

# Corporate Personhood: A Problem Worth Solving

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## Introduction

\_\_\_\_\_ Many of us in the United States pride ourselves in our freedom and democracy. In our foremost document, the Declaration of Independence, our founders insisted that government derives its power from the “consent of the governed” and that if that consent is taken then the people have the right and the responsibility to “alter or abolish it.” What our founders knew so clearly and profoundly is that democracy is the cornerstone upon which everything else rests. When democracy itself is flawed or corrupt then we are hindered from attending to other issues. We need to address foundational problems in our democracy to ensure that people have the power to choose for themselves and to choose well.

Our system of government is generally classified as a democratic republic, where citizens choose officials to represent themselves in government. Yet today our government is far from representing the people. A 2014 study by professor’s and Princeton and Northwestern Universities found that it would be more appropriate to classify the United States as an oligarchy rather than a democracy<sup>1</sup>. The authors explain:

“Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.”

People don’t have power, business elites do. This problem is at the core of so many our political, environmental, and economic problems. When it comes to criminal justice reform, labor laws, and environmental issues people just don’t have the same political power as businesses and

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<sup>1</sup>Gilens, Martin, and Benjamin I. Page. “Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens.” *Perspectives on Politics*, vol. 12, no. 03, 2014, pp. 564–581.

corporations.

### **How did we get here:**

\_\_\_\_\_There are a lot of different answers to this question. In this paper we will be investigating specifically the rising power of corporations and how they have become so powerful in our government.

Our first question is: what is a corporation. All of us have heard of these entities but it can be more complicated when you get down into the details. A limited liability (LLT) corporation is an economic organization whereby a charter from a state gives the organization legal rights that are separate from the owners'. Those rights given by the state include immortality, property ownership, and the ability to transfer shares easily. However, the most powerful and important right that corporation get is limited liability which means that the owners assets are protected if their corporation is sued. Limited liability is crucial for corporations because it means that investors can take huge risks and still be totally safe if their company messes up.

These rights are not natural or assumed. In any other situation if you hurt other people you are completely responsible for what you've done and are liable with all of your assets and property. If you as a regular person get sued the court can come for your house, your car, and even garnish your wages. If your corporation gets sued then those things are protected.

Some economists argue that the current corporate form has allowed corporations to produce an enormous amount of wealth<sup>2</sup>. They suggest that special rights like liability protections help incentivize the wealthy to invest more productively and produce more wealth for society. Workers organized by corporations have produced enormous amounts of wealth in the 20th and 21st century. A study commissioned by a British organization called Global Justice now found that in 2015, 69 out of the top 100 largest economic entities in the world were corporations and that the

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<sup>2</sup> Bogdaneris, J. G. (2016). We, the Corporate People. *Confrontation*, (120), 148-156.

top ten largest corporations in the world make more money than almost all other countries combined<sup>3</sup>. Corporations are incredibly powerful.

### **Things weren't always this way:**

Historically corporations used to be much more constrained. Jane Anne Morriss, a corporate anthropologist, researched laws regarding corporate charters and found that:

- corporations couldn't exceed their specific chartered purpose,
- their charters were revocable if they misbehaved or acted outside their charter,
- management and ownership retained liability,
- charters were granted for a specific amount of time,
- and that corporations were forbidden from making political contributions<sup>4</sup>.

The theory behind these laws was that since corporations were given special rights so that they could make a lot of money they should also have some limitations. These rules were considered to be checks and balances on the power that corporations could accumulate.

All of these rules have since gone away. Today owners have, among other rights, limited liability, corporate charters granted in perpetuity, and corporations are able to spend unlimited amounts of money for political purposes. Corporations retain all of their rights but not all of their responsibilities. This has created a society where many of the most powerful entities in the world are corporations, outside of people's democratic control and with interests that represent a narrowing group of the wealthiest people in the world.

