Prelude: Corporations - - Persons with Constitutional Rights

In *Citizens United v. Federal Election Commission* ("*CU"*) and *Burwell v. Hobby Lobby Stores, Inc.* ("*HL"*), the Supreme Court expanded corporate freedom from government regulation by ruling that corporations have the same rights to political speech and free exercise of religion as human beings. The cases are highly controversial and the strong and sustained reaction has included the drafting of at least three proposed constitutional amendments intended to overturn the holding in *CU.*

But, despite the controversy, even outrage, sparked by these cases, the Supreme Court Majority in *CU* and *HL* were endorsing concepts of corporate personhood that were far from novel, which in fact, had been adopted by the Court many years earlier. So, before analyzing *CU* and *HL* in detail, it would be useful to review some of the prior Supreme Court decisions that dealt with corporate personhood and, in some instances, provided the specific judicial precedents that the Court relied on in deciding *CU* and *HL*.

The Constitution and Corporate Personhood

Early in the history of the United States, the Supreme Court recognized that corporations were entitled to certain rights under the Constitution. In *Bank of the United States v. Deveaux* (1809), Chief Justice John Marshall, writing for a unanimous Court, ruled that a corporation could sue in federal court under Article III of the Constitution. Marshall espoused the view that the rights of a corporation were founded on the rights possessed by "the natural persons composing [the] corporation" rather than on the rights the corporation might possess as a separate and distinct legal entity. Ten years later, in another opinion written by Chief Justice Marshall, *Trustees of Dartmouth College v. Woodward*, the Court ruled that the college, although chartered by the State of New Hampshire, was a private rather than a public corporation, possessed the rights of its trustees, and therefore, was protected under the Contract Clause of the Constitution.

Although Justice Marshall had characterized a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law", his description was not meant to deny that corporations had rights, but rather to assert that such an entity was too ethereal to represent itself. Consequently, to determine what rights it had, it was appropriate to look directly through the corporation to the human beings who were its members. This understanding of corporate personhood has been called the "Aggregate Theory".

A number of ante-bellum Supreme Court decisions, however, diverged radically from Marshall's conception of what a corporation is. In *Bank of Augusta v. Earle* (1839), the Court held a corporation's rights were those that it possessed as a distinct legal entity, not those of its members: "Whenever a corporation makes a contract, it is the contract of the legal entity, of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in

that character, and not the rights which belong to its members as citizens of a state." Likewise in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* (1844) and *Marshall v. Baltimore & Ohio Railroad Co*. (1853), the Court ruled that a corporation was an independent legal entity whose rights were separate and distinct from those of its members. This approach to corporate personhood has been labelled the "Artificial Person Theory".

In *The Historic Background of Corporate Legal Personality* (1926), John Dewey, the American philosopher, psychologist, and educational reformer, argued that judges invoke the corporate personhood theory that is most useful to them in reaching the result they desire. Since either theory can be used to justify either limiting corporate power or enlarging it, he concluded judicial decisions involving corporate rights and duties are based on unspoken political considerations, not on the consistent application of personhood theories. Supporting Dewey's conclusion is the Supreme Court's persistent inconsistency in its decisions concerning corporate personhood, as reflected in the cases described above. And that inconsistency is not occasioned by the conflicting rulings being made by different justices in different eras. For example, in *Hale v. Henkel* (1906), the Court relied on the Artificial Person Theory - - "the corporation is a creature of the state . . . presumed to be incorporated for the benefit of the people" - - to hold that corporations are not entitled to the Fifth Amendment privilege against self-incrimination. In the very same opinion, however, the Court followed the Aggregate Theory in finding that a corporation was entitled to the Fourth Amendment's protection against unreasonable searches, since a "corporation is, after all, but an association of individuals under an assumed name" and their individual rights were entitled to protection.

