Of Corporations, Courts, Personhood, and Morality

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ABSTRACT: Since the dawn of capitalism, corporations have been regarded by the law as separate legal "persons." Corporate "personhood" has nonetheless remained controversial, and our understanding of corporate personhood often influences our thinking about the social responsibilities of corporations. This essay, written in honor of Prof. Thomas Donaldson, explores the tension in recent decisions by the U.S. Supreme Court and the Delaware Chancery Court about what corporations are, whose interests they serve, and who gets to make decisions about what they do. These decisions suggest that the law does not unequivocally support Donaldson's vision of corporations as "moral" persons.

KEY WORDS: Corporate personhood, Corporate morality, Citizens United, Hobby Lobby, Corporate social responsibility, Corporate constitutional rights

INTRODUCTION

SINCE THE DAWN OF CAPITALISM, corporations have been regarded by the law as separate legal "persons." Corporate "personhood" has nonetheless been controversial, even if the particular concerns expressed by critics tend to change over time.[1] At the writing of his book *Corporations and Morality*, more than 30 years ago, Prof. Thomas Donaldson told us that most people speak of corporations as if they believe that corporations have a "moral" character, and "are taken to be moral agents" (Donaldson 1982, 19), in addition to their legal character. He then developed arguments for the proposition that corporations, like natural persons, have moral and ethical responsibilities. He also observed that, while corporations have some of the same rights as natural persons, listing freedom of speech among them, he acknowledged that under the law (at the time), these rights were not as extensive as they are for natural persons (Donaldson 1982, 22-23).

The "facts on the ground," as they say in international diplomacy, have changed in many ways since 1982. Unfortunately, the changes have not been in directions that look good for the ideas and values that Donaldson was advocating in 1982.

In 1982, for example, corporations could not spend freely to fund political messages (Donaldson 1982, 8). Nor were corporations recognized as having the right to "practice religion." In fact, in his book, Donaldson observed that "many rights seem logically impossible to attribute to corporations: Can corporations have a right

©2016 **Business Ethics Quarterly** 25:4 (October 2015). ISSN 1052-150X pp. 415–431
DOI: 10.1017/beq.2015.32

https://doi.org/10.1017/beq.2015.32 Published online by Cambridge University Press

to worship as they please?" (Donaldson 1982, 23). But, while he believed corporations could not "worship," Donaldson nonetheless argued that corporations, like persons, are imbedded in communities, and that they should be expected to make decisions and act in morally accountable ways, even if this means sacrificing some profit potential.

Today, however, the Supreme Court has told us that corporations qualify as "persons" whose rights to "exercise religion" are protected from regulations that burden that right under the Religious Freedom Restoration Act of 1993[2], according to the Court's 2014 ruling in Burwell v. Hobby Lobby Stores, Inc.[3] The Supreme Court has also found that corporations have virtually unlimited rights to expend resources on "independent" political speech, according to the Court's ruling in Citizens United v. Federal Election Commission.[4] But while the Supreme Court has been extending more rights to corporations, treating them, in a sense, more like moral agents, the courts of Delaware, which is the predominant jurisdiction for corporate law, seem to be telling us that corporations have less in the way of moral or ethical responsibilities than even most corporate executives might have said in 1982, at the time Donaldson wrote his book.

This essay, which honors Prof. Donaldson's many important contributions to the fields of business ethics, reviews the changes in corporate rights and responsibilities that have been wrought by the U.S. Supreme Court and the Delaware Chancery Court in recent years. Part I reviews the changes in recent years in social expectations about corporate responsibilities. Part II reviews the expansion of corporate rights that has come out of recent Supreme Court rulings. And Part III explores some implications of these changes for business ethics and corporate social responsibility.

I. THE RESPONSIBILITIES OF CORPORATIONS

The view of corporations that Prof. Donaldson advocated in his 1982 book, a view that corporations have moral responsibilities beyond shareholder profit, was not universally accepted at the time that his book was published (Donaldson 1982). For decades before Donaldson's book, scholars had debated the question of whether corporations should be run solely in the interest of shareholders, or whether they have a broader social mandate.[5] In 1970, Milton Friedman had written that the only social responsibility of businesses is to make as much money as they can (Friedman 1970)[6]. But throughout most of the 20th century, Donaldson's view was accepted in general terms across a wide spectrum of policy analysts, scholars, and business people, including historians (Charles Maier 1988; Richard Pells 1989; Galambos and Pratt 1988), management theorists (Drucker 1946; Drucker 1975; Porter and Kramer 2006), legal scholars (Berle and Means 1932; Dodd 1932; Berle 1954), and economists (Kaysen 1957; and Mason 1959),[7] and in many cases even by corporate executives (Business Roundtable 1981; US Department of Commerce 1980; Henry Ford II 1969, as cited in Donaldson 1982, 36). These thought leaders all believed that corporations had obligations to society at large, as well as financial obligations to their shareholders.[8]

