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Supreme Businesses: Impacts of Business Cases Since 1886

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Abstract

Business law in the United States has come a long way from the Industrial Revolution. This essay analyzes landmark Supreme Court cases involving businesses since *Santa Clara County v. Southern Pacific Railroad* in 1886 to show how they have impacted the rights of individuals. Since the initial recognition of businesses as individuals, they have been able to access rights and privileges enjoyed by people. This essay will analyze how businesses have accessed and impacted the rights and privileges to speech, free exercise and economic engagement. This essay uses teleological argumentation and a legal realist approach in order to examine the impacts that the cases discussed have had on individuals. All of this leads to a discussion of how the development of corporate personhood threatens the intrinsic nature of rights.

Keywords

Law, Business, First Amendment, Economics, Politics

Disciplines

Antitrust and Trade Regulation | Business | First Amendment | Fourteenth Amendment | Judges | Law and Philosophy | Law and Society | Legal History | Legal Writing and Research

SUPREME BUSINESSES: IMPACTS OF BUSINESS CASES SINCE 1886

CHARLENE CANNING*

Business law in the United States has come a long way from the Industrial Revolution. This essay analyzes landmark Supreme Court cases involving businesses since Santa Clara County v. Southern Pacific Railroad in 1886 to show how they have impacted the rights of individuals. Since the initial recognition of businesses as individuals, they have been able to access rights and privileges enjoyed by people. This essay will analyze how businesses have accessed and impacted the rights and privileges to speech, free exercise and economic engagement. This essay uses teleological argumentation and a legal realist approach in order to examine the impacts that the cases discussed have had on individuals. All of this leads to a discussion of how the development of corporate personhood threatens the intrinsic nature of rights.

I.	INTRODUCTION.....	2
II.	THE ORIGIN OF BUSINESS RIGHTS.....	3
III.	BUSINESS CHANGES TO THE FIRST AMENDMENT	9
	A. OTHER STAKEHOLDERS.....	10
	I. SHAREHOLDERS.....	11
	II. EMPLOYEES.....	12
	B. MONEY IN POLITICS.....	14
	I. CAMPAIGN FINANCES	14
	II. BUSINESS LOBBYISTS.....	17
IV.	ECONOMIC IMPACTS	18
	A. LIMITING CONSUMER CHOICE	18
	B. NO RIGHT TO CONTRACT	21
	I. EMPLOYMENT	21

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II. PURSUING LEGAL ACTION	22
V. CONCLUSION	23

INTRODUCTION

Since the popularization of the *Declaration of Independence*, the idea that people ought to have certain inalienable rights has become more popular.¹ In order to exercise these rights or to engage in the pursuit of happiness, there are certain prerequisites, the foremost of such being the ability to exercise one’s agency. In a country with millions of other actors adjacently chasing their own versions of happiness, it is necessary to be able to advocate freely, an ability now protected by the First Amendment. Additionally, agency and autonomy are required to pursue equal access to economic activity.² In the years between the ratification of the Bill of Rights and where we, the United States, currently stand, there have been numerous ways in which such conduits to autonomy have been altered to place limits on the extent to which certain groups of people can exercise those freedoms, while a particularly wealthier class has seen a significant rise in their own agency. In this context, that class includes the group of people that the Supreme Court has chosen to recognize as owners of businesses, in addition to businesses themselves.

In order to analyze the coexistence of freedoms held by businesses and individuals,³ it is important to first recognize the definitions of key terms. Central to this essay are the concepts of business cases, corporate personhood, and judicial realism, as well as the analysis of business cases. More specifically, we will take a look at cases that involve businesses and have reached the Supreme Court. Most of the cases dissected will involve larger businesses that affect a considerable number of employees and shareholders in addition to any future parties involved in similar cases that will have to submit to the previously established precedent. First, we will look at the origin and development of corporate personhood.

¹ See U.S. DECLARATION OF INDEPENDENCE, paragraph 2 (1776).

² See e.g., Committee on the judiciary, CONFIRMATION HEARING ON THE NOMINATION OF JOHN G. ROBERTS, JR. TO BE CHIEF JUSTICE OF THE UNITED STATES, (2005) at 143 (“Chairman SPECTER. The joint opinion then goes on, after the statement as to sexual activity, to come to the core issue about women being able to plan their lives. The joint opinion says, “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”). During the confirmation process for Chief Justice Roberts, Chairman Specter references the codependence of autonomy and economic activity.

³ While employing the term “corporate person,” the term “individuals” refers to individual American people and not individuals who serve representative capacities as owners of businesses.

THE ORIGIN OF BUSINESS RIGHTS

Before businesses were able to go to court with arguments that relied on what would become corporate personhood, there was a time when they failed to seek legal standing—a prerequisite for bringing a suit to court.⁴ The first case heard before the United States Supreme Court involving a business was *Bank of the United States v. Deveaux* in 1809.⁵ The bank involved was ultimately successful and helped set a precedent confirming that businesses have the right to sue in federal courts.⁶ This was eventually upheld in 1844 and 1853, when the Supreme Court agreed in *Louisville, Cincinnati, and Charleston Railroad v. Letson* and that corporations were citizens.⁷ While these cases serve as proof of legal action performed by and against businesses, it was not until the 1886 case of *Santa Clara County v. Southern Pacific Railroad Company* that a business case resulted in a precedent that officially opened the door for businesses to access more notable rights that were previously held solely by individuals.⁸ It is no coincidence that the origin of corporate personhood can be traced back to a formidable structure that aimed to consolidate credit in the early 1800's, and then again to economic success of railroad companies later on in the same century.⁹ The timing of this success, coupled with the addition of new constitutional amendments following the Civil War, contributed to the development of corporate personhood.¹⁰ While the 14th Amendment had initially been one of the amendments passed in hopes of addressing racial injustice following the emancipation of slaves, this case is one of the many that would follow where businesses take advantage of reparative legal developments in order to advance their own interests.¹¹

⁴ See e.g., *infra* note 9.

⁵ *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

⁶ *Id.*

⁷ 43 U.S. 497 (1844). See also *Marshall v. Baltimore and Ohio Railroad*, 57 U.S. 314 (1853). While these cases uphold the precedent that businesses could sue and be sued, they were decided by the Taney court, which was known for its populist rulings and aimed to limit the rights of corporations. In these two cases, Taney sought to undermine the methods used by railroads to evade having their cases tried in federal court.

⁸ *Santa Clara County v. Southern Pacific R. Co.* 118 U.S. 394 (1886). In other accounts of the history of corporate personhood, it is popular to refer to the 1882 railroad cases concerning taxation. Specifically, *San Mateo County v. Southern Pacific Railroad*, 116 U.S. 138 (1885). While there was no ruling that supported the development of corporate personhood, the arguments of Roscoe Conkling, who was the influential lawyer for the railroad, set a foundation for the ruling that would come four years later.

