights of corporations to freedom of speech is often seen by the Court as unconstitutional, and the burden of proof is always placed on the government to prove otherwise – that regulation is necessary.⁷⁵ Any action taken in this regard more often than not comes under heavy scrutiny by the Justices of the Court which it is highly unlikely to survive, making it hardly possible for the government to regulate these rights under the corporations – seeing that these have been considered as just another part of US society. Conversely, the scrutiny placed on the aforementioned case-factors themselves is low to non-existent – most (if not all) are considered to be true and part of the reasoning within existing jurisprudence. Therefore, rather than assessing the relevant case factors, it has become practice to assess governmental intent.

Keeping these considerations in mind, it can be argued that a specific jurisprudential regime does exist within the Court on the subject of corporate personhood and associated rights. However, this regime is considerably more instrumental in nature (precedents are used to justify corporate rights) as well as directed on the assessment of intent (of both governmental regulation and the corporate reasoning in their appeals to First Amendment rights). Nevertheless, it does allow for a degree of structure within the legal dimension of the Court's decision making.

73 *First National Bank of Boston vs. Bellotti*, 435 U.S. 823. Referencing *Dartmouth* “The appellants herein either were created by the Commonwealth or were admitted into [it] only for the limited purposes described in their charters and regulated by state law.” In the partial dissent by Justice Stevens in *Citizens United*, he expressly quoted *Dartmouth* (under III). The same occurred in the dissent by Justice Bader-Ginsburg, who was joined by Justices Kagan, Breyer and Sotomayor, did the exact same – stating that “[a] corporation is an artificial being, invisible, intangible and existing only in contemplation of law”, under C-1.

74 See footnotes 66 and 67 mentioned above.

75 *First National Bank of Boston vs. Bellotti*, 435 U.S. 765, *supra* note 31: “The First Amendment rejects the “highly paternalistic” approach of status like [the RFRA] which restrict what the people may hear.” Furthermore, on the plaintiff's claim that corporate influence corrupts the elective process, Powell stated that “the risk of corruption perceived in this Court's decisions involving candidate elections is not present in a popular vote on a public issue”(435 U.S. 766), implicitly placing the burden of proof on the government to prove otherwise. In *Hobby Lobby*, the Court's majority held that the public interests under Obamacare do not outweigh the religious interests of those working under religious owners and contraceptive cure under the Act is not the least restrictive means through which the “governmental” interest can be served (I-III). *Citizens United* takes this a step further: “Quite apart from the purpose of effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speakers' voice.” (under III) Here, Justice Alito argues that corporations are persons and members of the public, and implicitly places the obligation on the Government to prove that regulation is even necessary in the case of freedom of speech.

Part IV: Identification of the Supreme Court's mode of thought.

Up until this point, the aggregate entity-theory has been discussed and explained, and the ideological and legal dimensions of the Supreme Court's decision making have been explored and analyzed. The role of the aforementioned theory has been to structure this thesis in its analysis, placing the focus on the values expressed by the Justices, as well as on the use of precedents in reasoning, rather than on the hard-line political ideologies of conservatism and liberalism. Although it cannot be denied that these do play some role in the Court's decision making process and govern some of their preferences, they alone do not provide a sufficient explanation for the expansion of corporate rights under the First Amendment in recent years. The analysis of both the ideological and legal aspects has determined that other, more subtle factors are at play that deserve consideration.

4.1 The Supreme Court's Mode of Thought: The Argumentative Basis

In Part II of the thesis, it has been found that ideology plays a central role in the Court's decision making in more than one way. The Justices are fairly free to let their personal ideas and values guide their decisions in complex and controversial cases, making ideology a sound basis for analysis and arguments in research – the case of Lewis F. Powell Jr., who in part introduced a specific manner of thinking concerning corporations to the Court. However, the blame does not solely fall on Powell, as just the lobbying for corporate rights by corporations does not facilitate their expansion as it has occurred so far. Lastly, it has also been found that the Justices' ideological views shift over time, making the attribution of the recent victories of corporations purely to a conservative mindset an oversimplification of the problem at hand. The ideological leaves several gaps open for interpretation and analysis, as it does not explain everything on the Court's decision making process and the expansion of corporate rights.