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<sup>3</sup>“10 Biggest Corporations Make More Money than Most Countries in the World Combined.” *Global Justice Now*, 19 Sept. 2016, [www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined](http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined).

<sup>4</sup> Hartmann, Thom. *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. Mythical Research, Inc., 2002. Page 75

In the late nineteenth and twentieth centuries corporations fought aggressively in the courts to argue that they should have access to all the rights that regular people do. Corporations don't live like other people do, they don't die like others do, they have structural access to enormous wealth, and cannot be punished with prison the way normal people are. Most importantly, their interests are often vastly divergent from regular people. Legally, everything a corporation does needs to be aimed toward increasing profit for their shareholders<sup>5</sup>. They don't care about compassion and empathy, they don't care about our air or water, they don't care about our children's educations or our quality of lives.

### **How did this Happen: Railroad Corporations Press Their Advantages**

In the early 18th century railroads dominated the American economy forming some of the biggest and earliest national monopolies. These companies made a small group of people extremely wealthy, forming the basis for the massive fortunes of Carnegie & Rockefeller. Railroad quickly became the fastest and most efficient way to distribute and deliver large amounts of coal, steel, and other commodities across the quickly developing Western United States.

Union Pacific and Southern Pacific consolidated industries both vertically and horizontally, forming relationships not only within the business sector but also crossing over into the political and legal sectors as well. Railroad magnates learned that there was big money to be earned by playing the legal system, and that with enough lawyers and political support they could manipulate the courts to their own advantage.

In 1868 the 14th amendment was passed to give citizenship rights and equal protection to former U.S. slaves following the civil war. However, this landmark amendment caused ripples and ramifications far outside of the new rights of former Black slaves. Alabama Senator and Supreme

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<sup>5</sup> *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135 (2012).

Court Associate Justice Hugo Black said in 1938 that “of the cases in this court in which the Fourteenth Amendment was applied during its first fifty years after its adoption, less than one half of one percent invoked it in protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations.”<sup>6</sup> That’s a ratio of over 10,000 percent corporations to African Americans.

Railroad companies in particular tried to use the fourteenth amendment in order to avoid paying taxes any way that they could. Those corporations argued that it wasn’t right that railroad tax law was different to the way that other businesses and corporations were taxed. Railroad attorneys argued that they should be able to deduct the value of their mortgage from their taxes, and that taxing different corporations and industries at different rates was a violation of their fourteenth amendment right to “equal protection under the law.”

### **The First Conspiracy: The Plot of the Congressional Committee**

Years before equal protection was extended to women in the United States, railroad lawyers brought this argument to the United States Supreme court. Those lawyers argued to the court that during the drafting of the fourteenth and fifteenth amendments the congressional committee had secretly conspired to give constitutional rights to corporations. Hugo Black in the early 20th century explained that back in 1822 lawyers had argued in the Supreme Court that ‘a journal of the joint Congressional Committee which framed the amendment, secret and undisclosed up to that date, indicated the committee’s desire to protect corporations by the use of the word ‘person.’”<sup>7</sup> That lawyer argued that rather than specifically tailoring the amendments to give rights to freed slaves, the

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<sup>6</sup> Hartmann, Thom. *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. Mythical Research, Inc., 2002. Pg. 157

<sup>7</sup> United States Supreme Court. *Connecticut General Life Insurance Company v. Johnson*. 31 Jan. 1938.

committee had purposefully used the language of “persons” in order to make those rights accessible to corporations.

This argument was thrown out of the court and considered a complete fabrication. It was considered ludicrous and absurd by all of the justices, save one. Hugo Black explained that even if it were true, a secret plot by the Committee to include corporations wouldn’t be enough to give corporations legal standing because “people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of State governments.”<sup>8</sup>

None of the justices took the argument seriously whatsoever, except for Justice Field, who had regularly supported the railroads while serving on the Ninth Circuit Court. Despite the absurdity of this incident, the story was brought back to the Court multiple times and indicates the unscrupulous actions that corporations have been willing to undertake.

