



The Corporation and American Democracy

What History Can Tell Us about the Current Debate

2014

In 2010, *Citizens United* sparked a nationwide discussion about corporate rights and power in our democracy. A missing piece of the puzzle was a key historical question that permeated the Supreme Court's decision: Would the framers of the Constitution have thought corporations held First Amendment rights, and how had American thinking on corporate rights developed since then?

Under the leadership of Naomi Lamoreaux (*Economics and History, Yale*) and Bill Novak (*University of Michigan Law School*), the Tobin Project is nearing completion of a new volume on the history of the corporation's role in American politics and governance. This inquiry has taken early and

important steps toward a longstanding goal of Tobin's democracy project: cultivating a new subfield of history focused on the many institutions of American democracy—formal and informal—and how they have evolved together.

The corporation has long played a role at all levels of American democracy. Even before independence, citizens and states used corporations to found churches and colleges and build public infrastructure. But Americans have also often feared the concentration and abuse of corporate power. This tension, and how it manifested in and around *Citizens United*, helped the Tobin Project frame a set of questions in need of new academic

research, including: **When and why did states and the federal government grant corporations rights? What did they ask in return? How have these relationships changed over time? And what are the implications for the present?**

To address these and related questions, Tobin assembled an all-star lineup of scholars together with Lamoreaux and Novak to write the first book-length history of the corporation and American democracy. In February, the scholars came together with policymakers from the U.S. Senate, judiciary, and the FEC to sharpen the chapters and consider the policy implications of their work.

The enthusiasm at the meeting among both top scholars and policymakers suggests the potential of this new approach to American history to yield important advances in understanding, both about the past and about how our democracy could work better today. Continuing to focus on academic rigor *and* real-world relevance, Novak, Lamoreaux, the contributors, and the Tobin Project are now at work finalizing the chapters and moving the volume toward publication.



← Daniel Crane (*University of Michigan Law School*), Sabeel Rahman (*Roosevelt Institute*), Jessica Hennessy (*Economics, Furman University*), and John Wallis (*Economics, University of Maryland*) at the *Corporation and American Democracy* meeting.

INSIDE

- New lab experiments explore the psychological and physiological effects of inequality
- *Preventing Regulatory Capture* book launch and roundtables with scholars and policymakers
- Tobin brings *Sustainable National Security* research to Washington, D.C.

Scholars' *Hobby Lobby* Brief Offers the Supreme Court a New History of Corporate Rights

Shortly after February's *The Corporation and American Democracy* conference (see cover), a number of Tobin scholars, with the help of attorney Jonathan Massey and the Tobin Project, submitted an *amicus curiae* brief to the Supreme Court in the *Hobby Lobby* case. The case involved a for-profit corporation requesting a religious exemption from certain contraception requirements of the Affordable Care Act. The scholars took this opportunity to apply a new evidence-based historical account to the national debate over corporate rights.

The brief argued that the Supreme Court has historically not treated corporations

as persons who enjoy all the rights and privileges of American citizens. Rather, the Court has long granted corporations protections of *property* rights, but has been far more wary of granting *liberty* rights—such as the religious rights claimed by *Hobby Lobby*—to for-profit corporations.

The scholars shared their research with Mr. Massey, a veteran Supreme Court litigator and instructor at the Harvard Supreme Court Law Clinic, who drafted the brief. The brief provided objective scholarly research to aid the Justices in their decision and help ensure that future corporate-rights decisions rest on firmer historical ground.

“Working on this project has led me to rethink completely the history of the corporation in the United States. It is clear to me now in a way that it never was before that corporations have always been implicated in both sides of the debate over American democracy. They were both critical agents of democratization and the enemy against which the forces of democracy organized.”

—Naomi Lamoreaux



↑ Initiative leaders Bill Novak (*University of Michigan Law School*) and Naomi Lamoreaux (*Economics and History, Yale*) at the February meeting.

READ MORE ONLINE

In March, Novak and Lamoreaux published an op-ed in *Slate* on the history of corporate rights, titled “Getting the History Right.” Read it at tobinproject.org/readmore.

The scholars' Supreme Court brief is also available at tobinproject.org/readmore.

A New Approach to the “History of American Democracy” is Gaining Steam at Harvard

This fall, Tobin Project founder and President David Moss taught a Harvard course on the “History of American Democracy” for the second time. The course proved remarkably successful in its first run in 2013, producing overwhelmingly positive reviews from students and attracting interest from a number of prominent scholars.

