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SO WHAT IF CORPORATIONS AREN'T PEOPLE?

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ABSTRACT

Corporate participation in public discourse has long been a controversial issue, one that was reignited by the Supreme Court's decision in *Citizens United v. FEC*. Much of the criticism of *Citizens United* stems from the claim that the Constitution does not protect corporations because they are not "real" people. While it's true that corporations aren't human beings, that truism is constitutionally irrelevant because corporations are formed by individuals as a means of exercising their constitutionally protected rights. When individuals pool their resources and speak under the legal fiction of a corporation, they do not lose their rights. It cannot be any other way; in a world where corporations are not entitled to constitutional protections, the police would be free to storm office buildings and seize computers or documents. The mayor of New York City could exercise eminent domain over Rockefeller Center by fiat and without compensation if he decides he'd like to move his office there. Moreover, the government would be able to censor all corporate speech, including that of so-called media corporations. In short, rights-bearing individuals do not forfeit those rights when they associate in groups. This Article will demonstrate why the common argument that corporations lack rights because they are not people demonstrates a fundamental misunderstanding of both the nature of corporations and the First Amendment.

I. INTRODUCTION

Few recent Supreme Court cases have provoked such lasting controversy as *Citizens United v. FEC*.¹ The contentious 5-4

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1. *Citizens United v. FEC*, 130 S. Ct. 876 (2010). For more on the (misplaced) outrage about *Citizens United*, see Ilya Shapiro & Nicholas M.

decision emerged from a dispute over whether a nonprofit advocacy group called Citizens United could air a movie critical of Hillary Clinton while she was competing in primary elections during the 2008 presidential campaign. The Court found in favor of the group, holding that the First Amendment prohibits limiting corporate and union funding of independent political speech, even (especially) in the run-up to elections.

For decades, it has been understood that corporations are regarded as “persons” under the Constitution. Nonetheless, a corporation’s right to participate in the political dialogue has long been a highly debated issue. Much of the criticism of *Citizens United* stems from the argument that the Constitution does not protect corporations because only natural persons, not “legal” ones, are entitled to enjoy constitutional rights. A corporation is not a “real person,” and therefore, the argument goes, it should not be afforded First Amendment protections, much less the ability to influence elections. This sentiment was the basis for Justice John Paul Stevens’s epic dissent in *Citizens United*:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations . . . and their “personhood” often serve as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.²

This is a common argument against “corporate rights.” As this Article will reveal, however, that sort of rhetorical appeal misses the point entirely. It demonstrates a fundamental misunderstanding of both the nature of corporations and the freedoms protected by the Constitution. Corporations, like any other association of people, are entitled to constitutional rights in order to protect the rights of individuals who have an interest in them. The supposedly hot question of whether a corporation should really be considered a “person” is thus, constitutionally irrelevant.³

Part II of this Article overviews the judicial development of corporate rights, highlighting that today’s conception of “corporate personhood” does not place corporate rights on par with individual

Mosvick, *Stare Decisis After Citizens United: When Should Courts Overturn Precedent*, 16 NEXUS J. L. & PUB. POL’Y 121, 121-23 (2011) (describing the controversy surrounding *Citizens United*).

2. *Citizens United*, 130 S. Ct. at 972 (Steven, J., dissenting).

3. See Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 123-24 (1992) (stating that the assertion that corporation is a “person” “does not . . . clarify the scope of constitutional protection of corporate speech. Because a corporation has the legal attributes of a ‘person’ only by operation of law, the policies underlying the law ultimately determine the extent to which a corporate person has particular attributes for purposes of constitutional protection.”) (footnotes omitted).

rights. Part III pinpoints the source of corporate rights—the individuals who make up the corporation. Part IV addresses the argument that the First Amendment protects only “media” corporations.

II. WHAT RIGHTS DO CORPORATIONS HAVE?

It is a misconception that the concept of “corporate personhood” has played a central role in shaping corporate speech rights in American jurisprudence.⁴ No court has ever said that corporations are real people.

