Neither Persons nor Associations: Why Recent Corporate Law Scholarship Undercuts Citizens United and the Constitutional Rights of Corporations

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NEITHER PERSONS NOR ASSOCIATIONS: WHY RECENT CORPORATE LAW SCHOLARSHIP UNDERCUTS CITIZENS UNITED AND THE CONSTITUTIONAL RIGHTS OF CORPORATIONS

ABSTRACT

This Article challenges the Supreme Court’s practice of extending constitutional rights to corporations, using Citizens United (2010) as the focal point of its analysis. Originally, corporations were understood to receive all their rights in grant from government. This precluded their holding constitutional rights against government. In the late 19th century, two new theories arose that conflate corporations with natural persons and thus attribute to corporations some of the rights of natural persons: (1) the “association” theory, which treats the corporation as little more than an association of natural persons, and (2) the “real entity” theory, which treats the corporation as an independent entity with interests, ends, and knowledge of its own, like a natural person. Under their influence, the Court began, and continues, to extend constitutional rights to corporations. Both theories are drawn on as justification for the result in Citizens United.

Recent corporate law scholarship shows that neither theory is tenable. The corporation is a property-owning entity entirely distinct from natural persons. It is thus not an association. Furthermore, the corporation’s very existence depends on legal privileges that can only be provided by government. It is thus not a real entity, but a legal artifice. These considerations return us to the original “grant” theory of the corporation, with its negative conclusion on corporate constitutional rights. Being dependent on government, not just for benefits, but for its very existence, a corporation cannot hold constitutional rights against government. Corporations do, however, hold property and contract rights, which they receive by charter. And any of their current constitutional rights could be provided by statute.
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INTRODUCTION

In 2009, the U.S. Supreme Court used the case of Citizens United v. FEC to once again raise the question of what rights corporations have under the U.S. Constitution. And once again the Court, in its 2010 opinion, affirmed and broadened corporate rights, extending to corporations the full political speech rights of citizens, with no limit on what they may spend for or against a political candidate.¹

The U.S. Constitution makes no mention of corporations or corporate rights. Indeed, the framers were so concerned about the possibility of privileged monopolies squeezing out ordinary citizens that they did not endow Congress with the traditional right of Parliament to charter corporations, let alone expressly extend constitutional rights to corporations.² Absent textual mention of corporate rights, the extension of constitutional rights to corporations has rested on the drawing of a connection between corporations and natural persons of sufficient intimacy to impute to the former the constitutional rights of the latter.

Two ways of drawing this connection suggest themselves. First, the corporation might be construed as an association of natural persons. If a corporation is merely an association of natural persons, then the rights of the corporation are the rights of these persons, which may include constitutional rights. Elaboration of this metaphor produces what I will call the

¹ 130 S. Ct. 876 (2010).
² Adolf Berle, Economic Power and the Free Society, in ANDREW HACKER (ED.), THE CORPORATE TAKE-OVER 87 (1964). This had the default consequence of devolving the chartering of corporations to the individual states, although the Marshall Court subsequently held the right to charter corporations to be an implied federal power. See McCulloch v. Maryland, 17 US 316 (1819).
“association” theory of the corporation. Second, the corporation might be construed, not merely as an artificial legal person, which no one disputes, but as an independent entity with interests, ends, and knowledge of its own. That is, it might be construed as itself a kind of natural person, deserving at least some of the constitutional rights of natural persons. Elaboration of this metaphor produces the “real entity” theory of the corporation. These theories gained prominence in the late 19th century, and under their influence, the Court began, and continues, to extend constitutional rights to corporations, on grounds that corporations are “persons” or “associations of persons.” Concepts from both theories are drawn on in the *Citizens United* opinion.

The currency of these theories, within business schools, law schools, and on the Court, rests on long-standing and widespread misapprehensions of the nature of the corporate form. This misapprehension of the corporate form is not surprising. Corporations are legally complex. What is more, it is only within the past decade that, thanks to some pioneering corporate law

3 Other names that have been used for this theory are the “partnership” theory, arguing that corporations are like partnerships of shareholders; the “trust” theory, arguing that corporations are like trust funds of their propertied shareholders (MORTON HORWITZ, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 94 (1992)); the “property” theory, arguing that corporations are the collective property of shareholders (William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002)); and the “contractual” theory, arguing that corporations are formed by bilateral contracting among shareholders, managers, workers, suppliers, and other involved parties (Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Economic Organization*, *American Economic Review* 777 (1972)). In other words, the theory has acquired disparate names depending upon the implication that the author wishes to highlight of reducing the corporation to natural persons in association.
scholarship, we have a full view of their legal attributes and the indispensable role of government in providing these attributes.  

In light of this scholarship, it becomes clear that the association theory and real entity theory are mistaken in the connections they draw between corporations and natural persons. Against the association theory, this scholarship shows that the corporation cannot be reduced to an association of natural persons. Indeed, a principal point of incorporating is to create a legal entity with property and contractual liabilities entirely separate from those of the natural persons who manage it or invest in it. Against the real entity theory, this scholarship shows that, even though the corporation has an existence independent of its members, it has no existence independent of government. All the key legal rights and duties that comprise the corporate entity can only be created and sustained by government overriding the common law and statutory rules of property and contract. They cannot be created from within these rules through bilateral contracting among private individuals. They are a government grant. The corporation, therefore, does not have the independence from government that would qualify it as a kind of natural person capable of holding constitutional rights against government.

The force of these arguments returns us to a third theory of the corporation, the original theory of the corporation, which in its main points was undisputed for centuries. This is the “grant” theory, which holds that the corporation receives its existence and its rights in grant from


5 See infra Parts II and IV.

6 See infra Parts II and V.
government. In contrast to the association theory, the grant theory maintains that the corporation is an entity distinct from its members. In contrast to the real entity theory, it maintains that the corporation is an “artificial” entity, not a “real” one. That is, it is a construct of legal rights existing only in contemplation of the law and by virtue of legal fiat.

In the grant theory view, corporations may assert *contractual* rights against government (suing government for breach of contract, for example), since contractual rights are part of what they are granted. But because corporations derive their very existence from government, they have no reserved rights against government and thus should not be able to assert constitutional rights against it. It was presumably the grant theory perspective that Justice Sotomayor was contemplating when she noted, in the reargument of *Citizens United*, that “there could be an argument made that that was the Court’s error to start with … that the Court imbued a creature of State law with human characteristics.” This Article shows how strong this argument is when fleshed out with the insights of recent corporate law scholarship.

This Article uses *Citizens United* as a focal point of analysis, not only because of the decision’s significance for American democracy, but because the majority opinion draws on both of the above theories, making it a paradigmatic example of the Court’s reasoning in all of its decisions extending constitutional rights to corporations. Its flaws are reflected in all.

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8 *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886) (non-binding headnote stating that corporations are persons within the meaning of the Fourteenth Amendment); *Minneapolis & St. Louis Railroad v. Beckwith*, 129 U.S. 26 (1889) (Fourteenth Amendment right to judicial review of state legislation concerning the deprivation of property and equal protection of the laws); *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893) (Fourteenth Amendment right to judicial review of federal legislation and action for due process
It is too much for this or any one Article to rebut each of the opinions from *Santa Clara* forward that have conferred constitutional rights on corporations. Naturally, any final conclusion on corporate constitutional rights must await such work. However, the critique of the *Citizens United* decision offered here uses arguments that will apply to the gamut of these decisions with relatively minor modifications in each case. If a constitutionally relevant connection between corporations and natural persons cannot be maintained, then it is not only the *speech* rights of persons that fail to pass through to corporations. *All* rights of persons fail to pass through.

This position appears radical only if one forgets how radical it was to extend constitutional rights to corporations in the first place,⁹ or if one forgets that there are other ways

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⁹ For example, the *Review of Reviews*, a highly regarded liberal reform journal from the turn of the 19th century, described *Smyth v. Ames* (171 U.S. 361 (1898), for the first time striking down a state law regulating railroad rates as an unconstitutional taking of property without due process of law, as “a Dred Scott decision which says that white men have no right that any
for corporations to acquire rights. In the author’s view, some of the constitutional rights corporations currently enjoy are reasonable rights for them to have. They can and should be enacted by statute. But they should not have constitutional status.

Part I first reviews the major points of contention in *Citizens United* before narrowing the discussion to the central and most fundamental point of contention, over whether the First Amendment allows Congress to impose greater restrictions on corporate speech than citizen speech. It then shows how the justices invoke, implicitly or explicitly, each of the three theories of the corporation in their arguments for or against the right to restrict corporate speech, with justices in the majority invoking (in a self-contradictory fashion) the association theory and real entity theory, and Justice Stevens, in dissent, invoking the grant theory.

Finally, Part I explains why it is necessary to adjudicate among these three theories to settle the constitutional question of corporate speech rights. The majority opinion often reads like an absolute protection of speech, regardless of the identity of the speaker and regardless of consequences. However resistant the majority may be to consequentialist qualifications of the free speech principle, the identity of the speaker does matter to members of the majority in at least one respect. Namely, they, like the Court as a whole, hold that election expenditures by non-citizens are not protected speech.\(^\text{10}\) The key question, therefore, becomes whether corporate entities have a connection to citizens and citizenship sufficient to justify First Amendment protection of their election expenditures.

It is at this point that theories of the corporation become relevant and indeed unavoidable. Theories of the corporation offer the most developed and best defended claims about the nature of the connection between corporate entities and the natural persons involved with them. The corporation is bound to respect.” *The Progress of the World*, 17 *The American Monthly Review of Reviews*, No. 1, 387, 403 (1898).

\(^{10}\) *Benjamin Bluman, et al. v. FEC*, 565 U.S. No. 11-275. Also, *see infra* Part I.C.
nature of this connection determines whether it makes sense for the rights of natural persons to pass through to the corporation, or, *a fortiori*, the rights of citizenship to pass through to the corporation.

Each of the three theories provides a different account of the nature of the corporation’s connection with natural persons and thus has different implications for the constitutional rights of corporations. The association theory sees the corporation as constituted by its members through normal, if complicated, bilateral contracting. From this it can be argued that the rights of the corporation are simply the rights of its constituting members, which may include constitutional rights. The real entity theory sees the corporation as a kind of group agent with a will and knowledge of its own that emerges from the interactions of individuals but is not reducible to them. Since it is distinct from its members, the corporation does not possess the rights of its members. However, as a kind of “person,” it possesses rights of its own, and if construed as a person within the meaning of the Fourteenth Amendment, it is arguable that the corporation possesses certain constitutional rights. Finally, the grant theory sees the corporation as an abstract legal entity possessed of rights, such as the right to own property and make contracts in its own name, which it receives through government charter. It is, in its legal form, a creature of government and cannot hold constitutional rights against its creator.

All legal theories of the corporation boil down to one or another of these three.\(^{11}\) The question is if there is a way to adjudicate among them. Recent corporate law scholarship allows us to do so. It identifies the legal attributes of the corporation and, importantly, shows whether these attributes are (or could be) created by bilateral contracting, or are emergent properties, or must be provided by legal fiat of government.

