Corporate Personhood and the Rights of Corporate Speech

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My objective here is to provide a little historical background on business corporations and their place in First Amendment law. In the course of that overview, I will also make a few observations that I believe can be helpful in thinking about corporate speech rights. First, I will argue that one aspect of the constitutional status of corporations—the notion of corporate personhood—has not played the central role in shaping corporate speech rights that some believe. Corporations have free speech rights, but they are more limited than those held by individuals. Second, I will argue that there is not a single right of corporate speech. Rather, there are at least four distinct free speech rights held by corporations. Each one is subject to its own set of rules and restrictions, and there are a number of inconsistencies in the reasoning of the relevant decisions, breeding a set of doctrines with little coherence. I will conclude with some thoughts on the effectiveness of limiting corporate speech in an age of "loose" corporate law.

I.

When the Founders established the principle of free speech in both the Federal and state constitutions, corporate speech was far from their minds. There were very few corporations at the founding, with estimates of only about six corporations chartered in the U.S. at that time.[1] Moreover, in the early decades of the U.S., the states exercised considerable control over corporations that made them unlikely holders of so-called rights against the government. Corporations could only be formed

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1. *See* Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903). Corporations grew rapidly in the immediate aftermath of the American Revolution, with estimates of approximately 350 business corporations formed between 1783 and 1801. *See* Oscar Handlin & Mary F. Handlin, *Origin of the American Business Corporation*, 5 J. ECON. HIST. 1, 4 (1945).

by an affirmative grant by the legislature and were required to have a "public purpose."[2] As part of this process of state chartering, states dictated corporate affairs with a fine eye for detail—setting the rates companies could charge, providing for government inspection, and establishing firm limits on corporate powers.[3]

In the landmark decision of *Dartmouth College v. Woodward*,[4] decided in 1819, Chief Justice John Marshall emphasized that a corporation was "an artificial being, invisible, intangible, and existing only in contemplation of law."[5] But this decision also held that state power was not unlimited. The charter given by the state to the corporation, Marshall wrote, was a contract that the state was bound to respect.[6] The basis for this ruling was a fundamental fact of the corporate form in the context of constitutional law: corporations are formed by real individuals and those individuals have constitutional rights against the state.[7] Corporations receive constitutional protection, as Dartmouth College did, in order to protect the constitutional rights of the individuals behind the artificial entity.

States easily maneuvered around the *Dartmouth College* decision by adding to new corporate charters provisions permitting the states to revise their bargains.[8] Because incorporators agreed to this contractual provision, they could not complain. Effectively, then, states were able to continue to regulate corporate affairs with vigor. This continued even after the adoption of "general" or "free" incorporation laws in the mid-1800s, which broadened access to corporations, diminished the necessity for an affirmative act of the legislature, and led to a wave of corporate formation.[9]

In 1868, the Fourteenth Amendment was added to the Constitution.[10] Its most significant provision, Section 1, guarantees to all

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2. "[A]t its origin . . . the corporation was conceived as an agency of the government, endowed with public attributes, exclusive privileges, and political power, and designed to serve a social function of the state." Handlin & Handlin, *supra* note 1, at 22.

3. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 210. For illustration of the detailed requirements of corporate charters, in this case New York turnpike companies, see Daniel B. Klein & John Majewski, *Economy, Community, and Law: The Turnpike Movement in New York, 1797-1845*, 26 LAW & SOC'Y REV. 469, 484–85 (1992).

4. 17 U.S. 518 (1819).

5. *Id.* at 636.

6. *Id.* at 643–44.

7. According to Marshall, "It is chiefly for the purpose of clothing bodies of men, in succession, with qualities and capacities, that corporations were invented, and are in use." *Id.* at 636.

8. *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1616–17 (1988).

9. *See* JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 9 (1970).

10. U.S. CONST., amend. XIV.

"persons" due process of law and equal protection of the laws. Although corporations were widespread and well known at this time,[11] the Framers of the Fourteenth Amendment did not intend to grant corporations these rights.[12] One member of the congressional committee that drafted the Fourteenth Amendment however—Roscoe Conkling of New York—argued to the Supreme Court on behalf of a railroad company that the drafters silently intended to include corporations within the ambit of the Amendment,[13] giving rise to what has been called the "conspiracy theory" of the Fourteenth Amendment.[14] No independent evidence to support his claim has ever been uncovered.[15]

Nevertheless, in 1886, the Supreme Court issued an opinion in the case of *Santa Clara County v. Southern Pacific Railroad*[16] that would establish corporate personhood. Prior to oral argument, Chief Justice Morrison Waite 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."[17] When the court reporter included this statement at the beginning of the published opinion,[18] corporate personhood was established—without argument, without justification, without explanation, and without dissent.