### **The Second Conspiracy: A Rogue Court Reporter and a Short Headnote**

The second conspiracy picks up right where the first one had ended. In 1886 Southern Pacific Railroad brought a lawsuit against Santa Clara County, trying to avoid paying taxes on the mortgage for their land. On their \$30 million mortgage Southern Pacific objected to paying \$30 thousand of taxes. Among five other defenses, Southern Pacific argued to the court that the 14th amendment's equal protection clause should allow them to make a tax deduction for the value of their mortgages the way that regular people are able to. They argued that as a corporate person they should have the same tax rules as regular people.

The court ultimately decided in favor of the railroad on other technical grounds and decided not to address the constitutional question of corporations and the 14th amendment. Moments

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<sup>8</sup> Hartmann, Thom. *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. Mythical Research, Inc., 2002. Pg. 94

before giving his oral argument Chief Justice Waite actually explicitly told the attorneys that the court did not intend to rule on the question of whether personhood constitutionally applied to corporations yet that “we are of the opinion that it does.”<sup>9</sup>

This sentence was not a part of the justice’s legal ruling. It was only recorded by the court reporter, Bancroft Davis in the headnotes of the ruling. Headnotes written by court reporters are supposed to have *no legal standing*. Nonetheless the statement was assumed true by the court and became incorporated into the legal record. In the span of two sentences Davis, a court reporter, managed to reshape the political landscape of the United States and shifted the balance from people toward monied interests. The idea of corporate personhood has still never been ruled on directly by the Supreme Court yet, as Vermont Secretary of State, Deborah Markowitz explains, “it is a part of our law, even if there was a mistake.”<sup>10</sup>

Since the headnote acquired so much significance some have questioned whether whether Davis’s recording was even correct. A letter written from Waite to Davis affirms that the headnote “express[ed] with sufficient accuracy what was said before the argument began.”<sup>11,12</sup> Yet despite this piece of evidence scholars ranging from Karl Marx to biographer Willard L. King have harshly criticized Davis, King saying that “Many of Davis’s headnotes were so vague that they gave no impression of the decision of the Court and sometimes they were quite misleading.”<sup>13</sup>

Today none of us can truly know what the justices intended. We don’t know for a clear fact whether the framers intended to include corporations within the 14th amendment or whether Davis wrote his headnote out of thin air. The purpose of these two conspiracy stories is to make

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<sup>9</sup> United States Supreme Court. *Santa Clara County v. Southern Pacific Railroad Company*. 10 May 1886..

<sup>10</sup> Hartmann, Thom. *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. Mythical Research, Inc., 2002. Pg. 109

<sup>11</sup>Waite to Davis, May 31, 1886. Bancroft Davis Papers

<sup>12</sup> Magrath, Morrison R. Waite: The Triumph of Character, Pg. 224

<sup>13</sup>Beatty, Jack. *Age of Betrayal: The Triumph of Money in America, 1865-1900*. Vintage, 2007. Pg. 177

clear that this historic struggle between people and corporations has never been fought above board. Corporations have been playing dirty and the people have been left behind.

### **What Corporations do When They Have People's Rights:**

The Santa Clara ruling let the genie out of the bottle. Since then corporations have been able to claim constitutional rights with far reaching legal implications. Starting in the 1970's especially, corporations have used their constitutional power in the courts to prevent the government from enforcing the will of the people.

In 1986 Dow Chemical Company sued the United States for violating their fourth amendment right to prevent "unreasonable search and seizure" arguing that the Environmental Protection Agency and Occupational Safety and Health Administration should not be allowed to fly airplanes overhead to inspect their facilities<sup>14</sup>. This ruling crippled the administrations' abilities to perform random surprise inspections of chemical companies, factory farms, and power plants, effectively preventing proper oversight from occurring. Since corporations have the rights of people, real people are unable to properly inspect and oversee corporate activities.