In deciding corporate rights cases the Supreme Court has proceeded on an ad hoc basis, never expressly acknowledging that it is adopting one theory or the other. But regardless of which political agenda the Court is silently pursuing or which theory of corporate personhood it is tacitly adhering to, the decisions usually implicate a Constitutional provision as a source of the rights being extended to or denied the corporation. In this regard, the Fourteenth Amendment, by virtue of the "selective incorporation" process, has proved to be a critical factor in advancing the rights of corporations.

The Fourteenth Amendment and the Bill of Rights

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

> person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment constrains the power of the states and does not apply to the federal government. The first ten amendments to the Constitution, the Bill of Rights, constrain the power of the federal government and were not intended to apply to the states. Gradually, however, in a jurisprudential process called “selective incorporation”, the Supreme Court interpreted the Equal Protection and the Due Process Clauses of the Fourteenth Amendment to extend the Bill of Rights to the states and, in doing so, limited state power to regulate corporations. In deciding if a right should be “incorporated”, the Court determines whether the right is "implicit in the concept of ordered liberty" or is "deeply rooted in our nation's history and traditions". If the right has met either of these subjective standards, it is deemed to be “fundamental” and, therefore, extendable to the states. Following this process, the Court has proceeded in piecemeal fashion extending some rights to the states but not others.

<u>The Strange Birth of Corporate Personhood under the Fourteenth Amendment</u>

Like the other two Civil War Amendments, the Fourteenth was adopted to ensure that the rights of the freed slaves and other African Americans were enforceable against repressive action by the states. Given the singular purpose of the Amendment, it is not surprising that the word “corporation’ does not appear in the Amendment’s text and that Senators and Representatives said nothing about corporations during the Congressional debates prior to the Amendment’s approval by Congress.

However, by the time Reconstruction ended in 1877, Republican ardor for the rights of African Americans had diminished drastically, replaced by a heightened concern for the business interests of the rapidly industrializing North. The Republican Party transitioned *en masse* from an anti-slavery party to the party of big business and Republican candidates dominated the era. From 1877 to 1932, ten Republicans were elected President and they appointed twenty-seven Supreme Court Justices. During the same period, only two Democrats reached the nation’s highest office and they appointed eight Supreme Court Justices.

With the Republican Party and the industrial North politically dominant, the prevailing pro-business ethos greatly aided corporations and they frequently invoked the Fourteenth Amendment to advance their interests. And in this effort they were helped enormously by former U.S. Senator Roscoe Conkling, a once fervid Radical Republican turned dishonest corporate lawyer. He appeared in the case of *San Mateo County v. Southern Pacific Rail Road* (1882) as both counsel for the railroad and as a witness, testifying that the Joint Congressional Committee on Reconstruction had vacillated between using “citizen” and “person” when drafting the Fourteenth Amendment. Conkling had served on the Committee and, according to his account, the drafters deliberately chose “person” in order to include corporations within the protections of the Amendment. Although he produced a journal that seemed to corroborate his testimony, no other contemporaneous account of the Committee’s deliberations contained any discussion of corporations nor did any of the public debate surrounding the Amendment.

The verdict of history is that the journal was a forgery and Conking's testimony a tissue of lies.

Despite Conkling's duplicity, the railroad lost the case and the Supreme Court did not, in fact, rule on the question of corporate personhood under the Fourteenth Amendment. But bizarrely, the court reporter included a headnote in the official case report stating that the Supreme Court justices unanimously believed that the Equal Protection Clause granted constitutional protection to corporations. The headnote was the first time the Supreme Court was depicted as having concluded the Equal Protection Clause applied to corporations as well as to natural persons.

A short time later, the official court report in *Santa Clara County v. Southern Pacific Rail Road* (1886) contained another misleading headnote which quoted the Chief Justice as stating "We are all of the opinion that . . . corporations are persons within the meaning of the Fourteenth Amendment." But, again, the Court did not hold that a corporation was a person under the Fourteenth Amendment, the court reporter's headnote was merely his unsuccessful attempt to summarize the Court's opinion in the case and was not part of the decision.

