

The Value of Corporate Speech

Thank you to the Journal and its editors for this important symposium and the opportunity to participate.

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Corporate-financed advertising, particularly political advertising, is critically important: it threatens the basis of our republican system. We spent several centuries trying to make our governors into our servants instead of our owners. We tamed the kings; we need to complete the job by taming the directors as well.

Corporations, of course, cannot speak in the normal sense any more than governments can. We have endowed them with no mouth, although they do have mouthpieces.

So to consider the importance of corporate speech, we must be careful of our metaphors. The question is not whether speech is good, or what the unalienable rights of this human creation might be, or even what the First Amendment, enacted well before the modern business corporation was created, commands.

Instead, we should be asking how this valuable tool works. When will we be better off allowing it to run under existing rules, and when could we improve them. And specifically, what the effects are of allowing it to intervene in our political, cultural and economic life.

Merely invoking the language of laissez-faire markets or natural rights isn't enough. Neither corporate law nor the markets it structures comes with a heavenly guarantee of success.

A business corporation is a governance structure for controlling a pool of assets and directing a bureaucracy, authorized and structured by law – like any other government, instituted by men to promote the common welfare.

Corporations cannot speak. But they can **publish** the work of authors, individual or collective, who are expressing their own commitments, views, conscience or sensibilities. To my mind, this is not corporate speech; it is the speech of the author. For constitutional purposes, the rights of the corporation as publisher are entirely derivative: sometimes – but not always – it will be convenient, or freedom enhancing, to allow the representative to assert the rights of the represented.

When the NY Times asserts the speech rights of its journalists, or the NAACP asserts the rights of its members, the rights do not belong to the corporation. The issue in these cases is whether the corporation is an adequate representative of its member, assuming that (unlike modern business corporations) it has members – as Michels taught us, groups never perfectly reflect the interests or values of their members. And, whether the actual speaker is in some fashion inhibited from acting on their own in a way that we seek to overcome – by fear of lynching or inability to finance lawyering up to match powerful libel plaintiffs or government censors.

The troubling “speech” is different. Business corporations also spend corporate funds to pay agents to speak, write, lobby, produce on behalf of causes that are the corporation’s own – the result of corporate fiduciaries acting in their corporate role, in pursuit or avoidance of their legally imposed fiduciary obligation to act in the interest of the corporation itself.

This is true corporate speech: not an expression of conscience or human creativity, or struggle for justice or even speech at all. It is simply a business proposition carried out by fiduciaries in the name of the profit motive: the corporation spending corporate money to pursue corporate goals.

When a corporation “speaks” by spending in this way, no human being is expressing himself or herself or promoting her or his commitments except to the extent that we’ve properly designed corporate law to promote human happiness. When we regulate this speech – as we must, because only law gives a corporation funds to spend or determines which human being may spend it and for what purpose – no human being is censored: even if we banned corporate speech entirely, the corporation’s managers could pass the corporate money out to its human affiliates – employees, investors, customers – for them to spend as they see fit.

This kind of expenditure – corporate advertising or lobbying on behalf of the corporation itself – is always a potential threat, never a right.

The First Amendment has at its core the ban on censorship. Politically, our system of democracy depends on the right of the people to control the government, which means they must be able to have an unrestrained debate about our goals and values, undistorted by incumbent officials using their office to protect their incumbency. Limited government also depends on individuals having a space to practice and develop their own beliefs, commitments and consciences, independent of the views of the majority or the powers that be. That is why we protect freedom of religion, freedom of conscience and freedom of expression, the other core of the First Amendment.

Corporate speech – fiduciaries using money not their own, to promote views that (if they are not violating their role obligations) are not their own but rather the ones that they believe promote the interests of their institution – is freedom reducing, in exactly the same way that governmental religious practice is freedom reducing. That’s why, at the very dawn of the age of corporate dominance, under Teddy Roosevelt we banned direct corporate campaign contributions – and why so many have struggled to finish the job since.

Corporate “speech” means that the boss tells you what to say – but even the boss is not free to say what he wants. The law requires that corporate directors, corporate CEOs, and corporate employees alike must **set aside** their own consciences and views in order to work for the interests of the corporate whole. When states practice a religion, their citizens are compelled to follow beliefs and rituals regardless of their own commitments. Similarly, when corporations speak, citizens in the corporation must set aside their own values in order to pursue the corporation’s interests – not the national interest nor the many values that for decent human beings from time to time trump mere economic self-interest.