Part II draws on this scholarship to lay out the legal attributes of corporations, as contrasted with the legal attributes of partnerships. It focuses on the attributes of the business

corporation especially, as it is the most complicated corporate form. (The case of non-profit corporations is reserved to Part VII, where it can be more readily treated in light of the discussion of for-profit corporations.) Emphasis is placed upon three attributes especially: (1) asset lock-in, which prevents investors from withdrawing corporate assets, (2) entity shielding, which prevents the creditors of investors from levying against corporate assets, and (3) limited liability, which prevents firm creditors from levying against the assets of investors. The first two attributes, although less well known, are the most indispensable to the business corporation. Without them, one does not have a corporation, but a partnership. After all three attributes have been explained, an economic theory of the corporation is developed which justifies emphasizing these three attributes in particular. It shows how all three work together to provide corporations with competitive advantages over partnerships and proprietorships in specific economic settings.

Part II then shows that these attributes, to be possessed in full, must be provided by government. Private parties can use contract law to create temporary asset lock-in and partial limited liability for a firm, but they cannot create either of these fully and permanently. And entity shielding cannot be created by private parties at all. In their full form, all are government grants. They are legal privileges born of government overriding the reigning rules of property and contract for the sake of creating and maintaining the corporate form.

Parts III through V evaluate the three theories of the corporation, drawing on the discussion in Part II of the corporation’s attributes and dependence upon government. Part III evaluates the grant theory and shows it to be well-founded, in that the key attributes of the corporation are and must be provided by government grant.

Part IV evaluates the association theory. It recounts the theory’s origins and shows the theory’s shortcomings. In particular, drawing on the analysis of Part II.E, it shows that corporations cannot be reduced to natural persons in association. This undercut the argument that the constitutional rights of shareholders should pass through to the corporation. Importantly, Part IV also explains why corporate assets cannot be construed as the property of shareholders. They are the property of the corporation. This undercuts the specific claim that the constitutional
right of shareholders to spend their money in elections justifies the right of corporate management to spend corporate funds in elections on their behalf. Shareholders can sell their shares and spend the proceeds on elections, fully vindicating their speech rights. The assets of the corporation are not theirs to spend.

Part V evaluates the real entity theory, describing its origins and shortcomings. It shows that, while the corporation has an existence independent of its members, it has no existence independent of government. It is an “artificial” legal person, not a “real” quasi-natural person. This undercuts the potential claim that corporate management has a constitutional right to spend corporate funds on behalf of the corporation as if it were itself an independent person under the Fourteenth Amendment. *A fortiori* it undercuts the notion that the corporation is in any sense a citizen with citizenships rights that management is responsible for vindicating.

Part VI provides a summary of the evaluations of Parts III-V. It reiterates the validity of the grant theory, the mistakes of the association theory and real entity theory, and the negative implications of this for corporate constitutional rights. If corporations are legal entities distinct from natural persons, and if the very existence of these entities depends upon government fiat, then their claim to constitutional rights against government regulation makes no sense. The First Amendment in particular—“Congress shall make no law … abridging the freedom of speech or of the press…”—refers to freedoms held by individuals prior to and independent of government that government may not abridge. If there are no corporations prior to and independent of government, the First Amendment cannot be said to apply to them.

Part VII addresses the seeming anomaly of corporate media companies, which fall under the First Amendment’s express protection of press freedom. It then applies the reasoning of the previous Parts to the case of non-profit corporations. It concludes that, although exception might be made for them because they are less indebted to government privileges than are for-profit corporations, their existence is also dependent on government intervention, and therefore they, too, do not merit constitutional rights. A Conclusion follows which points to the generalization
of the arguments in this Article to other cases of corporate constitutional rights besides those of political speech.

I. THE CITIZENS UNITED DECISION

The Citizens United decision leaves untouched the limits on direct contributions to political candidates that Congress has imposed on corporations and citizens alike. Further, it adds nothing to the existing right of corporations and citizens to spend unlimited sums on issue ads. What it does is strike down the Bipartisan Campaign Reform Act of 2002 as amended by §203 (BCRA §203), which barred corporate treasury funds from being used to advocate directly for or against a candidate—that is, to “electioneer”—in the immediate run-up to an election.12

A. Major Points of Contention between the Majority and Minority Opinions

The majority’s holding is assailed by the dissenting minority on both procedural and substantive grounds. Of the substantive bones of contention, there are three, any of which, if resolved the other way, would have reversed the decision. One is over whether independent expenditures by corporations can corrupt a politician or give rise to the appearance of corruption. The dissent argues the expenditures can.13 The majority defines corruption more narrowly and determines independent expenditures do not corrupt.14 A second disagreement is over shareholder protection, with the dissent arguing that BCRA §203 is justified as a means of protecting shareholders from being compelled to fund corporate political speech, and the


14 Id. at 908-11.
majority arguing that “shareholder democracy” provides sufficient protection to shareholders.\(^\text{15}\) I will not address these two disagreements here, but will instead focus on the third and most fundamental substantive disagreement on which the case turned.

This third disagreement is over whether the First Amendment allows the government to impose greater restrictions on corporate speech than citizen speech. As Justice Stevens writes in dissent, “The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its ‘identity’ as a corporation…”\(^\text{16}\) The dissent rejects this premise; the majority affirms it. Behind this explicit disagreement is an implicit disagreement over the theory of the corporation.

B. Three Theories of the Corporation in \textit{Citizens United}

1. \textit{The Association Theory}

In its argumentation, the majority opinion vacillates between two contradictory theories of the corporation.\(^\text{17}\) According to one theory, the corporation is an association of individuals—or, as Justice Kennedy prefers to put it in his majority opinion, an association of citizens. “If the

\(^{15}\text{Id. at 977-79.}\)

\(^{16}\text{Id. at 930.}\)

\(^{17}\text{To say that the majority makes use of “theories” is perhaps overly generous, as no member of the majority engages in serious theoretical analysis of the corporate form. In the hands of the majority, the theories are reduced to their core metaphors—the corporation as an association, and the corporation as a person, or speaker. Nonetheless, these metaphors do argumentative work for the majority, and since they have been the subjects of serious theoretical elaboration in other hands, interpretive charity leads one to consider them in their most articulate form and call them theories.}\)
First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the [Government’s position] were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form."  

Similarly, referring to the ruling in Austin that upheld the Congressional ban on corporate electioneering, Kennedy writes, “It permits the Government to ban the political speech of millions of associations of citizens.”  

This theory, which pervades the majority opinion, is reiterated in Scalia’s concurring opinion. “[The dissent] never shows why ‘the freedom of speech’ that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.”

2. The Real Entity Theory  

According to the majority’s other theory, the corporation is itself a kind of individual—a real entity, or “speaker,” albeit with a “corporate identity,” possessed of a “voice” that can contribute to the diversity of viewpoints in public debate. By restricting the speech of corporations,  

The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” And “the electorate [has been] deprived of information, knowledge and opinion vital to its function.” By suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests…. The purpose and effect of this law is to prevent corporations,  

18 Id. at 904.  

19 Id. at 906-07.  

20 Id. at 925; see also Id. at 928.
including small and non-profit corporations, from presenting both facts and opinions to the public.\textsuperscript{21}

Accordingly, restricting corporate speech “interferes with the ‘open marketplace’ of ideas protected by the First Amendment.”\textsuperscript{22}

3. Contradictions between the Majority’s Theories

The pairing of these theories is not coincidental, as each performs argumentative work that the other cannot. The association theory suggests that the corporate form is but a legal veil that, for constitutional purposes, must be pierced to reveal the reality of associating individuals underneath. Since, on this view, a corporation is but an association of individuals, and in particular an association of \textit{citizens}, then denying speech rights to corporations is denying speech rights to citizens.

The majority’s second theory—that the corporation is a real entity, a speaker with ideas of its own—could not get the majority to this conclusion, at least not as straightforwardly. A corporate speaker is most certainly \textit{not} a citizen, and thus no citizen rights would be infringed in restricting this non-citizen’s speech. However, this second theory does other work. Namely, it allows the majority to argue that the corporation has a distinctive viewpoint to contribute to public debate, separate from the viewpoint of natural individuals, and that the public has an interest in hearing this distinctive viewpoint so as to make the most informed choice of candidates. In other words, it identifies the corporation as a contributor to the “marketplace of ideas,” wherein a diversity of opinion is vital to an informed democratic electorate.\textsuperscript{23} This is

\textsuperscript{21} \textit{Id.} at 907 (citing \textit{McConnell v. Federal Election Commission}, 540 U.S. 93, 257-258 (2003); \textit{United States v. CIO}, 335 U.S. 106, 144 (1948)).

\textsuperscript{22} \textit{Id.} at 906 (citing \textit{New York State Bd. of Elections v. Lopez Torres}, 552 U.S. 196, 208 (2008)).

\textsuperscript{23} \textit{Id.} at 898, 907.
something that the association theory cannot do, since if the corporation is just an association of citizens, then it has no ideas of its own distinct from its members and restricting its presence in the marketplace of ideas would be no democratic loss.\(^\text{24}\)

The majority opinion in *Citizens United* is thus at war with itself. The association theory argues that a corporation is reducible to its members and thus deserves the speech rights of its (citizen) members; the real entity theory argues that the corporation deserves to have its speech protected because it is *not* reducible to its members, but has opinions of its own that can add to the marketplace of ideas. Each theory contradicts the argument of the other.

The association theory is the majority’s more important theory. Its argument stands independent of the real entity theory, even though, without the latter, corporations lose any appearance of contributing to the diversity of democratic discourse, and corporate funds become a mere amplifier of the existing speech of shareholders and management.

In contrast, the argument of the real entity theory does not stand alone. Its constitutional force is dependent on the association theory. This is because the viewpoint of the corporation, even if distinct, only merits constitutional protection if the corporation has some tie to citizenship,\(^\text{25}\) so reference must be made back to the association theory for an argument that it does. But a clear inference from the association theory is that corporations have no viewpoints of their own. Each theory thus contributes one piece of a two-piece argument for striking down restrictions on corporate electioneering—that corporations have distinct viewpoints, and that

\[^{24}\text{It is imaginable that the majority, which explicitly and repeatedly embraces the notion that the corporation is an association of citizens, would disclaim that it also embraces the real entity theory, but its argument for the distinctiveness of corporate speech ineluctably commits it to something like the real entity theory.}\]

\[^{25}\text{See infra Part I.C.}\]
they have citizenship status—but each theory also undermines the piece of the argument derived from its companion.

In sum, the majority opinion invokes two contradictory theories of the corporation. Even more awkwardly, while the argument from the association theory can stand alone, the argument from the real entity theory has force only if paired with an inference from the association theory that contradicts it. These contradictions vitiate *Citizens United*, although they do not completely undermine it. However, Parts IV and V argue that neither theory is coherent in its own right.

