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CORPORATIONS AND THE US CONSTITUTION: PERSPECTIVES ON
"CITIZENS UNITED" AND ITS AFTERMATH

The Enterprise Entity and the Constitution of the American Economic Republic

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The Enterprise Entity and the Constitution of the American Economic Republic

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Abstract

Both Citizens United and the recent debate on opinions provided by rating agencies amid the financial crisis face the problems raised by defining the corporation as a legal person and a legal subject. In contrast, the enterprise entity perspective considers the corporation as an intermediate collective body and a legal object, granted with instrumental legal personality in some circumstances. The legal person view has been historically important to articulate private and public orders, and protect the private domain from abuse of public power. At the same time, it was and still is important to impose some social control and social duties towards the community on enterprise entities, especially in a world where corporations are allowed to own and control other corporations, constituting corporate groups that are autonomous and opaque fields of private power. From this perspective, the definition and role of enterprise entities point to the constitution of legal-economic orders. Drawing upon Dewey's suggestion, the corporation can be defined as a functional set of mutual relations that has social consequences, controlled and modified by being the bearing of rights and obligations, privileges and immunities. This understanding embeds the corporation in its social context fraught with immanent conflicts of interest and representation. In this context, the enterprise entity emerges as an overarching principle (and idea) that can foster the unfolding formation of transient social orders. Here the quest for legal-economic principles becomes unavoidable. Like the corporation, these principles acquire duties and rights. They have the right to be tentatively free, which implies two distinctive duties: they are responsible towards reality, because they are expected to guide human actions in situation; and they are responsible towards society, because they are expected to facilitate welfare and justice and liberty in ordering social activities.

KEYWORDS: corporation, legal fiction, legal person, real entity, constitutional rights, free speech, Citizens United, rating agencies

JEL Classification Codes: K10, k22, l50, l20

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The critical divide between legal subject and legal object

Bratton raises insightful issues by accepting the Avi-Yonah's challenge of delving into the legal-economic principles that underline corporate law. In particular, he identifies the idea of artificial entity (or legal person) that has been fostered by recent finance-led transformations of the legal-economic order of corporations and related business firms, following then Dewey (1926, p. 667-668) on this argument:

In some respects, the concession theory is the more favorable to expanded power of corporation; a charter of broad powers might be granted and the courts might construe its terms liberally. Its conceded assimilation to the singular person, even when a corporation is called "artificial," might even enlarge its rights, privileges and immunities. In an "individualistic" period – that is, an era chiefly concerned with rights of private property and contract – it is pretty sure to do so.

Theoretically speaking, the critical divide concerns the constitutional status of the corporation either as a legal person and legal subject, or as an enterprise entity and legal object. Avi-Yonah reconstructs it as an internal distinction within the real entity view, while Bratton argues that the idea of a legal person is more akin with the artificial entity view that understands corporations as artificial persons incorporated by law. As a matter of fact, the majority opinion in *Citizens United* was written by Justice Powell, who took an artificial entity view in MITE and CTS. This apparently theoretical point has major implications, especially in a world where corporations are allowed to own and control other corporations, constituting then corporate groups that are autonomous and opaque fields of power (Strasser and Blumberg 2010).

Concerning *Citizens United*, the majority opinion argues that corporations are (artificial) persons for Fourteenth Amendment purposes and then protected by the First Amendment as natural persons (and citizens) are.¹ This approach appears to be more akin with artificial entity view than with real entity view. A very real entity view concedes that corporations have "legal personality" as a legal instrument or device for their collective action, but does not argue that they are (artificial or legal) "persons" incorporated by law. On the contrary, the artificial entity view claims for artificial incorporation by the state (legal form) instead of

¹ This case has generated a huge flow of commentaries, not only in the legal literature. On this case, corporate speeches and constitutional law, see for instance the symposium edited by Gold (2007), especially Greenwood et al. (2007) and Winkler (2007); Schotland (2011); and Shapiro and McCarty (2011).

the real existence as an intermediate collective body (economic substance), echoing Blackstone: “A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law.”² Corporations, Blackstone goes on, are “artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.”³ When the members “are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals... for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies.”⁴ This one (artificial) person acquires then all the rights of natural persons, including perpetual succession, the right to sue and be sued, the right to own property, to have a common seal, to make by-laws, and to be subject to certain criminal liabilities.⁵ The king constituted corporations, and the king or other visitors exercised some degree of supervision over them, but once established, the corporation (i.e., its members) remained subject to relatively little outside regulation.

This artificial entity view has been historically important to articulate private and public orders, and protect the private domain from abuse of public powers. At the same time, it was important to impose some social control and social duties towards the community on enterprise entities (Berle 1952b: 935). However, this artificial entity view affords the risk of enabling abuse of private powers which can nowadays construct legal-economic conglomerates (or enterprise groups) that undermine either artificial or aggregate entity views. From the constitutional perspective, corporations (and corporations of corporations that are corporate groups) are intermediate collective bodies that do not have a political purpose. This means that their collective action is purported to be economic, not political. The idea of a legal person assimilated to a natural person (and then granted with citizenship) favors the provision of constitutional rights to corporations, and undermines every legal power of regulation or supervision, because of liberty and other constitutional rights and protections allowed to citizens under a Republican political order.⁶ This is clearly recognized by the dissent opinion by stressing the difference between subjects and objects of law:

Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves

² Sutton’s Hospital Case, 10 Co. Rep. 1, 973 (1612).

³ William Blackstone, Commentaries, Vol. 1 “Rights of Persons,” Chap. 18 “Of Corporations” (1765), 455.

⁴ Blackstone, 456.

⁵ Blackstone, 463.