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In the three decades since Donaldson's book was published, the prevailing view of corporations in the business, academic, and legal communities has shifted strongly away from this view, in a direction of which Milton Friedman would have approved. Students in law schools and business schools are likely today to be told that corporations are owned by shareholders, and that corporate managers are agents of shareholders who have fiduciary duties to work to maximize the value of the equity shares for shareholders. Finance theorists have come to dominate discussions of corporate governance, intensifying the focus on financial performance, and share value in particular, as the only appropriate goal of corporate governance. In the state of Delaware, which has the most influential body of corporate law in the US, there has never been a *statutory* requirement that corporate directors and managers must "maximize share value," although case law in Delaware occasionally pays homage to the idea that corporations must be run for the benefit of common shareholders. Nonetheless, until very recently, Delaware courts made such pronouncements while granting enormous latitude under the "business judgment rule" for officers and directors to choose actions and strategies for their corporations that provide clear benefits to other "stakeholders," as long as those actions could be justified on the grounds that such approaches would be better for the shareholders "in the long run" (Allen 1992; Paramount Communications Inc. v. Time Inc.[9]).

In the last few years, however, Delaware courts seem to be veering more strongly toward a mandate that corporations must maximize value for shareholders. The Chancery Court has handed down decisions that seemingly curtail managerial discretion to consider any interests other than those of common shareholders, and that scold boards of directors for doing so. The decisions in eBay Domestic Holdings, Inc. v. Newmark[10], and In re Trados Inc. Shareholder Litigation[11] emphasize that directors who cause a corporation to take an action that benefits some other stakeholders at the expense of common shareholders may be found to have breached their fiduciary duties. The court's rationale for these decisions is largely based on a view of corporate boards of directors as agents of shareholders.

In *Newmark*,[12] eBay owned 28.4% of the shares of craigslist, Inc., while the two founders and controlling shareholders of craigslist, Craig Newmark and James Buckmaster, together, owned the rest of the shares (Newmark owned 42.6%, and Buckmaster owned 29%.). eBay had acquired its shares for $32 million when one of the original craigslist investors, Phillip Knowlton, wanted to sell out. Since craigslist was closely held, and the founders wanted to retain control, Buckmaster, who was CEO of craigslist, participated in finding an acceptable buyer for the Knowlton shares. When eBay surfaced as an interested acquirer, negotiations ensued, with eBay looking for certain rights to protect its minority position, and Newmark and Buckmaster looking for some compensation for agreeing to provide those protections. The agreement they reached called for a 3-person board of directors and cumulative voting, which meant that eBay would be able to control one seat on the board. Under the terms of a shareholders' agreement signed by all the parties, eBay agreed to certain confidentiality obligations. In exchange, eBay got veto rights over certain corporate transactions (including changes to the charter, increases or decreases in the number of authorized shares, adoption of any agreement between

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craigslist and its officers or directors involving issuing any new stock, and declarations of dividends), all three parties agreed to restrictions on their rights to transfer their stock, and eBay retained the right to compete with craigslist subject to certain consequences, including changes in some of the rights and obligations of the parties.

As soon as eBay had completed the acquisition of the craigslist shares, it began pressuring Newmark and Buckmaster to allow eBay to acquire the rest of the outstanding shares. eBay wanted to get into the online classified ads business, and craigslist was far and away the leading firm in that business. But craigslist has a business model that is very different from that of eBay, and Newmark and Buckmaster were not interested in seeing craigslist merged into eBay. Chancellor Chandler of the Delaware court described craigslist's business model this way:

> Though a for-profit concern, craigslist largely operates its business as a community service. Nearly all classified advertisements are placed on craigslist free of charge. Moreover, craigslist does not sell advertising space on its website to third parties. Nor does craigslist advertise or market its services. Craigslist's revenue stream consists solely of fees for online job postings in certain cities and apartment listings in New York City. . . . Almost since its inception, the craigslist website has maintained the same consistent look and simple functionality . . . . [It] has largely kept its focus on the classifieds business. It has not forayed into ventures beyond its core competency in classifieds. . . . [It] is committed to this community-service approach to doing business. They [craigslist's management team] believe this approach is the heart of craigslist's business. For most of its history, craigslist has not focused on 'monetizing' its site . . . . Perhaps the most mysterious thing about craigslist's continued success is the fact that craigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or market share. (*Newmark,* 8).

When Newmark and Buckmaster persisted in refusing eBay's efforts to buy out their shares and merge craigslist into eBay, the eBay director on craigslist's board resigned, and eBay proceeded with plans to launch its own classified ads website, which it called Kijiji. This decision to compete triggered consequences under the shareholders agreement, and after about six months, Newmark and Buckmaster responded by taking three steps, which they could now do without eBay's consent: 1) they implemented a "staggered board" through amendments to craigslist charter and bylaws; 2) they approved a stockholder "rights plan" (a poison pill); and 3) they offered to issue one new share of craigslist stock in exchange for every five shares on which a craigslist stockholder granted a right of first refusal in favor of craigslist (*Newmark*, 21). The first two steps are classic takeover protection steps, although a poison pill is a highly unusual strategy for a closely-held corporation (*Newmark,* 30). The third step meant that eBay would either have to grant craigslist the right of first refusal on all of the craigslist stock it held, or find that its interest was diluted sufficiently that it could no longer elect anyone to the craigslist board. If the purpose was to prevent eBay from getting control of the board of craigslist, this last step was superfluous because, once the board had been staggered so that only one director would be elected each year, eBay would be unable ever to elect a

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director, even with cumulative voting.[13] In other words, the actions meant that eBay would be frozen in, with no way to either sell out to another investor (because no outside investor would be willing to buy stock that was restricted in this way), or to influence the management of craigslist in a way that would produce some benefit to eBay in exchange for the $32 million investment it had made.

