



4-1-2013

We the People, in Order to Form a More Perfect Union: A Look at Organic Law as Foundation for Corporate REstrictions in Politics

Jonathon Green

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

BYU ScholarsArchive Citation

Green, Jonathon (2013) "We the People, in Order to Form a More Perfect Union: A Look at Organic Law as Foundation for Corporate REstrictions in Politics," *Brigham Young University Prelaw Review*. Vol. 27 , Article 12.

Available at: <https://scholarsarchive.byu.edu/byuplr/vol27/iss1/12>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

WE THE PEOPLE, IN ORDER TO FORM A MORE PERFECT UNION: A LOOK AT ORGANIC LAW AS FOUNDATION FOR CORPORATE RESTRICTIONS IN POLITICS

Jonathon Green¹

In 2010, the Hart Research Associates tracked the sentiments of the American people in regards to corporate influence on politics. Of those surveyed, eighty-five percent expressed that corporations have too much influence on politics, and ninety-three percent felt that the average citizen holds too little influence.² The results of this study indicate that the public feels that they are being marginalized and not being heard in Washington.

A few months prior to the Hart Research study, the Supreme Court ruled on the cases *Citizens United v. Federal Election Committee* (FEC) and *Speechnow.org v. FEC*. These rulings allowed for corporations and individuals to donate unlimited funds to political organizations.³ While it is still too early to see the full implications of these two rulings, the Court's move has generated a significant reaction in the media. In their ruling, the Court reasoned that because corporations are recognized under the law as persons, they also were

1 Jonathon Green would like to extend his deepest gratitude to the various editors, professors, and mentors that assisted in writing this article. Specifically, he thanks Devynne Barret for her absolute dedication to perfection; without her help, this article would never have been completed.

2 People for the American Way, *Protecting Democracy from Unlimited Corporate Spending*, PFAW.org, <http://www.pfaw.org/sites/default/files/CitUPoll-PFAW.pdf> (last visited Mar. 26, 2013).

3 Robert Barnes, *Super PAC Mania*, COLUMBIA LAW SCH. MAG., Spring 2012, available at <http://law.columbia.edu/magazine/621141>.

guaranteed protection and rights equal to those enjoyed by human persons, as found in the Declaration of Independence.⁴ By doing so, the Supreme Court overturned one hundred years of restrictions on corporate donations to political causes—precedent established to protect the interests of the American people. One hundred forty-six years prior to this ruling, Abraham Lincoln issued a warning about the power of corporations that seems appropriate to remember in the country's current political climate:

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. Corporations have been enthroned, an era of corruption in high places will follow, and the money-power of the country will endeavor to prolong its reign by working upon the prejudices of the people until the wealth is aggregated in a few hands and the Republic is destroyed.⁵

While Lincoln's words may be extreme, the core message possesses a valuable warning: the inclusion of corporations in the political arena increases the threat of corruption in politics. To determine the accuracy of this warning, there should be strict scrutiny over the next several election cycles to determine whether corruption has increased with the addition of corporate donations. One way to view the effects of this would be a game theory analysis between corporations and politicians, to see if potential outcomes of actions lead to results that are not in the best interests of the public. If this were to prove the case, then the argument that corporations are not citizens of the American society would potentially allow the Court to reverse their decision in *Citizens United*, and follow the dissenting opinion.

I. HISTORY OF CORPORATIONS AS PERSONS

In 1907 Congress passed the Tillman Act. The Tillman Act was the first piece of legislation prohibiting corporate donations to

4 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

5 THE LINCOLN ENCYCLOPEDIA 32, 40 (Archer Shaw ed., 1950).

national political campaigns.⁶ Senator Benjamin Tillman of South Carolina sponsored the bill after President Roosevelt called for the prohibition of corporate contributions. Roosevelt's actions were in response to allegations that various corporations were blackmailing politicians to vote in certain ways, according to an article in *The New York Times* on June 17, 1906.⁷