In Part III, the legal dimension has been analyzed and discussed, and it has been found that there are some factors here that explain several of the gaps left behind by the ideological dimension of the Court's decision making. First, it has become apparent that the practice of judicial review opens the door for ideological considerations to become law as the Justices are obligated to interpret the Constitution rather than to work within expressly formed boundaries. Second, the ruling principle of *stare decisis*, while limiting ideological interpretation of controversial cases and serving as a guiding principle in decision making, is highly sensitive to context and also serves to embed controversial decisions in jurisprudence. Other problems in the legal dimension can be attributed to obsolete laws (the laws set in the US Constitution are outdated and only regulate the relationship between the government and the individual - corporations are not mentioned), the principle of *stare decisis* (*stare decisis* serves as both to justify and reject corporate rights, resulting in a continuing divide and discussion on the subject of corporate personhood, and the “dead-horse syndrome” which prevents discussion on the nature of the corporation and blocks any possible agreement on how to see it before

the law), and the framing of the freedom of speech and religion as negative rights (the freedoms under the First Amendment have been written as negative rights, prescribing inaction rather than protection. The nature of the corporation does not fit with the legal application of the freedom of speech, and its protection is sensitive to context as it is non-prescriptive). Lastly, it can be argued that a jurisprudential regime concerning corporate personhood before the Court exists, as the same cases are invoked time and again to support or reject claims made by corporate plaintiffs and lawyers.

One of the main questions that remains now is the following: how does all of the above factor in the identification of a specific mode of thought on the level of the Supreme Court concerning corporate personhood? Within the framework set by the aggregate entity-theory, it has become possible to link the cases of *Bellotti*, *Citizens United* and *Hobby Lobby* to one another. Here, several central recurring arguments and perspectives have been identified, which are as follows: (1) the corporation is more and more presented as an association of individuals pursuing their own interests; (2) regulation at the hand of government is frowned upon; (3) there is little discussion on the nature of the modern corporation; (4) shareholder protections have been framed as a primary interest, as their protection is often a key point in controversial cases; (5) the same precedents are invoked time and again in order to justify or reject the expansion of corporate rights; (6) there is as of yet no agreement on the nature of the corporation; (7) an emphasis is placed on the individual right to free-enterprise and pursuit of his/her interests; and (8) the perception that corporations are invaluable to US society as participants in the 'marketplace of ideas' and community leaders.

Using these recurring arguments and perspectives as a basis, it will be possible to identify several core values inherent to the Justices' general reasoning. First, individual agency is of prime importance. Whether someone pursuing a personal interests in free-enterprise alone or within the association of the corporation, or wishes to live by his or her religious beliefs at all times, the protection of this type of individual freedom is paramount. Second, there is the importance attributed to 'expression' - the spread of availability and ideas within US society. Everyone should be able to voice a personal opinion and to donate to politicians of their choosing freely. Third, the view of the government as a paternalistic institute, leading to a consistent rejection of governmental regulation whenever an aspect of individual freedom is at stake. Fourth, a majority of the court has a rather specific conception of what it means to be free – in the case of corporate personhood it is seen as the freedom to do as one pleases within free-enterprise, the freedom to pursue one's own interests either for self-fulfillment or monetary gain without constraint. This conception is highly centered on ego and personal interests rather an equality in freedom. Fifth and last, an implicit acceptance of corporate leadership. It has frequently been asserted that corporations have plenty to offer to society – they are participants in the 'marketplace of ideas', participate in humanitarian efforts and charities, and provide the public with the services they need to continue their current way of life.

4.2 Identification and Structure of the Mode of Thought:

Translating these values into a specific mode of thought / rationale, it can be argued that the Court has been expressing a *libertarian* vision of modern US society and the subject of corporate personhood. Within this political ideological system, political rights and civil liberties enjoy prevalence over social, economic and cultural rights.⁷⁶ Furthermore, libertarians confine their moral reasoning to a legal or political ethic – this ethic, based on property rights and the non-aggression principle, lies at the heart of libertarian morality. However, this framework is exceptionally limited as it does not concern itself with the rights connected to standards of life or equality, and it has no prescriptive force in action towards the life and/or betterment of others – the only thing it emphasizes is non-action towards the rights of others. Considering the subject of corporations and the impact the modern corporation has on our daily lives, this is highly problematic – especially for the human rights protections of non-corporate persons in terms of the freedom of speech and religion. These issues, and libertarian thought, will be discussed in more detail in the next chapter.

⁷⁶ Michael Lind, “Why libertarians apologize for autocracy”, *The Salon* (version of August 30, 2011) http://www.salon.com/2011/08/30/lind_libertariansim/ (last accessed August 15, 2016).