4. The Grant Theory

In his dissenting opinion, Justice Stevens canvasses, although he does not expressly embrace, a third theory, the “grant” (or “concession”) theory of the corporation. According to this theory, which Stevens rightly notes was the theory universally held by the Framers of the Constitution, a corporation is neither an association of natural individuals, nor itself an independent individual (with a “voice”), but rather is an abstract legal structure imparted with rights and powers that it cannot claim for itself, but receives in grant from its chartering government. John Marshall’s decision in *Dartmouth College v. Woodward*, quoted by Stevens, gives the grant theory one of its classic formulations: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.”

As Stevens notes, most legal scholars dropped the grant theory long ago, for reasons explored below. Stevens’ own invocation of the theory is only to make a historical point, that

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26 *Citizens*, 130 S. Ct. at 948-49 (2010).

27 *Id.*, 950 (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. 510, 518 (1819)).

28 *Id.* at 952.

29 See infra Part III.
“[i]n light of these background practices and understandings” it is “implausible that the Framers believed ‘the freedom of speech’ would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.”

Stevens does not spell out why it is implausible, but it is not hard to see. “We the People” are taken as having constituted the government, providing it with its rights, yet also as having reserved certain rights that may be held against the government. But corporations did not constitute the government. Rather, by the lights of the grant theory, corporations are constituted by government. They thus have no preexisting rights to reserve. Without reserved rights, and without any express rights granted in the constitutional text to corporate entities, it makes no sense, on the grant theory view, for corporations to claim constitutional rights against government. Therefore, Stevens continues, the Court cannot claim that it is acting as the “guardian of ancient values,” or that “constitutional history dictates today’s outcome.”

Nevertheless, Stevens goes out of his way to insist that “[n]othing in [his] analysis turns on whether the corporation is conceptualized as a grantee of a state concession.” Rather than arguing from any particular theory of the corporation, Stevens presents a list of empirical differences between corporations and natural persons that he contends are substantial enough to merit their receiving different constitutionally treatment, whatever theory of the corporation one might hold. First, Stevens points out, “Unlike natural persons, corporations have limited liability for their owners and managers, perpetual life, separation of ownership and control, and favorable treatment of the accumulation and distribution of assets … that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’

30 *Citizens*, 130 S. Ct. at 950 (2010).
31 *Id.* at 952.
32 *Id.* at 971 n.72.
Furthermore, the funds that consumers and investors provide to them reflect economic decisions, and thus cannot be taken as support for corporate management’s political ideas. Additionally, “corporations have no consciences, no beliefs, no feelings, no thoughts, no desires”; and they can be controlled by foreign persons and governments.\textsuperscript{34}

However, the question remains as to whether these differences between corporations and natural persons are constitutionally relevant. Are they differences that make a constitutional difference? Stevens believes they are; the majority, which is not unaware of these differences, does not. In the majority’s view, the fact that the corporation produces speech is a similarity to natural persons that outweighs all these differences. Thus it would appear that, contrary to Stevens’ contention, the issue cannot be settled by the cataloguing of empirical differences alone.

C. Why the Theories Matter: Connecting Corporations to Citizenship

Stanley Fish has provided an analysis of the case that helps explain why appeal to empirical differences between corporations and natural persons cannot settle the question of corporate speech rights. But his pessimistic conclusion that the dispute is therefore rationally irresolvable does not follow. Both majority and minority hold that a connection to citizenship is a precondition of constitutional speech rights, so analysis can proceed to the question of what ties if any corporations have to citizens and citizenship.

As Fish presents it, the difference between the dissent and the majority opinion reflects not so much an empirical disagreement as an underlying divide over whether the First Amendment should be read in a consequentialist or in a deontological, non-consequentialist fashion. For consequentialists, such as Stevens, the First Amendment is a means to secure more

\textsuperscript{33} Id., 971 (quoting \textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652, 658-59 (1990)) (internal quotation marks omitted).

\textsuperscript{34} Id. at 972.
basic values, whether it be truth, self-expression, or, of most relevance in this case, democratic
debate that reflects the distribution of citizen opinion rather than just monied opinion. Viewed in
this light, restrictions on certain speech and speakers can actually advance the ends of free
speech. As Fish summarizes the view,

“The marketplace of ideas can become congealed and frozen; the free flow can be
impeded, and when that happens the only way to preserve free speech values is to curtail
or restrict some forms of speech, just as you might remove noxious weeds so that your
garden can begin to grow again. Prohibitions on speech, Stevens says, can operate “to
facilitate First Amendment values,” and he openly scorns the majority’s insistence that
enlightened self-government “can arise only in the absence of regulation.”35

In contrast, a deontologist (for example, a strict constitutional textualist) regards the strict
following of an authoritative rule to be imperative, regardless of the consequences. Fish writes,

“The cleanest formulation of this [deontological] position I know is given by the
distinguished First Amendment scholar William Van Alstyne: “The First Amendment
does not link the protection it provides with any particular objective and may,
accordingly, be deemed to operate without regard to anyone’s view of how well the
speech it protects may or may not serve such an objective.”

In other words, forget about what speech does or does not do in the world; just
take care not to restrict it. This makes things relatively easy. All you have to do is
determine that it’s speech and then protect it, as Kennedy does when he observes that
“Section 441b’s prohibition on corporate independent expenditures is … a ban on
speech.”36

This contrast in judicial philosophies that Fish points out explains why, for example,
Ronald Dworkin’s forceful rebuttal of the decision in the New York Review of Books will leave
the majority unmoved. Dworkin examines each of the leading theories “of the First
Amendment’s point” and argues that none of the ends that these theories identify is advanced by
corporate electioneering. Specifically, corporate electioneering does not inform the electorate,

35 Stanley Fish, What is the First Amendment For?, OPINIONATOR: EXCLUSIVE ONLINE
COMMENTARY FROM THE TIMES (February 1, 2010)


36 Id.
protect individual dignity, or disclose government corruption. But to focus on the Amendment’s ends as Dworkin does is to assume a consequentialist interpretation of the Amendment, which for the majority is beside the point.

This contrast in judicial philosophies also explains why Stevens’ appeal to empirical differences cannot by itself resolve the dispute. For the deontologist, not only consequences, but also empirical differences among speakers, are irrelevant to the rule that speech be protected.

That said, it does not follow that, as Fish argues, there is no rational way to settle the constitutional question—that it all comes down to a question of philosophical gestalt, whether one is a consequentialist or deontologist. Intimations of another possible approach to resolving the dispute can be found in the majority’s hint that it would uphold restrictions on the speech of foreign controlled corporations. In other words, at some level, the identity of the speaker does matter to the majority. Kennedy’s insistence on describing corporations as associations of citizens, rather than just as associations of persons, suggests so as well. As does Justice Alito’s mouthing of the words “not true” in response to President Obama’s statement in his 2010 State of the Union address that the decision “will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.” Specifically, if the justices in the

37 Ronald Dworkin, The Decision that Threatens Democracy, 58 NEW YORK REVIEW OF BOOKS 8, 63 (May 13, 2010).

38 Dworkin also never addresses the majority’s central contention that corporations are associations of citizens. If true, it arguably undoes all of his arguments, since all the hypothesized ends of the First Amendment then would be advanced.

39 Citizens, 130 S. Ct. at 911 (2010); see also the opinion of Stevens to the same effect, Id., 946-47.

majority incline toward deontology, they are nevertheless deontological nationalists, believing that the First Amendment only protects citizen campaign contributions. This is confirmed by the Court’s summary affirmation in *Bluman v. FEC* (2012) of a district court’s dismissal of a case challenging the portion of the Federal Campaign Election Act of 1971 that bars non-citizens from spending in U.S. elections. In sum, that corporations have some tie to American citizenship is, in the view of the Court, a precondition of their receiving First Amendment protection for their political expenditures. Therefore, even if the majority cannot be accused of empirical blindness, the possibility remains that it has committed a category error, positing a false tie between corporations and citizenship.

The question that therefore must be answered is whether corporations have a connection to citizens or citizenship such that certain rights of citizenship pass through to them. It is within theories of the corporation that we find the most developed claims about the nature of the connection between corporate entities and natural persons. Therefore, contrary to Stevens’ disavowal, the question of whether corporation speech and citizen speech can be regulated differently does turn on one’s theory of the corporation. Indeed, the question of whether any of the rights of persons should pass through to corporations turns on one’s theory of the corporation. To settle the question of corporate constitutional rights, it is necessary to adjudicate among theories of the corporation and their core claims about the connection between corporations and natural persons.

II. THE CORPORATE FORM: ATTRIBUTES, ADVANTAGES, AND DEPENDENCE ON GOVERNMENT

In recent years, corporate law scholarship has deepened our understanding of the corporate form to a point where it is now possible to pronounce with some assurance on the

cogency of each of the three competing theories of the corporation. The present Part lays out the central legal attributes of the business corporation, shows their respective contributions to the corporation’s economic success, and asks how the corporation acquires these attributes. If these attributes of the corporation arise from nothing more than a series of contracts among private persons, then a plausible, if difficult, case could be made that the corporation is an “association of citizens” and that its rights are the rights of its associating members. But if only government can provide these attributes, then the grant theory is correct that the corporation has no existence independent of government and cannot claim the constitutional rights of persons against government.

A. Contractual Individuality

The most central privilege of a corporation, whether for-profit or non-profit, is its right to own property, make contracts, and sue and be sued, as a unitary legal entity. I will call this the corporation’s “contractual individuality,” which is not the same thing as a corporation having “constitutional individuality.” Other properties and privileges have been enjoyed by corporations at various times, such as centralized management under a board structure, the right of management to impose regulations on those within the corporation’s jurisdiction, and the privilege of perpetual existence. But contractual individuality has been a defining feature of all


43 See infra Part V.B.

corporations back to Roman times.\textsuperscript{45} Without it, a corporation is not a corporation, but a partnership.

Contractual individuality is significant, in that it separates the property and liabilities of the corporation from its agents and, additionally, eliminates many of the coordinating costs and other transaction costs classically born by general partnerships. It is proper to call it a privilege, since it cannot be secured through the bilateral contracting of private parties, but must be provided by government.\textsuperscript{46} For example, a group of friends, having created an informal lending library by pooling their respective book collections, cannot unilaterally decide, no matter the content of the contracts they sign with one another, that the courts will treat the books of the library as library property, allow contracts to be made in the library’s name with its books as collateral, or allow lawsuits to be filed in the name of the library. These are the attributes of contractual individuality, and they are in the grant of government, via a corporate charter.

This by itself casts doubt on the notion that corporations possess constitutional rights against government, since their most basic trait of contractual individuality comes in grant from government. It would not be a persuasive rejoinder to point out that natural individuals, too, are often granted privileges by government—as when senior citizens are granted the right to a social security payment—without thereby forgoing their claim to constitutional rights.\textsuperscript{47} These two grants are simply of a different order, since, in the case of corporations, the privilege granted brings the corporation into its very existence, creating a legal individual where no individual existed before. Contractual individuality is a constitutive privilege, not simply a legal benefit.

\textsuperscript{45} See Williston (1888), supra note 42.

\textsuperscript{46} For legal devices partially able to simulate legal unity without corporate status, see \textsc{DuBois Armand}, \textit{The English Business Company after the Bubble Act}, 1720-1800 216ff (1983).