This doctrinal development coincided with the dawn of the giant management corporations.[19] Fed by a national economy, broader stock

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11. *See* SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER AND IDEOLOGY 42 (1996).

12. *See* CHARLES FAIRMAN, 2 RECONSTRUCTION AND REUNION 1864–88, at 724 (1987) (concluding that "the framers of the Fourteenth Amendment did not have corporations in view"); Ins. Co. v. City of New Orleans, 13 F. CAS. 67, 68 (C.C.D. La. 1870) (No. 7052) (rejecting 14th Amendment personhood for corporations in light of the "history of the submission by Congress, and the adoption by the states . . . so fresh in all minds as to need no rehearsal").

13. *See* Charles A. BEARD & MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 111–13 (rev. ed. 1937); FAIRMAN, *supra* note 12, at 725–28. Conkling's argument, which was made in *San Mateo v. Southern Pacific Railroad*, 13 F. 722 (C.C.D. Cal. 1882), is reprinted in HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 606 (1968).

14. *See* BEARD & BEARD, *supra* note 13, at 111; Howard Jay Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); Howard Jay Graham, *The "Conspiracy Theory of the Fourteenth Amendment: 2*, 48 YALE L. J. 171 (1938) [hereinafter Graham, *Conspiracy Part Two*]; Andrew C. McLaughlin, *The Court, The Corporation, and Conkling*, 46 AM. HIST. REV. 45 (1940).

15. *See* Graham, *Conspiracy Part Two*, *supra* note 14, at 384–85.

16. 118 U.S. 394 (1886).

17. *Id.* at 396.

18. *See* THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 107–08 (2002).

19. *See* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

ownership separated from corporate control, and the liberalization of corporate law to remove longstanding limits on corporate powers—such as the doctrine of ultra vires—American business became organized largely around the business corporation.[20] Less and less were corporations controlled by state corporate law; increasingly they were run by professional, salaried managers.[21]

According to some critics of *Santa Clara*, the decision placed business corporations on par with natural individuals, with each entitled to the same rights under the Constitution.[22] But equivalent rights for corporations did not follow from *Santa Clara* and, indeed, in subsequent years the Supreme Court allowed the states to cabin the rights of corporations in ways not possible in the context of individuals. For example, in the *Lochner* era, when the Supreme Court held that individuals enjoyed a liberty of contract that prevented states from interfering with private business relationships, the courts upheld state laws limiting corporations' contractual rights.[23] Although recognizing corporate rights under the Fourth Amendment, the Court also held that, unlike individuals, corporations do not have a Fifth Amendment right against self-incrimination.[24]

In the realm of freedom of speech, corporate rights have never been equivalent to those of individuals. In the early 1900s, Congress and the majority of state legislatures adopted laws completely barring corporations from contributing money to candidates for public office.[25] These laws remain in effect, even though individuals cannot be subjected to such a ban. In the 1930s and 1940s, the Supreme Court first began to offer judicial protection for the constitutional guarantee of free speech

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20. *See* Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L.J. 871, 907–08 (2004); Hovenkamp, *supra* note 8, at 1659–64.

21. *See* William Bratton, *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 STAN. L. REV. 1471, 1487–88 (1989).

22. *See* HARTMANN, *supra* note 18, at 5–6. This view is especially prevalent in the anti-corporate activist community. *See, e.g.*, William Meyers, *The Santa Clara Blues: Corporate Personhood Versus Democracy*, http://www.mcn.org/e/iii/afd/santaclara.html (last visited November 15, 2006); Richard L. Grossman & Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation* (1993), http://www.ratical.org/corporations/TCoB.html (last visited November 15, 2006); Joel Bleifuss, *Know Thine Enemy*, IN THESE TIMES, Feb. 8, 1998. For dissenting views, *see* Hovenkamp, *supra* note 8, at 1643 (arguing that *Santa Clara* was based on practical convenience of naming corporations, rather than their shareholders, in litigation); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 67 (1992) (arguing that *Santa Clara* was not meant to express a pro-big business theory of the corporation).

23. *See, e.g.*, Nw. Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243 (1906). *See also* Hovenkamp, *supra* note 8, at 1646 (arguing that corporate rights of contract in the *Lochner* era were not equivalent to those of natural individuals).