Part V: The Supreme Court, Corporate Personhood and Human rights.

Having established the Supreme Court's thinking regarding corporate personhood and its associated rights to be of a libertarian strain, it is now possible to continue on with an analysis on the issues this poses for the protection and exercise of First Amendment-rights for natural persons. As such, the purpose of this last Part is threefold: its focus lies on (1) exploring the impact libertarian thought has on the understanding of the rights propagated under the First Amendment; (2) on the identification of the problems from the position of human rights – to what possible degree the attribution of rights intended for natural persons to corporations fits within the historical and moral framework of human rights; and (3) on an analysis of the impact of libertarian thinking on the government's designated role as the guardian of human rights within US society.

5.1 The Impact of Libertarian Thought on the Understanding of the First Amendment.

The right to free speech and religion can be understood in different ways – as a safeguard against ideological or educational oppression by an entity of greater power, as a means to express one's own ideas on various subjects and thereby inviting discussion and understanding, or as a basis of human agency. These conceptions of the right carry a particular moral dimension. With this I do not mean to say that it is decidedly right or wrong; rather, it functions as a means to self-fulfillment – to be able to speak of personal ideas and visions, and to have others hear of them.

The First Amendment Rights under libertarian thought carry no such understanding. It can simply be understood as non-abridgment of these rights by governmental action – mainly just censorship in general.⁷⁷ This particular understanding of the rights is both limited in scope and exceptionally broad: it can be referred to as a straightforward tenet of non-intervention, or it can incorporate the freedom to express personal ideas on society and other subjects, the freedom to pursue one's own interests in life, or even understood as a part of civil agency within society. In other words: the scope of the libertarian framing leaves a lot open to context, making it practically applicable in any situation. In addition, this conception is arguably heavily anti-governmental – government is more often than not depicted as the institute that people need protection from.

This libertarian understanding is to be considered highly problematic in the case of corporate personhood. Due to the fact that its view of the freedoms to speech and religion are both highly contextual – and therefore open to interpretation in a variety of ways – and also narrowly defined, allows it to be applied to the modern corporations and justified under the norm of “freedom of abridgment” in different shapes and forms. This can be observed in the *Bellotti* (commercial speech),

⁷⁷ The non-aggression principle in particular an agent through which libertarian thought rejects governmental regulation in any shape or form. The emphasis libertarians place on freedom of speech as a means to counteract governmental action, in addition to the value it places on individual freedoms, cannot be understood as anything else but a complete rejection of governmental influence in the individual's life. This rejection is best conceptualized as non-abridgment, which basically means: “do not infringe upon my individual rights”.

Citizens United (political speech) and *Hobby Lobby* (freedom of religious expression) cases. This is especially true in the reasoning of the aggregate entity-theory, where the corporation is seen as a legal construct which serves the interests of an association of individuals.⁷⁸ This libertarian implementation of corporate personhood by the Supreme Court effectively establishes an understanding of the modern corporation as a person within US-law – better called the process of anthropomorphizing the corporations and the attribution of personal rights that accompany it.

This process poses a particularly large issue in modern US society, as it allows corporations to prioritize the shareholders over stakeholders (consumers, local communities, and employees). No detailed explanation of the theory or an explanation of its consequences is needed here: it allows corporations to pursue their own interests at the cost of those who are affected in this pursuit without much scrutiny. Furthermore, it provides corporations with the “natural” character they need in order to be able to use concepts such as “expression” and “discrimination” in their fight to stave off governmental regulation.⁷⁹ In recent years, this has already taking place as “(...) at present, almost any regulation of commerce that some entity objects to is being attacked (...) as a violation of the First Amendment rights of the business in question, or carrying the discrimination analogy further (...)”⁸⁰ Many businesses, large and small, seek to undo existing regulations.

5.2 The Framework of Human Rights: How do Corporations Fit in and what are the Problems?

When we are to consider the aforementioned anthropomorphizing of the corporation, the question on the applicability of human rights to corporations immediately comes to mind. Not only would this mean that corporations – should it ever occur – get an even stronger position towards governmental attempts at regulation, it would also go against the very essence of human rights law. If we are to look at the history of the 20th century, the period in which arguably the most important document of human rights law was written (of course referring to the Universal Declaration of Human Rights of 1948), we find that the very purpose of human rights was to provide individuals with agency and dignity simply by the virtue of “being human”. It was to provide a modicum of protection against instances of oppression and they existed to be used by ethnic or religious minorities against those who would deny them equal rights – especially during the period of decolonization.⁸¹ As such, its purpose was to constrain the actions of governments or other entities of great influence towards individuals – regardless of ethnicity or religion. More importantly, the purpose of human rights is to prevent rebellion against tyranny – in other words, to foster social and societal stability.