⁹ See Adam Winkler, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

¹⁰ *Id.*

¹¹ *Id.*

This practice of referring to law that was originally intended to secure the rights of African Americans to achieve unrelated ends is prevalent throughout legal history in the United States. In addition to *Santa Clara* in 1886, another corporate case integral to the development of corporate personhood is the 1905 case of *Lochner v. New York*.¹² This case involved the New York Bakeshop Act, which limited the amount of time people could work in a week.¹³ Lochner, the owner of the bakeshop involved, violated this act twice and appealed the conviction after the second time, arguing that the 14th Amendment protects the freedom to establish their own contracts.¹⁴ Accordingly, the issue at hand was whether or not the Bakeshop Act violated the liberty protected by the Due Process Clause of the 14th Amendment.¹⁵ After analyzing the facts and considering this question, the Court held that the statute was thus unconstitutional.¹⁶

West Coast Hotel Co. v. Parrish overturned *Lochner*, which further supports the idea that economic success of large businesses incentivizes the Supreme Court to grant them additional elements of legal personhood.¹⁷ The historical context of *West Coast Hotel* is such: In 1937, the United States was still recovering from the Great Depression and trust in the financial solvency of businesses in America was especially low. The interest in providing financial security for individuals is clear in Justice Charles Evan Hughes's words in the majority opinion that read as the antithesis to *Lochner*.¹⁸ This interest is evident when he argues that police power permitted the state to create and enforce minimum wage laws, superseding any interest in respecting the right to contract.¹⁹ Some academics have characterized the judicial action in *Lochner* as unjust because of the political bias manifested in the Court's clear preference for government inaction. In response to this, Cass R. Sunstein, a leading constitutional law scholar, was one among many who argued that this interpretation of *Lochner* and the period that followed was inaccurate because the claim that the Court's preference for "government inaction" insofar as "judicial deference to legislative enactments" was ultimately dependent on the faulty premise that neutrality and inaction can be defined "in terms of the perpetuation of current practice."²⁰ The characterization of *stare decisis* as neutrality or inaction is a method of

¹² 198 U.S. 45 (1905).

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ 300 U.S. 379 (1937).

¹⁸ *See supra* note 12.

¹⁹ *See West Coast Hotel*, 300 U.S..

²⁰ Cass R. Sunstein, *LOCHNER'S LEGACY* (1987).

dismissing the analytical responsibility of the Court.²¹ If judicial activism is defined as the expansion of rights, deliberate inaction in *Lochner* is to judicial activism as the deliberate action via the invocation of police power in *West Coast Hotel* is to the expansion of individual rights since *Lochner* developed the notion of a right to contract and contributed to the later affirmed individual rights to state-mandated minimum wage.

Both *Lochner* and *West Coast Hotel* show us that business law has a long history of consequential significance in the United States. In theory, judges are meant to deliver opinions that do not reflect any political biases and simply apply legal analysis and objective reasoning. While the reality of this practice has long been up for debate, Arthur Schlesinger, Jr established the term “judicial activism” in 1947 to convey the idea that judges consider the consequences of their opinions and manufacture their legal analysis accordingly.²² Like the binary of *Lochner* and *West Coast Hotel*, Schlesinger posited that judges could be put into one of two categories: ones that practice judicial activism and ones that exercise judicial restraint.²³ Many legal scholars have chosen to interpret the opinion delivered in *West Coast Hotel* to be the end of the *Lochner* period through economic and judicial lenses due to the fall of striking down economic regulations and the perceived rise in judicial activism.

Some may believe that the judiciary’s role is to invent and improve upon acceptable doctrine, but this also requires judicial activism.²⁴ There is no such thing as neutrality, and the acknowledgement of this fact is an example of the legal realist perspective that this essay adopts. The theory of legal realism posits that “all law derives from prevailing social interests and public policy” and that judicial realism accordingly considers the fact that judges contemplate social norms and public policy in addition to abstract rules.²⁵ Even if we reject the idea that judges have their own political agendas when considering cases, we must concede that those seemingly impartial judges employ doctrine originating from precedent that is politically biased.

²¹ See *Dartmouth v. Woodward*, 17 U.S. 518 (1819). An earlier example of this practice can be found in Chief Justice John Marshall’s opinion. When the court was tasked with answering a question they had never answered before (whether or not businesses were private or public entities). Justice Marshall remarks that “It is too clear to require the support of argument that all contracts and rights respecting property, remained unchanged by the revolution.” Here it is clear that the legal continuity Justice Marshall alludes to does not exist. This method of disguising new legal precedent with the facade of continuity allows Justice Marshall to escape the need to justify the apparently private nature of business.

²² Keenan D. Kmiec, THE ORIGIN AND CURRENT MEANINGS OF “JUDICIAL ACTIVISM” (2004).

²³ It is worth noting that Schlesinger believed that “a wise judge knows that political choice is inevitable” and that judicial restraint in the form of upholding conservative or liberal precedent does not occur in the absence of political bias or action.

²⁴ See *supra* note 20.

²⁵ https://www.law.cornell.edu/wex/legal_realism (doi: 8/15/2020 at 2:30pm).

Thus, the most tangible effect of judicial activism is that judges on the Supreme Court have the capability of leaning toward an end of the political spectrum and delivering opinions that reflect this political bias.

However convincing anyone makes an argument in support of judicial activism, the practices of the current Chief Justice are antithetical to the notion of judicial realism. In his own words during a confirmation hearing, Chief Justice John Roberts believes that, “Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath.”²⁶ Throughout his tenure on the highest bench in the country, this belief has not always been apparent. During the process of choosing judges for the Supreme Court, each party in congress does their best to support judges that they believe will produce or support opinions that coincide with their partisan interests.²⁷ Evidence of this contention is the standoff around President Obama’s March 2016 Supreme Court nomination. The nominee was Merrick Garland, who was meant to replace the spot left vacant by the death of the notable conservative Justice Antonin Scalia. Republican leaders in the Senate did their best to delay the voting until the arrival of a new president and were ultimately successful. This stalling shows that there is evident partisanship involved in the selection process, and supports the idea that the judges that are chosen to sit on the bench therefore at least have a history that includes upholding or overturning certain precedents, and that it is this record that convinces either party that those nominees would be willing to support their partisan efforts.

While Chief Justice Roberts was nominated by a Republican president, one might say that his decisions during the summer of 2020 are anything but conservative. His decisions to join the liberal sides of three prominent rulings might suggest to the lay person that he has altered his political views. This would contradict his own words, which are that his actions only demonstrate his proclivity for the objectivity allegedly provided by *stare decisis*.²⁸ The first ruling where Justice Roberts supposedly adopts a liberal perspective includes a set of cases being referred to as landmark rulings for queer rights.²⁹ Additionally, *Department of Homeland Security et*

²⁶ See *supra* note 3.

²⁷ See *supra* note 3 (There is a large amount of questions dedicated to *Roe v. Wade*, many of them framed with political perspectives and aimed to see where John Roberts stood on this issue.).

²⁸ See *id.* At 142-144 (John Roberts explains his respect for *stare decisis* and goes on to explain his rationale for its application and relevant conditions while providing answers to questions from the Committee on the Judiciary.).