24. *See* Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

25. *See* Winkler, *supra* note 20, at 926.

for individuals.[26] At this same time, broad restrictions on corporate speech were enacted in the form of the federal and state securities laws. These laws imposed strict limits on a variety of corporate speech relating to their businesses in the name of protecting investors.[27]

In the 1970s, the Supreme Court held that corporations have some free speech rights in *Central Hudson Gas v. Public Service Commission*[28] (commercial speech) and *First National Bank of Boston v. Bellotti*[29] (political speech). Yet, contrary to the criticisms of corporate personhood, corporate speech rights are still not equivalent to individual speech rights. For example, corporations are still barred from using their general treasury funds to support candidates for office.[30] Instead, business corporations have to raise this money through voluntary contributions to separate, segregated accounts. Individuals, of course, cannot be barred from using their "general treasury accounts" to finance political contributions and required to use segregated funds.[31]

Moreover, to the extent the Court has recognized First Amendment rights of corporations, corporate personhood was not central to those decisions. The Court was more inclined to rest the argument for corporate speech on the right of listeners, for whom the underlying information would be useful.[32] *Bellotti* was clear that asking if corporations had First Amendment rights was "the wrong question."[33] Indeed, the *Bellotti* decision stated that the corporate identity of the speaker was irrelevant.[34] None of the major corporate speech decisions rely on the *Santa Clara* decision.

Thus, corporate personhood has played a smaller role in crafting corporate constitutional rights than many believe. In addition, corporate constitutional rights, including the freedom of speech, are not equivalent to the rights enjoyed by natural persons.

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26. *See* Schneider v. New Jersey, 308 U.S. 147, 160 (1939); Grosjean v. Am. Press Co., 297 U.S. 233 (1936); Gitlow v. New York, 268 U.S. 652 (1925).

27. *See* HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION 93–106 (1995) (arguing that provisions of federal securities law are unconstitutional abridgements of speech).

28. 447 U.S. 557 (1980).

29. 435 U.S. 765 (1978).

30. 2 U.S.C. § 441b (2000).

31. *See* Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECT. L.J. 361 (2004).

32. *See, e.g.*, *Bellotti*, 435 U.S. at 777.

33. *Id.*

34. *Id.*

II.

Although not equivalent to the speech rights of individuals, corporate speech rights do exist. Indeed, there are numerous distinct, identifiable speech rights enjoyed by corporations.[35] There are at least four different corporate speech rights, and potentially five. Each one is subject to different doctrinal requirements and legislative burdens. And there is a considerable degree of inconsistency in the reasoning and rationales behind them.

First, there is the right of commercial speech. Under *Central Hudson Gas, Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*,[36] and related decisions, corporations have the right to propose commercial transactions and to advertise their goods and services. As I mentioned, the Court did not rely on corporate personhood to protect this speech right but relied instead on the right of consumers to the information.[37] The identity of the speaker was more or less ignored. Moreover, the corporate right of commercial speech can be limited. Courts apply a form of intermediate scrutiny to burdensome laws,[38] and states may regulate the content of commercial speech to insure it contains truthful information—something states cannot do with regard to political speech.[39]

The second corporate free speech right pertains to electoral speech concerning ballot measures. Here, *Bellotti*, where the Court held unconstitutional a Massachusetts law barring corporations from spending money to influence ballot measure campaigns,[40] applies. Under *Bellotti*, laws burdening this type of corporate political speech are subject to a higher standard than commercial speech: strict scrutiny.[41] Although *Bellotti* announced that the corporate identity of the speaker was not a relevant consideration under the First Amendment, Justice Lewis Powell's majority opinion was not totally blind to corporate organizational dynamics. For example, Powell did consider whether the ban on ballot measure speech was justified by the state's interest in protecting dissenting shareholders from supporting corporate political expenditures chosen

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35. There are ample reasons why we might decide not to accord business corporations First Amendment speech rights. By law, corporations are not free to choose any perspective; rather they must pursue business purposes. Moreover, the legal commitment of management to shareholders envisions unidimensional, exclusively profit-oriented shareholders. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995 (1998).

36. 425 U.S. 748 (1976).

37. *See, e.g.*, Cent. Hudson Gas & Elec. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 567–68 (1980).

38. *See id.* at 564–65.

39. *See, e.g., id.* at 563–64.

40. *See* First Nat'l Bank of Boston v. Bellotti 435 U.S. 765, 795 (1978).