In that same year the Supreme Court struck down a regulation from the Public Utilities Commission of California that would have required an energy corporation to include alternative viewpoints alongside its' corporate newsletter that distributed material that could be construed as propaganda to all of its' customers in their monthly billing statements<sup>15</sup>. The point of the regulation was to help the commission fulfill its' authorized mission of keeping utility rates low. However, since Pacific Gas and Electric Corporation was considered a person, its' first amendment right to free speech blocked the regulation.

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<sup>14</sup> United States Supreme Court. *Dow Chemical Co. v United States*. 19 May 1986.

<sup>15</sup> United States Supreme Court, *Pacific Gas and Electric v. Public Utilities Commission of California*, 25 February 1986.

Corporations have used their personhood rights to prevent governments from passing defensible and enforceable campaign finance reforms that would limit the amount of money spent in American elections. In 2010, based on corporate first amendment rights, the court struck down a provision that would have prevented corporations from paying for “electioneering communications” (election advertisements) within 30 days before an election. First amendment rights have also been used to argue that corporations should be allowed to donate unlimited amounts of money to political action committees to sway and influence our elections.

Since corporations have access to the 14th amendment’s equal protection clause they have been able to strike down laws that allow communities to favor small businesses and farms over larger corporate versions. For example in 2004 Wal-Mart sued the small California town of Turlock, CA for blocking their plan to build a massive supercenter. These kinds of arguments prevent communities from deciding for themselves how they want their economy to be structured.

Corporations get unequal access to the bill of rights, unequal protection from risks, unequal relief from taxes, unequal privacy rights, and enormous undue influence over our governments and society<sup>16</sup>. Corporations have all of the rights of people but are in fact not themselves, human people. Corporations cannot live or die, they don’t have children, and they don’t share people’s interests. Rather, corporations represent an artificially constructed drive toward profit that is separated from their owners and workers actual interests as people. When we allow corporations to assume the rights of people we are undermining the very point of those rights in the first place, to prevent tyranny and preserve human freedom.

### **What Should We Do To Fix This?**

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<sup>16</sup>Hartmann, Thom. “Unequal Protection: How Corporations Became 'People' and How You Can Fight Back.” *Truthout*, [www.truth-out.org/opinion/item/331:unequal-protection-how-corporations-became-people-and-how-you-can-fight-back](http://www.truth-out.org/opinion/item/331:unequal-protection-how-corporations-became-people-and-how-you-can-fight-back).

To date no supreme court has ever ultimately ruled directly on the question of corporate personhood. Congress has never passed a law that explicitly gives corporations access to political rights that are protected for regular people. Nevertheless this is the world that we are all living in. Since corporations are accessing constitutional rights this is ultimately a constitutional question. In order to change the answer to that question we are going to need to go through either the Supreme Court of the United States or through an amendment to the Constitution itself.

A ruling by the Supreme Court will likely be best for a first attempt. If the Supreme Court ultimately decides to make a ruling directly on the question of corporate personhood then it is possible that they will investigate the evidence and recognize that the Constitution and federal law never directly intended to make personhood rights applicable to corporations. This is unlikely. While the Supreme Court has not ruled directly on this question, they have used it as precedent many times. If the Supreme Court decides not to rule on the question of corporate personhood directly or votes in favor of maintaining the status quo then our only other course of action can be to propose a constitutional amendment.

There are two different routes to achieving an amendment to the United States constitution. The first route is through a two-thirds supermajority vote in both the House and Senate of Congress. The second route is through a national convention called by Congress at the behest of a two-thirds supermajority of State Legislatures across the country. All 27 amendments to the constitution have been passed through the first route, the second route has never been used. Either path to an amendment is going to be difficult, yet still possible. A 2010 poll by the Washington Post/ABC News found that 80% of Americans oppose Citizens United. There are many reasons from different political perspectives to oppose corporate personhood. This fight will require all of our collective support and energies. Talk to your friends, contact your representatives, let's end corporate personhood together.