Not surprisingly, eBay sued, alleging that Newmark and Buckmaster breached their fiduciary duties as controlling shareholders and directors, to eBay, a minority investor. In deciding the case, the court first analyzed whether craigslist had "proper corporate objectives" for implementing the rights plan (*Newmark*, 28). Newmark and Buckmaster defended the action on the grounds that they were trying to protect the unique culture of craigslist from the possibility that eBay might eventually get control after they die if their heirs were willing to sell out to eBay (*Newmark*, 32). The court said that protecting corporate culture "from beyond the grave" is not an adequate corporate purpose (*Newmark*, 34), especially if that culture did not contribute to increasing profits or share value for the corporation:

> Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders. . . . Ultimately, defendants [Newmark and Buckmaster] failed to prove that craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value to support the indefinite implementation of a poison pill . . . . As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds. . . . The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. . . . Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. . . . Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization – at least not consistently with the directors' fiduciary duties under Delaware law (*Newmark*, 33 - 34).

In *Trados*,[14] the Delaware Chancery Court seemed to go way beyond what was necessary to decide the case to make the point that corporate directors owe fiduciary duties to the corporation and its common shareholders that preclude them from causing the corporation to take any action for the benefit of some other stakeholder at the expense of common shareholders. Trados Inc. was a software company financed with funds from venture capital investors. As is the practice in the venture capital world, the venture capital investors had acquired preferred stock in Trados, rather than common stock. The Trados board consisted of the CEO of the company, plus six directors who were all representatives of various venture capital funds that had supplied financing for the company, and who held preferred stock, not common stock. By 2004, Trados had done well enough that its revenues were growing fairly consistently, but it was not growing fast enough to allow it to generate a substantial return for its venture capital investors. Consequently, these investors wanted to exit. So the CEO and the board began looking around for a buyer for Trados. The deal

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that they arranged provided enough cash to pay off the dividends and liquidation preferences of the preferred shares in Trados, plus pay a bonus promised to the top officers of the company for successfully preparing Trados to be acquired and finding an acquirer, but not enough to provide any payment for the common shareholders.

After the deal was announced, a holder of Trados common stock filed suit complaining that, "instead of selling Trados, the board had a fiduciary duty to continue operating Trados independently in an effort to generate value for the common stock" (*Trados*, 20). The court ultimately found that, in spite of the fact that all of the directors had a conflict of interest and were not adequately considering the interests of the common shareholders, nonetheless, the price paid to the common shareholders in the deal—zero—was actually what the common shares were worth, so that the transaction was fair to them. But along the way, Vice Chancellor Laster took the opportunity to write scathingly of the directors for failing to act for the benefit of common shareholders. At five different places in the decision, he pounded home the point that directors' duties are owed to common shareholders, and they may only take actions that benefit some other stakeholder if "such activities are rationalized as producing greater profits over the long term" (*Trados*, 36). He even engaged the scholarly literature in which some legal scholars have argued that corporate directors should focus on "enterprise value," rather than share value, to reject this idea. In the most extended statement of the point, he said:

> The standard of conduct for directors requires that they strive in good faith and on an informed basis to maximize the value of the corporation for the benefit of its residual claimants, the ultimate beneficiaries of the firm's value, not for the benefit of its contractual claimants. In light of this obligation, it is the duty of directors to pursue the best interests of the corporation and its common shareholders, if that can be done faithfully with the contractual promises owed to the preferred . . . . The principle is not unique to preferred stock; it applies equally to other holders of contract rights against the corporation. Consequently, in circumstances where the interests of common stockholders diverge from those of the preferred stockholders, it is possible that a director could breach her duty by improperly favoring the interests of the preferred stockholders over those of the common stockholders" (*Trados*, 40 - 41).