²⁹ See *Bostock v. Clayton County*, 590 U.S. _ (2020); see also *Altitude Express v. Zarda*, 590 U.S. _ (2020); see also *R.G. & G.R. Harris Funeral Homes Inc v. Equal Employment Opportunity Commission*, 590 U.S. _ (2020).

al.v. Regents of the University of California, consists of a set of facts concerning Deferred Action for Childhood Arrivals.³⁰ The majority opinion for *Medical Services v. Russo* is the final of the three more noteworthy ones this summer and is a consequential callback to *Whole Woman's Health v. Hellerstedt* and *Roe v. Wade*.³¹

While Chief Justice Roberts's proclivity for *stare decisis* is a possible explanation for these progressive rulings, some of his past decisions are exceptions. In his concurring opinion for *Citizens United v. Federal Election Comm'n* he says, "Austin, however, allowed the Government to prohibit these same expenditures out of concern for 'the corrosive and distorting effects of immense aggregations of wealth' in the marketplace of ideas"³² and preempts this with a quote from *Buckley*: "restricting the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."³³ Here, Justice Robert's participation in the overruling of *Austin* and *Buckley* juxtaposes his habit of sticking to precedent. (Similar to the sentiment in this concurring opinion, this essay will analyze the ways in which certain cases have prioritized the interests of the few rather than the many.) This all matters because he has increasingly been the swing vote.³⁴ Moreover, this could mark the beginning of a decrease in judicial realism. Most importantly, we must consider the degree to which judges are willing to manufacture legal analysis necessary to support certain politically-aligned outcomes. If this is the case, it would support the idea that those judges are aware of the impacts that corporate cases have on the rights of individuals, and that those impacts are intentional.

So then, is Justice Roberts the ideological center of the Court?³⁵ Or is his process truly dictated by his preference for precedent rather than a political perspective? Were the Taney and Chase Courts pressured by the economic success of railroad companies to rule in their favor? Was the economic recovery of individual people a political priority in the year that brought the contentious *West Coast Hotel* ruling? The answers to these

³⁰ 591 U.S. _ (2020).

³¹ 591 U.S. _ (2020); see also *Whole Woman's Health v. Hellerstedt*, 579 U.S. _ (2016); *Roe v. Wade*, 410 U.S. 113 (1973). Compared to his decisions for the cases that concerned the rights of queer people, Justice Robert's support was even more consequential in *Department of Homeland Security et al. v. Regents of the University of California and Medical Services v. Russo* because these were ultimately 5-4 decisions.

³² 558 U.S. 310 (2010) at 8 (Roberts, concurring).

³³ *Id.*

³⁴ See Adam Liptak, *John Roberts Was Already Chief Justice. But Now It's His Court*, NY TIMES (June 30 2020), <https://www.nytimes.com/2020/06/30/us/john-roberts-supreme-court.html>.

³⁵ *Id.* Pulitzer Prize finalist Adam Liptak is an example of someone who believes this theory. His reasoning includes the apparent loss of an ideological center left by the retirement of Justice Kennedy in 2018.

questions of judicial activism, judicial realism and the origin of corporate personhood serve as a historical foundation for analysis of how corporate cases impact the rights and free agency of individuals.³⁶ Some may argue that it is not the intent of either the parties or judges involved in landmark cases to cause such impacts,³⁷ but identifying and analyzing trends that indicate otherwise not only helps us gather an understanding of why these cases were ruled the way they were; it can also help us predict future impacts. Further discounting appellate objectivity is the contentious process of nominating and swearing in judges for the highest court. This is reflected in the rise of opposition Supreme Court nominations received during the voting process and the decrease in the overall success of federal court nominations.³⁸ A specific instance demonstrating the increasing political polarization of the process is the pinnacle itself: when the Republican majority blocked President Obama's Supreme Court nomination in 2016.³⁹ This shows that the nomination process for federal judges has become a partisan process in which either party is motivated to support judges that appear to support their agendas.

Ultimately, the acknowledgement of judicial activism via the acceptance of judicial realism is necessary in order to fulfil the moral objective that is using law to accomplish positive impacts. Judicial realism is necessary because it requires judges to first be aware that their rulings have tangible impacts in order for them to have preferred outcomes. In the context of this essay, maintaining a pretense of objectivity subverts this mission and is essential to the rise of business enfranchisement and indirect impacts on the rights of individuals.

³⁶ See *Bank of the United State supra* note 5 (syllabus) ("A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.") Marshall's explicit endorsement of using the Constitution as a means of inventing law instead of being a conclusive, descriptive document demonstrates what would eventually be referred to as judicial activism. Moreover, this was the first case in which a business was successful at gaining some form of corporate personhood (the precedent established was the right to sue and be sued).

³⁷ See e.g., Cass R. Sunstein, *ARE JUDGES POLITICAL?* (2006).

³⁸ See John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's are No Exception*, Pew Research Center (March 7, 2018) <https://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/>.

³⁹ See Ron Elving, *What Happened with Merrick Garland in 2016 and Why it Matters Now*, NPR (July 29, 2018), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

BUSINESS CHANGE OF THE 1ST AMENDMENT

Most cases chosen to be heard before the Supreme Court are not one-dimensional. There are usually several legal questions within a single case, but the Court has the ability to narrow their opinions down to answering the question or questions of their choice.⁴⁰ One explanation for this is that this is the Supreme Court attempting to limit the potential abuse of their rulings by limiting the legal scope of the questions being asked.⁴¹ After all, desperate or otherwise inspired by a particular strategy, attorneys do their best to use seemingly unrelated precedents to support their own arguments or to refute the opposing case. This limitation of scope is usually indicated in a surreptitious footnote, with a phrase such as “[the solicitor] presented a substantial amount of testimony and evidence at trial to prove [a conclusion related to a question that we do not wish to address] but we need not reach that issue.”⁴² This example shows that appellate courts are able to choose which legal issues or questions to address because of the perfunctory method of dismissing the issue in question. Moreover, concurring opinions that reach similar conclusions but choose to answer questions neglected in the majority opinion further supports the idea of intentionally limiting the language of opinions in order to prevent certain applications. In this section of the essay, it will become clear that the realm of corporate law related to free speech and exercise is one that includes the legal maneuvering lawyers do on behalf of businesses and the careful limitation of scope in the opinions written. Accordingly, business cases that modify the legal understanding of 1st Amendment rights are perhaps the most consequential since they change the

⁴⁰ See, e.g., *supra* note 9 at 67 (“Although Marshall based a corporation’s ability to sue in federal court on the citizenship of its members, the esteemed jurist never identified who exactly counted as a member of a corporation...Marshall skipped right over this key issue and declared that the Bank had the right to sue the tax collector in federal court.”); see also *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 US _ (2020) at 2 (Alito, concurring) (“I understand the Court’s desire to decide no more than is strictly necessary, but under the circumstances here, I would decide one additional question: whether the Court of Appeals erred in holding that the Religious Freedom Restoration Act...does not compel the religious exemption granted by the current rule.”) Here we see Justice Alito explicitly note a question unanswered by the majority opinion.

⁴¹ Federal Judicial Center, *JUDICIAL WRITING MANUAL: A POCKET GUIDE FOR JUDGES* (2013) at 17 (“Moreover, a judge may find it efficient to address issues not necessary to the decision if the judge can thereby provide useful guidance for the lower court on remand. However, judges must be careful not to decide issues that are not before them and to avoid advisory opinions and unnecessary expressions of views that may tie the court’s hands in a future case.”).

⁴² *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1084 n.8 (7th Cir. 1984).

extent to which businesses are understood to be people and able to access other rights.

