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CITIZENS UNITED AND THE NEXUS-OF-CONTRACTS PRESUMPTION

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Citizens United v. Federal Election Commission[1] has been described as "one of the most important business decisions in a generation."[2] In *Citizens United*, the Supreme Court of the United States invalidated section 441(b) of the Federal Election Campaign Act of 1971 as unconstitutional.[3] That section prohibited corporations (and unions) from financing "electioneering communications" (speech that expressly advocates the election or defeat of a candidate) within 30 days of a primary election. The five Justices in the majority rested their holding on the assertion that "Government may not suppress political speech on the basis of the speaker's corporate identity."[4] In reaching this conclusion, the majority relied on a view of the corporation fundamentally as an "association of citizens."[5]

Meanwhile, the view of the corporation advanced by Justice Stevens in dissent differed markedly from that of the majority. Where the majority saw an association of citizens, the dissent saw state-created entities that: (1) "differ from natural persons in fundamental ways";[6] (2) "have no consciences, no beliefs, no feelings,

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[1] 130 S. Ct. 876 (2010).

[2] Larry E. Ribstein, *The Court Unleashes the Corporation*, IDEOBLOG (Jan. 22, 2010, 8:22 AM), http://busmovie.typepad.com/ideoblog/2010/01/the-court-unleashes-the-corporation.html.

[3] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (amending 2 U.S.C. § 441(b) (2006)).

[4] *Citizens United*, 130 S. Ct. at 885.

[5] *See, e.g.*, *id.* at 906–07 (asserting that the Court's prior ruling in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), "permits the Government to ban the political speech of millions of associations of citizens"); *id.* at 908 (asserting that, under 2 U.S.C.A. § 441(b), "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in . . . political speech").

[6] *Id.* at 971 n.72 (Stevens, J., dissenting).

no thoughts, no desires";[7] and (3) "must engage the political process in instrumental terms if they are to maximize shareholder value."[8] Of particular note, the dissent asserted that "corporations have been 'effectively delegated responsibility for ensuring society's economic welfare.'"[9]

These competing visions of the corporation roughly align with two divergent theories of the corporation: nexus-of-contracts theory for the majority and concession theory for the dissent.[10] It is worth considering that adoption of these competing theories of the firm was in some meaningful way dispositive. By denying that there was anything more substantial to the corporation than an association of citizens, the majority could conclude that there was nothing about the corporation qua corporation that justified restricting corporate political speech solely on the basis of corporate identity.[11] Conversely, the dissent's view of the corporation as "differ[ing] from natural persons in fundamental ways"[12] arguably made it much easier to conclude that the challenged limitations on speech survived strict scrutiny.

If the foregoing is correct, then it becomes quite puzzling that the majority remained silent as to the role of corporate theory and the dissent expressly disavowed any connection. Wrote Justice Stevens: "Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, a nexus of explicit and implicit contracts, a mediated hierarchy of stakeholders, or any other recognized model."[13] What might explain such apparent incongruence?

One could argue that whatever differences the majority and dissent may have had regarding theories of the corporation, their differences were not dispositive because the only thing we need to know about the nature of the corporation in

[7] *Id.* at 972.

[8] *Id.* at 965.

[9] *Id.* at 971 (quoting Milton Regan, *Corporate Speech and Civic Virtue*, *in* DEBATING DEMOCRACY'S DISCONTENT 289, 302 (A. Allen & M. Regan eds.,1998)).

[10] *See, e.g.*, Stephen M. Bainbridge, *Citizens United v. FEC: Stevens' Pernicious Version of the Concession Theory*, PROFESSORBRAINBRIDGE.COM (Jan. 21, 2010, 4:05 PM), http://www.professorbainbridge.com/professorbainbridgecom/2010/01/citizens-united-v-fec-stevens-pernicious-version-of-the-concession-theory.html. *But see* Larry E. Ribstein, *Citizens United v. FEC: A Roundtable Discussion*, FEDERALIST SOCIETY (Feb. 3, 2010), http://www.fed-soc.org/debates/dbtid.38/default.asp ("In general, Justice Kennedy's majority opinion and Justice Stevens' dissent represent diametrically opposed views of the corporation. . . . Neither the majority nor the dissent sees the corporation for what it is – a set of contracts among the participants."); *cf.* Liam Seamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 201 (2006) ("This Article challenges the two preeminent theories of the corporation—contract and concession. . . ."); *id*. at n.3 ("Not all theorists use the language of contract and concession, with several preferring 'property' and 'entity,' but the contract and property theories are roughly the same, as are the concession and entity theories.").