Under human rights law, the right to freedom of speech can be understood as having a right to voice ideas or values that do not coincide with the view of others, to invite discussion when ideas

78 For a renewed understanding of this reasoning, look back to Part I of this thesis.

79 Piety, “The Corporate First Amendment”, 5.

80 Ibidem, 36.

81 For an expertly written overview on the development of human rights and their meaning, see: Griffin, J., *On Human Rights* (Oxford University Press 2008). **See also:** Armaline et al, *The Human Rights Enterprise* (Cambridge 2015).

contrast with one another; and to be able to do so anywhere in the world.⁸² The right to freedom of religion can be understood as the right to hold and change the religious beliefs one has, and the right to express these beliefs in “teaching, practice, worship and observance.”⁸³ Although these rights are similar in their writing in the Universal Declaration of Human Rights and the US Constitution, the two are written in completely different spirits. The UDHR, in its preamble, posits that states have the moral obligation to promote respect for and observance of human rights.⁸⁴ What is discernible here is a particular duty to ensure that individuals know that they have, and can make use of, human rights.⁸⁵ A brief analysis of the spirit of the US Constitution paints a wholly different picture – more than anything, it depicts the freedom from governmental oppression in any shape or form. Here, in the very First Amendment, we solely find a prohibition on the side of the state to not infringe upon the rights of individuals. It depicts no governmental task or duty to facilitate or protect freedom of speech or religion – it simply prescribes non-action and little more.⁸⁶

In the event that US-based corporations come to enjoy the freedom of speech and religion as human rights, the US government would have a duty to make sure that these freedoms can be enjoyed and are promoted. In the hands of corporations, it has the potential to become nothing more than a tool for corporate interests. Under the aforementioned conception of the right to freedom of speech - which serves as the foundation for the growth and expression of ideas – natural persons can be indirectly silenced by the more powerful corporations or have their ideas suppressed, as the offended can make cases for slander or discrimination. In such a case, the freedom of speech of corporations can be protected at the cost of the freedom of speech of an individual. In the case freedom of religion, the right serves to allow individuals to freely express their personal religion outside of the private sphere, such as work, the street and stores. Corporations can use their right to religion to refuse to provide various facilities to their employees based on their own religion, as was the case in *Hobby Lobby*. Here, the right of one is used to either deny or circumvent the right of another. And the list would go on.

5.3 Libertarian Thought and the Government as the Guardian of Human Rights.

The Court's libertarian implementation of the First Amendment rights of the US Constitution also carry strong implications for the role of the government as the guardian of human rights. If anything, the

82 Universal Declaration of Human Rights (1948), Article 19. “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

83 Universal Declaration of Human Rights, Article 18. “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

84 Ibidem, Preamble. “Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”

85 Although the rights enlisted in Articles 18 and 19 can be characterized as negative rights (they mainly enumerate the freedom to do as one wants, without interference from another), they do carry an expressly positive character. The rights pronounced in the UDHR are not all expressly negative or positive – they possess the characteristics of both. In this case, state governments have the obligation to make such freedoms possible through legislation, the fostering of a specific culture and the creation of a political environment that is secure enough to express these rights. For a detailed overview, see J. Griffin, *On Human Rights* (Oxford University Press 2008), Chapter 5.

86 David P. Currie, “Positive and Negative Constitutional Rights”, *University of Chicago Law Review*, Vol. 53 (1986), 865-867.

libertarian strain encourages corporations to pursue the interests of their shareholders in the face of governmental attempts to regulate and/or balance not only them, but also the relationship between the corporation and the individual, and the individual and the government. So far, the expansion of constitutional corporate rights has resulted in multiple attempts (and some successes) to change or do away with existing regulatory legislation – which was constitutionally passed by Congress. Most of these attempts come at the expense of the natural person – the non-incorporated individual. These expenses vary from not being informed of the right to unionize, to withholding information on products that may impact his or her health in a negative manner. At the core, what this continuing deregulation of the corporation means for the individual in US society is that it will become increasingly difficult to view the government as an institution that can act upon his or her interests.