41. *See id.* at 786–89.

by management. But Powell bought into the traditional corporate law argument as to why regulation to protect shareholders is unnecessary: "shareholders normally are presumed competent to protect their own interests," he wrote, citing to the "procedures of corporate democracy" and derivative suits against management.[42]

Since being handed down in 1978, *Bellotti* has been the starting point for discussion of corporate political speech rights. Yet it is easy to exaggerate the importance of *Bellotti*. There is another line of Supreme Court cases on corporations' ability to speak about electoral matters, one which allows a considerable amount of regulation of corporate speech. In an often-overlooked series of early Supreme Court campaign finance cases decided between 1948 and 1972[43]—what I call the *Segregated Fund Cases*[44]—the Court held that corporations and unions could be required to finance candidate-related speech through separate, segregated funds rather than through general treasury funds. Although any law barring corporations and unions from collecting voluntary contributions from members to use in electoral politics would raise the "gravest doubt . . . as to its constitutionality,"[45] the state could protect dissenting financial supporters from being forced to fund political speech. These cases establish the third corporate speech right: a right to candidate-related speech, which may be subject to special financing rules designed to protect dissenting members. In contrast to *Bellotti* and the commercial speech decisions, the cases coming out of this third corporate speech right are all about protecting shareholders and employees. Corporate form here is key to shaping the constitutional right.

In numerous cases decided after *Bellotti*, the Court has made clear that the segregated fund framework survived that landmark decision. Indeed, in each subsequent case *Bellotti* was not treated as a landmark but relegated to a footnote, distinguished away and limited to its particular facts. In *FEC v. National Right to Work Committee*, the Court upheld a federal campaign finance law that restricted corporations and unions from soliciting money from anyone but their members for their segregated funds.[46] According to the Court, "the special characteristics of the corporate structure require careful regulation," and it was appropriate to "treat[] unions, corporations, and similar organizations differently from

42. *See id.* at 794–95.

43. Pipefitters v. United States, 407 U.S. 385 (1972); United States v. Autoworkers, 352 U.S. 567 (1957); United States v. CIO, 335 U.S. 106 (1948).

44. *See* Winkler, *supra* note 31, at 361 (analyzing the influence of the segregated fund framework in contemporary campaign finance law).

45. *CIO*, 335 U.S. at 121.

46. 459 U.S. 197 (1982).

individuals."[47] In *Austin v. Michigan Chamber of Commerce*, decided in 1990, the Court upheld a state bar on corporations using general treasury funds to finance independent advocacy in favor of candidates.[48] The law required corporations to finance such expenditures through voluntarily raised, segregated funds. The state was entitled to adopt these restrictions to prevent corporations from using the "state-conferred" benefits of the corporate form, which enables them to raise money for economic purposes, "to obtain an unfair advantage in the political marketplace."[49] Implicit in the reasoning of the Court was a concern for protecting dissenting shareholders.[50] In *FEC v. Beaumont*, decided in 2003, the Court once again stated that it was constitutionally permissible to require business corporations to use segregated funds for candidate-related speech.[51] And in *McConnell v. FEC*, which upheld most provisions of the McCain-Feingold campaign reform law, the Court held that the "ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage in express [political] advocacy. That has been this Court's unanimous view. . . ."[52]

Bellotti, then, is of potentially limited significance when it comes to corporate political speech rights. It is worth emphasizing that the law involved in that case was very broad and did not allow corporations to establish separate, segregated funds to finance ballot measure speech. Moreover, the strict scrutiny standard established in *Bellotti* has not proven fatal to laws with segregated fund options; the corporate speech restrictions in *Austin* and *McConnell* are notable examples of that supposedly rare breed—strict scrutiny survivors. This raises the unanswered question of whether even corporate speech related to ballot measures can be restricted to speech financed through separate, segregated funds.

Finally, there is a fourth (and possibly even a fifth) corporate speech right. The fourth right is the right to non-election-related political speech—or, alternatively phrased, speech about general matters of public concern. The Supreme Court first addressed this type of law in *Consolidated Edison Co. v. Public Service Commission*, which involved a regulation barring public utilities from including in monthly bills inserts discussing controversial issues of public policy.[53] The Court invalidated the

47. *Id.* at 209–10.

48. 494 U.S. 652 (1990).

49. *Id.* at 659–60 (internal quotations omitted).

50. *See* Adam Winkler, *Beyond* Bellotti, 32 LOY. L.A. L. REV. 133 (1998) (showing how concerns for protecting shareholders underlie *Austin*).

51. 539 U.S. 146 (2003).