For instance, the 1819 landmark corporate rights case, *Dartmouth College v. Woodward*,⁵ established the principle that corporations were protected from alterations by states for public reasons. Chief Justice John Marshall emphasized that “a corporation is an artificial being, invisible, intangible and existing only in contemplation of law.”⁶ The Court thus acknowledged that a corporation is *not* a real person, but nevertheless ruled that a charter given it by the state was a contract that the state was obligated to uphold. Chief Justice Marshall went on to explain that corporations are formed by individuals and those individuals have constitutional rights.⁷ “Corporations receive constitutional protection, as Dartmouth College did, in order to protect the constitutional rights of the individuals behind the artificial entity,” not because they are deemed real persons.⁸

In 1886, the Supreme Court established what would later become known as “corporate personhood” in the case of *Santa Clara v. Southern Pacific Railroad*.⁹ One of the arguments thoroughly briefed here by defendants’ counsel was that corporations are persons within the meaning of the Fourteenth Amendment. The parties were never given the chance to debate the issue, however, because Chief Justice Morrison Waite disposed of it before oral argument even began. He announced:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.¹⁰

4. Adam Winkler, *Corporations and the First Amendment: Examining the Health of Democracy: Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863 (2007).

5. *Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

6. *Id.* at 636.

7. *Id.* at 636-638.

8. Winkler, *supra* note 4, at 864.

9. *Cnty. of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) [hereinafter *Santa Clara*].

10. *Id.* at 394.

With that curious pronouncement, the Fourteenth Amendment was applied to corporations—quite literally, no questions asked. The doctrine known today as “corporate personhood” was thus established without explanation.

Critics of *Santa Clara* insisted that the decision gave corporations constitutional rights equivalent to the rights of natural citizens. Nevertheless, the critics’ prediction never came to fruition. Instead, the cases that succeeded *Santa Clara*, defined and sometimes limited corporate rights in ways that would not be possible in the context of individuals. For example, in the 1911 case of *Wilson v. United States*, the Court held that, unlike individuals, corporations do not have a Fifth Amendment right against self-incrimination.¹¹ Also, *Lochner*-era decisions regularly upheld state laws limiting corporations’ contractual rights.¹² Even in a time when the Court protected individuals’ liberty of contract by preventing states from interfering with private business relationships, the Supreme Court cabined corporate rights.¹³

Yet, the same criticism that followed *Santa Clara*—that corporate rights are now equivalent to the rights of individuals—resounded after *Citizens United*. Even ostensibly neutral commentators explained that “the decision conferred new dignity on corporate ‘persons,’ treating them—under the First Amendment’s Free Speech Clause—as the equal of human beings.”¹⁴ When the Court took certiorari in *FCC v. AT&T*¹⁵ later that year, it was thought to be a “return to the debate over corporate ‘personhood.’”¹⁶

But in *FCC v. AT&T*, the first corporate rights case heard by the Supreme Court since *Citizens United*, the Court clarified explicitly that the rights of corporations are not equivalent to the rights of living, breathing human beings. While the term “personal privacy” clearly applies to natural persons under Freedom of Information Act (FOIA) Exemption 7(C), the Court read it not to apply to the alleged privacy of artificial persons.¹⁷ The Court relied

11. *Wilson v. United States*, 221 U.S. 361 (1911). The Court in *Wilson* did, however, recognize a corporation’s rights under the Fourth Amendment. *Id.* at 375-376.

12. *See, e.g.,* *Nw. Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (stating there is no violation of companies’ Fourteenth Amendment rights when state insurance regulation limited the right of insurance companies to void insurance policies based on purported application misrepresentations).

13. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1646 (arguing that corporate rights of contract in the *Lochner* era were not equivalent to those of natural individuals).

14. Lyle Denniston, *Analysis: The Personhood of Corporations*, SCOTUSBLOG (Jan. 21, 2010, 6:45 PM), <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations>.

15. *FCC v. AT&T, Inc. (FCC v. AT&T)*, 131 S. Ct. 1177 (2011).