The implications of the Tillman act were obfuscated with Supreme Court rulings over the twentieth century. Furthermore, the current situation is the culmination of prior rulings spanning two centuries. Since 1818, the Supreme Court has determined over various rulings that corporations are effectively "persons" under the Constitution, who have rights under the First and Fourteenth Amendments.⁸ Furthermore, the ruling of *Buckley v. Valeo* (1976) determined that money is a form of speech, which granted a certain level of protection to political contributions under the First Amendment.⁹ In the 2010 case *Citizens United v. FEC*, corporations were granted the legal right to donate to political causes because they are persons.¹⁰ This ruling is based upon the inalienable right of a person to exercise free speech under the First Amendment, and invalidated more than a century of legislation, providing the final blow in a multistep erosion of the precautions established by the Tillman Act.¹¹

A corporation is a body formed and authorized by law to act as a single person although constituted by one or more persons. It is legally endowed by the government with various rights and du-

6 Roger Berkowitz, *A Brief History of Campaign Finance*, HANNAH ARENDT CENTER (Feb. 9, 2012), <http://www.hannaharendtcenter.org/?tag=tillman-act>.

7 *The Complete Speeches and Addresses of Theodore Roosevelt*, ALMANAC OF THEODORE ROOSEVELT, <http://www.theodore-roosevelt.com/trspeechescomplete.html> (last visited Mar. 28, 2013).

8 *Trs. Of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819); see also Clay Calvert, *Freedom of Speech Extended to Corporations*, in 1 *ENCYCLOPEDIA OF AM. CIVIL LIBERTIES* (Paul Finkelman ed., CRC Press 2006).

9 *Buckley v. Valeo*, 424 U.S. 1 (1976).

10 Barnes, *supra* note 2.

11 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

ties, including the capacity for succession.¹² Prior to forming a corporation, the founder must file the Articles of Incorporation. These are defined by Black's Law Dictionary as "a governing document that sets forth the basic terms of a corporation's existence, including the number and classes of shares and the purposes and duration of the corporation. In most states, the articles of incorporation are filed with the secretary of state as part of the process of forming the corporation."¹³

During the filing process, a corporation must designate their purposes for incorporation. These purposes fall into one of two main categories: corporations that are aimed at profit maximization via selling of goods and services, and those that are determined as non-profit. Non-profit corporations include Political Action Committees (PACs), SuperPACs, and various other entities.¹⁴

II. STATUS QUO

Justice Anthony Kennedy wrote the majority opinion in the *Citizens United* case stating:

There is no basis for the proposition that, in the political speech context, the government may impose restrictions on certain disfavored speakers. The government may regulate corporate speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.¹⁵

This ruling upholds the sanctity of the First Amendment, in the opinion of the majority ruling. By allowing corporations to donate without restriction, the Court merely extended the legal fiction of corporations as people. This action appears to be directly in line with the precedent stretching back to the original case when corpo-

12 *Corporation Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/corporation> (last visited Mar. 28, 2013).

13 BLACK'S LAW DICTIONARY 128 (9th ed. 2009).

14 *Nonprofit Organization*, U.S. SMALL BUS. ASS'N, <http://www.sba.gov/content/nonprofit-organizations> (last visited Mar. 30, 2013).

15 Barnes, *supra* note 2.

rations were defined as “persons,” *Trustees of Dartmouth College v. Woodward*.¹⁶ If corporate personhood is sufficiently similar to human personhood, then this gradual allocation of rights was and is a logical progression.

This is the principle with which the dissenting opinion, as written by Justice John Paul Stevens, takes issue. He wrote:

The notion that the First Amendment dictated [today’s ruling] is, in my judgment, profoundly misguided. In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it.¹⁷

Stevens’ argument is about whether corporations should be considered in the same context as people in regards to First Amendment rights. He argues that the case should not have been decided on grounds that corporations are speakers and therefore endowed with the right to that speech. Rather, Justice Stevens argues that the context of the speech of corporations in respects to election to public office is sufficiently different from that of human persons to warrant additional restrictions on corporations. Continuing in his statement, he concludes that this difference is the capacity of an individual to participate as a member of society.