Both of these cases involved closely-held corporations in which one group of shareholders (Newmark and Buckmaster in *Newmark*, and the preferred shareholders in *Trados*) received a benefit that came, arguably, at the expense of the other shareholders. This is the same factual context in which the Michigan court, in the famous *Dodge v. Ford Motor Co.* case, made pronouncements about the duty of directors being to manage corporations for the benefit of shareholders.[15] So *Newmark* and *Trados* are not necessarily inconsistent with prior case law. D. Gordon Smith tells us that "[T]he shareholder primacy norm was first used by courts to resolve disputes among majority and minority shareholders in closely held corporations" (Smith 1998, 79). In fact, he says that in nearly all of the corporate law cases where courts have emphasized the fiduciary duties of directors to try to create value for *shareholders*, the factual circumstances have involved directors acting with a conflict of interest, preferring their *own* interests (either as directors or as majority shareholders)

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at the expense of the corporation, rather than preferring the interests of some other non-shareholder stakeholders over shareholders (Smith 1998). In these two recent Delaware cases, we also have a factual situation in which directors are acting in their own interests rather than in the interests of common shareholders. Nonetheless, the judges in these cases seem to be going out of their way to articulate a strong shareholder-primacy position, leaving little room for corporate managers and directors to justify actions taken for "moral" reasons or to balance the interests of various stakeholders if those actions do not clearly create value for shareholders.

II. THE SUPREME COURT AND CORPORATE RIGHTS

Corporate law is largely determined at the state level, but over the last two centuries, the Supreme Court has decided a number of cases that have determined just how far the law will go in granting Constitutional rights to corporations.[16] Corporations have been granted rights available to "persons" under the Constitution to establish diversity jurisdiction (Bank of United States v. Deveaux[17]; Louisville, Cincinnati and Charleston Railroad Co. v. Letson[18]; Marshall v. Baltimore & Ohio Railroad[19]; Dodge v. Woolsey[20]), and for purposes of the application of Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments[21] (Santa Clara County v. Southern Pacific Railroad[22]). But it did not treat corporations as "citizens" for purposes of the application of the Privileges and Immunities Clause of Article IV[23] (Bank of Augusta v. Earle[24]; Paul v. Virginia[25]; Pembina Consolidated Silver Mining v. Pennsylvania[26]). They have been found to be capable of committing crimes (New York Central & Hudson River Railroad Co. v. United States[27]). They have protections against unreasonable searches and seizures[28] (Hale v. Henkel[29]), but no protection under the Fifth Amendment privilege against self-incrimination[30] (also in *Hale v. Henkel*). But they do have protection under the Double Jeopardy Clause[31] (United States v. Martin Linen Supply[32]), and have rights to a jury trial in some instances (Ross v. Bernhard[33]). From the 1970s to 2010, corporations were recognized as having some freedom of speech, especially in the context of commercial speech (Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council[34]; Central Hudson Gas & Electric Corp. v. Public Services Commission of New York[35]). Under First National Bank of Boston v. Bellotti, the Court said that laws burdening corporate political speech are subject to strict scrutiny.[36] Nonetheless, until the *Citizens United* case in 2010, the Court had permitted some constraints on corporate political spending. Under *Citizens United*, constraints on corporate spending on political speech (as distinguished from direct contributions to political campaigns) were struck down.[37]

Elizabeth Pollman and I have elsewhere shown that throughout the history of the Supreme Court's corporate rights cases, the Court has generally justified its granting of Constitutional rights to corporations not on a theory that corporations are themselves Constitutionally protected "persons," as is sometimes claimed, but on the logic that a corporation is an association of persons acting together (Blair and Pollman 2015).[38] To be sure, the Court has often pointed to *Santa Clara*, decided in 1886, in support of the notion that the protection of "persons" under the Fourteenth Amendment was intended to apply to corporations. But in its specific applications

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extending one type of protection or another, it has usually appealed to the idea that a corporation is an aggregate of natural persons. As such, the Court has said that it is sometimes necessary or convenient to grant rights to a corporation in order to protect the rights of the individuals that the corporation represents. The majority in *Citizens United* adopted this same line of reasoning (*Citizens United*, 343, 349, 354, and 356),[39] although they did so, as the Court has done in the past, without articulating a clear theory of what corporations are (Blair and Pollman 2015, 1731-1732). For example, the Court argues that corporations are aggregates of natural persons, but it also refers to corporations "speaking"' (*Citizens United*, 337) and having "views" (*Citizens United*, 339) without considering or answering questions such as exactly which natural persons the corporation is representing when it speaks, or whether the views of a corporation can be different from those of the natural persons that it represents (and if they can, what is the legal significance of this?). The Court repeatedly referenced the "First Amendment principle that the Government cannot restrict political speech based on the speaker's identity," (*Citizens United*, 346) seemingly implying that the corporation itself, not just the natural persons behind it, is a "speaker." But once the Court affirms the notion that the Fourteenth Amendment was intended to cover corporations, nothing else in the majority's decision seems to turn on how the Court conceives of corporations.

Thus, paradoxically, even as it was granting corporations an almost unlimited right of freedom of speech in the context of political campaigns, the Court sidestepped questions about who it is that the corporation represents when it is "speaking," not to mention such questions as those that philosophers and ethicists have struggled with, about whether the corporation itself should be regarded as a "moral person" (Donaldson 1982).