16. Denniston, *supra* note 14.

17. *FCC v. AT&T*, 131 S. Ct. at 1185.

on the ordinary meaning of “personal”—not a defined term in the statute—which ordinarily refers to individuals but not artificial “persons” such as corporations. The Court concluded that “personal,” in the phrase “personal privacy,” “conveys more than just ‘of a person;’ it suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like AT&T.”¹⁸

The Court thus made clear that the rights of corporate or “artificial” persons—notwithstanding the alarmist reaction to *Citizens United*—are not on par with the rights of natural or “real” persons. Indeed, Chief Justice John Roberts did not even mention *Citizens United* in his twelve-page opinion. Although the Court did concede that a corporation is a person with certain constitutional rights, it cautioned that the case:

[D]oes not call upon us to pass on the scope of a corporation’s ‘privacy’ interests as a matter of constitutional or common law. The discrete question before us is instead whether Congress used the term ‘personal privacy’ to refer to the privacy of artificial persons in FOIA Exemption 7(C)¹⁹

With this, the Court quickly dismissed any hopes of AT&T’s constitutional corporate rights/personhood saving the day. Instead, the Supreme Court ruled unanimously that corporations are not entitled to the same privacy that human beings enjoy. If *FCC v. AT&T* is any indication of what is to come in future “corporate rights” cases, we can expect decisions that do not so much “open the floodgates for special interests,”²⁰ but a pattern of case-by-case adjudication that treats corporations differently from individuals no more or less than the period following *Santa Clara*.

As *FCC v. AT&T* reinforced, corporations are artificial persons under the law. However, because of their status as “artificial entities,” corporations have never enjoyed rights equal to a natural person’s. But, that does not mean that corporations have no *speech* rights, or had none before *Citizens United*. “Although not equivalent to the speech rights of individuals,” UCLA law professor Adam Winkler explained in 2007, “corporate speech rights do exist.”²¹ For example, in *Central Hudson Gas v. Public Service Commission*, the Court held that corporations have certain types of rights relating to *commercial* speech.²² Additionally, in

18. *Id.* at 1179.

19. *Id.* at 1184.

20. *Statement from the President on Today’s Supreme Court Ruling*, THE WHITE HOUSE (Jan. 21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0>.

21. Winkler, *supra* note 4, at 868 (explaining that there are numerous distinct speech rights enjoyed by corporations).

22. *Cent. Hudson Gas v. Pub. Serv. Comm’n*, 447 U.S. 557, 566-68 (1980) (protecting commercial speech generally by citing consumers’ need for and

First National Bank of Boston v. Bellotti, the Court treated a corporation's *political* speech much the same as the speech of individuals.²³ The concept of corporate personhood is thus, at most, tangential to the Court's jurisprudence regarding corporate speech. Indeed, the speaker's identity is generally irrelevant to First Amendment analysis, which turns instead on the scope of protection for the speech at issue.²⁴

But speech is different from other types of activity that may be protected (or not) in other ways. For instance, corporations are entitled to Fourth Amendment protection against unreasonable searches and seizures, but they are not entitled to the Fifth Amendment privilege against self-incrimination, even if corporate officers are.²⁵ Nor are corporations covered by the Fourteenth Amendment's Privileges or Immunities Clause or Article IV's Comity Clause.²⁶ In each of these contexts, the Court looks not at the ramifications of corporate personhood, but at the nature of the right at issue and whether it makes constitutional sense to extend that right beyond natural persons.²⁷

And so we are left with the idea that corporations are artificial persons that are entitled to certain constitutional rights, rights which sometimes approach but never exceed those of natural persons. But where—apart from Chief Justice Waite's *ipse dixit*—do they get these rights?

III. WHY DO CORPORATIONS HAVE RIGHTS?

One of the “sub-controversies” *Citizens United* reignited was over the nature of the corporation and the legitimacy of its actions.

right to have advertising information).

23. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

24. *See, e.g., id.* at 776 (“The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the law at issue] abridges expression that the First Amendment was meant to protect.”); Larry E. Ribstein, *The First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1031 (2011) (“The First Amendment does not guard corporations’ expressive rights, but rather the public’s interest in hearing what corporations have to say.”).

25. *See Hale v. Henkel*, 201 U.S. 43, 75 (1906) (noting that an individual can refuse to answer incriminating questions but a corporation must “show its hand.”).

26. *Blake v. McClung*, 172 U.S. 239, 259 (1898).

27. Some individual rights implicated in the corporate context are, of course, protected in other (non-constitutional) ways—for example, through common-law tort or statutory corporate governance and securities law. Whether these non-constitutional remedies are themselves wise or well-drawn in their present form are issues beyond the scope of this Article.

There are multiple schools of thought on these conceptual issues, but that academic debate is both beyond the scope of this Article and not necessary to resolve in order to get at the issue of the nature and legitimacy of corporate rights.²⁸ Corporations are useful legal fictions composed of individuals who do not shed their own constitutional rights at the office-building door.