Developed by Moss in consultation with the Tobin Project and with extensive support from Harvard Business School, the course uses the case method to explore how Americans have made political decisions at crucial moments in history, from ratifying the federal Constitution to litigating California's Proposition 8 on marriage equality. The cases push both undergraduates and business school students to consider how American democracy produces political decisions, the full range of actors and institutions involved, and what factors have distinguished success from failure over time.

The course manifests an approach to the history of American democracy central to Tobin's democracy initiative. As put by John Cisternino, Tobin's Director of Research: “To better understand how the American democracy makes both good and bad decisions, we must look beyond elections and formal institutions. We must consider how individuals have come together over time, often through informal types of organization, to push for political change.” The Tobin Project hopes that the course will help spark more teaching and research with this focus in coming years.



↑ (top to bottom)

Ilyana Kuziemko (*Economics, Princeton*) discusses experimental methods for understanding the consequences of inequality.

Michael Norton (*Harvard Business School*) at the August meeting.

First-of-their-kind Experiments Underway on the Psychological and Physiological Effects of Inequality

Economic inequality attained a new level of prominence in public debate over the past year, as President Obama declared heightened economic inequality and reduced mobility the “defining challenge of our time” and Thomas Piketty’s tome *Capital in the Twenty-First Century* became a surprise bestseller. But scholars have yet to reach a consensus on what may be the most important question about rising inequality: **What are its consequences for our politics, economy, and society?**

To begin to answer these questions, the Tobin Project is investigating how inequality may shape individual decision making. If researchers can begin to understand—and document—these mechanisms on an individual level, they will be well positioned to deepen our understanding of inequality’s impact on society writ large.

In 2013, a Tobin-led group of economists and psychologists began conducting experiments at a Harvard lab. Early results from multiple rounds of experiments suggest new insights about how people perceive their place in the income distribution at different levels of inequality. With this part of the project well underway, Raymond Fisman (*Columbia Business School*), Ilyana Kuziemko (*Economics, Princeton*), Michael Norton (*Harvard*

Business School), and new collaborator Marianne Bertrand (*University of Chicago Booth School of Business*) met this August with David Moss (*Harvard Business School*) and Tobin staff members to develop further ideas for innovative experiments that could shed light on potential consequences of inequality.

At the same time, the Tobin Project has been working with Wendy Berry Mendes and Nancy Adler (*both Psychology, UC San Francisco*) on a new set of experiments. Adler and Mendes hope to discover whether extreme inequality produces any psychological or physiological changes, and, if so, how they might undergird decision making, including non-rational decision making. All involved believe this research could have a large impact. As Adler put it: “Understanding the mechanisms gives us more possibilities for [mitigating consequences]—and I think we can make people’s lives better.”

Late this summer, Adler and Mendes began piloting a series of lab experiments that focus on inequality and risk-taking. The experiments aim to determine whether inequality affects risk preferences and, if it does, to uncover psychological and physiological mechanisms behind the effect.



→
Marianne Bertrand (*University of Chicago Booth School of Business*) with Howard Rudnick (*Tobin Project*) and David Moss (*Harvard Business School and Tobin Project*)

Preventing Capture Reaches Academic & Policy Audiences

The year 2014 saw new ideas that have emerged from Tobin's *Preventing Capture* initiative begin to take hold in both academic and policy circles. The initiative's capstone—a volume titled *Preventing Regulatory Capture*—brought together scholars from political science, history, law, and economics to address an understudied question with implications across every field of government regulation:

How can we prevent the capture of regulators by special interests?

In December, the Bipartisan Policy Center hosted a book launch in Washington, D.C. Here, a group of scholars and policymakers—including former Rep. Brad Miller (*D-NC*), now a Senior Fellow at the Center for American Progress, and Mark Calabria, Director of Financial Regulation Studies at the Cato Institute—consider the book's findings during the event. →



Two months later, volume co-editor Daniel Carpenter (*Government, Harvard*) and contributor Nolan McCarty (*Woodrow Wilson School, Princeton*) participated in a panel on Preventing Capture at the Center for American Progress. The panel featured a keynote speech by Senator Sheldon Whitehouse (*D-RI*), who wrote the afterword to the volume with former Rep. Jim Leach (*R-IA*).