\textsuperscript{47} This majority makes this point in \textit{Citizens}, 130 S. Ct. at 905 (2010).
I return to this point when taking up the case of non-profit corporations. But the case of the for-profit business corporation requires a more extensive analysis because of the layer of legal complexity that is added by its possessing a permanent joint stock.

B. The Joint Stock Mechanism

What distinguishes the modern business corporation from its non-business cousins is that the business corporation has annexed to it a joint-stock mechanism. This turns the corporation into an investment vehicle with a license to make and distribute a profit. It also increases the capital-raising capacity of the corporation, allowing it to pool the capital of numerous investors. Is the joint stock mechanism an attribute of the business corporation that can be provided independent of government, or must it too be provided by government?

To answer this, it is necessary to understand how the corporate joint stock mechanism works. For the pooling of capital in a corporation is no ordinary pooling. It is pooling done in such a way as to preserve the corporation as a separate contracting individual, by converting investor capital into a separate corporate fund. As we will see, this wedding of a joint stock mechanism (which provides superior capital-raising capability) to contractual individuality (which provides superior liquidation protection) is what gives the corporate form of business its special economic advantages over proprietorships and partnerships.

Part II.C isolates the special property rules that convert investor capital into a separate corporate fund and describes the economic advantages that flow from this. Part II.D asks whether these rules can be secured through contract, or whether they must be provided by government. If it turns out that not only a corporation’s contractual individuality, but also its capacity for capital pooling, must be provided by government, then the case for the independence

\[48 \text{ See infra Part VII.B.}\]
of the corporation from government collapses, as does the case for corporate constitutional rights.

C. Attributes Preserving Contractual Individuality Despite Joint Stock, and their Economic Advantages

1. Asset Lock-in

Partnerships pool capital in a simple and straightforward fashion. Partners put up money, which is used to purchase assets for carrying on the business of the partnership. The partners collectively own these assets. That is, the assets of the partnership remain legally bound to them. For this reason, the partnership falls short of being a separate contracting individual. If a partner leaves, the partnership is dissolved and its assets divided up among the partners; or at the very least, the remaining partners must buy out the withdrawal partner, which might require them to liquidate a portion of firm assets to pay off the withdrawing partner.\(^{49}\)

In contrast, the assets that a corporation purchases with the proceeds from sale of shares are “locked in.” The investors in a corporation become “shareholders” and reclaim the value of their investments only by finding someone to buy their shares. The assets that the firm purchased with their investment remain locked in; the investors have no claim upon them.

The economic consequences of this difference are considerable. A partnership is always under threat of the departure or death of a partner and as a precaution will prefer to keep assets in relatively liquid form for ease of resale.\(^{50}\) In contrast, a corporation can with minimal risk specialize its assets to the production process, and its workers to it specialized assets, increasing

\(^{49}\) See Hansmann, Kraakman, & Squire (2006), supra note 4, at 1387-94.

firm productivity. While a partnership keeps one eye on its liquidation value, a corporation can go “all in” to maximize its going-concern value.\textsuperscript{51}

Nor is this the only benefit. “Asset lock-in,” as we may call this corporate privilege, also improves the credit of the corporation relative to that of a partnership, since the creditors of a corporation do not have to worry about partners liquidating firm assets and rushing out the door, leaving creditors high and dry. This lowers the corporation’s capital cost.

Thus, one sees the advantage for the corporation of being a separate contracting individual with a separate fund: increased productivity through asset specialization, and increased credit through asset security. Asset lock-in is one of the rules of corporate investment that establishes this fund as separate.

2. Entity shielding

But asset lock-in cannot by itself make the separation complete, as can be seen by returning to the example of a general partnership. Imagine that a partner incurs significant credit card debts, or an adverse divorce settlement, or debts from some other business. If the partner’s personal assets are insufficient to pay off the personal creditors in question, the creditors may go after partnership assets. Again the firm is put under threat of liquidation. What Henry Hansmann and Reiner Kraakman have dubbed “entity shielding” is a legal privilege that protects corporate assets from this.\textsuperscript{52} The personal creditor of a shareholder may take the shareholder’s shares, but corporate assets are shielded. It is the conjunction of asset lock-in and entity

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\textsuperscript{51} See Blair (2003), supra note 4, at 387 What Blair calls “capital lock-in,” I call “asset lock-in,” as more concrete and more consistent with the vocabulary of corporate law, which general speaks of assets rather than capital.

\textsuperscript{52} Hansmann, Kraakman, & Squire (2006), supra note 4, at 1333.
shielding that provides the protection from liquidation that allows corporations to specialize their assets and that boosts their credit.

3. Limited Liability

One more legal rule is required, however, to provide for full contractual individuality. This is the rule of limited liability for shareholders, which shields shareholders from the debts of the corporation. Without it, a corporation’s credit would not truly rest on its own assets and future prospects, but, like a partnership, would rest in part on the assets and credit of its investors.

Beyond this, limited liability provides economic benefits of its own to the corporation. Most obviously, it makes the corporation much more attractive than a partnership for small and passive investors. Even a small investment in a partnership entangles the partner in potentially large partnership liabilities. A stockholder, however, is liable only up to the value of the stock held. By attracting small investors, as well as by attracting large but passive investors who wish to diversify through numerous small investments, the corporation can raise great sums at low cost.\(^53\)

Less obviously, limited liability combines with entity shielding to make shares *tradable*. Tradability is critical because, without it, the only point at which corporate investors could recoup their investments would be at the dissolution of the firm, since investments are locked in. Few would invest in a long-term enterprise under such a regime, unless dividends were particularly high. Tradability returns liquidity to investors, allowing them to draw out the value of their shares provided they can find buyers for them.

Why are limited liability and entity shielding necessary underpinnings of tradability? Without them, the real value of shares would fluctuate not only with the prospects of the firm, but also with the financial condition of all stockholders, since the personal assets of the stockholders would be the ultimate foundation of the firm’s credit (as they are in a general partnership). This would make the pricing of shares difficult, to say the least. What is more, it would lead existing shareholders to oppose tradability so as to protect their investments from the dilution that would follow should financially weak investors buy shares (as they would have every incentive to do, with the object of using firm assets as personal collateral).54

In sum, the rules of asset lock-in, entity-shielding and limited liability completely disentangle corporate assets and liabilities from investor assets and liabilities. Because of them, the assets of the corporation alone bond the contracts of the corporation alone. In other words, they preserve the corporation as a separate contracting individual even after it has been turned into a joint-stock investment vehicle. This brings great business benefits. As a separate contracting individual (which is primarily secured by asset-lock-in and entity shielding), the corporation has strong liquidation protection, which increases its productivity (by enabling asset and labor specialization) and lowers its cost of capital (by lowering the risk and monitoring costs of its creditors and investors). Limited liability then lowers the cost of capital even further by lowering investor risk (both directly, and by combining with entity shielding to make shares tradable).

Circumstances remain where the sole proprietorship (with its legal simplicity and frequent tax advantages) and the general partnership (with its greater flexibility in assigning ownership and control) are preferred business forms. But whenever a large quantity of specialized physical capital is called for, the corporate form becomes the legal form of choice.

54 See Id.; Hansmann, Kraakman, & Squire (2006), supra note 4, at 1350.
The required capital is beyond the reach of most sole proprietorships (or partnerships), while the required specialization of capital is beyond the reach of most partnerships.

D. An Economic Theory of the Corporation

The economic benefits provided by these legal attributes may be diagrammed as follows, providing us with the essentials of an economic theory of the corporation—something that, with only one exception, has not be provided by the discipline of economics, which has restricted itself to developing economic theories of the firm in general, without any consideration of their legal forms or why one form is chosen over another.55

Diagram 1: An Economic Theory of the Corporation

Finally, it is crucial to recognize that it is only because of these rules of asset and liability partitioning that there is such a thing as a business corporation. Without them, one is back with a

55 The exception is Margaret Blair and Lynn Stout, A Team Production Theory of Corporate Law 85 VIRGINIA L. REV. 248 (1999). Blair is an economist and Stout a law professor. The theory as diagrammed was developed independently of Blair and Stout, but tracks their theory in part, and the economic insights of the work of Hansmann and Kraakman on entity shielding in larger part. See Hansmann, Kraakman, & Squire (2006), supra note 4.
general partnership. These rules do much more, therefore, than provide economic benefits. They are the *sine qua non* of corporate existence.

E. Dependence of Corporate Capital Pooling on Government

Today, asset lock-in, entity shielding, and limited liability are provided by each state as part of a default package of legal privileges that come with incorporation. But can these attributes only be provided by government, or could an association of natural individuals secure them for itself through a series of bilateral contracts? If they could be secured through bilateral contracting, then business corporations would not be dependent upon the state for their existence in any deep way. They would be, or at least could be, naturally emergent market entities—the independent creations of contracting individuals—rather than government constituted entities. This is the contractual view of corporations.  

Were it true, then it could be argued that the rights of corporations are simply the rights of its constituting members, which pass through to it. And if these members are citizens, then the corporation would bear the rights of their citizenship.

However, the contractual view is not correct. The argument of this Part is that, while limited liability and asset lock-in may be partially established through private contracting, they cannot be fully established through it, and entity shielding cannot be established through private contracting at all.

1. Limited Liability

Among corporate privileges, limited liability receives the most attention, because it is the most obvious and, in the minds of many, the most important.  


limited liability through bilateral contracting. This may be done by having every corporate contract include a rider specifying that, in case of the corporation’s default, the corporate creditor will not levy against the personal assets of the corporation’s shareholders. This is not just a theoretical possibility. In early nineteenth century England—where the Lords Justice, acting as Regents, had made the corporate form largely unavailable after the South Sea bubble—this became a not infrequent practice, gradually, if grudgingly, condoned by the English courts.58

Nevertheless, it would go too far to infer from this that corporations are not dependent on the state, for two reasons. First, such bilateral contracting cannot limit investor liability for corporate torts. For example, these contracts would not exempt the shareholders of a chemical company from liability for groundwater contamination, since the damaged parties (those drinking the water) would not have been party to the contract. Only the legal fiat of government can grant tort protection to investors.59 In the litigious culture of the United States, this is a significant privilege.

Second, limited liability is not the key corporate privilege as most believe. In the past, it was not always granted, and corporations have managed without it (although generally at the cost of advantages such as tradable shares). Indeed, as Morton Horwitz has pointed out, “truly limited shareholder liability was far from the norm in America even as late as 1900.”60 Far more important are the privileges of asset lock-in and entity shielding—the primary constituting


60 Horwitz (1992), supra note 3, at 94.
privileges establishing a corporation as a corporation, a separate entity with its own assets and credit. Therefore it is on asset lock-in and entity shielding that the question really turns.

2. Asset Lock-in

Like limited liability, asset lock-in can also be partially secured through bilateral contracting. Investors simply contract with one another not to withdraw assets for a fixed term of time. This is, in fact, a common arrangement among partners in a partnership, who through this secure for their firm some of the advantages of asset lock-in.\textsuperscript{61} However, corporations enjoy asset lock-in on a permanent basis, whereas courts have viewed contractual arrangements among partners that restrict asset withdrawal beyond a handful of years as inconsistent with the rights of private property, and have been unwilling to honor them.\textsuperscript{62} This is no substitute in industries that require long-term dedication of specialized capital—including almost all manufacturing and resource extraction industries, for example. So again, private contracting is only partially successful in securing the corporate privilege.