A. Other Stakeholders

Perhaps the most academically-dissected way that corporate cases have impacted the First Amendment rights of individual Americans is through the development of corporate personhood.⁴³ There is particularly abundant criticism about the overall impacts on First Amendment rights of stakeholders such as shareholders and employees. A salient result of corporate personhood is the legal recognition of a company's religious beliefs.⁴⁴ In *Burwell v. Hobby Lobby*, the Supreme Court of the United States considered facts involving Hobby Lobby, a national arts and crafts chain owned by the Greens, a Christian family.⁴⁵ The Greens refused to cover birth control in their employee health care plans because to do so would have gone against their religious beliefs.⁴⁶ The family, as representatives of Hobby Lobby Stores, sued Kathleen Sebelius, who was the secretary of the Department of Health and Human Services.⁴⁷ The legal argument brought forth by the representation for the Greens contended that the Patient Protections and Affordable Care Act both violated the Free Exercise clause of the 1st Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).⁴⁸ Thus, the issue that concerned the Supreme Court was whether RFRA allows a for-profit company to deny its employees health coverage if doing so would violate their religious beliefs.⁴⁹ Ultimately, the Court held that Congress intended for the RFRA to be applicable to businesses because they are

⁴³ Tim Wu, *IS THE FIRST AMENDMENT OBSOLETE?* (2018); *see also* e.g., Jonathan Macey, *CITIZENS UNITED AS BAD CORPORATE LAW* (2018); *see also* e.g., John Coates, *CORPORATE SPEECH & THE FIRST AMENDMENT: HISTORY, DATA, AND IMPLICATIONS*; *see also* e.g., *CORPORATE PIETY AND IMPROPRIETY: HOBBY LOBBY'S EXTENSION OF RFRA RIGHTS OF THE FOR-PROFIT CORPORATION* (2014).

⁴⁴ *See* e.g., *infra* note 45.

⁴⁵ 573 U.S. 682 (2014).

⁴⁶ *Id.*

⁴⁷ *See* Reem Garris, *BURWELL V. HOBBY LOBBY* (June 29, 2020, 4:40 PM), <https://embryo.asu.edu/pages/burwell-v-hobby-lobby-2014#:~:text=In%20the%202014%20case%20Burwell,corporations'%20right%20to%20religious%20freedom.> (“On 10 April 2014, the Secretary for the HHS, Sebelius, resigned. Appointed as the new head of the HHS, Sylvia Burwell inherited the case on behalf of the department. The case was then renamed *Burwell v. Hobby Lobby*.”).

⁴⁸ *See Hobby Lobby*, 573 U.S..

⁴⁹ *See id.*

composed of individuals.⁵⁰ Moreover, Justice Alito wrote that the contraception requirement creates a substantial burden that is not the least restrictive method of satisfying the government's interests.⁵¹ The outcome of this case is a legal precedent protecting only the religious beliefs of the more prominent stakeholders of a company: the owners.⁵² Consequently, this holding fails to adequately represent the beliefs of all stakeholders involved. More specifically, the negative impacts are experienced by two particular groups: shareholders and employees.

SHAREHOLDERS Less obvious are the effects that the religious protection of businesses have on shareholders with opposing religious beliefs. With this subset of corporate stakeholders, it is easy to make the argument that people are essentially free agents and can accordingly choose to invest or divest from companies as they wish. After all, if shareholders choose to remain investors of companies that "speak in ways that may not reflect the positions of their equity owners,"⁵³ they have clearly decided that the economic benefit outweighs the burden of any cognitive dissonance. Justice Alito says in the majority opinion that RFRA was intended "to protect the rights of people associated with the business, including shareholders, officers, and employees,"⁵⁴ but the reality of only reinforcing the protection of the owners' religious beliefs proves otherwise.⁵⁵ This then leaves the assurance that the owners of the company are the only ones that possess the religious beliefs being exercised.

Instead of acknowledging that businesses consist of many different stakeholders at all levels that have different religious beliefs, the majority opinion only recognizes and protects the First Amendment rights of the Green family, or more specifically, the CEO and President.⁵⁶ Why is the Court content with giving a small number of people the ability to contradict the religious beliefs and exercise of the masses? In addition to a CEO and a President, a business consists of other stakeholders that most often outnumber those two positions. The recognition of businesses as people is frequently

⁵⁰ See *id.*; see also e.g., *supra* note 9 at 54-55 ("[Horace Binney] sought to collapse the distinction between the corporation and its members, suggesting the courts see right through the corporation and focus instead on the people who compose it.").

⁵¹ *Id.* at 40 ("The least-restrictive-means standard is exceptionally demanding...and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.").

⁵² See *id.* (Ginsburg, dissenting).

⁵³ Gregory Mark, *HOBBY LOBBY AND CORPORATE PERSONHOOD: TAKING THE U.S. SUPREME COURT'S REASONING AT FACE VALUE* (2016).

⁵⁴ *Hobby Lobby*, 573 U.S. at 3 (syllabus).

⁵⁵ See *Hobby Lobby*, 573 U.S. (Ginsburg, dissenting).

⁵⁶ *Id.* at 12.

defended with some variation of the argument that businesses are people because they consist of people,⁵⁷ yet the *Hobby Lobby* precedent does not “reflect... the varied interests of the actual human beings who own its equity,”⁵⁸ instead, it honors the religious beliefs of a few people involved in the company. By only accepting the religious beliefs of the highest positions as the sole representations of the beliefs of a business, the religious beliefs and other 1st Amendment rights of stakeholders with different religious beliefs are ignored. The Court therefore fails to adequately recognize the rights of the people in a company. Though the motivation and reasoning in Justice Alito’s opinion may differ, the impact is clear: the people with the most power involved (de facto owners of businesses) have access to a greater amount of liberty in the form of rights that are not truly inalienable.

EMPLOYEES *Hobby Lobby* also affects employees’ provision of healthcare.⁵⁹ Instead of healthcare benefits involving the prevention of reproduction being provided by the employer, *Hobby Lobby* sets the precedent that such access to healthcare can be provided by the government in lieu of one’s employer.⁶⁰

While this disparate impact may seem like a reason to abolish corporate personhood, two things rebut this: First, the fact that all workers seeking the provision of healthcare that goes against the religious beliefs of an owner ultimately receive their benefits. Second, businesses are not democracies and do not have legal, ethical, or moral obligations to mirror the religious beliefs of the majority.⁶¹ While it may be advantageous for a business to consider the preferences of stakeholders beyond the owners themselves, they have no obligation to do so.

Instead, let us look at the nonuniqueness of the provision of healthcare in either scenario. The business owners viewed the action of providing financial assistance in the form of healthcare to their employees as consent to actions that violate their religious beliefs. This relies on the premise that monetary spending is indicative of expression, and in this case, religious exercise.⁶² So then, if the alternative created to solve this problem is that the business makes payments to the government so that they can provide the same services that the owners object to, one might say that this too is assent. If the monetary spending and provision of healthcare occur in either scenario, then the added bureaucracy of making payments to the government instead of the employees themselves is superfluous. One might even venture on to

⁵⁷ See *supra* note 50.

⁵⁸ *Supra* note 48.

⁵⁹ *Supra* note 48.

⁶⁰ *Id.*

⁶¹ See e.g., Lynn Stout, CORPORATIONS SHOULDN’T BE DEMOCRACIES, (2007).

⁶² See *supra* note 48.

argue that the only impact of importance is the money saved when a business in this situation makes the substitute payments to the government that are less than what would be spent on healthcare.