Finally, in P*embina Consolidated Silver Mining Co. v. Pennsylvania* (1888), Justice Stephen Field, a consistent advocate of corporate freedom from state regulation, wrote the Court's opinion and inserted the statement: "Under the designation of "person" there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose . . ." Although this was a succinct expression of the Aggregate Theory of corporate personhood, it had nothing to do with the holding in the case and, therefore, could not constitute binding legal precedent.

<u>The Legacy of *Santa Clara*</u>

Despite the fact, as Gertrude Stein famously remarked about Oakland California, "there is no there, there", the Court has treated the *Southern Pacific* cases as authoritatively establishing that corporations are person under the Fourteenth Amendment. For example, in *First National Bank of Boston* v. *Bellotti* (1978)**,** a critical underpinning of the *CU* decision, the Supreme Court relied on *Santa Clara* when it stated that "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."

Bellotti was not alone in mistakenly basing its holding on *Santa Clara*. For example, in *Wheeling Steel Corp. v. Glander*, (1949), the Court stated "It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws at least since 1886, *Santa Clara Co. v. Southern Pacific RR."* The more historically accurate Dissent in *Wheeling* argued that the "[t]here was no history, logic, or reason given to support that view" and that "the purpose of the Amendment was to protect human rights - - primarily the rights of a race which had just won its freedom."

Despite its intended purpose to safeguard the rights of African-Americans, the Fourteenth Amendment, with the inestimable assistance of the erroneous headnotes from the *Southern Pacific* cases, became corporate America's favorite constitutional basis for asserting the rights of corporations and for the Supreme Court's repeated rulings in their favor at the expense of state and federal efforts to regulate corporate activity. From 1868 to 1912 the Court heard 604 Fourteenth Amendment cases, of which 312 involved corporate rights and only 28 the rights of African Americans. The corporations won about half of their cases, while black Americans lost almost all of theirs.

The Lochner Era

In *Lochner v. New York* (1905), the Supreme Court struck down a state law that prohibited employees from working in bakeries for more than 10 hours per day. The Court asserted that the Fourteenth Amendment's due process clause not only guaranteed procedural fairness, but also placed a substantive limitation on the type of control that the government could exercise over individuals. The Court found the state law infringed on workers' Fourteenth Amendment "freedom of contract" and was, therefore, unconstitutional. That the Fourteenth Amendment makes no reference to "freedom of contract" was not an obstacle for the Majority, since they believed such a "freedom" was one of many common law rights implicitly protected by the Amendment. The *Lochner* case did not involve a corporation, but the concept of "substantive due process" which it embraced, was utilized in many subsequent decisions that were favorable to corporations. Pro-business substantive due process embodied the spirit of laissez faire capitalism, which flowered in the Gilded Age and, despite a brief progressive period, lasted until the country's economic collapse in the Great Depression.

In *Lochner*, Justice Oliver Wendell Holmes famously dissented:

> This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*" [and the] constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire."*

Before Holmes's view could prevail, however, the Supreme Court overturned much of the early New Deal's economic legislation, until finally the *Lochner* era came to an end with the Court's decision in *West Coast Hotel Co. v. Parrish* (1937). In that 5-4 ruling, the Court upheld a Washington State minimum wage law, holding that it did not infringe any rights the corporation had under the Fourteenth Amendment.

Comment: Old Wine in New Bottles

In his confirmation hearings before becoming Chief Justice, John Roberts concluded that the *Lochner* court improperly substituted its own judgment for the legislature's findings:

> The *Lochner* case, you can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law.

It's ironic, therefore, that the Roberts Court, by its frequently invalidating the laws and regulations of the federal government and the states, has raised judicial activism - - the Court making, not interpreting, the law - - to a level that rivals that of the *Lochner* Era.