As will probably have become clear by now, the Court's libertarian thought has posed strong limits on governmental action against corporations and its ability to function as a check on corporate interests and behavior. Aside from increasing tendencies towards deregulation, the government will find more and more difficulties in regulating corporations – the rhetoric of “corporate expression” and “discrimination” has put constitutional constraints on the government and freedoms on corporations. Most importantly, this corporate constitutional rights movement it has posed challenges to the government's ability to protect the public's welfare with respect to health and safety regulations – one example of this is the FDA's graphic warning labels for tobacco being declared as unconstitutional.⁸⁷ Due to the fact that almost every corporate activity can now be described as an expressive activity protected by the First Amendment, opponents can always argue that regulation is unconstitutional – which in turn limits any governmental attempts for regulation.

Of course, this also has implications for the possibility of the US government to protect the human rights of individuals (notably the freedom of speech and religion) when confronted with corporate interests. The first thing to be considered here is the individuals' ability to bring a corporate human rights violation to the attention of the government – which is non-existent under corporate personhood: human rights abuses by corporations cannot be brought directly against them because human rights law is about protecting individuals from the state. They have to use other laws to do so, and often lack the resources to initiate a case before the courts. After all, the government usually is not able to protect human rights if it is not aware that violations are occurring. The second issue to be presented is that of the corporate influence in politics since the decision in *Citizens United*. A massive disparity between the individual and the corporation exists on the level of donations to electable officials. To be fair, both donate to an official of their choice simply because they experience that that one person is the best choice to further their interests. This is where the similarities end, however – corporations have far more resources and influence than a single individual, resulting in a dramatic imbalance. The official in question, if elected, will be far more inclined to work in the interests of

⁸⁷ R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

corporations – possibly downplaying or just not considering any infringement on the human rights of the individual. The third and last issue is linked to the second: the corporate influence on the environment and the extraction of resources poses a direct threat to the individuals' livelihood – arguably also a human right enlisted in the UDHR.⁸⁸ The extraction of resources such as oil often coincides with governmental economic interests, at home or abroad. This leads to a diminished capability to protect the rights of the individuals involved, who have to move in order to make the corporations' operations possible – either because the government does not want to, or simply can't under political and economic pressure.

⁸⁸ These observations are implied in the right to life and liberty (Article 3) and adequate standards of living (Article 25) of the Universal Declaration of Human Rights.

Conclusion

Despite general acceptance on the problematic nature of the modern corporation and the need for regulation, the concept of corporate personhood has come a long way since the latter years of the 1970s. Although we can always choose the easy way out and blame ideology for the expansion of corporate rights under the First Amendment, there is clearly more going on and in a succinctly different manner – something others do not always want to see or admit. Ideological values and attitudes need a mechanism, a catalyst to transfer them from the realm of the intangible to reality. In the case of corporate personhood, this has been the Supreme Court – and to a degree its structure.

This thesis has been an attempt to identify a particular mode of thought on the level of the Court when it comes to the subject of corporate personhood, and an assessment on the impact this would have on the human rights protections under the First Amendment on both natural and corporate “persons”. Using the analytical framework set by the aggregate entity-theory of corporate personality, the Court's decision making process in the ideological and legal dimensions has been analyzed, as well as their significance in terms of the Court's decision making. From this framework it can be concluded that while ideology plays a significant part in the Court's decision making, it is arguably only so because of the Court's mandate within the limits of the US Constitution and due to the gaps that are left open by law and jurisprudence. With the corporation having no such thing as a basis in constitutional law or otherwise, the Justices of the Court are left to established precedents and their ideological views in giving them a place under the practices of judicial review and *stare decisis*. Up to this very day, no consensus has been established on how to view the corporation in US law – leading to the endurance of an ideological divide between proponents and opponents of corporate personhood. Discussion on the nature of the corporation is more often than not completely left out, and rather focuses on the rights of the individuals entrenched within the construction of the corporation.

These particular dynamics between ideology, law and the Supreme Court have been found to be problematic to the extent that it has created a specific environment in which corporations can pursue their “personal” interests at the cost of non-incorporated individuals – and do so rationally and successfully. It seems that they only have to utter the words “expression”, “discrimination”, or “First Amendment”, and the Court already displays an inclination towards the case of the corporate plaintiffs and/or defendants. Aside from the ideological factor, the Court currently possesses a(n involuntary) bias towards corporations in corporate personhood-related cases based on precedent, reasoning and a now established understanding of the rights under the First Amendment. These have resulted in a specific mode of thought – in this case, the Court has been acting in a distinct libertarian matter. The government is depicted as a paternalistic institution, individual freedoms enjoy priority over everything else, and the understanding of the rights under the First Amendment is one of non-abridgment.