Some might say that the Supreme Court worked within the confines of the legal question at hand, which concerned RFRA's allowance of for-profit companies to deny employees health coverage of contraception. However, judicial realism shows us that the omission of a more nuanced discussion is purposeful. This idea is further supported by the fact that the only in-depth discussion of the consequences of this expansion of corporate personhood occurs in the dissent, when Justice Ginsburg says there is "no support for the notion that free exercise rights pertain to for-profit corporations."⁶³ While pointing out the err of maintaining that companies have First Amendment rights, Ginsburg highlights the lack of precedent. Thus, Justice Alito's dismissal of the contention that businesses cannot access First Amendment rights via the lack of supporting precedent is not *mere dicta*; it is judicial activism. While the majority opinion is focused on the argument that a business is included in the definition of "person,"⁶⁴ the dissent written by Justice Ginsburg also explains that the unique harm done to third parties in cases like this fulfills the compelling interest mechanism and thus outweighs the government's interest in upholding a company's supposed religious freedom.⁶⁵

In addition to the other insinuations made by the different aspects of the majority opinion, the Court's acceptance of Hobby Lobby's logic that directly providing contraceptive health care would be taking a stance suggests that the act of spending money is an act of speech or expression—a legal question confirmed by a previous case involving money in politics.

B. Money in Politics

One way of bypassing the democracy of American politics is through the possession and use of abundant wealth. When wealthy actors in the form of businesses interfere in political processes, the result is political change that

⁶³ *Hobby Lobby* 573 U.S. at 14 (Ginsburg, dissenting).

⁶⁴ *Id.* at 3 n.2.i. ("And HHS's concession that a nonprofit corporation can be a "person" under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of "person" includes natural persons and non-profit corporations, but not for-profit corporations.") The reduction of this interest to semantics instead of a substantive question of corporate law with tangible impacts is another example of a Court evading meaningful analysis and accountability.

⁶⁵ *Id.* at 2, 7-8; see also *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 US _ (2020) (Ginsburg, dissenting) The harms to third parties in this case are more extreme since there is no alternative source of funding for employees to access the healthcare to which their employer objects.

does not accurately reflect the will of the people and instead disproportionately reflects the wishes of a small portion of the population. In this context, this includes corporate heads with enough finances and market control to effectively control American politics. This section of the paper will discuss two ways money is used in politics and their impacts of a corruption of democracy through the inaccurate representation of a politician's constituency. The first of these two ways is the quid pro quo funding of political campaigns, and the second is the lobbying done to get specific legislation passed.

CAMPAIGN FINANCES Before the 2014 Supreme Court ruling of *Burwell v. Hobby Lobby*, the court chose to recognize First Amendment rights insofar as free speech for businesses in the 2010 ruling for *Citizens United v. Federal Election Commission*.⁶⁶ Previously in this section, attention has been drawn to the way that protecting the First Amendment rights of a few people in charge of a single business has negatively impacted the same rights of individuals. One dynamic of this is that the allowance of companies to affect political campaigns is undemocratic. During the oral argument made before the Supreme Court, the solicitor for Citizens United criticized the proposed general public agreement condition in the lower courts by saying it is unreasonable for any court to require that businesses to reflect the will of the masses in order to be politically active. If anything, this is consistent with the fact that companies are not democratically elected bodies. Therefore, their political efficacy via financial contributions or expenditures ought not to be accepted since the results of these expenses are often ones of success because this practice contradicts the notion that the United States is a democracy.

One example of disproportionate business influence in American politics is the lobbying done by the National Rifle Association (NRA).⁶⁷ The NRA is notorious for funding political campaigns via the organization's political action committees (PACs) and individual members rather than directly from the organization itself.⁶⁸ A combination of these two actors contributed \$1,094,909 toward 2016 elections and spent \$3,188,000 in lobbying efforts during the same year.⁶⁹

Not only is this particular actor an example of immoral action because of the perversion of democracy, but it also serves as an example of a

⁶⁶ *Citizens United*, 558 U.S..

⁶⁷ See *infra* note 76.

⁶⁸ See Brennan Wiess and Syke Gould, *These are the Members of Congress with the Most NRA Donations*, Business Insider (Feb. 28, 2018), <https://www.businessinsider.com/nra-political-contributions-congressional-candidates-house-senate-2018-2>.

⁶⁹ https://www.opensecrets.org/orgs/summary?topnumcycle=2016&topprecipcycle=2020&ontribcycle=2020&lob_cycle=2020&outspendcycle=2020&id=d00000082 (aoi: 8/5/2020 3:09pm).

consequence of the *Citizens United* ruling: foreign interference with American elections.⁷⁰ First brought up by Justice Ginsburg as a concern, Justice Alito asks the solicitor a leading question about whether foreign companies have any less access to First Amendment rights, to which the solicitor answers that there is no precedent or government concern to support the idea that foreign entities ought not have the same access to First Amendment rights.⁷¹ While the NRA is a 503(c) nonprofit organization, its biggest donors are private corporations.⁷² After the spectacle that was the 2016 United States presidential election, the topic of foreign interference with political campaigns became a topic of national discourse. The potential for foreign influence in American politics is now acknowledged and abhorred by a majority of Americans. Yet, the NRA is the beneficiary of million-dollar donations from foreign companies like the Beretta U.S.A and Benelli U.S.A,⁷³ whose headquarters are in Italy. Thus, we see how the NRA's acceptance of foreign funding casts shade on the façade of its mantra of protecting the All-American right to bear arms.

After reputable sources confirmed that foreign efforts influenced the 2016 presidential election, most Americans responded negatively to the news.⁷⁴ On the surface level, foreign interference in a sovereign democratic nation's politics is harmful since it erodes the extent to which the political process produces change that accurately reflects the people of the nation. This issue of corrupt democracy is compounded in cases where the Supreme Court considers the amount of support certain legislation gathers when they have to decide whether or not it ought to be stricken down. For example, during the oral arguments for *Hobby Lobby*, one of the justices makes a hypothetical argument in favor of RFRA by saying that the legislation got a lot of support when passed by Congress.⁷⁵ This referral to the popularity of legislation upon its passing supports the idea that heightened popularity of legislation increases the reluctance of judges on the Supreme Court to strike it down.

⁷⁰ See *Citizens United*, 558 U.S. at 47 (The issue of foreign influence is mentioned and dismissed as something the Court need not answer).

⁷¹ See e.g., *supra* note 32.

⁷² Danny Hakim, *Beyond the Grave, the N.R.A.'s \$56 Million Donor Lives On*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2019/07/16/us/nra-donor-robert-petersen.html>.

⁷³ *Beretta Group Pledges \$1 million to Benefit the NRA Institute for Legislative Action and Civil Rights Defense Fund*, NRA-ILA (Sept. 13, 2008), <https://www.nraila.org/articles/20080903/beretta-group-pledges-1-million-to-ben> (“The National Rifle Association (NRA) announced today that the Beretta Group of companies, led by Beretta U.S.A., Benelli U.S.A., and Burris in the United States have pledged to give the NRA \$1 million over the next five years.”).

⁷⁴ See e.g., Scott Shane and Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html>.

⁷⁵ See *supra* note 48.