3. Entity Shielding

The biggest stumbling block for the contractual view is the privilege of entity shielding. The failure of contractualists to come to terms with this privilege is understandable, given that it is only in the past ten years that the privilege has been properly isolated and analyzed. But it is arguably the lynchpin privilege, combining with each of the others to secure their economic benefits. If it cannot be contracted for, then corporations simply cannot be reduced to the contracts of private parties.

\textsuperscript{61} See Blair (2003), \textit{supra} note 4, at 410.

\textsuperscript{62} See Hansmann & Kraakman (2000), \textit{supra} note 4, at 412.
The device that would have to be used to secure entity shielding through contract is clear. Every investor would have to write a contract with every one of her personal creditors specifying that, in case of non-payment, the creditor could not levy against corporate assets. These creditors would include the banks that might hold her mortgage or car loan, the utility companies and communication and entertainment companies that service her home, and every vender with whom she purchases on credit, from grocery stores to on-line venders.

The most obvious strike against this ever happening is the high negotiation costs involved. But there is an even bigger, less obvious, strike against it. It would be against the interest of every investor to write these contracts. Without the contracts, the investor’s credit would be markedly improved, as the assets of those corporations in which the investor owns stock would back her loans. Signing the contracts would reduce her credit, as she would only have her personal assets to back any loan. Given this adverse incentive to signing, establishing entity shielding contractually would require every investor to monitor the content of the contracts of every other investor, which would be neither feasible nor legal. In conclusion, between the contracting costs and the adverse incentives involved, securing entity shielding through bilateral contracts is out of the question, and there are no historical examples of it. Entity shielding is a privilege that must be provided by government or not at all.63

In sum, of these three legal privileges, limited liability and asset lock-in can be partially secured with the creative use of contracts. However, they cannot be wholly secured. Their provision by government makes them complete and lowers their cost, and thus is properly considered a privilege. What is more, entity shielding must be entirely provided by government. Thus, all of the constitutive attributes of the business corporation—its contractual individuality,

and the rules of asset and liability partitioning that allow it to retain contractual individuality
despite the addition of outside investors—can only be provided in full by government.

III. EVALUATING THE GRANT THEORY

The conclusions of the Part II allow us to evaluate the three theories of the corporation
within *Citizens United*. We begin with the grant theory, mapping its original strength, its
subsequent decline, and its renewed force in light of contemporary scholarship on the
corporation’s legal privileges.

The grant theory was *the* theory of the business corporation on through the Civil War.
There are several reasons for the self-evidence of this theory in the early history of the business
corporation. First, before the era of general incorporation laws, the grant of a charter had a
strong performative dimension. Incorporation involved negotiations between would-be
incorporators and the sovereign (whether Crown or legislature), which, if successful, resulted in
the grant, by special enactment, of a charter, wherein was specified the rights being conveyed.\(^{64}\)
Under such a procedure, the “grantedness” of corporate rights was obvious.

Second, the rights conveyed often included, beyond those discussed above, clear
delentions of sovereignty. The English East India Company and Dutch East India Company,
the world’s first two publicly traded limited liability business corporations, enjoyed monopolies
over trade, and a right to mint coin, imprison law-breakers, establish colonies, declare war, and
negotiate treaties.\(^{65}\) Even in early nineteenth century America, corporate rights generally

\(^{64}\) Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *William
And Mary Quarterly* 51, 54-56 (1993).

\(^{65}\) See Nick Robins, *The Corporation That Changed the World: How the East India
included a monopoly and might additionally include the exemption of incorporators from taxes or even military service. These were hardly normal business rights; they were clear exceptional grants—delegations of sovereignty for undertaking activities that the government supported but did not have the desire or capacity to undertake itself.

Third, the early business corporations were founded in the Age of Absolutism, during which official ideology accorded all rights to the sovereign, with all liberties understood as privileges carved out of this overarching sovereignty. Under this theory, whatever rights were acquired by a corporation would naturally have been understood as privileges in grant.

So long as the grant theory held sway, the idea of corporations having constitutional rights was a non-starter. But over the ensuing centuries, political and business transformations weakened the hold of the grant theory on the legal mind. The absolutist theory of sovereignty was the first to go. Over the course of the English Civil War, the Glorious Revolution, and especially the American independence movement and the French Revolution, theories of natural rights were articulated that turned the theory of sovereignty on its head, suggesting that the rights of government were a grant from the governed rather than the other way around. Meanwhile, corporate privileges were being narrowed down to the core elements discussed in Part II, with corporate monopoly in particular coming under lethal assault from Jacksonian Democrats. Finally, as part of this same Jacksonian assault on monopoly and privilege, states passed general

66 Maier (1993), supra note 64, at 67


68 See Richard Tuck, Natural Rights Theories: Their Origin and Development (1982)

69 Maier (1993), supra note 64, at 76.
laws of incorporation that extended the right of incorporation to all, provided that incorporators paid the requisite fee and abided by specified business practices.\textsuperscript{70}

Combined, these transformations could convey the impression that incorporation and the rights that come with it are a part of normal, “natural” business rights, rather than government privileges. This impression was exploited by corporate lawyers seeking to overthrow the grant theory and replace it with alternative theories more supportive of corporate rights against government regulation.\textsuperscript{71} But as our discussion in Part II shows, the impression is false. Whichever advantages of the corporate form one emphasizes—its contractual individuality, or its inexpensive pooling of large amounts of capital—government granted privileges remain indispensable to corporate existence. It is immaterial whether these privileges are granted through special legislative enactment, as they once were, or through a licensing process under a general law of incorporation, as now. Either way, corporations are brought into being by legal fiats that override the normal rules of property and contract.

The majority opinion in \textit{Citizens United} therefore misses the point when it argues (quoting Scalia’s dissent in \textit{Austin}) that “the State cannot exact as the price of [a corporation’s] special advantages the forfeiture of First Amendment rights.”\textsuperscript{72} What this fails to appreciate is that there is no corporation prior to these “advantages,” and thus no entity with constitutional rights to forfeit.

The surprising implication is that the grant theory of the corporation—old-fashioned though it may be—is seen to rest on a firm foundation once the legal attributes of the corporation are properly identified and analyzed. Corporations do not emerge naturally from the property and contract law of market economies. Rather, government constitutes them by issuing charters

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{See infra}, Part IV.A.

\textsuperscript{72} \textit{Citizens}, 130 S. Ct. at 905 (2010).
that override on their behalf the normal rights of private property and duties of liability, for example, by barring investors from withdrawing their capital contribution, and relieving investors of their liability to corporate creditors. These are legal privileges that are not a mere “advantage” to corporations, but essential to their very existence. However much the modern practice of incorporation may look like a private act, the legal privileges granted to corporations (and not to natural individuals, proprietorships, or general partnerships) belie this appearance and instead show us that corporations, at their very foundation, blur the line between public and private.

The clear implication of the grant theory is that corporations should not be able to claim constitutional rights against government—whether the state government that brings them into existence, or the federal government. On the grant theory view, it makes no more sense to grant constitutional rights to a corporation than it would to grant them to a governmental agency such as the EPA, since both owe their legal existence to government. Nevertheless, it is worth evaluating the other two theories of the corporation that inform the decision in *Citizens United* (and that, in one variant or another, inform all other Supreme Court decisions granting corporations constitutional rights), lest either of these also find ground to rest on, and if they do not, to see where they err.

**IV. EVALUATING THE ASSOCIATION THEORY**

**A. Origins of the Association Theory**

The association theory argues that a corporation is identical with its members, generally with the additional claim that it is formed, rather like a partnership, through voluntary association. As put by Victor Morawetz in 1882, in one of the earliest legal treatises advancing the theory, corporations “are formed by the voluntary association of their members…. Although a corporation is frequently spoken of as a person or unit … the existence of a corporation as an entity, independently of its members, is a fiction; and … the rights and duties of an incorporated
association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.”

We know immediately that this theory is incorrect. Shareholder agreements are not sufficient to establish a corporation; and, as a corporation’s property, credit, and liability are wholly separate from that of its investors, the corporation is a separate legal entity. We can also foresee that, since the corporation cannot be equated with its members, the constitutional rights of its members are not its own. But prior to proper identification and analysis of the corporation’s privileges, this conclusion was not obvious.

The motives behind the development of the association theory were mixed. In some cases, it seems to have been nothing more than an attempt to square corporate theory with the widespread adoption of general incorporation laws. These laws rendered the grant theory obsolete in the eyes of many, who wrongly inferred that, because charters were no longer granted as privileges, but were available to all qualified applicants, then charters themselves no longer grant privileges. The privilege of limited liability would have been the one obvious exception,

73 Victor Morawetz, A Treatise on the Law of Private Corporations Other Than Charitable 2 (1882). For the claim that the corporation is constituted by a contract among shareholder-members, see Id. at 248. For a more polemical treatise in the same vein, see Henry O. Taylor, A Treatise on the Law of Private Corporations Having Capital Stock (1884). In unsystematic form, the analogy of corporations to partnerships goes back much farther and can be found, for example, in the opinions of James Kent, a Federalist member of New York’s Council of Revision, in the first decade of the 19th century. See Ronald E. Seavoy, The Origins of the American Business Corporation, 1784-1855 238-39 (1982).

74 See supra Part II.A and C.

75 See, e.g., the argument of Roscoe Conkling before the Supreme Court in San Mateo County v. Southern Pacific R. Co., 116 U.S. 138 (1885): “[C]orporations … so long as they
but since it was not a universal privilege of incorporation until after 1900, it could be glossed over, while the other key privileges—of asset lock-in and entity shielding—were not yet understood.

For the most part, however, the theory was a weapon in a newly enjoined fight over corporate powers. First, the theory justified an expansion of corporate powers in a number of areas. For example, it provided a way around the *ultra vires* doctrine, the doctrine that a corporation cannot exercise powers beyond those granted in its charter. If, rather than being a grant, a corporation is really but an association of shareholders, and its charter but an agreement among shareholders, then unanimous shareholder consent should be all that is required to overleap a charter’s bounds. Thus, for example, a corporation barred by its charter from expanding outside a specific line of business could now claim the right to do so without state approval, so long as (following the example of partnerships) shareholders unanimously consented.\(^{76}\)

Importantly, the theory was also the first wedge for grafting constitutional rights onto the corporate form. *Santa Clara* (1886) famously declared for the first time, although only in *obiter dicta*, that corporations can have constitutional rights, and in particular the property protections

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\(^{76}\) See Horwitz, *supra* note 3, at 90.
of the Fourteenth Amendment. Its companion case was *San Mateo* (1885), and, in his circuit court opinion in *San Mateo*, Justice Field offered reasoning that, Horwitz has argued, informed the Court’s position in *Santa Clara* as well:

Private corporations are, it is true, artificial persons, but … they consist of aggregations of individuals united for some legitimate business…. It would be a most singular result if a constitutional provision intended for the protection of every person against … discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.  