A. Rights-Bearing Individuals

The anti-corporate-rights crowd is correct: a corporation is not a real person. This is a rather obvious conclusion on which most people of all ideologies and jurisprudential backgrounds can agree. Edward, the First Baron Thurlow, put it best: “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”²⁹ And so, as we saw above, the Constitution does not apply to corporations in the same way that it applies to the authors, editors, and readers of this Article. Indeed, many constitutionally protected individual rights simply do not make sense when applied to corporations. For example, the Constitution’s protection of sexual privacy and prohibition of slavery are meaningless in the corporate context.³⁰

However, even though a corporation is not a living, breathing, blood-pumping human being, the individuals who make up those corporations—officers, directors, employees, shareholders—are. It would be a mistake to deny constitutional rights to those individuals on the grounds that the corporation itself is not a real person. The rhetorical tactic of conflating a right with the means used to exercise it is just that—a tactic that misses the larger point: the people who own and operate the corporation are natural, rights-bearing individuals.³¹ Simply because a group of individuals decide to join together and exercise those rights in concert does not result in those individuals losing their rights. Stated another way,

28. For more on the legitimacy of a corporation and the corporation’s authority to act, see, e.g., Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1248 (1979), available at http://stephankinsella.com/wp-content/uploads/texts/ga-l-rev-1979_6.pdf (“set[ting] forth a straight forward defense of corporation’s rights.”).

29. Stephen Bainbridge, *Sonia Sotomayor and the Corporate Personhood*, PROFESSORBAINBRIDGE.COM (Sept. 17, 2009, 2:30 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2009/09/sonia-sotomayor-and-the-corporate-personhood.html>.

30. Ilya Shapiro, *When Individuals Form Corporations, They Don’t Lose Their Rights*, CATO@LIBERTY (Feb. 2, 2010, 7:45 PM), <http://www.cato-at-liberty.org/when-individuals-form-corporations-they-dont-lose-their-rights>.

31. Ilya Somin, *Corporate Rights and Property Rights are Human Rights: Why It’s a Mistake to Conflate a Right with the Means Used to Exercise It*, THE VOLOKH CONSPIRACY (Jan. 21, 2010), <http://volokh.com/2010/01/21/corporate-rights-and-property-rights-are-human-rights-why-its-a-mistake-to-conflate-a-right-with-the-means-used-to-exercise-it>.

individuals standing together as a group should not be stripped of rights that would be constitutionally guaranteed to them standing alone.

The contention that the Constitution does not protect individuals organized as a corporation ignores the absence of a constitutional distinction between individuals and groups of individuals, however associated. People are free to organize and associate in a whole host of manners and the decision to use the corporate form—as opposed to a partnership, a union, an informal club, or an unincorporated group of friends—to pool their assets does not strip them of constitutional rights such as the freedom of speech.³²

Indeed, common sense tells us that corporations must have some constitutional rights—or there would be little incentive to form them in the first place. For example, if corporations had no Fourth Amendment rights, the police could storm corporate offices and cart off computers and files for any or no reason. If corporations had no Fifth Amendment rights, the mayor of New York could exercise eminent domain over Rockefeller Center by fiat and without compensation if he decides he'd like to move his office there. If forming a corporation means losing all of these (and other) constitutional protections, the only form of business would be sole proprietorships and the proverbial Mom 'n' Pop shops.

Similar to the above Fourth and Fifth Amendment examples, the Constitution has to protect the First Amendment rights of people associated through the corporate form. But that corporate form does not create new constitutional rights; it's simply a vehicle through which individuals exercise their own rights. "[T]he Court has long understood that to speak effectively in a vast nation, you need to be able to pool your resources with others."³³ The Court has recognized this within the realm of the right to expressive association, and corporate speech is but one form of expressive association. As Chief Justice Roberts said in his concurrence in

32. See, e.g., *Citizens United*, 130 S. Ct. at 900 ("[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.'" (quoting *First Nat'l Bank of Boston*, 435 U.S. at 784)) ; Larry E. Ribstein, *Corporate Speech is About Real People Speech*, IDEOBLOG, (March 13, 2010), <http://busmovie.typepad.com/ideoblog/2010/03/corporate-speech-is-about-real-people-speech.html> ("*Citizens United* is about the speech rights of real people acting through associations. If you take away the speech rights of people acting through corporations, you have to decide which other types of associations you want to apply that to. Unincorporated firms? The ACLU? You might be surprised that your theory is more likely to apply to the ACLU than to *Citizens United*.").