[11] *See Citizens United*, 130 S. Ct. at 899 (majority opinion) (concluding there was no reason to include BCRA in the "narrow class of speech restrictions that operate to the disadvantage of certain persons" because "[t]he corporate independent expenditures at issue in this case . . . would not interfere with governmental functions").

[12] *Id.* at 971 n.72 (Stevens, J., dissenting).

[13] *Id.* (internal citations omitted).

order to decide the case is that corporations are "persons" whose speech is protected under the First Amendment.[14] However, one also could argue that First Amendment analysis regarding a corporate person is incomplete without considering the theory of the corporation. According to this argument, speech by such a corporate person potentially fits within the "narrow class" of cases upholding identity-based speech restrictions,[15] but we cannot properly determine that issue without clarifying the "identity" of the corporation—which would need to be based on a theory of the corporation.

Overall, it might have been improper to focus on corporation theory because that theory is not in fact outcome determinative.[16] However, most modern commentators agree that the nexus-of-contracts theory generally is aligned with less regulation of corporations, while concession theory generally is aligned with more regulation.[17]

I suggest another explanation. It may well be that corporate theory was dispositive in *Citizens United*, but that acknowledging such a role for corporate theory would have raised serious questions about the propriety of the Supreme Court proclaiming what the "true" nature of the corporation might be. As recently as 1989, the Court described corporations as "entities whose very existence and attributes are a product of state law."[18] Would the Court now turn around and tell states what they had created? Such a pronouncement would raise issues of federalism. Rather, one might view the majority's effective adoption of the nexus-of-contracts theory as the adoption of a sort of presumption—not unlike the adoption of the fraud-on-the-market presumption in *Basic Inc. v. Levinson*.[19] The fraud-on-the-market theory then, like the nexus-of-contracts theory now, certainly had much academic support. Nonetheless, by merely adopting a presumption, the Court was able to employ the benefits of the widely accepted theory without having to confront difficult questions of having exceeded its expertise by

[14] *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.15 (1978) ("[C]orporations are persons within the meaning of the Fourteenth Amendment.").

[15] *See* Daniel J.H. Greenwood, *Fictional Shareholders: For Whom are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1093–94 (1996) (arguing that corporations lobby for laws that no human being would desire, and which may in fact be harmful to human beings).

[16] *Cf.* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 202 (1990) ("Historically, the political implications of the natural/artificial and entity/aggregate distinctions have been ambiguous, meaning different things at different times.").

[17] *Cf.* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 433 (1989) ("Commentary grounded in the nexus of contracts concept declares 'contract or concession' to be the political issue regarding the theory of the firm. It asserts that advocates of government regulation subscribe to a concession theory of the corporation's origin and then draws on the nexus of contracts to rebut concession theory.").

[18] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89 (1989).

[19] 485 U.S. 224, 250 (1988) (holding that "[i]t is not inappropriate to apply a presumption of reliance supported by the fraud-on-the-market theory" in Rule 10b-5 actions).

determining whether the theory was in fact correct.[20]

Likewise, one might view the majority's reliance on a view of the corporation as nothing more than an association of citizens as the adoption of a presumption in favor of the nexus-of-contracts theory—albeit an unexpressed adoption.[21] Interestingly, we may see the Court apply such a presumption again in the pending case of *FCC v. AT&T*.[22] In that case, the Court has been asked to decide whether corporations have personal privacy rights under the Freedom of Information Act ("FOIA"). While the case may well be decided on the basis of a purely textual analysis of the statute, there certainly appears to be room for an assertion that there is nothing unique about corporations—since they are merely associations of citizens (in accordance with the nexus-of-contracts presumption)—that should preclude them from claiming personal privacy rights under FOIA like other persons.

[20] *Id.* at 242 ("Our task, of course, is not to assess the general validity of the theory, but to consider whether it was proper for the courts below to apply a rebuttable presumption of reliance, supported in part by the fraud-on-the-market theory.").

[21] One possible reason that the Court did not expressly adopt the suggested presumption is that both the majority and the dissent considered their respective views of the corporation to be so obvious as to require little further comment. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 971, n.72 (Stevens, J., dissenting) ("It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern."). As far as the dissent is concerned, the motivation for avoiding further discussion of the theory of the corporation may also include a desire to avoid the objection that its concession theory ultimately seeks to impose an unconstitutional condition on the grant of corporate powers. *See id.* at 905 ("It is rudimentary that the State cannot exact as the price of those special advantages [of incorporation] the forfeiture of First Amendment rights.") (quoting Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting)).

[22] 582 F.3d 490. *See generally* Stefan J. Padfield, *Freedom of Information Act: FCC v. AT&T*, 38 PREVIEW OF U.S. SUP. CT. CASES 156, 158 (forthcoming Jan. 2011) ("One thing to watch for is the extent to which corporate theory plays a role in the decision.").