52. 540 U.S. 93, 203 (2003).

53. 447 U.S. 530 (1980).

law under strict scrutiny.[54] Here, unlike in the Segregated Funds Cases, the corporate identity of the speaker was ignored; the Court offered no discussion of how the particular organizational dynamics of the utility affected the underlying right.

The interesting question is whether corporate speech on general matters of public concern can be limited in other ways. This was the issue raised by the recent case of *Nike v. Kasky*, which involved a suit against the shoemaker for taking out allegedly misleading advertisements defending its labor policies in overseas factories.[55] The Supreme Court appeared poised to strike down the California law but abruptly dismissed the case without reaching the merits. Invalidation of the law would have been in line with established First Amendment doctrine on speech related to matters of public concern, where Oliver Wendell Holmes' notion that the marketplace (not the government) is the arbiter of truth has long been the norm.

But such a decision might well have called into question aspects of the securities laws. If a corporation has a First Amendment right to make uninhibited public announcements, a number of important provisions would be called into question. These include the current rules regulating prospectuses—such as the mandatory silent period imposed on new issuers of securities[56]—and the proxy solicitation rules, which compel corporations to include unwanted speech in communications to shareholders.[57]

One might respond that the securities laws cover commercial speech, which is subject to more regulation than political speech. But commercial speech doctrine allows government to restrict false or misleading speech, while the securities laws apply even to completely *truthful* speech. Communications to potential investors and proxy solicitations are burdened regardless of their truth. The same can be said for Regulation FD—which requires corporations to disclose information to the market as a whole rather than to selective, most favored recipients.[58] The Supreme Court would not likely want to undermine over seventy years of federal securities laws. Recognizing a broad right of corporations to speak about matters of public concern might have that unfortunate effect.

Should a case like *Nike v. Kasky* be decided anytime soon, the Court may well craft a fifth corporate free speech right: a new set of rules to oversee regulation of corporations to preserve the integrity of the capital markets. Under this speech right, corporations can be sharply

54. *Id.* at 541 et seq.
55. 539 U.S. 654 (2003).
56. *See* Securities Act of 1933, 15 U.S.C. § 77e (2006).
57. *See* 17 C.F.R. § 240.14a-8 (2006).
58. *See id.* § 243.100.

restricted in the name of protecting actual and potential investors. Here it will be hard for the courts to ignore corporate organizational dynamics, as protection of one group of corporate members (shareholders) from the potential misconduct of another group (managers) is the whole purpose of the regulation.

III.

Finally, let me offer a sobering observation about the effectiveness of restrictions on corporations' First Amendment rights. Even if the courts were to permit the banning of corporate political speech entirely, corporate influence and power would not be substantially reduced. Consider, for example, what happened in the wake of the Tillman Act of 1907, the federal law that banned corporations from contributing general treasury funds to candidates. Did corporate interests cease to exercise undue control over electoral politics? Hardly. Instead, the executives and financiers of corporations redoubled their own efforts to influence politicians to favor corporate interests, using their own money.[59] That such money was made up for by increased salary taken from the corporate till was predictable.

The same phenomenon will occur with any broad restriction on corporate political speech. The executives and bankers behind the major corporations in America are the richest class of citizens outside of Major League Baseball All-Stars and Oprah Winfrey. The problem, in a nutshell, is corporate law. This body of "regulation"—and I use that term loosely—does almost nothing to limit the use of company funds by corporate executives. Fiduciary duties of care and loyalty are not offended by salaries and compensation packages that offend every other sensibility.[60] The capital markets are no solution either. Although contractarian scholars have for the last three decades touted the ability of efficient capital markets to discipline corporate management,[61] the markets have shown that even remarkably excessive forms of self-dealing evade punishment. The result is that if we restrict the political speech of Nike, you can be sure that Phil Knight, the company's founder and board Chairman, will finance the same ads and pursue the same political power. And he will do it with money he takes from the corporation through compensation or stock.

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59. *See* JAMES K. POLLOCK, JR., PARTY CAMPAIGN FUNDS 127–28 (1926).

60. *Cf. In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006) (holding that $130 million severance package for executive fired shortly after hiring did not breach fiduciary duties).

61. *See* Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985) (detailing and criticizing the contractarian argument).

Even if the fictional entity as such did not have constitutional rights, such as free speech, the actual persons behind the corporation—as John Marshall recognized almost 200 years ago—will continue to have them. In light of current corporate law, corporate executives will find a way to exercise those rights with the help of other people's money.