In February, Duke hosted the first university roundtable on Preventing Capture, led by Ed Balleisen (*History*) and the Rethinking Regulation program that he directs at Duke's Kenan Center for Ethics. The panel included volume co-editor David Moss as well as Congressman David Price (*D-NC*) and Joseph Smith, who currently oversees the federal government's National Mortgage Settlement, which aims to correct past abuses in mortgage servicing and to assist affected homeowners. Here, the four panelists talk after the event. ←

In July, the Society for the Advancement of Socio-Economics organized a Preventing Capture panel at its annual meeting in Chicago. Co-editor Daniel Carpenter and contributor Bill Novak (*University of Michigan Law School*) discussed the book's new definition of capture and the historical development of the concept, while scholars Nicholas Bagley (*University of Michigan Law School*), Tom Baker (*University of Pennsylvania Law School*), and Mary Furner (*History, UC Santa Barbara*) called for new research that applies the book's lessons to fields such as insurance regulation and "ideological capture." →



Chapter Excerpts from *Preventing Capture* Panelists

Corrosive Capture? The Dueling Forces of Autonomy and Industry Influence in FDA Pharmaceutical Regulation

Daniel Carpenter

“The strongest conclusion that can be drawn from the historical and statistical evidence is that entry-barrier capture of the sort theorized by Huntington, Bernstein, and Stigler is not a solid or powerful explanation for the development or operation of American pharmaceutical regulation. If anything, the capture that has plausibly occurred has been of the corrosive, deregulatory kind, and this raises larger questions about the limits of existing capture theory.”

Complexity, Capacity, and Capture

Nolan McCarty

“The first and most obvious [policy implication] is that government should strive to reduce the expertise advantages of firms. The straightforward (but perhaps politically untenable) step would be to increase public sector salaries (at least in key areas) to rates that can better compete with the private sector. However, simply drawing talent out of the private sector may not be enough if the new regulators come with the social and cultural connections that lead to pro-firm biases. Government agencies that regulate complex domains need to develop career paths and educational opportunities for their key personnel that are more autonomous from the regulated industry.”

A Revisionist History of Regulatory Capture

William J. Novak

“Working with a foreshortened narrative of nineteenth century laissez-faire and twentieth century regulation, capture theorists missed the degree to which the problem of capture and corruption animated most previous American political, constitutional, and legislative (as well as regulatory) development—and indeed motivated the development of the regulatory commission in the first place.... Consequently, capture theory’s traditional prescription—usually some form of deregulation or simply ending the regulation as we know it—ended up being as shortsighted as the myopic history that stood behind it.”

Contributors to *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2014)

Daniel Carpenter (*Freed Professor of Government, Harvard University*)

Christopher Carrigan (*Assistant Professor of Public Policy and Administration, George Washington University*)

Mariano-Florentino Cuéllar (*Associate Justice Designate, California Supreme Court; Stanley Morrison Professor of Law, Stanford Law School*)

Jonathan Decker (*Director of Policy and Communications, The Tobin Project*)

Sanford Gordon (*Professor of Politics, New York University*)

Catherine Hafer (*Associate Professor of Politics, New York University*)

James Kwak (*Associate Professor of Law, University of Connecticut School of Law*)

Michael Livermore (*Associate Professor of Law, University of Virginia School of Law*)

M. Elizabeth Magill (*Dean and Richard E. Lang Professor, Stanford Law School*)

Nolan McCarty (*Susan Dod Brown Professor of Politics and Public Affairs, Woodrow Wilson School, Princeton University*)

David Moss (*John G. McLean Professor, Harvard Business School*)

William Novak (*Charles F. and Edith J. Clyne Professor of Law, University of Michigan Law School*)

Richard Posner (*Judge of the U.S. Court of Appeals, Seventh Circuit; Senior Lecturer, University of Chicago Law School*)

Richard Revesz (*Lawrence King Professor of Law and Dean Emeritus, New York University Law School*)

Daniel Schwarcz (*Associate Professor of Law, University of Minnesota Law School*)

Susan Webb Yackee (*Professor of Public Affairs and Political Science, University of Wisconsin-Madison*)

Luigi Zingales (*McCormack Professor of Entrepreneurship and Finance, University of Chicago Booth School of Business*)

Professor Daniel Carpenter on *Preventing Regulatory Capture*

*We spoke with Daniel Carpenter, the Freed Professor of Government at Harvard University, about working with the Tobin Project's Government & Markets initiative and his experience as a co-editor of *Preventing Regulatory Capture*.*

Q: *You helped lead Tobin's Preventing Capture initiative—what do you think are its most important contributions?*

A: I think we've established a definition for capture and an evidentiary baseline for saying whether it's happening or it's not. In doing so, we've also buried the argument from the Stiglerian or Chicago School that regulations are inevitably captured, that deregulation is the only remedy, and that capture is some diagnosis that you can slap on a regulation and then say that because it's captured it's a failure. On reflection today, that point might seem obvious, but the literature in the '70s, '80s, and '90s was characterized by expansive capture claims.