The recent decision of the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* did not involve a Constitutional claim, but rather a claim under the Religious Freedom Restoration Act of 1993 (RFRA)[40] by plaintiffs that were closely-held for-profit corporations.[41] They claimed that they should be exempted from providing coverage for certain forms of birth control in their employee health care plans, on the grounds that the forms of birth control in question violated their religious free exercise rights. In its decision for the plaintiffs, the Court, in effect, recognized that for-profit corporations have a right to be protected from federal mandates that impose a burden on their ability to freely exercise their religion.[42] This right had been recognized previously for non-profit religiously-based corporations such as churches, charities, and religious schools, but prior to *Hobby Lobby*, the Court had never before recognized that for-profit corporations have, and should be free to exercise, religious beliefs.

This case, then, even more than *Citizens United*, raises questions about the Court's understanding of what corporations are, what corporate "personhood" means, and whether corporations are "moral" persons, questions that the Court made no attempt to answer directly in the *Hobby Lobby* decision. These questions are more urgent in the wake of *Hobby Lobby* than after *Citizens United*, or other prior freedom of speech cases, because the Court cannot fall back on an "instrumental" rationale similar to that employed in *Citizens United* (and in *Bellotti*, which the *Citizens United*

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court relied on), that protecting the right of the corporation to "speak" is necessary to protect the rights of listeners to hear what the corporations have to say. The right to exercise religion is a right to believe and act in a certain way, not a right to observe or benefit from the practice of religion by another party, whether the other party is a natural person or a corporation. Thus the Court had to justify its claim that the religious rights of a corporation deserve protection on the basis of something that it understands is intrinsic to or fundamental about the nature of the corporation itself, and its relationship with natural persons, rather than on the rights of third parties to hear or observe what the corporation is doing. Instead of addressing these questions head on, the Court in *Hobby Lobby* merely appeals generally to the idea that a corporation is an aggregate of natural persons. "A corporation is simply a form of organization used by human beings to achieve desired ends. . . . When rights, whether Constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people," Justice Alito wrote for the majority (*Hobby Lobby*, 2768).

After that, the Court's argument, to the extent that it speaks to the nature of corporations, gets vague and confused, saying at one point that the natural persons whose rights deserve protection might be "shareholders, officers, and employees" (*Hobby Lobby*, 2768) but not specifying which group of people matter for which questions. In deciding this case, however, the Court identifies the "humans who own and control" the companies (*Hobby Lobby*, 2768) as the natural persons whose rights are protected by extending free exercise rights to corporations, without further justifying why it is shareholders' rights that count in this case, given that the substantive issue at stake in *Hobby Lobby* was an employee benefit, not a property or contract right, nor even a dividend or voting right of a shareholder. Why, exactly, is the corporation identified with those "who own and control" Hobby Lobby, but not with those who work for Hobby Lobby? If we are only supposed to consider the rights of those who "own and control" a corporation when identifying the persons whose rights of expression are being protected, this seems to be in tension with the decision in *Citizens United* because Citizens United, the corporation, is a non-profit—it has no shareholders or owners.

The Court has so far provided no guidance about the question of who should count, and why, when we are identifying the natural persons whose rights are at stake in any claim of rights for a corporation.[43] In the case of a religious *non-profit* corporation, which was brought into existence for non-commercial reasons, it seems reasonable to believe that the group of people who came together to form the organization, as well as others who joined later, sought out the connection to other like-minded people for the explicit purpose of religious expression. Similarly, in the case of *Citizens United*, we know that it was a group of politically like-minded individuals and other organizations that came together to fund Citizens United, the corporation, for the purpose of delivering a political message.[44] In cases such as these, the argument is plausible that, to protect the rights of the people who founded and who fund the corporation, the Court must extend the right to the corporation. The Delaware Chancery Court, however, tells us that Newmark and Buckmaster formed craigslist with a quasi-social purpose in mind. Yet it also tells us that the for-profit status of craigslist means that it may not expend resources solely to express

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that purpose because the use of the for-profit form means that they must put profits ahead of any social mission. From these cases, it would seem to follow that under Delaware law, at least, not-for-profit corporations can, and are expected to pursue some social mission, or perhaps a religious mission, but for-profit corporations are required to pursue profit, and may not sacrifice profit in order to further a social mission.

Then how should we understand *Hobby Lobby*? In that case, five shareholders of Hobby Lobby Stores Inc. also chose the for-profit corporate form. Why should the Court assume that their association in the corporate form was primarily about religious expression rather than about achieving certain economic and business-related benefits, such as limited liability, indefinite life, profits and appreciation of their stock in the corporation? If their purpose in organizing was to exercise religion, why didn't they choose a not-for-profit form? These five people, all members of the same family, presumably have any number of other ways to organize or associate for religious expression purposes. Yet the Court seems to have said that they are exercising their religion by the formation and operation of a for-profit corporation.