Furthermore, this positive correlation also erodes democracy because the Court is meant to be a check on the legislative branch. While there is philosophical merit in considering what the people generally favor, if a single corporation such as the NRA is able to leverage their donations against politicians, then the judicial branch has become yet another one that is unjustly influenced by businesses since the legislation is not truly enthusiastically supported by the majority of a politician's constituents but instead by the comparatively fewer owners of a single business.⁷⁶

Thus, we see the reappearance of a familiar framework: businesses infringe upon the rights of individuals and defend themselves by claiming that they themselves have rights. Moreover, another effect is that politicians are motivated to represent the interests of a few people.⁷⁷ Thus, the argument against wealth corrupting the marketplace of ideas insofar as political efficacy is not given a proper response. There is little consideration of the fact that businesses indirectly or directly donating money to political campaigns in cases like this *are* extremely wealthy and do in fact violate the First Amendment rights of the masses by essentially skewing the political attention paid to certain issues and legislation. Ultimately, businesses are an unelected body of people that unjustly have significant political efficacy.⁷⁸ Actions made by politicians whose campaigns were funded by businesses are not representative of their constituents because such politicians are motivated to pass legislation or otherwise act in ways that advance the agendas of the companies that donated to them and encourage further donations.

BUSINESS LOBBYISTS Businesses also interfere with accurate political representation when they spend money to promote or stifle certain legislation.⁷⁹ In 2012, Bill Gates and other affluent philanthropists, supported

⁷⁶ Jeffrey M. Jones, *Americans' Views of NRA Become Less Positive*, GALLUP (Sept. 13, 2019), <https://news.gallup.com/poll/266804/americans-views-nra-become-less-positive.aspx> (this gallup article includes a poll showing that the NRA has a low approval rate, which is “below 50% for only the second time in 30 years”). Corporations like the NRA are particularly odious since these companies have disguised themselves as an accurate perspective of American people; *see also* Domenico Montanaro, *Poll: Most Americans Want To See Congress Pass Gun Restrictions*, NPR (Sept. 10, 2019), <https://www.npr.org/2019/09/10/759193047/poll-most-americans-want-to-see-congress-pass-gun-restrictions> (Showing that most Americans support the idea of passing some sort of legislation that increases gun control.) This reform would include measures such as mental health screening and background checks.

⁷⁷ *See e.g.*, Nicholas Confessore, Sarah Cohen and Karen Yourish, *Small Pool of Rich Donors Dominates Election Giving*, N.Y. TIMES (Aug. 1, 2015), nytimes.com/2015/08/02/us/small-pool-of-rich-donors-dominates-election-giving.html.

⁷⁸ *See e.g.*, *supra* note 61.

⁷⁹ *See Remarks of Senator Barack Obama*, N.Y. TIMES (June 22, 2007), <https://www.nytimes.com/2007/06/22/us/politics/22text-obama.html> (“When I arrived in

Initiative 1240, a referendum to open public charter schools in Washington state. Three times prior to this, similar initiatives had been unsuccessful via referendum. While this example includes a philanthropist with the intentions to help people, other wealthy actors have less benevolent agendas. A short list of actors includes companies whose impacts range from opposing desegregation, to impeding progress for the feminist movement, a rise in obesity in the United States, an increase of cancer caused from the use of tobacco products and most regrettably, the escalation of school shootings.

All lobbyists share the interest of supporting public policy that coincides with their own agendas. Groups like the American Civil Liberties Union, Public Citizens for Children and Youth and the National Association for the Advancement of Colored People are businesses motivated by public advocacy.⁸⁰ Historically, the work done by organizations like these are on behalf of marginalized groups that lack the political efficacy to enact the change they wish to see in their communities.⁸¹ While these businesses have used the benefits of corporate personhood to bring forth social progress, this cannot be said of all lobbyists.

Many believe that the National Rifle Association is another example of a corporation focused on advocating for citizens, but the contention that the NRA is a corporation primarily interested in reflecting the interests of American gun owners is undermined by its acceptance of significant foreign donations and lobbying efforts that contradict the wellbeing of American people.⁸² The NRA Institute for Legislative Action has added many lobbying efforts to the books over the years, including efforts in favor of Congress cycle is Manchin-Toomey Amendment to S. 649 and against legislation such

Washington eight years later, the need for change was equally clear. Big money and lobbyists were clearly drowning out the aspirations of the American people.”)

⁸⁰ See e.g., <https://www.naacp.org/about-us/> (doi: 8/17/2020, 3:52pm) (“The vision of the National Association for the Advancement of Colored People is to ensure a society in which all individuals have equal rights without discrimination based on race.”); see also e.g., <https://www.aclu.org/> (doi: 8/17/2020, 3:55pm) (“The ACLU dares to create a more perfect union — beyond one person, party, or side. Our mission is to realize this promise of the United States Constitution for all and expand the reach of its guarantees.”).

⁸¹ See e.g., *Brown v. Board of Education* 347 U.S. 483 (1954); see also e.g., *Trump, President of the United States, v. National Association for the Advancement of Colored People*, 591 US _ (2020); see also e.g., *Frontiero v. Richardson*, 411 US 677 (1973).

⁸² See *supra* note 76; see also Madison Thomas, *UWire* (Oct. 24, 2017) (“In response to the 2012 Sandy Hook shooting, the NRA donated a record \$2.7 million to its political action committee, the National Rifle Association of American Political Victory Fund, the following January and February...This year saw the deadliest single mass shooting in modern American history, as well as the largest year of spending for the NRA. From June to July of 2017, \$3.2 million dollars have been spent on lobbying alone, compared to \$3.1 million in the entirety of 2016. There is a clear connection between the occurrence of gun-related terrorist attacks on American soil and the NRA's attempts to continue to protect the very same weapons.”).

as the Fix Gun checks Act of 2013.⁸³ All of this effort to thwart legislation is especially harmful since studies have shown that this reform could be effective at decreasing the rate of gun violence in the United States.⁸⁴ By ensuring that politicians produce legislation that reflects a distorted version of public desire, lobbyists are able to perpetuate the political inefficacy of everyday voters.

ECONOMIC IMPACTS

The most direct impacts businesses have on society at large are economic ones because the codependent nature of independent people and companies. In addition to being shareholders or the owners themselves, individual people are the consumers and employees upon which companies rely.

A. Limiting Consumer Choice

Beyond the scope of people more immediately involved with businesses are members of the general public that elect to take part in the affairs of a business by way of consumption. Monopolies limit the free agency of consumers by limiting the choices available in a given market. Two impacts of this will be discussed in this section: the inability of consumers to freely associate with businesses that support their own values and the high price increases that result from price control.

In addition to limiting the choices available for consumption, the existence of monopolies allow a limited number of companies to take advantage of an entire industry's price control.⁸⁵ The Supreme Court case *Apple Inc. v. Pepper* is an example of a corporate case that concerned this kind of price control.⁸⁶ While Apple's global market share hovers around 20%,⁸⁷ its market share in the United States is significantly higher, reported to be at 47% in the fourth quarter of 2018.⁸⁸ Apple's revenue largely consists

⁸³ Sam Mua, THE IMPACT OF NRA ON THE AMERICAN POLICY at 2-4.

⁸⁴ Rand Corporation, THE SCIENCE OF GUN POLICY: A CRITICAL SYNTHESIS OF RESEARCH EVIDENCE ON THE EFFECTS OF GUN POLICIES IN THE UNITED STATES, Rand (2018); *see also* David DeGrazia and Lester Hunt, DEBATING GUN CONTROL, (2016).

⁸⁵ Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) ("The monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate").

⁸⁶ 587 U.S. _ (2019).

⁸⁷ Team Counterpoint, *Global Smartphone Market Share: By Quarter*, Counterpoint (May 18, 2020), <https://www.counterpointresearch.com/global-smartphone-share/>.