33. Eugene Volokh, *Constitutional Rights and Corporations*, THE VOLOKH CONSPIRACY (Sept. 22, 2009, 12:44 PM), <http://volokh.com/posts/1253637850.shtml>. See also Ribstein, *supra* note 24, at 1036 ("Shareholder-maximizing firms may be the most efficient way for these shareholders to express and effectuate these pro-business views.") (footnote omitted).

Citizens United, “the First Amendment protects more than just the individual on a soapbox and the lone pamphleteer.”³⁴

B. Useful Legal Fictions

The law gives corporations, which are indisputably non-human entities, the status of “legal persons” that, like natural persons, have various rights (as well as privileges, responsibilities, liabilities, and other attending consequences under common, statutory, and constitutional law). But the reason corporations have these rights is not because they are “legal persons” (which is just a useful construct for dealing with them in a legal setting). Instead, corporations are merely one of the ways in which the aforementioned rights-bearing individuals associate to better engage in a whole host of constitutionally protected activities. What we think of as corporate actions—speech or otherwise—is therefore just individuals using the corporate form to act (including to communicate a message). Therefore, the specific rights at issue are the rights of the individuals who own and operate the corporation, not the rights of the corporation itself.

A corporation’s personhood is thus a useful and necessary legal fiction—and not just for the exercise of free speech rights. Indeed, “the legal conceit that companies are natural persons is vital to capitalism.”³⁵ No one is saying that the corporation is a real human being, but simply that it has the power to form certain legal relationships, to behave as a (legal) person for certain purposes.

Personhood facilitates commerce and allows corporations to more effectively participate in transactions. Corporate personhood is also useful because a corporation, along with being an aggregation of rights-bearing individuals, is essentially a nexus of contractual relations. “Government regulation of corporations obviously impacts the people for whose relationships the corporation [sic] serves as a nexus.”³⁶ In this context, it is essential to protect the parties to various contracts that the corporation can enter into.

Legal personhood also allows the corporation to “stand for” the constantly changing group of individuals behind the scenes. In a practical example, imagine if a company were required to list all of its stakeholders—including employees and shareholders—on every corporate document, press release, or court filing. This would be an intolerable burden, would make the documents

34. *Citizens United*, 130 S. Ct. at 803 (Roberts, J., concurring).

35. Schumpeter, *Peculiar People: How Far Should One Push the Idea that Companies Have the Same Rights as Ordinary People?*, THE ECONOMIST, Mar. 24, 2011.

36. Bainbridge, *supra* note 29.

impenetrably long, and, given changes in stock ownership and employment, would make the documents quickly out-of-date. The law recognizes this and allows the corporation, acting through its officers with the consent of its owners, to speak, act, and sue in the corporation's own name. That is, "[c]ompanies can act like individuals when it comes to owning property or making contracts."³⁷ Moreover, legal personhood facilitates the adjudication of legal or even constitutional disputes arising out of the collective action of the individuals comprising that corporation.³⁸

The concept of legal personhood in this context reinforces the anthropomorphization of corporations—speaking of them as if they really were monolithic entities with human characteristics. For example, we say “Time Warner did this” or “Google said that.” It’s almost impossible to talk about large companies without anthropomorphizing them.³⁹ But companies are just groups of individuals organized in the corporate form, not real people, so to say that Google the corporation did anything is, again, indulging in useful legal fiction. While acknowledging that the corporation-as-a-person is a necessary and useful legal fiction, it is also “important to remember that this is still a fiction that we embrace to facilitate protection of the rights of individuals.”⁴⁰

Whether or not one accepts the notion of the corporate person as a mere legal fiction, however, the result is the same: corporations are entitled to certain constitutional rights. “If you accept the legal fiction of the corporation as a separate person, then taking its property violates its rights. But if you reject that fiction, as a means of arguing that the corporation should lack rights, then taking its property violates its owners’ rights.”⁴¹ Either way, the result is the same: the Constitution—the Takings Clause, in the example above—applies to protect the rights of the individuals affected. And either way, the legal fiction that a corporation is a person should be utilized because it makes the analysis easier, but does not alter the results.⁴²

C. Preserving Democracy

But constitutional rights aren’t solely designed to protect individuals. They are also intended to check government power

37. Schumpeter, *supra* note 35.

38. Bainbridge, *supra* note 29.

39. Stephen Bainbridge, *Who Owns the Corporation? Nobody*, PROFESSORBAINBRIDGE.COM (Feb. 13, 2006), <http://www.professorbainbridge.com/professorbainbridgecom/2006/02/who-owns-the-corporation-nobody.html>.