This is the great appeal of the theory, then as now, for those wishing to extend constitutional rights to corporations. If an association of individuals, a corporation can be said to merit the rights of these individuals, including constitutional rights.

B. Shortcomings of the Association Theory

This theory goes awry at any number of points, however. One problem was recognized immediately: while rationalizing new corporate powers and rights, the theory threatened to undermine existing ones. As Dwight A. Jones cautioned in 1892,

The main value of a corporate charter arises from the fact that powers and privileges are thereby acquired which individuals do not possess. It is this that makes the difference between a business corporation and a partnership. In the former there is no individual liability…. There is no death…. It is not policy therefore for a corporation to break down its own independent existence by burying its original character in the common place privileges of the individual…. Any mingling of corporate existence with the existence of the shareholders will weaken corporate rights.  

The association theory thus proved to be a double-edged sword and was used to attack corporate rights almost as often as it was used to advance them. Many critics went so far as to

78 Quoted in Horwitz, supra note 3, at 70.
79 Quoted in Id. at 91 (italics in original).
argue, in light of it, that incorporation laws should be repealed and all corporations revert to the partnership form.\textsuperscript{80} This contradiction seems lost on the majority in \textit{Citizens United}.

But more than identifying a contradiction, Jones puts his finger on the bigger problem with the association theory, which is that the corporation is a rights-bearing, property-owning entity separate from the individuals who invest in it, work for it, or occupy its offices. Therefore the corporation (arguably unlike a general partnership) cannot be identified with its members. And therefore the rights of its members do not transfer to the corporation.\textsuperscript{81}

The intuition that a corporation is an association likely arises from the fact that this independent legal entity, the corporation, does foster a hive of associative activity. But that does not mean it is itself an association, any more than a dog park is an association by virtue of its bringing people into association.

What is obvious in the case of a dog park is less obvious in the case of a corporation, because we can \textit{see} the dog park and thus know that it is distinct from both its users and funders, in a way that we cannot \textit{see} the separateness of a corporation. It has a separate legal existence,

\begin{flushright}
\textsuperscript{80} \textit{Id.} at 76, 92.
\end{flushright}

\begin{flushright}
\textsuperscript{81} Whether a partnership is an association has become more difficult to say in recent years, given the trend toward making partnerships more corporation-like, both within partnership law and through the proliferation of hybrid forms such as the Limited Partnership, the Limited Liability Partnership, and the Limited Liability Limited Partnership. \textit{See} Hansmann, Kraakman, \& Squire (2006), \textit{supra} note 4, at 1387-97. Still, because the classic general partnership requires unanimous agreement for major decisions, and because partners are jointly and severally liable for partnership debts, it is plausible to refer to it as an association. Also, it remains the case today that in many jurisdictions a withdrawing partner has the right to dissolve the partnership, suggesting that a change in the composition of partners changes the partnership itself, and thus suggesting again that the partnership may be reduced to the individuals in association.
\end{flushright}
but no natural being. Yet in considering questions about rights and property, it is this fact of separate legal existence that matters and that distinguishes a corporation from a true association. Even if a corporation bought back all of its outstanding stock (eliminating its shareholders) and if all employees and managers resigned, the corporation would still exist, because it would still own property and be party to outstanding contracts. In contrast, if all the members of a bridge club or any other association of citizens were to quit, we would certainly say it had ceased to exist, because it has no property and makes no contracts.

C. Property and the Association Theory

The above argument establishes the general proposition that the corporation is an entity distinct from its members, whether shareholders, or Board, or employees. Whatever rights the corporation may have, they do not come from its members.

However, the specifics of the Citizens United case, which is about the use of corporate property, suggests an exception. The exception would be based on the premise that, whether or not the corporate entity is reducible to natural persons, corporate assets and funds are. They are the property of shareholders, who “own” the corporation. This is the prevalent view in law school classrooms and the business press, and it seems to be the view of the Court as well. If true, then it does not matter that the entity holding the funds is not reducible to its members. If corporate funds are the funds of shareholders, then shareholders have a right to spend these funds in elections, just as they have the right to spend the funds in their bank account in elections. And corporate management, as agent of the shareholders, has the right to spend corporate funds on behalf of the shareholders.

This argument seems powerful. The problem is with its premise. That shareholders own the corporation is decidedly not the case, either in logic or law. To see this, we move from the

82 Citizens, 130 S. Ct. at 908.
general question of how corporate rights relate to member rights, to the specific question of how corporate property relates to shareholder property.

1. Corporate Assets are Owned by the Corporation, not by Shareholders

No one ever thinks to ask who owns the books in a university library, or the hymnals of a church, or the office furniture of a charitable organization, or the park benches of a city. Private universities, churches, charitable organizations, and cities, are all organized as non-profit corporations, and it is understood that their property belongs to the corporate entity and not to any natural individuals. Yet as soon as a joint stock mechanism is annexed to the corporation, turning it into a profit-making venture with outside investors, we are led to believe that these investors become the owners, however small a percentage of the financing of a corporation they may provide (with most corporate financing coming from retained earnings, corporate bonds, and bank loans). This belief is false.

Shareholder own shares of stock, reflecting their contribution to the financing of the corporation. The shares may generate dividends for them, and their selling price will go up or down with the prospects of the company as a going concern.

But owning these shares is not at all the same thing as owning corporate assets. Neither individually nor as a body do shareholders have the right to use corporate assets, lend them out, use them as collateral on a loan, or sell them. They may not even claim the profits from the sale of corporate assets, as they would if they were truly the “residual claimants” of corporate property, since dividends are provided at management discretion. Yet these are the rights that follow from true ownership. See Kent Greenfield, The Failure of Corporate Law (2006) 43-47 (rebuttering the notion of shareholder ownership).
would be their responsibility to discharge company debts to corporate creditors. But in reality, corporate creditors are paid first, with shareholders receiving what is left over, as heirs, not owners.\textsuperscript{84}

All of this is a direct result of the combined privileges of asset lock-in and entity shielding, which disentangle corporate assets from investor assets. Having such a separate fund is a central part of what it is to be a corporation. It is therefore quite incorrect to claim that corporate treasury funds are the funds of the associating members. Rather, it is the \textit{corporation} that owns the assets of the corporation, just as it is the corporation that shoulders corporate liabilities. That is what it means to be a contracting individual: to have separate assets to bond one’s contracts. A business corporation is in this regard no different from a church, or a state, or any non-profit corporation such as a university or hospital, all of which are contracting individuals that own their own property and bond their own contracts.

2. The Property Rights of Shareholders do not Pass to Management

The idea of corporate property, distinct from individual property, sits uncomfortably in the Lockean mind. Even though we are surrounded by examples of corporate property and know that it operates under distinct rules of control and liability, we instinctively try to reduce it to the property of individuals. But if this distinction can be fixed in mind, then it becomes relatively easy to identify the error in the Court’s question-begging claim that “associations that have taken on a corporate form” deserve the same right of unlimited election expenditures as individuals and unincorporated associations.

Invoking the association theory, the majority suggests that, when corporate funds are used for political speech, what is really happening is that the funds of associating citizens are being used for speech. As Kennedy complains, “[W]ealthy individuals and unincorporated

\textsuperscript{84} \textit{Wood v. Dummer}, 30 F. Cas. 435 (C.D. Me. 1824) (No. 17944).
associations can spend unlimited amounts on independent expenditures…. Yet certain
disfavored associations of citizens—those that have taken on the corporate form—are penalized
for engaging in the same political speech.”

However, corporate funds are not the personal funds of investors or anyone else. They
are corporate property. This has implications for both shareholder and management use of
corporate funds for political purposes.

With regard to shareholders, it explains why, as a matter of corporate law as well as
sound theory, shareholders do not have the right, either individually or jointly, to spend corporate
funds, regardless of the purpose. This is the prerogative of management. Shareholders who
want to use part of their financial stake in a corporation for political expenditures can and should
sell some of their shares and use the proceeds for this purpose (either spending them directly, or
giving them to a 527 organization for expenditure as part of a proper association). This
preserves their constitutional rights in full. But unlike their shares, which they actually own, the
funds of the corporation are simply not theirs, and therefore their right to spend unlimited
personal funds on political speech does not extend to corporate funds.

The fact that shareholders do not own corporate funds is also why management, whose
prerogative it is to spend corporate funds, does not properly receive the constitutional right to
spend corporate funds without limit on behalf of the shareholders. To say otherwise is to say
that, even though shareholders have absolutely no other property rights over corporate
property—cannot use it, lend it out, borrow on it, or sell it—and have none of the legal liabilities
that come with property ownership, we will nonetheless attribute to them a right to spend
corporate property without limit in elections, and furthermore will posit that, through some
unexplained commutative principle, management gets to exercise this right for them, even if
without any process of authorization and against their will.

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85 *Citizens*, 130 S. Ct. at 908.
In short, just as the corporation, as a separate, government-constituted legal entity, cannot be construed as an association, so the property of the corporation cannot be construed as the property of its “associating members” (shareholders). Therefore, corporate management should not be able to claim a constitutional right to electioneer with corporate property as if they were vindicating the private property rights of their shareholders.

Of course, this does not preclude managers and shareholders from speaking and acting in association on behalf of the corporation. Managers and shareholders may pool their personal funds, without limit, in a 527 organization, which may spend these funds without limit for or against political candidates. In this way, all of their constitutional speech rights and association rights are vindicated. But management cannot claim that the electoral use of corporate funds vindicates the speech rights of shareholders or any other natural person.

In sum, the association theory is riddled with problems:

(1) The corporate form cannot be created through a series of bilateral contracts, but only through government’s legal fiats. The corporation thus cannot be construed as an association. The rights it has are not acquired from its members, and it cannot, in legal logic, claim the constitutional rights of its members.

(2) If the rights of a corporation are derived from its members, why does a corporation receive rights that its members do not have, such as entity shielding, limited liability, and perpetual life? What is more, if rights pass through to a corporation from its members, why do corporations not enjoy all constitutional rights, including the right to vote?

(3) Citizens may pool their personal funds and spend these without limit on electioneering if they so choose. But corporate funds are not the funds of individuals. Unlike with partnerships or other genuine associations, the property, contracts, profits, and liabilities of corporations are entirely separate from those of its members. The use of corporate funds in elections gives voice not to citizens, but to the corporate entity itself.
(4) As discussed at the outset of the next Part, the association theory also flies in the face of the fact that, for over a century, corporate management has enjoyed almost complete autonomy from shareholders in its control over corporate affairs.

V. EVALUATING THE REAL ENTITY THEORY

A separate question from whether managers can use corporate funds to vindicate the speech rights of shareholders is whether managers, as fiduciaries of the corporate entity, have a constitutional right to use corporate funds to speak on behalf of the corporation itself. In other words, does the corporate entity itself have constitutional speech rights that managers may vindicate? Answering this requires an analysis of the real entity theory.