When we give corporations the right to speak, we necessarily give corporate decisionmakers – your boss – the right to **ensor** dissidents. The corporation speaks as a unit, regardless of agents who'd prefer to send a different message, consumers and suppliers and employees and investors whose funds are conscripted to promote a message that is not their own. To have true freedom of speech in this environment requires not giving corporations rights against us but the other way around: the freedom to disagree with the incumbent boss that is implicit in journalistic independence from marketing, academic tenure, civil service neutrality, restrictions on firing union activists and all the other institutional protections we create when we genuinely intend to protect freedom of expression in bureaucratic contexts.

In our mixed economy, a major purpose of politics and the institutions of government is to assure that markets and the institutions within them, including our major corporations, continue to promote human happiness – without wandering off into internally reinforced spirals of dysfunction or corruption.

If the institutions themselves are allowed to change the rules, this system breaks down. Most crudely, if corporate leaders are allowed to use corporate funds to influence the rules that limit them from stealing corporate funds, we are likely to discover that our agents have become our owners.

Slightly more subtly but even more importantly, even if corporate leaders pursue corporate interests instead of their own, their impact on the law will almost always be negative. **As Adam Smith¹ and Schumpeter taught and Acemogulu and Robinson recently reminded us, capitalist growth requires the opportunity for innovative upstarts to disrupt existing structures.** Corporate law and the markets it creates insist that corporate managers pursue profit – and often the cheapest and easiest way to do that is to corrupt the governmental managers who are supposed, like Adam Smith's invisible hand, to assure that the pursuit of profit furthers our collective interests and values.

When past economic success allows major institutions to buy legal protection from innovation and public subsidies our republican system threatens to degenerate into oligopolistic corruption locking in the status quo. We see this all too often:

- bars on Medicare using its competitive power to bring pharmaceutical prices closer to production costs,
- legal monopolies of ever expanding patent and copyright,
- so-called privatization that turns the taxpayers into forced consumers of inefficiently provided medical insurance, military, prisons, or educational goods, or that leads to overpriced providers of telephone, internet and cable, airlines and utilities suppressing potential competitors,
- banking regulation that privatizes profits and socializes losses,

¹ "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Wealth of Nations, Book I, Chapter X, Part II, pg.152.

- give-aways of public property such as energy resources or airwaves,
- exemptions from tort liability for dangerous activities ranging from nuclear power plants to off-short drilling to gun manufacture that amount to licenses to invade people's bodies and property,
- direct subsidies to established businesses, often with the effect (and sometimes intent) of making innovative upstarts not viable.

When those with the most can buy political power, both economy and democracy are in peril.

Questions (not a transcript):

- A. What about making corporations more democratic, for example by giving shareholders a greater say?

First, shareholders are not people – most shares today are held by other institutions. So this just shifts power from one fiduciary to another even narrower one. In any event, share voting is anything but democratic: the rule is one vote per (saleable) share, not one vote per person. This is at best plutocracy or market, not democracy. Giving shares more power is no more democratic than putting the Congress up for sale.

Second, and more important, if we were to democratize corporations, we'd have to go well beyond shareholders. Corporate money, if the corporation is successful, comes from corporate employees producing something that can be sold for more than it costs to produce. The funds, therefore, come from customers charged more than they would be in a competitive market, and employees and investors and suppliers and the public fisc paid less than they could be. If the corporation doesn't use this money for lobbying or electioneering, its directors are free to use it for any corporate purpose, including funding innovation or investment, or increasing the amounts paid to employees, investors, supplier or the public fisc or reducing prices charged to consumers, or just hoarding it.

Corporate money does not come from, will not necessarily go to, and certainly does not belong to shareholders. There is no reason why shareholders, any more than managers, should get to use other people's money to promote their interests or interests the law imputes to them. If we are going to make business corporations democratic actors, they will need to look much more like municipal corporations – that is, cities.

Third, democracy is a costly way to run our major enterprises. Time Warner is hard enough to deal with as it is, without adding the dysfunctionality of Congress on to it. We are much better off trying to retain the advantages of the division of labor – let corporate managers pursue profit within rules set by others who can focus, instead, on making sure that the profit motive serves us instead of enslaving us.

- B. Are you claiming that we've made a conceptual error, considering corporations as part of the governed instead of part of the government.