40. *Id.*

41. Volokh, *supra* note 33.

42. *Id.*

and ultimately preserve democracy.⁴³ For example, the right to a trial by jury and other procedural protections prevent the government from punishing dissenters through arbitrary arrest, search, and imprisonment.⁴⁴ Freedom of speech is equally important in that vein; it allows for the free flow of ideas without censorship and eliminates the risk of those in power suppressing criticism. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people."⁴⁵

As UCLA law professor Eugene Volokh explains, this rationale of constraining government power applies equally to corporate rights:

Consider for instance, *First National Bank of Boston v. Bellotti*, where the Court clearly held that corporations generally have free speech rights. The Massachusetts legislature wanted the voters to give the legislature the power to impose an income tax. Various corporations—which is to say, the managers of the corporations, whom the stockholders gave the power to speak on behalf of the corporations—opposed the income tax. So to get the tax enacted, the legislature banned corporations from speaking out about most proposed ballot measures. If the government had the power to shut out one large set of speakers from the public debate, it would have tremendous power indeed.⁴⁶

In short, a world without corporate speech rights necessarily implies a world where government is empowered to shut down speech because it does not like criticism of its policies—a profoundly undemocratic development. If only individuals acting alone can speak, unable to pool resources efficiently, that speech will be less effective and the government less constrained.

D. *The State Giveth, the State Taketh Away?*

Another argument advanced against corporate rights contends that the government is the sole source of corporate rights—if the law, a creature of government, did not recognize corporations, they would not exist—and so the government has the power to limit and define those rights. Under this theory, rights-bearing individuals are not entitled to constitutional protections when they use the corporate form because corporations are "state-created entities." And since corporations exist only because of government-issued licenses—not to be confused with the monopoly-granting "charters" of the corporations that existed in the early days of the Republic—the government can attach conditions on those licenses to define and limit the entities' rights

43. *Id.*

44. *Id.*

45. *Citizens United*, 130 S. Ct. at 898 (citing *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976)).

46. Volokh, *supra* note 33.

in any way it pleases.⁴⁷ While this claim is slightly different than the “corporations aren’t real people” argument, it shares many of the same weaknesses.

First, the Supreme Court has long recognized that the government does not have a free hand to impose conditions on grants of benefits.⁴⁸ Although the government has significant power to define the rules of property, contract, and corporate law—and some additional power to attach strings to certain grants of benefits⁴⁹—that power does not include the ability to impose unlimited conditions on the enjoyment of a particular benefit. This is so, particularly when the would-be condition is the waiver of a constitutional right. For instance, a state can say that you have to be sixteen years old and pass a road test to get a driver’s license, but it cannot say that to get that license you must refrain from criticizing the DMV. Similarly, a state can subject corporations to all sorts of environmental and accounting regulations, but it cannot prohibit them from speaking.

And that makes sense: if the government had the ability to impose conditions on any “state-created institution,” it would have virtually unlimited power over people’s lives. What if it conditioned the grant of a marriage license on the agreement, on penalty of law, to have only one child or—in light of the Ponzi scheme our welfare entitlements represent—to have at least two? Or, returning to a previous example, what if, to preserve the mayor’s options for future office space, the government conditioned the grant of a corporate charter on that company’s waiver of its Fifth Amendment rights?

Moreover, if you accept the notion that the government has plenary authority over “state-created entities,” it is difficult to find a limiting principle of the object of that authority. As George Mason University law professor Ilya Somin has said, nearly everyone and everything can be categorized as a state-created entity. If the notion of a state-created entity is defined broadly, to

47. Ilya Somin, *Should People Acting Through Corporations be Denied Constitutional Rights Because Corporations are “State-Created Entities”?*, THE VOLOKH CONSPIRACY (Jan. 22, 2010, 4:52 PM), <http://volokh.com/2010/01/22/should-people-acting-through-corporations-be-denied-constitutional-rights-because-corporations-are-state-created-entities>.