III. CORPORATE RIGHTS AND THE SOCIAL CONTRACT

Business people, as well as law and management scholars, should be forgiven for being confused by these mixed messages from two important courts.[45] In fact, there may be reasons to believe that even justices of the Delaware Supreme Court are troubled by the conflicting messages in these cases.[46] In recent essays written by the outspoken and prolific Justice Leo E. Strine, Jr., now Chief Justice of the Delaware Supreme Court, he expresses the view that *Newmark* did not represent a departure from prior Delaware court rulings, in that it asserts that a corporation must, "within the limits of its legal discretion, treat stockholder welfare as the only end" (Strine 2015, 61). He cites former Chancellor William T. Allen approvingly for what he calls a "non-controversial" statement of the law that "directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of "other constituencies" (Strine 2015, 61). But he also cites Chancellor Chandler in *Newmark* for the proposition that "directors of a for-profit Delaware corporation cannot deploy a rights plan [poison pill] to defend a business strategy that openly eschews stockholder wealth maximization – at least not consistently with the directors' fiduciary duties under Delaware law" (Strine 2015, note 261).

Perhaps more importantly, Strine, in other essays and scholarship, argues that, whether the law requires shareholder value maximization or not, social and economic pressures will, in practice, compel corporate directors to pursue profits even at the risk of generating socially destructive externalities (Strine 2012, 136). The public should "recogniz[e] that for-profit corporations will seek profits for their stockholders using all legal means available," he observes (Strine 2012, 136). Strine recognizes that the public is harmed by pollution, financial risks, and other negative side effects of business that are externalized to the public or to the economy as a whole. But in the face of continuing pressure on corporate executives to focus on profits, Strine believes it is misguided to expect the courts to solve this problem by

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officially granting corporate executives permission to pursue goals other than profits, because courts are not in a position to ensure that the other goals that will actually be pursued by corporate executives are socially preferable to what corporations will do in pursuit of profit.

Justice Strine is highly skeptical about the feasibility and benefit of trying to ensure that corporations are socially responsible by expecting corporate executives and directors to steer corporations in socially beneficial directions. Thus, in his view, the Supreme Court decisions that have granted constitutional rights to corporations to promote the *noneconomic* values of its managers and/or shareholders through freedom of speech and freedom to exercise religion are "worrisome". (Strine 2015, 5). Strine's view is that corporate behavior should be regulated by labor law, environmental law, consumer protection law, financial markets regulation, tax incentives, and other laws designed to protect the general welfare in order to ensure that corporations act in accordance with public good. But, he says, recent Supreme Court decisions undermine the ability of legislatures to do this. "*Citizens United* puts pressure on corporate law itself because it weakens the argument that the concerns of other corporation constituencies should be addressed by bodies of law external to corporate law. *Hobby Lobby* increases that pressure." (Strine 2015, 60).

> "First, . . . if both *Citizens United* and *Hobby Lobby* are correct and the corporation has a multi-constituency focus, why are its religious values determined by reference to the equity owners and who they decide to elect? Why not the employees of the corporation? Or its customers? Or the communities in which it operates? . . .
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> When . . . the federal courts conclude that corporate funds and corporate policies can be directed to advancing religious objectives or political objectives unrelated to stockholder profit, the arguments of those who would have corporate law itself operate on the basis where stockholder welfare is the only legitimate end are much weaker. If the Supreme Court believes that corporate managers have the ability to use their control of the corporation for religious and ideological purposes, then corporate law itself may have to change. . . .
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> Finally, and of critical importance, because *Citizens United* enables the corporation to inhibit the ability of government to regulate corporate externalities and expand the social safety net, the argument that internal corporate law constraints are not needed is weakened. *Hobby Lobby*'s elevation of the interests of corporate managers over those of secular society has a similar effect (Strine, 2015, 68–71)."

The decisions in *Hobby Lobby* and *Citizens United*, Strine concludes "have in common . . . that they constrain the ability of Congress to regulate businesses effectively and to provide a floor for working Americans." (Strine 2015, 59, footnotes omitted).

Advocates of corporate social responsibility might at first think that the *Hobby Lobby* and *Citizens United* decisions support their view that corporations have moral responsibilities—if they have the capacity for political or religious expression, one may be tempted to argue, corporations surely must have the "capacity to use moral reasons in decision-making," the first of Donaldson's two requirements for moral decision-making processes (Donaldson 1982, 30). But these recent decisions do more to weaken corporate accountability than strengthen it. In *Corporations &*

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Morality, Donaldson tells us that to qualify as a "moral agent," a corporation must "embody a *process of moral decision-making*." (Donaldson 1982, 30, emphasis in original). This process requires not only the capacity to use moral reasoning, as noted above, but also the "capacity of the decision-making process to control not only overt corporate acts, but also the *structure of policies and rules*" (Donaldson 1982, 30, emphasis added). Moreover, those policies and rules must be consistent with the terms of a "social contract" for business, Donaldson says, building on the concept from the theories of political social contracts developed by Thomas Hobbes (1651), John Locke (1689), and Jean-Jacque Roussseau (1762), all of which emphasize the importance of consent of the governed. Moral decision-making in corporations, thus, is about a process that involves moral reasoning and includes reflection on the process itself, and securing the consent of those affected by the actions of corporation.[47] The emphasis on process and consent appears again in Donaldson's work on "Integrative Social Contracts Theory" (ISCT) with Thomas Dunfee (Donaldson and Dunfee, 1994).