Q: *Have you seen any evidence that the book is having an impact?*

A: The book has already been influential. Different Congressional committees have begun to use it, it's getting reviewed, there have been various panels on it, and it's getting cited a fair bit for a very young book. For example, I was sitting in the back of a conference in France last May and several people spoke at a general audience session, saying, "**there is this new American approach to studying capture**, and people should be reading it and thinking about different ways to define and study capture."



↑ Daniel Carpenter teaching at Harvard. Photo credit: Staff Photo Stephanie Mitchell/Harvard Staff Photographer

I don't think people will be able to write about capture in the future without referencing this book and engaging with its arguments.

Q: *What was different about working on this Tobin Project initiative?*

A: The Tobin Project really emphasizes the applicability of research to contemporary policy debates, and that to me is valuable. With a lot of the papers that I write, we're thinking about how we can get it into a peer-reviewed journal. **Tobin does care about that, but also about the idea that the problems that we work on are important to society.** I emphasize that people can (and do) do both—academia

"I don't think people will be able to write about capture in the future without referencing this book and engaging with its arguments."

wouldn't be academia without people having passion about working on things that didn't have immediate application. But academia and academics should also think about those features of their work that might be relevant to public debates and to policymaking.

Tobin Scholars Bring New Work on Economics and National Security to D.C.

In January, four scholars from the Tobin Project's *Sustainable Security* initiative shared their research in discussions with the Department of State's Policy Planning Staff, the Brookings Institution's Project on International Order and Strategy, and the Bridging the Gap project housed at American University's School of International Service. The scholars presented their research for Tobin's forthcoming *Sustainable Security* volume, which asks: **How can the United States maintain its long-term security in the face of shifts in domestic and international political economy and new challenges to post-Cold War unipolar dominance?**

Their work takes on special relevance in the wake of a slow and tentative recovery from the global financial crisis, record budget deficits, the fast-growing economies of potential rivals like China, and a variety of new threats from the Caucasus to the Middle East. Indeed, some have

suggested these trends may be starting to threaten the economic and military foundations of American power and security. Daniel Drezner, Nancy Hite, Jonathan Kirshner, and Jeremi Suri's research offers insights that could bear on how the United States responds.

The January events engaged scholars, policymakers, and think tank experts in provocative discussions about how best to sustain long-term American security in the face of these challenges. Participants from the Defense Department, USAID, and other agencies were eager to learn how the scholars' insights might apply to their work; think tank fellows from organizations such as the Cato Institute and the Center for a New American Security homed in on the policy implications; and scholars from several universities joined the academic conversation on this cutting-edge research.



↑ Nancy Hite and Daniel Drezner (both of the Fletcher School, Tufts University) discuss their research on the economic effects of military primacy with James Goldgeier (Dean, School of International Service, American University) and others.

Sustainable National Security Research

Military Primacy Doesn't Pay (Nearly as Much as You Think)

Questioning a widely held belief, **Daniel Drezner** and **Nancy Hite** (both of the Fletcher School, Tufts University) find that military primacy produces only marginal economic benefits, especially in today's unipolar world.

State Finance and National Power: Great Britain, China, and the United States in Historical Perspective

Using historical evidence, **Jeremi Suri** (*History, University of Texas at Austin*) argues that state financial capacity—the ability to raise low-cost capital and then use it to adapt to change and stay active in the world—is the key to state power, while sheer military strength and cultural “soft power” are less important.

Bringing Them All Back Home? Dollar Diminution and New Macroeconomic Constraints on American Power

Jonathan Kirshner (*Government, Cornell*) writes that the recent financial crisis has increased the vulnerability of the dollar to potentially competing global reserve currencies, which could reshape the world's America-friendly monetary and financial system.

MacArthur and Carnegie Renew Generous Grants to the Tobin Project

We are proud to announce that the MacArthur Foundation and the Carnegie Corporation of New York have renewed their generous funding for the Tobin Project for the next three years. Along with a committed group of individual donors, both foundations have supported the Tobin Project for many years, and our work would not be possible without them.

Mission Statement

The Tobin Project is a catalyst for transformative research in the social sciences. The mission of the Tobin Project is to mobilize, motivate, and support a community of scholars across the social sciences and allied fields seeking to deepen our understanding of significant challenges facing the nation over the long term. Toward this end, the Tobin Project aims to identify and pursue questions that, if addressed with rigorous scholarly research, could have the greatest potential to benefit society.

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