48. Volokh, *supra* note 33. The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.

49. *See, e.g.*, *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 553-54 (1983) (determining that a 501(c)(3) organization can be barred from electioneering with tax-exempt funds so long as it could have a 501(c)(4) affiliate that was free to use non-tax-exempt funds); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973) (holding that government employees can be barred from participating in partisan politics); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99 (1947) (same).

refer to the “particular bundle of legal rights currently attached to the corporate form, then . . . virtually all other organizations are ‘state-created entities’ as well” (e.g., universities, schools, charities, churches, partnerships, sole proprietorships, etc.).⁵⁰ Even individual citizens might fall into the definition because citizenship is a state-created designation or status which grants its holder myriad rights and benefits.

On the other hand, if “state-created entity” is defined narrowly, then it would not include most corporations because even if the corporate status was abolished by statute, most corporations would still exist and continue to engage in their business activities.⁵¹ Indeed, corporations arise through private, contractual arrangements and can exist without state participation.⁵² Even if the government abolished the corporate form, most companies would continue to engage in the same business or nonprofit activities—but under different, and probably less efficient, legal statuses (LLCs, partnerships, joint ventures, etc.). There would still be a demand for the products produced by these ex-corporations because economic forces are not dependent on state sanction. Corporate actions are thus really the responses of various people acting under the corporation’s authority to meet the demand of other people in the marketplace.⁵³ We thus circle back to the theme of this Article—that corporate rights are bound up in individual rights.

IV. WHAT ABOUT MEDIA CORPORATIONS?

A. *Media Corporations Are Corporations, Too*

If we accept the argument that corporations, for whatever reason, should not enjoy constitutional rights, then it follows that the government would be free to censor all corporations, including those that own the WALL STREET JOURNAL, NEW YORK TIMES, Fox News, MSNBC, NATIONAL REVIEW, etc. That is so because nearly every newspaper, broadcaster, and political journal in the country is a corporation. So are most nonprofit advocacy groups: if corporations lack constitutional rights, then the government would

50. Somin, *supra* note 47.

51. *Id.*

52. Pilon, *supra* note 28 at 1320; Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUPREME COURT ECONOMIC REVIEW 95, 100 (Univ. of Chicago Press, 1995) (“Government “creates” corporations only in the sense that it “creates” other types of contractual relationships—by enforcing them. If government action is unnecessary to create the important features of the corporation, the corporate person theory can stand only on normative arguments that justify extraordinary government regulation of the corporate form.”).

53. For more on the legitimacy of a corporation and the corporation’s authority see generally Pilon, *supra* note 28.

be free to stop the ACLU or the NRA from expressing their views—and remember that Citizens United itself is an “education, advocacy, and grass roots organization [that] seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security.”⁵⁴ Even corporately structured religious groups, such as the Catholic Church, would not be able to voice their beliefs. All our major sources of information, including private universities, would be stripped of their constitutional rights, meaning that these outlets would maintain their freedom of speech at the government’s pleasure alone.

There is something intuitively wrong with that state of affairs. Even if the government would never in a million years censor the news (and why not?) every government that can do—we should not have to rely on our rulers’ continued good graces for the enjoyment of our liberty. As Chief Justice Roberts said during the *Citizens United* oral argument, “we don’t put our First Amendment rights in the hands of FEC bureaucrats”⁵⁵

Moreover, there is no principled way to confine the denial of corporate constitutional rights to the realm of political (or other) speech. “After all, the supposed power to define the rights of state-created entities isn’t limited to free speech rights.”⁵⁶ If corporations aren’t protected by the First Amendment, then the government could also forbid religious services on corporate property—including property owned by churches organized as nonprofit corporations. And again, the government would not be bound to respect corporate rights under the Fourth Amendment, Fifth Amendment, and so on.

B. “The Press” Is an Activity, Not A Speaker

Nevertheless, some contend, citing the First Amendment’s protections of the “freedom of speech or of the press” that media corporations are different. Because “the press” is singled out for protection, the argument states that media corporations enjoy First Amendment rights greater than other types of corporations.