⁸⁸ Team Counterpoint, *US Smartphone Market Share: By Quarter*, Counterpoint (May 17, 2020), <https://www.counterpointresearch.com/us-market-smartphone->

of what it earns from the provision of products and services.⁸⁹ Alarmed by what seemed to be Apple's ability to raise app store prices without consequence, consumers sued the company.⁹⁰ Since Apple is not directly responsible for the prices of their apps, the counsel arguing on behalf of the company maintained that the class action suit ought to have been raised against the app developers that were raising the prices.⁹¹ Initially left unsaid was the fact that Apple had been steadily increasing its contractual fees with independent app developers,⁹² which in turn motivated the developers to raise the prices of their smartphone applications in order to maintain their bottom line.⁹³

So then, the ultimate question before the court was one of responsibility: are the consumers "proper plaintiffs for this kind of antitrust suit,"⁹⁴ allowing them to bypass the developers and sue the company for harmful pricing? In the dissenting opinion, Justice Neil Gorsuch explains his frustration through something that could nominally be referred to as the Pass On theory; because developers were passing on the price of the heightened contractual fees, they ought to have been the ones held responsible.⁹⁵ On the other hand, Justice Brent Kavanaugh ultimately blamed Apple's monopoly and predisposition to optimize their profits in his explanation for the majority opinion.⁹⁶ He specifically mentions that their contractual fees and 30% share of the profit from each app compound their interest in profit.⁹⁷ Thus, the higher prices are a direct result of Apple's behavior since the prices would not have gone up without the added fees and reduction of revenue received by application developers. In this instance, Apple dominates in the market and exploits application developers' willingness to contract, thus limiting the economic agency of the consumer by taking advantage of the limited amount of options available.

Beyond the scope of price control, corporate personhood has also affected the extent to which consumers are able to impact the range of the

[share/#:~:text=Apple%20is%20still%20leading%20the,39%25%20share%20in%20Q3%202018.](#)

⁸⁹ Chrome-extension://cefhlgghdlbodbpihfdadojifnpgbjj/<https://www.apple.com/newsroom/pdfs/Q1%20FY20%20Consolidated%20Financial%20Statements.pdf> (aoi:8/15/2018:20pm).

⁹⁰ *Apple*, 587 U.S..

⁹¹ *See id.*

⁹² *Id.*

⁹³ *See id.* at 2 (Gorsuch, dissenting); *see also*, e.g., *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968).

⁹⁴ *Id.* at 4.

⁹⁵ *Id.* at 5 (Gorsuch, dissenting).

⁹⁶ *Id.* at 8, 11, and 14.

⁹⁷ *Id.* at 2-4.; *see also id.* at 5 (Gorsuch, dissenting, agrees that the 30% commission Apple charges is "anticompetitive").

option set available to them; in addition to causing prices in a market to increase, monopolies also limit the number and variety of suppliers.⁹⁸ As one of a limited amount of suppliers, there is limited competition and thus limited motivation for businesses to do things such as consider what is best for society; businesses with considerable control of the market are less likely to adopt programs that primarily exist for the sake of public good.

A harmful impact of limiting the convenience of a proper option set is the reduction in the power of the consumer. An example includes the existence of only one kind of coffee shop on urban college campuses: Starbucks—a common indicator of incoming gentrification.⁹⁹ In this common situation, affiliates of a university that are against gentrification have no other choice within the given option set but to support a chain that shares responsibility for uprooting communities and encouraging young white professionals to stay, and that even if these people chose not to consume Starbucks products, the remaining portion of the community only has one option for access to convenient caffeine and related products. Here we see that attempted boycotts motivated by problems perpetuated by the private sector become less likely to have a big impact on sale revenue if the businesses responsible for perpetuating the issue are the only available retailers or providers in the area.¹⁰⁰ The impact here is clear: companies that harm society are able to continue doing so when they have significant control of the market, and consumer activism becomes less effective as a result of this monopoly.¹⁰¹

⁹⁸ *Supra* note 85.

⁹⁹ See *Starbucks Accused of Abusing Monopoly Power in Violation of Sherman Act*, Gale Academic OneFile (Sept. 25, 2006), https://go-gale-com.proxy.library.upenn.edu/ps/i.do?p=AONE&u=upenn_main&id=GALE%7CA151859264&v=2.1&it=r&sid=summon; see also *Starbucks Sued for Trying to Sink Competition*, CNN Money (Sept. 26, 2006), <https://money.cnn.com/2006/09/26/news/companies/starbucks/>; see also Benjamin Y. Fong, *Unfair Trade*, The Outline (Apr. 3, 2020), <https://theoutline.com/post/4192/starbucks-racism-timeline?zd=1&zi=otkxrn4e>.

¹⁰⁰ Timothy J. Brennan, *REFUSING TO COOPERATE WITH COMPETITORS: A THEORY OF BOYCOTTS* (1992) (“For a boycott to be effective, the target firm must fall victim to higher input prices or a decrease in demand for its output.”).

¹⁰¹ *Id.*; see also Zephyr Teachout *Boycotts Can’t Be a Test of Moral Purity*, The Atlantic (August 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/boycotts-cant-be-a-test-of-moral-purity/614821/> (“The reason for this is that boycotts replace tension in the political sphere with tension in the private sphere, putting the central axis of tension between the firm and the activists.”) As the quote suggests, this article adopts a critical lens while evaluating the social effects of boycotting. One of the most salient points include the fact that holding monopolistic (and otherwise problematic) businesses accountable ought to be the burden of policymakers rather than consumers. While this would probably be more efficient, this argument fails to acknowledge that policymakers are politicians that care most about being reelected. If neither wealthy donors nor everyman voters demonstrate disdain

B. *No Right to Contract*

The United States of America is a democracy and therefore meant to prioritize the rights and agency of its citizens. Consistent with this is the idea that the U.S. does not place other incentives, monetary or otherwise, above this interest. Inconsistent with this is the reality of allowing private businesses to solve disputes involving the infringement of such rights.

There is a long history of unsuccessful cases in which this supposed right to contract is further limited. For example, the dissents in the *Slaughterhouse* cases refer to the violation of the freedom to contract via the Due Process Clause of the 14th Amendment.¹⁰² However, it was not until *Frisbie v. United States* that the idea of a right to contract is recognized at all,¹⁰³ and it was not until the 1897 case of *Allgeyer v. Louisiana* that the Supreme Court delivered a majority opinion declaring that the due process clause of the 14th Amendment protects one's ability to contract.¹⁰⁴ This line of development is particularly remarkable since it includes a rare occasion where a right is affirmed for businesses before it is for individuals. Nevertheless, this section will explain that protecting this action has had two negative consequences for individual people: coercive employment contracts and private arbitration.

EMPLOYMENT In addition to affecting the agency of individuals when it comes to participating in the economy, additional economic impacts of corporate cases include employment itself. These employment contracts could be characterized as coercive because of the inclusion of common features such as incongruous scheduling, inadequate compensation and the ultimate impact of perpetuating wealth inequality.

Some might argue that employees are capable of leaving any company if they are not satisfied with the terms of their employment, but this is not true for the masses that work menial jobs or for those whose work requires skill or otherwise involves classified information because exit barriers exist for both of these groups.¹⁰⁵ For people with jobs that do not

for certain businesses, then there is no motivation for a politician to pass policy that reflects such disapproval. The article is certainly correct about other things, such as the fact that ethical consumerism without complementary policy often fails to produce long-term success.