The Supreme Court's expansive approach to granting rights to corporations, however, displays no concern about either the process by which decisions are made in corporations, or consent of the parties the corporation is assumed to represent. If corporations have expressive rights because they represent natural persons who have those expressive rights, what processes are in place to assure that the persons who are supposedly represented by the corporation have given their consent to the forms and content of the corporation's expressions?[48] The Court did not bother to consider any process questions in either decision, but in both decisions, it waves these concerns away by pointing to the governance rules provided by corporate law.[49]

Corporate law, of course, is concerned with process, but the Delaware Chancery Court's narrow view of the responsibilities of corporate officers and directors leaves little room for directors or managers to make decisions for corporations in a manner that represents or serves the interest of any parties other than common shareholders.[50] Considered in the light of the actual decision-making processes and avenues of accountability in Delaware corporations, the Supreme Court's references to corporate democracy ring hollow. The majority in *Hobby Lobby*, for example, paid lip service to the idea that corporations represent a range of people who are involved in them, "including managers, employees, and shareholders" (*Hobby Lobby* 2768), but in the end, the Court granted authority to five shareholder/managers to make a decision to opt out of a mandated benefit that the law had said should be made available for the firm's 23,000 employees, without any process or mechanism by which those 23,000 employees could give or withhold their consent (other than by giving up their job).

CONCLUSION

Among the insights we gain from Prof. Donaldson's many contributions to the study of corporations, morality, and corporate social responsibility is that it is of little significance whether we understand corporations as artificial entities, or real entities,

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or legal persons, or as aggregates of persons. What matters for the question of corporate morality is whether the decision-making processes used in the corporation adequately support moral reasoning, and require the consent of parties affected by the corporations' decisions. Recent Supreme Court decisions take for granted that they do, just as the Delaware courts seem to be taking away the discretion that might have at least permitted directors to consider the interests of any parties other than common shareholders.

ACKNOWLEDGEMENTS

Blair would like to thank Caitlin Snelson, Yijie Song, and Daniel Lewis for able research assistance. Any remaining errors are the responsibility of the author.

NOTES

1. Blair (2013) provides an extended discussion of the legal meaning and function of corporate personhood.
2. 42 U.S.C. §2000bb.
3. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751 (2014).
4. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
5. Early salvos in this debate were exchanged in *Harvard Law Review* articles by E. Merrick Dodd, Jr. (Dodd 1932), and Adolf A. Berle (Berle 1931).
6. Friedman did qualify this statement by noting that corporations must stay within the law and within "ethical custom" (Friedman 1970).
7. Wells (2013) provides an excellent discussion of the emergence of what he calls "heroic capitalism" in the early to mid-20th century. See also Wells (2002).
8. In the late 1970s and early 1980s, according to Smith (1998, 289), many publicly-traded corporations "adopted charter amendments allowing managers greater discretion to consider the interests of nonshareholder constituencies in the context of a corporate takeover," and in the 1980s, more than half of the states adopted statutes explicitly protecting corporate directors and managers if they take account of nonshareholder constituencies in decisions about takeovers. See also Somer (1991) and Orts (1992).
9. 571 A.2d 1140 (1989). The Court found that Time directors and managers were not required to accept a tender offer, even though the offer provided a higher return for shareholders in the short run. "The fiduciary duty to manage a corporate enterprise includes the selection of a time frame for achievement of corporate success. Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." Id., at 1151.
10. 16 A.3d 1 (Del. Ch. 2010).
11. 73 A.3d 17 (Del. Ch. 2013).
12. The facts reported here all come from the Chancery Court decision in this case, cited in note 11 above.
13. Under cumulative voting, a large enough minority group can be guaranteed to elect some board members if enough seats are open at each election. With three open seats, a minority would be able to fill one seat if it held more than 25% of shares. With only one seat open per election, a minority can never fill that seat. (O'Kelley and Thompson 2010, 168).
14. The facts of this case are all taken from the Chancery Court's decision.
15. 170 N.W. 668 (Mich. S. C., 1919).
16. See Blair and Pollman (2015) for an extensive discussion of the history of constitutional rights for corporations.
17. 9 U.S. (5 Cranch) 61 (1809). As Prof. Pollman and I have discussed at length in Blair and Pollman (2015), the Supreme Court did not actually regard corporations as having constitutional rights and protections because they were "persons" in their own right, but, in each of the cases discussed here, found that corporations were associations of persons and that the corporation at interest in the case therefore represented an identifiable group of people who had chosen to associate through the corporate form (Blair and

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Pollman 2015, 1678). Corporations were granted the rights in question to protect the rights of the natural persons represented by the corporations. In *Deveaux*, for example, the Court found that the "shareholders, president, and directors" of the Bank of United States "were all citizens of Pennsylvania," (*Deveaux*, 63) while the defendants were citizens of Georgia, and therefore held that, although the bank, not the individual participants in the bank, was the plaintiff, there was diversity for purposes of federal jurisdiction.