Yes. Hobbes described the state as a corporation. The metaphor works even better the other way around.

- C. Are corporations persons?

Corporations are legal persons, which just means that they have the right to sue and be sued, to enter into contracts and to hold property in their own name (unlike, say, children). This has been the core of the corporate form since Roman times. But there is no rule that says that a legal person for some purpose needs to have all the rights of people, let alone human rights or citizen's rights, in other contexts. States – but not their citizens -- are legal persons in international law, and ships are legal persons in admiralty law. Under our drug seizure statutes, sometimes you can sue a seized bundle of marijuana to determine its ownership. It doesn't follow that ships and marijuana have Free Speech rights.

The word "persons" is not the issue. The Supreme Court invented constitutional rights for corporations before the word appeared in the Constitution—for example, deciding that corporations may sue under diversity jurisdiction even though that privilege is restricted to "citizens". And the Fourteenth Amendment also declares that apportionment in the House of Representatives is to be according to the full number of "persons" in each state. Delaware, so far, has not had the audacity to contend that it is entitled to additional Congresspeople based on its corporate "persons." (Although a fellow named Jon Frieman is currently litigating his claim that he and his corporation are two "persons" to enable him to drive in the carpool lane). The question is, as Humpty Dumpty says, who is to be the master.

- D. If corporations have speech rights, do they also have the right to bear arms? Or to practice religion?

The issues are indeed quite similar.

When a company practices a religion, it coerces its employees and customers to practice along with it. There is no alternative. Corporations were not endowed by their (human) creators with a conscience. Giving the corporation the right to free exercise is the same thing as establishing a religion. It is absolutely contrary to the American tradition and our liberal heritage.

When corporations are allowed to bear arms against the citizenry, we will have returned to the Middle Ages. Defenders of liberty fought for centuries to disarm the aristocracy and dismantle the castles. Americans fought to disarm the Pinkertons and the private armies of the Robber Barons.

Our Declaration of Independence and Constitution commit us to the view that our institutions exist for us and not the other way around. Let us not give up these hard fought victories.

- E. If corporations don't have speech rights, doesn't that mean the government can censor them?

First, remember that censoring a business corporation merely means that the corporate managers cannot use money that is not their own to support a position that they are required by law to take (or that they are violating the law by taking).

Even if corporate "speech" were entirely banned, the corporation would be absolutely free to pass corporate money out to human beings who could spend it to support their own positions. No actual speaker would be censored in any way. Every citizen would be just as free to use his or her money to influence our politics. Small businessmen who entirely control their corporations would lose the ability to use tax-subsidized funds to promote their political activities, but they'd be entirely free to pay themselves a dividend or salary and, once the money was in their personal name, spend it in their personal capacity.

Similarly, even if business organizations were entirely excluded from politics and lobbying – something that is not on the agenda and is unlikely ever to be – the people who work for, benefit from and associate with the corporation would remain entirely free to form a genuine association to promote their political views. There is no reason why business corporations, which are not associations of people united to pursue a political program, should be treated as if they were.

Second, according to the Supreme Court, many corporations have no First Amendment rights already -- including cities, government agencies, and even, to some extent, public universities. Our true protection is not the Supreme Court but an aware citizenry committed to voting for politicians who understand the difference between freedom and its opposite.

When we banned corporate campaign contributions from treasury funds a century ago, we also protected the right of citizens affiliated with the corporation to associate for political purposes. That's the way a democracy does it.

- F. What about unions?

Unlike business corporations, unions actually are associations of citizens to pursue a common goal that they choose (within fairly strict legal limits) and can change. Moreover, union members have the legal guaranteed right to opt out of union political activity – in sharp contrast to employees, customers and investors in business corporations, who have no right at all to control or opt out of corporate spending in their name or using funds they've contributed to the firm.

- G. One of your fellow panelists said that he had "just heard that corporations are the source of all evil". Is that correct?

On the contrary. Pro-business (which invariably means pro-incumbent business) is rarely pro-market.

Business corporations are one of the great innovations of the capitalist era, the source of much of our wealth and many of our jobs. But like most tools they can be used for good or ill. It is the job of the law to ensure that they are used for good and not ill.

Free countries limit the extent to which incumbent politicians are permitted to use the perquisites of office to win elections and retain power. The same rule, for the same reason, should apply to incumbent businesses.