¹⁰² 83 U.S. 36 (1873).

¹⁰³ 157 U.S. 160 (1895).

¹⁰⁴ 165 U.S. 578 (1897).

¹⁰⁵ See e.g., Vincent S. Flowers and Charles L. Hughes, *Why Employees Stay*, (1973) ("The exhibit shows that low-skill manufacturing employees stay primarily for maintenance or environmental reasons, many relating to the non work environment. Seven of their top ten reasons relate to the external environment—for example, "I wouldn't want to rebuild the benefits that I have now" and "I have family responsibilities." Their two outstanding reasons

require specialized skills, the businesses they work for are easily able to replace them and thus the voice of the individual employee is not very efficient in terms of creating change through self-advocacy. This has created a reality where most menial jobs involve similar features such as the long hours, inadequate compensation and abusive scheduling. Thus, because of an excess of people applying for each available position and the similarity of working conditions, the average worker does not benefit from leaving one job to go to another with the same issues. Even those with highly specialized jobs face repercussions for trying to seek better employment. Many of these highly technical jobs have non-compete clauses in their initial employment contracts which make it more difficult for those people to find employment in a short period of time after leaving another company. This can lead to their skills no longer being up-to-date and further prevents them from being ideal candidates when they seek employment after the end of their non-compete clauses. Thus, employees are motivated to stay employed at their current job since the task of finding new work elsewhere is strenuous in the short-term and does not outweigh the burden of sticking to a job that provides steady income. Thus, the agreement between an employee and their employer does not necessarily qualify as satisfaction with the agreement, especially when the option set is homogenous or limited.¹⁰⁶ Similarly coercive are clauses included in employment contracts that compel employees to private arbitration.

PURSuing LEGAL ACTION The Supreme Court's support of private arbitration has led to a proliferation of disputes solved outside of court. In the 2001 case of *Circuit City Stores, Inc. v. Adams*, the Supreme Court considered facts involving the employment contract between a sales counselor and his employer.¹⁰⁷ Saint Clair Adams, the counselor, filed a discrimination lawsuit against his employer after signing the contract, which required that all disputes be settled by arbitration.¹⁰⁸ Circuit City then argued that Adams must be compelled to arbitration via the Federal Arbitration Act (FAA).¹⁰⁹ Ultimately, the Court considered the issue of whether or not the exclusions listed in the FAA applied to employment contracts.¹¹⁰ Thus,

for staying that relate to the internal environment are fringe benefits and job security. These employees will not remain on the payroll because of job satisfaction. To them, factors outside the company are more important...Managers offer quite a different profile. They stay mainly for reasons related to their jobs themselves and community ties; the difficulty of finding another job, family responsibilities, and company loyalty exert relatively less influence on them.”)

¹⁰⁶ See Elizabeth Anderson, LIBERTY, EQUALITY, AND PRIVATE GOVERNMENT (2015).

¹⁰⁷ 532 U.S. 105 (2001).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

private arbitration has had negative effects on those who wish to pursue legal action. For example, employment contracts often include clauses forbidding class action suits. This is another instance of businesses infringing upon the rights of their employees and saying that they are simply exercising their own rights, in this case the ability to contract is being used as a justification for preventing two things: the faults of a business being handled by the court system and negative publicity.¹¹¹

Effects of the increased popularization of private arbitration includes one derivative of an argument based on principle: the decrease of justice. Businesses prefer private arbitration over going to court because doing so saves them time and money, both of which companies spend more of when disputes go to court. This also benefits any employees involved in a given case. To some extent, private arbitration creates a more equitable standing ground for each side because businesses are usually able to dedicate more monetary resources to any given legal issue. This often gives them an upper hand in lengthy court battles and can discourage employees from continuing to seek redress for their grievances.¹¹²

Perhaps a more pragmatic argument against private arbitration is the increase of injustice. Private arbitration does not involve the same amount of public scrutiny as a case tried in court.¹¹³ This privacy increases the likelihood that businesses will repeat the egregious behavior in the future, thus increasing the amount of injustice in the workplace. One prominent example of this is sexual harassment in the workplace and how sweeping it under the rug perpetuates a hostile workplace that means more people will experience sexual harassment. Additionally, forced arbitration removes employees' access to a civil suit involving a jury of their peers. Finally, the decisions in private arbitration are often final, whereas decisions involving two parties established in court can be appealed.¹¹⁴

CONCLUSION

While the merit of corporate personhood remains a contentious concept constantly affected by the spectrum between judicial activism and *stare decisis*, there is no doubt that such development has greatly impacted the rights of individual people. Throughout this essay, we have seen examples

¹¹¹ See e.g., Katherine Stone and Alexander Colvin, *Arbitration Epidemic*, Economic Policy Institute (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

¹¹² In the end, we see once again that one motive to further develop corporate personhood is financial. Such motives are explicitly stated in an amicus curiae submitted to the Supreme Court while they were deciding *Circuit City Stores*. Among other things, the document explains that advantages of private arbitration include saving time and financial resources.

¹¹³ See *supra* note 111.

¹¹⁴ *Id.*

of the choices and beliefs of the few affecting the many. The most salient points supporting this include the limitations that corporate cases have introduced to the rights of individuals insofar as the First Amendment and economic agency. In the first part of this essay that discusses First Amendment rights, the Courts usually justified their rulings by explaining that the suppression of those rights was unconstitutional.¹¹⁵ In spite of this concern, these decisions protected the First Amendment rights of the “owners” of businesses while simultaneously limiting the same rights of many others. In the section discussing economic impacts that limit the economic agency of individuals, we see that the Court expresses multiple perspectives. Something the Court apparently agrees on is upholding private arbitration, often without discussion of the consequences.

Finally, let us also consider the reverse. Without the development of corporate personhood, organizations such as the American Civil Liberties Union and the National Association for the Advancement of Colored People probably would have had a harder time fighting cases that result in undeniable social good. On the other hand, the nonuniqueness of complicity in cases such as *Hobby Lobby* show us that the only real difference between the existence of corporate personhood and a lack thereof is the commodification of rights.¹¹⁶ While individuals are also capable of being exploitative and primarily motivated by profit, the difference is the compounding of protection that corporate personhood provides.

This leads to a bigger discussion that simultaneously implicates the future of corporate law in the United States: are the rights and agency of people in the United States intrinsically valuable? If there is intrinsic value in the rights afforded to people by their government, then we can expect to see a Supreme Court that leans toward the disenfranchisement of businesses.¹¹⁷ Judicial activism would be necessary in order for this to occur since such a trend would violate *stare decisis*. If the purpose of having rights is that they may not be infringed upon without due consequences and further deterrence of such violation, then surely granting those same protections to corporate entities that in turn use them to justify the infringement they perform upon individuals is not just. In order to avoid needlessly negative impacts, judges must first acknowledge that their decisions are influenced by inescapable differences in perspective. Only after taking accountability will our society

¹¹⁵ See *supra* note 48; see also *supra* note 32.

¹¹⁶ See *supra* note 9 at *xxi-xxii*.

¹¹⁷ Michael Sandel, *WHAT MONEY CAN'T BUY* (2012) at 312 (“To corrupt a good or a social practice is to degrade it, to treat it according to a lower mode of valuation than is appropriate to it.”).

be able to progress to one that benefits from decisions that are not only just, but also moral.

* * *