18. 43 U.S. (2 How.) 497 (1844). In *Letson*, the Court held that a corporation was a "citizen" of the state where it was incorporated for purposes of diversity jurisdiction (*Letson*, 555). "The Court looked no further than the 'artificial entity' and its state of incorporation," observe Blair and Pollman (2015, 1685).

19. 57 U.S. (16 How.) 314 (1854). In this case the Court reverted back to the rationale employed in *Deveaux*, that a suit by or against a corporation is regarded as a suit by or against the shareholders for diversity purposes, but it established a conclusive presumption that, at least for the purpose of diversity jurisdiction, all shareholders of a corporation are citizens of the state in which the corporation is chartered (Blair and Pollman 2015, 1685).

20. 59 U.S. (18 How.) 331 (1856) "Despite Marshall's presumption that all shareholders are citizens of the corporation's state of incorporation, the Court found diversity between the shareholder and the corporation on the basis of the shareholder's adverse stance in the case." (Blair and Pollman 2015, 1686).

21. U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of the law. . ."); and amend. XIV §1 (. . . nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.").

22. 118 U.S. 394 (1886). *Santa Clara* is widely cited for the proposition that corporations are "persons" for the purposes of "equal protection" and "due process," under the Fourteenth Amendment, although the Court did not actually reach such a decision in this case. A headnote subsequently reported with the decision noted that the Court did not hear argument on the question of whether the Fourteenth Amendment applies to corporations because "we are all of the opinion that it does." *Santa Clara*, 118 U.S. at 396 (headnotes). See discussion of this case and related cases in Blair & Pollman (2015).

23. U.S. Const. art. IV §2 c.1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

24. 38 U.S. (13 Pet.), 519 (1839).

25. 75 U.S. (8 Wall.) 168 (1868).

26. 125 U.S. 181 (1888).

27. 212 U.S. 481 (1909).

28. U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .").

29. 201 U.S. 43 (1906).

30. U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

31. U.S. Const. amend. V (". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

32. 430 U.S. 546 (1977).

33. 396 U.S. 532 (1970).

34. 425 U.S. 748 (1976).

35. 447 U.S. 557 (1980).

36. 435 U.S. 765 (1978).

37. Blair and Pollman (2015) provide an extended discussion and analysis of all of the cases cited in this paragraph.

38. Totenberg (2014) provides a thoughtful but accessible discussion of the legal significance of corporate personhood.

39. The Court, however, relied more heavily on what Prof. Pollman and I have called an "instrumental" argument, which first appeared in the corporate commercial speech cases, to the effect that the First Amendment is intended to protect the rights of parties outside the corporation such as customers or citizens, to hear all viewpoints, without regard to the source. See Blair and Pollman (2015), at 1720.

40. 42 U.S.C. §2000bb.

41. 134 S. Ct. 2751 (2014). In addition to Hobby Lobby Stores Inc., the other plaintiffs were Mardel Christian and Education Stores, Inc., and Conestoga Wood Specialties Corp.

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42. Thus, the Supreme Court majority answered Donaldson's 1982 question (1982, 23) about whether corporations can exercise religion in the affirmative!

43. See Blair and Pollman (2015, 1740 - 1742) for a discussion of the "who should count and why" question in the context of finding constitutional rights for corporations as a way of protecting the rights of the natural persons behind the corporation.

44. Unlike a PAC (political action committee), Citizens United is not required to identify its sources of funding.

45. In a student note in *Yale Law Journal*, David Wishnick, now an associate at Jenner & Block, identifies five different interpretations of the significance of *eBay v. Newmark* that appeared in the law reviews and law blogs within a few months of that decision (Wishnick 2012). *Citizens United*, *Hobby Lobby*, and *Trados*, have also prompted an outpouring of challenges and interpretations in the law reviews and blogosphere.

46. And we know for a fact that the four justices in the minority of both *Citizens United* and *Hobby Lobby* are troubled by those decisions. See discussion of the dissenting opinions in both cases in Blair and Pollman (2015, 1727-1728, and 1730-1731). But that's not what this essay is about.

47. Donaldson and Dunfee (1994, at 262) emphasize that consent (to what they call a "microsocial contract") must be "buttressed by a right to exit", and that "their consent to a microsocial contract is binding only when it is informed."

48. Donaldson and Dunfee (1994, at 263) suggest that the failure of an employee to leave a corporation and seek alternative employment is tantamount to signaling consent to the policies of that corporation. The ability to exit may apply as to the employee's position in a given corporation (although there may often be significant practical limitations on an employee's ability to quit a job), but an employee does not have the option to exit a system that gives employers the ability to opt out of providing certain benefits.

49. In *Citizens United*, at 361-362, the Court dismissed concerns raised by the Government that corporate expenditures on political campaigns can be limited to protect shareholders who might disagree with the choice made by managers and boards of corporations about such expenditures. "There is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy,'" the Court said without elaborating on how those procedures could supposedly be used to prevent abuse. In *Hobby Lobby*, at 2775, the Court says "State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure."

50. Some advocates of shareholder rights would claim that corporate law process rules fail even to provide or protect the participation rights of common shareholders (Bebchuk and Jackson 2010).

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