The first shortcoming of the “press is different” argument is the practical problem of defining who the press is. In the age of blogs and other social media, how do you define “the press”? Is anyone with a platform to speak or reach a wide audience to be

54. *Who We Are*, CITIZENS UNITED, <http://www.citizensunited.org/who-we-are.aspx> (last visited May 30, 2011).

55. Transcript of Oral Argument at 66, *Citizens United*, 130 S. Ct. 876 (2010) (No. 08-205) available at [https://a.next.westlaw.com/Document/Ica6d4a6b067311dfa7e0c40c26bf1b92/View/FullText.html?transitionType=UniqueDocItem&contextData=\(sc.DocLink\)&userEnteredCitation=130%20S.%20Ct.%20876&originationContext=Unique%20Find](https://a.next.westlaw.com/Document/Ica6d4a6b067311dfa7e0c40c26bf1b92/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.DocLink)&userEnteredCitation=130%20S.%20Ct.%20876&originationContext=Unique%20Find).

56. Somin, *supra* note 47.

considered a member of the press? If so, what is a “wide” audience? Does this include a threshold number of Facebook friends or Twitter followers?

That definitional problem is only the tip of the doctrinal iceberg. The contention that “the press” is different because the First Amendment singles it out fails not because it is difficult to apply to modern modes of communication, but because it is an incorrect reading of constitutional text. That is, in the corporate rights context, it is irrelevant that the First Amendment specifically mentions “the press.”

While today we commonly refer to news and media agencies, such as the WASHINGTON POST and CNN, as “the press,” that term as used in the text of the First Amendment is not addressing these entities (whether organized as corporations or otherwise). Nor does it grant “the press” superior or distinct First Amendment protections. As stated by Adam Liptak of THE NEW YORK TIMES:

There is little evidence that the drafters of the First Amendment meant to single out a set of businesses for special protection. Nor is there much support for that idea in the Supreme Court’s decisions, which have rejected the argument that the institutional press has rights beyond those of the other speakers.⁵⁷

Instead, the First Amendment speaks of freedom of the “press” as a certain type of protected activity, not a specific class of protected persons:

‘[F]reedom of the press’ is not a constitutional right for a particular group of people or organizations. Rather, it is a right to engage in a certain class of activities (such as publishing newspapers and pamphlets), whether the person doing so is a professional member of the media or not.⁵⁸

Freedom of speech is blind as to the nature of the speaker. As Justice Scalia said during his review of historical evidence of the meaning of the First Amendment in *Citizens United*, “[t]he Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals”⁵⁹

If all that is true, then there is no reason why General Electric, which owns NBC, should enjoy greater First Amendment protections than its competitors Siemens or Citigroup. And no

57. Adam Liptak, *In Arguments on Corporate Speech, Press is a Problem*, N.Y. TIMES, Feb. 7, 2011, at A12.

58. Ilya Somin, *People Organized as Corporations are People Too*, THE VOLOKH CONSPIRACY (Jan. 21, 2010, 5:12 PM), <http://volokh.com/2010/01/21/people-organized-as-corporations-are-people-too/>.

59. *Citizens United*, 130 S. Ct. at 929 (Scalia, J., concurring).

principled reason why the “press activity” of a hypothetical CITIZENS UNITED DAILY JOURNAL would be protected while that of Citizens United, the advocacy group—or even a fictional CitizensU, the widget manufacturer—would not.

V. CONCLUSION

The charge that corporations “aren’t people” and thus should not be afforded constitutional rights is legally baseless and logically irrelevant. Justice Stevens was right that corporations are not real people and “have no consciences, no beliefs, no feelings, no thoughts, no desires.”⁶⁰ But it is a convenient legal fiction to grant corporations a certain personhood and, more importantly, corporations consist of human individuals who enjoy a panoply of constitutional protections.

When rights-bearing individuals associate to better engage in a whole host of constitutionally protected activity, their constitutional rights remain fully intact. These individuals do not lose their right to speak or act simply because they chose to exercise those rights by pooling their resources in a corporate form.

While corporations are not entitled to the same rights as natural persons, they are entitled to *some* rights. If you pierce their corporate veils, they will not bleed. But if you ban their political speech, they will suffer constitutional offense.

60. *Id.* at 972 (Stevens, J., dissenting).