A. Origins of the Real Entity Theory

The real entity theory was primarily developed in response to weaknesses in the association theory. We have already noted one of the latter’s difficulties: that it threatened to undermine corporate rights such as limited liability. More than this,

[T]he picture of the corporation as a contract among individual shareholders was … becoming a nostalgic fantasy at the very moment the partnership view was most forcefully put forth.

Some of the contractualists seemed to have had in the backs of their minds an ideal of what in a later age would be called “shareholder democracy.” But during the 1880s it was beginning to become clear that the managers, not the shareholders, were the real decision makers in large, publicly owned enterprises….

By the time of the First World War, it was common for legal writers to observe that “the modern stockholder is a negligible factor in the management of a corporation.” “It cannot be too strongly emphasized,” another wrote, “that stockholders today are primarily investors and not proprietors.”

86 Horwitz, supra note 3, at 92-3.
Increased industrial scale was one reason behind the declining influence of the stockholder. Less obviously, so was the development of public stock exchanges. It was only in the late 1890s that large numbers of companies began to publicly offer shares of stock, beyond the customary practice of private subscription. The number of stockholders soon exploded, and the iron law of oligarchy followed in its wake. Overwhelmingly, stockholders became passive investors, too numerous and dispersed to exercise any effective control, which fell into the hands of management. Thus, when the majority in *Citizens United* refers to the ability of disapproving shareholders to rein in corporate political activity “through the procedures of corporate democracy,” they are over 100 years behind the times.

Not only was the association theory out of touch with emerging corporate reality; to the chagrin of corporate managers, the association theory was impeding the transition, justifying the preservation of traditional shareholder rights such as the (increasingly onerous) common law rule that management secure unanimous shareholder approval on all major corporate decisions.

Having to choose between the grant theory and the association theory thus put corporate advocates on the horns of a dilemma. They could embrace the association theory for the constitutional rights it promised, yet risk forgoing important corporate rights such as limited liability, and also forgoing the centralization of control that corporate managers craved. Or they could cling to the grant theory to secure these, but forego constitutional protection and leave themselves ideologically defenseless against a range of government regulations.

The “real entity” theory was developed in the 1890s to remove corporations from the horns of this dilemma, providing them with all the benefits, and few of the liabilities, of the other two theories. Like the grant theory, the real entity theory posits that the corporation is an entity

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87 *Id.* at 95.

88 *Citizens*, 130 S. Ct. at 911.

89 Horwitz, *supra* note 3, at 74, 87.
distinct from its members—a “legal person” with rights of its own (such as limited liability), which can also justify management control free of shareholder interference. Like the association theory, the real entity theory posits that corporations arise independent of the state and are therefore fully private. Taken together, this would mean that corporations are “private persons” and thus capable of holding constitutional rights against government through the Fourteenth Amendment.

B. Shortcomings of the Real Entity Theory

The appeal of such a theory for corporate executives is clear enough. But on its face, the claim that a corporation is a “real entity” akin to a flesh-and-blood person is bizarre. Yet for the sophisticate, two factors lent the theory an air of plausibility.

First, there is the fact that corporations are, indeed, “legal persons,” or “legal individuals.” That is, in contrast to general partnerships, corporations have the right to own property, make contracts, and sue and be sued, as a unitary entity, an “individual.” This is indisputable, and has been true of corporations from the very beginning. It is what makes a corporation a corporation. Furthermore, these are rights that a corporation is entitled to vindicate against government in court, as when a government contractor sues the government for nonpayment.

90 There was one noteworthy downside for corporate advocates, which is that the real entity theory, in attributing intention and will to the corporation, rationalized holding corporations liable for criminal conduct, which had previously been dismissed as ultra vires and thus not attributable to a corporation. See Daniel Lipton, Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century, 96 VIRGINIA L. REV. 1911, 1928-1930 (2010).

91 See Williston (1888), supra note 42.
However, in the context of corporate rights, the term “legal individual” is deeply ambiguous. The rights just described make the corporation a very specific kind of legal individual—a “contracting individual,” with rights under the law of property and contract. This is very different from being a “constitutional individual,” with constitutional rights such as those in the Bill of Rights. A foreign national, or even foreign government, can be, within United States jurisdiction, a contracting individual, but only in a very few legal areas can a foreign person or government claim the protections of a constitutional individual. Nonetheless, since a constitutional individual is also a kind of legal individual, it becomes all too easy to imagine that the corporation, as a legal individual (meaning a contracting individual) deserves to have the rights of a legal individual (meaning a constitutional individual).92

But to give the real entity theory a proper grounding, something more was needed than a linguistic sleight of hand. Corporate advocates had to come up with an argument that corporations were legally separate from their members and also independent of the state—non-artificial, “natural” and thus “real.” It was at this point that corporate advocates drew on a new and learned multi-volume history of associations and corporations by the great German scholar Otto von Gierke, which was read and elaborated upon by the great English scholar, Frederick Maitland and the American, Ernest Freund, among others.93 The thrust of this work, which was simultaneously anti-statist and anti-individualist, was to show that medieval corporations, such as towns, universities, and guilds, were not the handiwork of the state, but were sui generis

92 Much confusion would be avoided were the ambiguous terms “legal individual” and “legal person” eliminated and replaced by more precise terminology distinguishing between “contracting individuals” and “constitutional individuals.”

groups with organic lives of their own independent of the state and irreducible to the individuals composing them. “Our German Fellowship is no fiction, no symbol, no piece of the State’s machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand.”94 American scholars such as Arthur Machen of the University of Chicago Law School applied these conclusions to their own work on the business corporation. “In these days it has become fashionable to inveigh against the doctrine that a corporation is an entity, as a mere technicality and a relic of the Middle Ages, but nothing could be further from the truth. A corporation is an entity—not imaginary or fictitious, but real, not artificial but natural.”95

The error of these scholars, however, was to infer the nature of the modern business corporation from the nature of the medieval corporation. Many medieval corporations, such as towns, did in fact form independent of the crown and only later were required by the crown to obtain a charter.96 But this cannot be said of business corporations. Being investment vehicles, they rely upon government granted privileges such as asset lock-in and entity shielding and cannot form without this government intervention. Business corporations are inherently “artificial” entities. This was not obvious to historians of a century ago, but it should be obvious in light of recent corporate law scholarship.

The entity theory thus rose on the back of two errors: (1) a conflation of contracting individuals with constitutional individuals and (2) a conflation of medieval corporations with


95 Quoted in Horwitz, supra note 3, at 103.

modern business corporations. Despite this, the theory has had significant influence. “The main effect of the natural entity theory of the business corporation,” Horwitz notes, “was to legitimate large-scale enterprise and to destroy any special basis for state regulation of the corporation that derived from its creation by the state.” Specifically, it legitimated the concentration of power in the hands of management, gradually freeing management from shareholder control, and it legitimated the idea that corporations are independent, private persons and thus entitled to due process and equal protection of the laws under the Fourteenth Amendment. Accordingly, it has been used in the courts—along with the association theory, which continues to have a constitutional afterlife—to expand corporate constitutional rights, as in Citizens United.

C. The Real Entity Theory and Corporate Speech

The real entity theory is relevant to two different questions raised by the Citizens United case. First, does the corporate entity itself have a constitutional right to free speech that management may use corporate funds to vindicate? The majority never raises this question, convinced that management is vindicating shareholder rights. But the question is available. And

97 Horwitz, supra note 3, at 104.

98 On the importance of the real entity theory, see, e.g., Horwitz, supra note 3, at 104; Mark, supra note 75, at 1477-78; Naomi R. Lamoreaux, Partnerships, Corporations, and the Limits on Contractual Freedom in US. History: An Essay in Economics, Law, and Culture, in Constructing Corporate America, 43-48 (Kenneth Lipartito & David B. Sicilia eds., 2004). For a contrary view that courts’ invocation of the real entity theory was subservient to more fundamental reasoning based on the rights of property, see Lipton (2010), supra note 90, at 1928-1930. If Lipton’s view is correct, then it was the association theory of the corporation that remained dominant, with corporate constitutional rights derived from due process protection of (what the courts took to be) shareholder property.
it is tricky, because it is apt to be confused with a separate question, of whether management has a constitutional right to speak on behalf of the corporation in ways that do not use corporate funds.

The answer to this latter question is, yes. Management (or its spokesperson) unquestionably has an individual speech right to express its views on what would be in the corporate entity’s interest. Therefore, it can fairly be said that management has a constitutional right to express the electoral preferences of the corporation (even if in practice this is nothing more than the electoral preferences of management) through costless avenues such as interviews, speaking engagements, and press releases. And of course individual managers may spend their personal funds to broadcast these preferences in other ways.

The real question is, does management have a constitutional right to use corporate funds for media buys and other electioneering expenses on behalf of the corporate entity? To this question, the answer is, no. A corporation is indeed a legal entity, or contracting individual, separate from its members. But this entity is constituted through state action. Therefore it is not an independent, natural, “real entity,” but a dependent, artificial entity; and it is not private but quasi-public. Being government-dependent, artificial, and quasi-public, a corporation cannot plausibly be construed as a citizen, or as a person under the Fourteenth Amendment. Therefore, it cannot claim a right to political speech, and management cannot claim to be vindicating this right when it spends corporate funds in elections.

In short, in using corporate treasury funds, management is neither using the funds of citizens, nor the funds of a person under the Fourteenth Amendment. It is using the funds of a separate, state-constituted, property-owning entity. Expenditure of these funds in elections provides de facto representation in our political system, not to natural persons, but to the corporate modality of property. And it is a most peculiar modality of property, with peculiar legal advantages, interests, and incentives for irresponsible use, since those who control it do not
own it.\textsuperscript{99} Being neither the property of associating citizens, nor of a citizen, nor of a person under the Fourteenth Amendment, corporate funds merit no First Amendment protection.

The second question to which the real entity theory is relevant is whether the corporation has a distinctive “voice,” the unlimited amplification of which deserves constitutional protection because it contributes to democratic debate. This is a more difficult question than at first appears.

The majority in \textit{Citizens United} argues that “By suppressing the speech of manifold corporations … the Government prevents their voices and viewpoints from reaching the public and advising voters…”, and thus “the electorate is deprived of information, knowledge and opinion vital to its function.”\textsuperscript{100} The obvious rejoinder is that corporations have neither vocal chords nor viewpoints of their own to express. It is an officer of the corporation—the CEO or subordinate—who speaks. It is the officer’s voice and viewpoints that get expressed. Since a corporation has no distinctive information, knowledge, or opinion to impart, the argument in favor of corporate expenditures on the ground of viewpoint diversity collapses.

This may be a fully adequate response. However, taking a page from Gierke and the real entity theorists, or from new work by List and Pettit,\textsuperscript{101} it might be rejoined that a corporation has interests, ends, and knowledge of its own. If this is the case, then it might also have political viewpoints based on these interests and ends that are not reducible to the viewpoints of the

\begin{itemize}
  \item \textsuperscript{99} \textsc{Adolf A. Berle \& Gardiner Means}, \textit{The Modern Corporation and Private Property} (1933).
  \item \textsuperscript{100} \textit{Citizens}, 130 S. Ct. at 907 (2010) (quoting \textit{CIO}, 335 U.S. at 144 (1948)) (internal quotation marks omitted).
  \item \textsuperscript{101} \textsc{Christian List \& Philip Pettit}, \textit{Group Agency: The Possibility, Design, and Status of Corporate Agents} (2011).
\end{itemize}
individuals involved with it and that might genuinely add to the diversity of ideas in the
democratic arena.