One measure of a corporation’s capacity to participate in society, and thereby constitute a member thereof, would be to see how the rules and consequences of regulation in that society affect a corporation. If they are equally in effect for corporations and people, then it is a sound conclusion that corporations are people in society.

Consider the First Amendment: Congress shall not abridge the freedom of speech. Ignoring the money-speech debate, it is possible to infringe this right for human persons by denying them a voice in public matters, just as it is possible to prevent corporations from

16 *Key Supreme Court Cases*, STUDENT CENTRAL, ABA, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/dartmouth.html (last visited Mar. 30, 2013).

17 Barnes, *supra* note 2.

having a “voice” in public matters. In this it appears that a corporation can incur the same injustice as a human. However, the Court has ruled in limited cases that when it is in the interest of public safety, human persons do not have the right to free speech.¹⁸ Such exceptions include slander, obscenity, fighting words, and more. If humans may be limited in their First Amendment rights, albeit under narrowly defined circumstances, then corporations too could be subjected to similar restriction.

Next, regarding the Second Amendment, if a well-regulated militia is essential, and the people possess the right to bear arms, then how is this right expressed in a corporation? Does a corporation bear the right to raise an armed and well-regulated militia? There are corporations that do so, namely entitled as Private Military Companies (PMC). These firms contract security services, domestically and abroad. Whether or not this is equated with a person’s right to own a firearm or to raise a militia with intent of self-defense is debatable. It is important to note that in order to form a corporation with the intent of acting as a PMC, one needs to obtain approval from the State Department, for licensing as well as for every contract negotiation.¹⁹ This qualification appears to distinguish corporate rights from human citizens’ Second Amendment rights. Yet the counterargument exists that people have similar restrictions in place for the obtaining of select firearms, namely fully automatic weaponry.²⁰

With the Fifth Amendment, the question arises of whether a corporation is deemed equal to a person when it is denied the right against self-incrimination. The Court has ruled multiple times denying corporations the Fifth Amendment, starting with *Hale v. Henkel* (1906) and continuing through to the most recent case of *Federal*

18 Henry Cohen, Cong. Research Serv., 95-815, Freedom of Speech and Press: Exceptions to the First Amendment (2009).

19 Laura Peterson, *Privatizing Combat: The New World Order*, Ctr. for Pub. Integrity (Aug. 10, 2011, 5:22 PM), <http://www.publicintegrity.org/2002/10/28/5678/privatizing-combat-new-world-order>.

20 Gun Control Act, Pub. L. No. 90-618, 82 Stat. 1213 (1968); *see also* Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

Communications Commission V. AT&T Inc. (2011).²¹ Human persons are not obligated to self-incriminate when on trial, but the Court has unilaterally denied this right to corporations, forcing them to produce incriminating documents when under subpoena. The difference between the two is that the possible punishments are not equitable between human persons and corporations. If people incriminate themselves, they risk imprisonment and/or fines. A corporation cannot be imprisoned, and therefore is not on the same terms as a human person in respects to this right. This is a similar discrepancy to the one that Justice Stevens noted in his dissenting opinion for the *Citizens United* case.

Finally, the Fifteenth Amendment states, “The right of citizens of the United States to vote shall not be denied or abridged by the United States.”²² Heretofore, corporations have not been granted the right to vote. Either corporations are not citizens and not guaranteed the same rights as citizens, or the current system is unlawfully barring corporations from voting in elections. It is this element of citizenry that provides support to the argument that corporations can be viewed differently under the law.