Since the 1970s, this problematic concoction of factors has allowed and even facilitated the strong advancement of corporate personhood. Furthermore, it has proven to be a potentially significant limiting factor on the protection of human rights through a disregard for the historical role of human rights as well as through constraints on governmental action to act on behalf of the individual. Corporate power, influence and interests are on par and aligned with those of the government. When put together with the Court's libertarian view of the corporation as an association of individuals acting upon the fulfillment of their interests, the protection of the (human) rights and interests of the non-incorporated person becomes more and more unlikely as economic and political interests are prioritized. In other instances, individuals simply lack the resources to address any grievances they have suffered at the hands of corporate activity. Individuals are increasingly considered as a resource to be mined - as consumers, voters, or even legitimacy - for the furtherance of political and corporate interests. In a society that considers democracy to be of the highest values - such as the United States - this simply will not do.

Under the aforementioned reasoning, one possible development is very worrying: the future use of human rights law to protect corporate interests. The libertarian reasoning of the Supreme Court within the lines of the aggregate entity-theory is not only to be considered dangerous due to the fact that corporations can enlist protections under human rights standards, however - it is also highly problematic due to the fact that it provides corporations with capabilities normally only attributable to natural persons: expression, discomfort, discrimination, a religious identity, and even morals. Although the rest of the body of the UDHR contains rights that corporations would have no need of (such as the right to an adequate standard of living as described in Article 25), it would drastically change the conception of the rights to freedom of speech and religion, as well as the dynamics in which these rights would be understood and protected. By reason, the odds that the Justices of the Supreme Court would make corporations eligible entities for human rights protections are incredibly slim, but if it continues the trend of setting precedents for constitutional protections of corporations, they may soon find themselves at a crossroads from which there is no turning back from.

Closing notes

Although the research done for the writing and completion of this thesis has provided me (and hopefully the reader) with a greater and deeper understanding on a range of subjects surrounding modern corporations and the Supreme Court, the conclusions derived from this knowledge are by no means an end to questions surrounding these subjects. As can be discerned from the Introduction and Chapter 1, this thesis focuses on the broader historical context over a span of nearly forty years (1978-2015). This leaves room for academics to focus on a specific decade and to consider such a period in greater detail. Furthermore, this thesis has focused solely on a trinity (by manner of speech) of actors - the Supreme Court, the corporation and the state. Further research can be done on the impact that

public opinion may or may not have on corporate policy, state behavior and Supreme Court decision making. Another option is even to consider whether there is a specific dynamic between corporations when it concerns adherence to human rights – do corporations reprimand and/or encourage one another when living up to human rights standards? There are so many more angles the subject of corporations and human rights can be viewed and researched from – even from the analytical framework of different theories. As such, the conclusions reached in this work should be seen as temporary and need to be tested against other views of the dynamic between the Supreme Court and corporate interests. That said, I am happy to have provided at least a different perspective in the relevant fields of academic study, and a possible basis for others to use as their starting point.

Figure 1: Historical overview of the development of corporate personhood.

Year	Case Name	Supreme Court Decision
1853	Marshall v. Baltimor and Ohio Railroad	Corporations are citizens for the purposes of court jurisdiction.
1886	County of Santa-Clara v Southern Pacific Railroad	Corporations are persons within the provisions of the Fourteenth Amendment (equal protection under law).
1906	Hale v. Henkel	Corporations are protected from unreasonable searches and seizures under the Fourth Amendment.
1931	Russian Volunteer Fleet v. United States	Foreign corporations enjoy protections under the Fifth Amendment.
1977	United States v Martin Linen Supply Co.	Corporations are protected under the Double Jeopardy-clause, preventing them to be sued more than once for the same offense.
1978	First National Bank of Boston v. Bellotti	Corporations have a First Amendment right to make contributions to ballot initiative campaigns, provided that they have a business interest in doing so.
2010	Citizens United v. Federal Election Commission	Corporate rights under the First Amendment are expanded, and from this moment allow corporations to donate freely to individuals running in an election.
2014	Burwell v Hobby Lobby Stores Inc.	Closely-held for-profit corporations are exempt from a law that violates their religious beliefs, provided that there is another option to further the law's interest.

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