It is difficult to say whether corporations have interests or ends separate from those of
natural persons. Corporations were originally chartered only on condition that they have a clear
public benefit—an end generally beyond the private interests of those immediately involved with
it. But the benefit of the public is still an end of natural persons. Opinion today assumes
corporations serve the natural individuals involved with them and divides only over whether the
individuals served should be the shareholders alone or also other “stakeholders,” such as
employees, suppliers, customers, or the general public.

Fortunately, we need not decide this question. Even if the real entity theorists are right
that corporations have wills and viewpoints separate from the natural individuals involved with
them, the fact remains that corporations are dependent on government for their existence and are
therefore not citizens, nor even non-citizen natural persons. It appears to be the Court’s firm
view that the constitutional right to speak in elections or be heard by the electorate stops at
citizenship. Therefore, corporations should not receive First Amendment rights on the basis of
their possible contribution to viewpoint diversity in the democratic arena.

VI. EVALUATION SUMMARY

The findings of this Article on the for-profit corporation can now be summarized. Over
the past century and a half, three distinct theories of the corporation have informed, and continue
to inform, arguments over corporate constitutional rights, each differently construing how

102 Davis (1905), supra note 44.
103 ABE J. ZAKHEM, MARY LYNN STOLL & DANIEL E. PALMER (eds.), STAKEHOLDER
104 See supra Part I.C.
corporations relate to natural individuals and government. The above analysis of the legal attributes of the corporation allows us to evaluate all three.

The grant theory holds that government relates to the corporation as creator to creature. This is not to say that natural individuals are not required to animate the abstract legal body. But the corporation is conceived as a rights-bearing, property-owning, legal entity separate from its members, with all its rights coming in grant from the government. Analysis of the constituting privileges of asset lock-in and entity shielding confirms the grant theory view. And because the government is the source of corporate rights, and indeed of corporate existence, it makes no sense, on the grant theory view, for a corporation subsequently to claim constitutional rights for itself against government.

The association theory denies that the corporation has any essential relationship to government. Instead, it sees the corporation as constituted by its members through normal, if complicated, bilateral contracting. Being reducible to its members, the corporation therefore deserves the same legal rights as its members, including constitutional rights. But as analysis of the legal attributes of the corporation shows, its existence as a property-owning, contracting individual cannot be reduced to contracts among of its members. Neither can its property be reduced to the property of its members. Therefore it cannot in sound logic acquire constitutional rights from its members.

The real entity theory agrees with the association theory that the corporation owes nothing to government. And it agrees with the grant theory that the corporation is distinct from its members. That is, it denies that the corporation is constituted either by government or reducible to natural individuals. The corporation is a “real entity” separate from each. The theory’s denial of a constitutive relationship between the corporation and individual citizens would seem to put in jeopardy the use of this theory for the justification of corporate constitutional rights. However, the Fourteenth Amendment’s fateful use of the word “person” rather than “citizen” created a back door by which the entity theory could claim that a corporation, as a “private individual,” is a person within the meaning of the Amendment, and
thus a proper object of the Amendment and all the rights incorporated through it. However, analysis shows that the claim of independence from government is erroneous. The corporation may well have interests not reducible to its individual members. These interests might even catalyze political viewpoints that would add to the diversity of ideas in the democratic arena.

But as a property owning, contracting individual, the corporation is dependent on government for its very existence. It is an artificial entity, not a “real” entity, nor a person within the meaning of the Fourteenth Amendment, nor a citizen, and its property does not merit First Amendment protection.

In conclusion, the grant theory is the only defensible theory. The corporation’s connection to any particular natural individual is contingent. Its connection to government is necessary. Therefore, the corporation cannot, in sound logic, hold constitutional rights against government.

This is not to say that a corporation cannot hold any rights against government. All corporations are chartered as contracting individuals with the right to own property, make contracts, and sue in court, and this has long included a corporation’s right to sue government if a government makes and breaks a contract with it. But this is a common law right of contract.

In contrast, constitutional rights are not in the gift of government, whether state or federal. They are in the gift of “We the People.” And this People has never gifted these rights to

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Since the Constitution of 1789 referred to slaves as “persons,” the drafters of the Fourteenth Amendment could only be certain that the Dred Scott decision would be overturned and the Amendment applied to the freedmen, by using “person” instead of “citizen.” That the drafters of the Amendment did not, despite the later protestations of Senators Conkling and Edmunds, consider the term to include corporations, has been convincingly argued in Howard Jay Graham, The Conspiracy Theory of the Fourteenth Amendment, 47 YALE L. J. 371 (Part 1) (1938) and 48 YALE L. J. 171 (Part 2) (1938).
corporations; nor it is legitimate to “find” them in our current constitutional text, because, again, corporations are neither associations of citizens nor persons under the Fourteenth Amendment. A proper grant of constitutional rights to corporations would require a constitutional amendment. Ironically, however, the decisions of the Court over the past 120 years, and its disposition today, may make a constitutional amendment necessary to assert this fact.  

VII. FINAL ISSUES

A. A Corporate Media Anomaly?

The majority opinion makes much of the apparent anomaly that BCRA §203 exempted media corporations from its ban on corporate electioneering in proximity to elections. But, as Stevens points out in his dissent, this “anomaly” is inscribed in the Constitution, which, while silent on corporations, explicitly grants freedom of the press. It is therefore hardly a forced constitutional construction to deny non-media corporations unrestricted political speech rights while granting them to media corporations.

In any case, strict consistency would not be so damaging as the majority suggests. The only corporate media companies that make a regular practice of endorsing candidates are the corporately owned newspapers. It would hardly be a blow to democracy were they required by law to make any endorsements at least 30 days before a primary and at least 60 days before a general election, which is how the law stood for all other corporations prior to the Citizens

106 112th Congress, 1st Session, S. J. Res. 29; 112th Congress, 1st Session, H.J. Res. 88, “Proposing an amendment to the Constitution of the United States to clarify the authority of Congress and the States to regulate corporations, limited liability companies or other corporate entities established by the laws of any state, the United States, or any foreign state.”

107 Citizens, 130 S. Ct. at 976.
United ruling. Indeed, it would hardly be a blow to democracy were corporately owned newspapers not allowed to make endorsements at all. What is important is that they be allowed to probe the issues and candidates freely, and that right is not in question.

B. Non-profit Corporations and Constitutional Rights

Having analyzed the case of for-profit corporations, we may much more easily tackle the case of non-profits. On the one hand, non-profits do not have investors. Therefore, they have no need for limited liability, nor for asset lock-in, nor for entity shielding. On the other hand, like all corporations, non-profits are able to own property, make contracts, and sue and be sued, as a unitary entity, and establish internal governance—all things granted through legal fiat.

For-profit and non-profit corporations are different enough that a constitutional distinction might be drawn. However, I believe the debt of non-profits to government fiat remains substantial enough that non-profits should not be able to claim constitutional rights. They are not “real entities,” since their capacity to own property comes in grant. And because they do not have shareholders, it is even more obvious that they cannot be construed as associations of individuals. Indeed, the implausibility of construing non-profits as associations strengthens the case that for-profits are not associations, since for-profits merely tack on an investment mechanism to the non-profit form which historically preceded it. As an add-on, 

108 In contrast to the “strong entity shielding” of for-profits, non-profits are describe by Hansmann and Kraakman as enjoying “complete entity shielding,” because, other than a non-profit’s creditors, no natural person has a claim on its assets, even at dissolution. See Hansmann, Kraakman & Squire (2006), supra note 4, 1338. But since a non-profit has neither owners nor investors, this is a shield without an assailant. Thus there is no real “protection” here at all, and the concept is otiose.
investors do not suddenly become the corporation. The grant theory remains the correct theory for non-profits, and therefore non-profits should not be able to claim constitutional rights either.

CONCLUSION

The analysis provided in this Article of the legal attributes of the corporate form shows that Citizens United is based on a category error—a misconstrual of the kind of entity that a corporation is, and thus an erroneous affirmation of corporate ties to citizenship. In disregard of the legal and institutional history that brought the association theory into question at the end of the nineteenth century, the majority in Citizens United invokes the theory for the purpose of endowing corporations with the rights of political speech, and without tracing any of the legal consequences that would follow were this theory to be taken in earnest. Inconsistently, the majority also invokes the opposed “real entity” theory in a metaphor about the contribution that corporations as “speakers” make to the diversity and quality of opinion in a democracy.

Despite these confusions, the majority’s use of these two theories is hardly unique. Corporations have, over the past 120 years, acquired constitutional rights in a host of areas. In some cases, the Court has argued for the rights of corporations explicitly, drawing on one or the other of these theories. This includes the leading cases granting corporations due process and equal protection rights.\textsuperscript{109} It also includes Hale v. Henkel, protecting corporations against

\textsuperscript{109} See Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886), the non-binding headnote of which stated that corporations are persons within the meaning of the 14\textsuperscript{th} Amendment. This case was cited as precedent in the Court’s holding to this effect in Minneapolis & St. Louis Railroad v. Beckwith, 129 U.S. 26 (1889). Noble v. Union River Logging R. Co., 147 U.S. 165 (1893) provided due process protection for corporations against federal law. Lochner v. New York, 198 U.S. 45 (1905) provided due process protection against state law.
unreasonable search and seizure on grounds that a corporation is “but an association of individuals under an assumed name.””\textsuperscript{110} And it includes the line of cases protecting corporate political speech, from \textit{First National Bank of Boston v. Bellotti} (allowing corporate expenditures in referenda on grounds that the corporation is a “speaker” providing valuable information to the public)\textsuperscript{111} culminating in \textit{Citizens United} (granting corporations the full political speech rights of citizens). At least as telling, however, are the many instances in which corporations have acquired constitutional rights, not on the basis of any positive argument, but simply because, having been assimilated to the category of persons, or of business partnerships, they are simply assumed to be included within a constitutional right, such as the right to trial by jury in criminal cases\textsuperscript{112} and in civil cases,\textsuperscript{113} the right against uncompensated regulatory “takings”,\textsuperscript{114} the right against double-jeopardy,\textsuperscript{115} and the right of commercial speech.\textsuperscript{116}

If the argument of this Article is correct, all of these decisions are suspect and should be reconsidered. This is not to say that none of these rights ought to be extended to corporations. Any of them might be granted through statute. But whether or not this is done should be a matter of policy. It should not be a matter of constitutional adjudication.

\textsuperscript{110} \textit{Hale v. Henkel}, 201 U.S. 43, 76 (1906).
\textsuperscript{112} \textit{Armour Packing Co. v. U.S.}, 209 U.S. 56 (1908).
\textsuperscript{114} \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393 (1922).
\textsuperscript{115} \textit{Fong Foo v. United States}, 369 U.S. 141 (1962).