In truth, many amendments offer challenges when attempting to view corporate roles in society. This would appear to support the argument that Justice Stevens offered in the dissenting opinion that corporations’ societal position warrants barring them from a voice in the electoral process. Furthermore, because the Court split five to four in the case in question, there is strong evidence that Justice Stevens is not alone in his views and that the government would not be overstepping its bounds by regulating certain corporate rights, like free speech.

21 *Braswell v. United States*, 487 U.S. 99 (1988); *see also* *Hale v. Henkel*, 201 U.S. 43, 43-89 (1906); *Comm’n v. AT&T Inc.*, 582 U.S. 490 (2011).

22 U.S. CONST. amend. XV.

III. GAME THEORY

Since the ruling on *Citizens United*, there have only been one presidential and two congressional elections. This limits the amount of time available for empirical analysis to be successful in determining the effects, positive or negative, of allowing corporations to donate to politicians and political groups. However, if the motives behind political donations of people differ from the motives of corporations there is valuable insight into forecasting behavior based upon those motivations.

People rationally donate primarily to one side or the other of a political issue, namely the side that most accurately represents their personal viewpoints. Corporations do not mimic this pattern of behavior as shown in this report from the Huffington Post examining the ten largest corporate political contributors. The majority of corporations have approached political donations with the same strategy that they would pursue investment portfolios—namely diversification. Seven of the ten largest contributing corporations donated roughly 60-40 to one party or the other. The remaining three donated either one hundred percent or ninety-nine percent to only a single candidate, namely the Huntsman Corporation via chairman Jon Huntsman Sr. to Jon Huntsman Jr.'s campaign and related SuperPacs, Las Vegas Sands Corp. donating to Newt Gingrich's campaign and associated SuperPacs with ninety-five percent of the eleven million dollars coming directly from CEO Sheldon Adelson, and DreamWorks to the Democratic Party and the SuperPacs that primarily support them.²³

These examples support in large part the assumption that corporations differ in practice from people in their political contributions. One way to analyze the future impacts and repercussions of this behavior is to utilize economic Game Theory. This branch in economics is known as an effective tool in analyzing potential outcomes for interactions between parties. Through the use of simplification of

23 Douglas A. McIntyre, *The Ten Companies Making the Biggest Political Donations*, 24/7 WALL ST (July 2, 2012, 3:37 PM), <http://247wallst.com/2012/07/02/the-ten-companies-making-the-biggest-political-donations>.

real world situations, Game Theory provides a valuable insight for why parties choose to act based on a matrix of potential outcomes.

To set up this model, we'll begin with two participants: politicians and corporations. Each participant has a set of actions, and depending upon the actions of the other participant, they each receive an outcome. Consider the following game matrix:

		Politician	
		Favor	Not Favor
Corporation	Donate	$(\delta\alpha - \beta) + pz, \beta + pz$	$-\beta + pz, \beta + pz$
	Not Donate	$\delta\alpha + pz, +pz$	0,0

In this game δ represents the probability that the firm will receive a political favor and is a positively correlated function of β . β is the corporation's donation and also the politician's benefit, and α represents the benefit to the corporation from a political favor. The variable z represents the fine for wrongful favors or bribery, and is based upon the probability of discovery, p , and is a number between 0 and 1. This is also a two-stage game, meaning that the corporation goes first with Donate or Not Donate, and then the politician responds by either Favor or Not Favor. While the matrix only shows the payoffs for the first round of the game, the game can be to have the same payoffs for any number of rounds, alternating between the two players.

When playing out this game, the outcome, or equilibrium, is found depending on certain conditions. As p approaches zero, the likelihood of discovery also goes to zero, meaning that there are essentially no repercussions to deter the corporation and politician from improper behavior. Furthermore, for the corporation to always donate, the term needs to be sufficiently related to the value of the donation such that the corporation would have an optimal β value at which the gains from α are sufficient to outweigh all potential costs

and fines. Also, if the β term is high enough from the politician's perspective to outweigh the consequences of pz , then the politician will be best motivated to favor the corporation. These conditions lead to two equilibrium outcomes, either (Donate, Favor) or (Not Donate, Not Favor). The first situation will always be the outcome if the politician values future donations, thereby being motivated to continue favoring the corporation rather than gain a onetime benefit. The second outcome would be the equilibrium if the β donation is too expensive to the firm with a low probability of return; also, if the likelihood of discovery and fines were high enough, neither party would be motivated to act improperly. This places a large burden on the process for rigorous scrutiny. From a societal perception the (Donate, Favor) outcome is potentially detrimental. This loss could be translated into loss of influence in politics, feelings of marginalization, as well as policies being enacted that are in the best interests of corporations to the detriment of persons in society.

This theoretical extension would conclude an end outcome of either a society which is unable to properly oversee impropriety and corruption leading to a corrupt outcome, or it results in a society that properly regulates and dis-incentivizes collusion and corruption. In the latter of the two, without the ability to sway a politician, the corporation has no motivation to donate—whether it is legal or not. In the former situation, society becomes subject to the preferences of the corporation, essentially losing its voice in the political process. To translate this back into the real world, this game would suggest careful attention to the donating behaviors of corporations in future election cycles. This would either help justify the Court's ruling to allow them to donate, as politicians maintain the public interests despite corporate influence as reflected by declining corporate donation values, or it would signal a warning that corporations are deriving unjust benefits via ever increasing donations.

IV. SEPARATING AND DEFINING CORPORATE RIGHTS

In the *Citizens United* case, the winning argument focused on the injustice of restricting all corporations from political involvement, when media corporations were allowed nearly unfettered

political involvement.²⁴ This line of reasoning relies heavily on equating money-speech with the speech found in newspapers, journals, news broadcasts, etc. Since media corporations were exempt from the Tillman Act, proponents of the aforementioned cases argued that all corporations should be exempt. In other words, the Tillman Act was argued to be unconstitutional. The Court agreed.²⁵ Yet, it is important to note that the focus of this argument is weakened by the explicit protection of the First Amendment to “the press.” This would grant the media relief from the Tillman Act through the direct language of the First Amendment.

When dealing with political speech, there is a potential benefit to distinguishing between corporations and other interest groups. By limiting corporate involvement in politics, Congress would diminish the potential for governmental corruption. Delineation between corporations that were incorporated with the purpose of expressing political thought from those that were incorporated with the primary intent to maximize wealth would provide a sensible method of distinguishing which types of corporations could be allowed to donate to political causes. Congress could enact a law allowing for political speech and contributions from certain corporations and not others, using the distinction of wealth maximizing or non-profit as defined above. The value to this is that through a non-profit organization’s reliance on donations themselves, the organization is a better representation of public voice. This would make the volume of an organization’s voice dependent on the voices of real people, rather than a factor of economic booms and profit margins.

V. CONCLUSION

Clear language detailing the exact rights granted to corporations is permissible, and even desirable in the United States. This is supported by a careful analysis of the risks and benefits of unlimited corporate donations in politics. These effects are spread across society,

24 Editorial, *Justice Alito, Citizens United, and the Press*, N. Y. TIMES, Nov. 20, 2012, at A26.

25 *See id.*

as seen through economic forecasting of political behavior. It appears that the ramifications of Citizens United will have an overall negative effect on society. Therefore, it would be prudent to curtail the harmful consequences of the ruling. In order to do this efficiently, the high-risk factors for corruption and societal detriment should be observed carefully over the next several political cycles. In the event that the ruling does prove to be detrimental, the Supreme Court should consider limiting the rights of corporate persons. This action would be fully justified in the law under Justice Steven's argument that while corporations are protected as persons in some aspects of the law, by not being actual members of society other facets are not applicable or should be denied them for the protection of human persons in society.

With this style of reform, those groups who were chartered to specifically engage in political discussion would still be granted the right to political free speech, fulfilling the purpose of their incorporation. At the same time, the government would be able to more easily control the effects of corporations on politics and society.