⁶ By the way, Berle was aware of the political implications of the corporate revolution, and always addressed them together with economic and legal issues related to the corporate form.

as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Accordingly, the dissent opinion adopts the enterprise entity view by recognizing corporations with instrumental legal personality (and an object of law), which does not imply to consider them as (legal or artificial) persons (and a subject of law). On this basis, “legal personality” can be and should be distinguished by being a “person,” including from the constitutional viewpoint.

The enterprise entity and the constitution of legal-economic orders

This theoretical divide shows the importance of delving into theoretical issues that are fundamental to the constitution of legal-economic orders, including that of corporate law. According to Eisenberg (1969: 4) “corporate law is constitutional law; that is, its dominant function is to regulate the manner in which the corporate institution is constituted, to define the relative rights and duties of those participating in the institution, and to delimit the powers of the institution vis-a-vis the external world.” According to Berle (1952), the emerging corporate principles appear to be that the corporation, whatever an artificial person created by the state or a real enterprise entity “relied on by the community as a necessary part of its economic function,” (*ibidem*, 658) is as subject to constitutional limitations and responsibilities as are citizens or the state itself, requiring it “to respect certain individual rights and to assure a measure of equal protection of the laws within the scope of its power, as well as to fulfill the economic function it has undertaken of production, supply and service” (*ibidem*, 643). This constitutional duty includes to “not exercise its economic power so as to deny or hinder the exercise by any person of his constitutional right of freedom of speech and freedom of worship” (*ibidem*, 657); with reference to *Marsh vs. Alabama*,⁷ it had been observed that

[...] the corporation can no more deprive people of freedom of press and religion than it can discriminate against commerce.

Beyond matters of civil rights, similar concerns have recently been raised in regards to the first amendment’s protection that used to be granted to rating agencies. Their professional judgments were claimed to be “free speeches,” in order to protect them against lawsuits in the aftermath of the financial crisis of

⁷ 326 U.S. (1948) at 501 n. 4.

2007. The rating agencies claimed protection under the first amendment as a matter of free speech and freedom of the press. A number of courts had agreed with this position and applied the Supreme Court's actual malice standard for journalistic liability in determining the agencies' liability for the accuracy of their credit ratings. A speaker is not liable for a false or misleading statement about "matters of public concern" unless it made the statement with "actual malice." In fact, reviewing several court decisions on this matter, Partnoy (2006) found that any first amendment protection for rating agencies' opinions is generally "qualified," not absolute. In other words, they clearly can be regulated, the same as other corporate speech that is not entitled to absolute first amendment protection. Accordingly, those opinions may be considered as "professional" or "commercial speeches," offering rating agencies a form of limited protection that accommodates the first amendment's concern for the free flow of information, yet still allowing Congress to both regulate agencies' methodologies and impose a liability standard that deters misconduct. Theoretically speaking, once again, corporate speeches result from corporate entities and can be (and should be) distinguished from free speeches given by natural persons.⁸

Why principles and ideas matter

In fact, Bratton casts doubts on Avi-Yonah's theoretical effort to disentangle and organize the constitutional debate on the corporate form. He appears to drawing upon the Dewey's pragmatist view on the debate on the corporation as a legal person, whether real or artificial. Dewey (1926) takes an instrumentalist view to consider any corporate form as a tool employed to organize and influence other people's actions. Dewey moves then towards an institutional perspective by identifying corporations as "right-and-duty-bearing units" (*ibidem*, p. 656) in line with the notion of "enterprise as such" (*Unternehmen an sich*) or enterprise entity (not a legal *subject*, but a legal-economic *object* or agency) that Berle, following Rathenau, recommends for the institutional economics of the business firm. Dewey encourages defining the corporation from a functional perspective, as a set of mutual relations, which requires in turn an "analysis of facts" and of "*such* social consequences as are controlled and modified by being the bearing of rights and obligations, privileges and immunities" (*ibidem*, p. 661). In this context, institutions rule the playing level field generated by the corporation by framing

⁸ On the role and function of credit rating agencies in the operation of the US securities market, see SEC (2003). On US doctrine, regulation and litigation related to their activities, see also Pinto (2006), Mulligan (2008), Crawford (2009), Freeman (2009), Nagy (2009), Coffee (2010), Deats (2010), Jones (2010), Bunn (2011) and Heggen (2011), all providing further literature review, as well as legal references and cases.

and shaping the involved relations, whether agents decide to comply with those rules or not (Weber).

On this basis, Dewey (1926) actually liquidates the metaphysical debate on the essence of the corporate form through an appeal to the context and underlying reality, framed by conflicting interests and transacting social forces. He relegated then the embedding of legal institutions in human culture to a matter of history, not theory or practice of law (*ibidem*, p. 664).⁹ Therefore, according to Dewey, legal systems of words result to follow the humpty-dumpty adage:

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again. “They’ve a temper, some of them – particularly verbs: they’re the proudest – adjectives you can do anything with, but not verbs – however, *I* can manage the whole lot of them! Impenetrability! That’s what *I* say!”

“Would you tell me please,” said Alice, “what that means?”

“Now you talk like a reasonable child,” said Humpty Dumpty, looking very much pleased. “I meant by ‘impenetrability’ that we’ve had enough of that subject, and it would be just as well if you’d mention what you mean to do next, as I suppose you don’t mean to stop here all the rest of your life.”

“That’s a great deal to make one word mean,” Alice said in a thoughtful tone.

“When I make a word do a lot of work like that,” said Humpty Dumpty, “I always pay it extra.”

⁹ This astonishingly led him to miss the critical point of such active philosophy of law as is required to disentangle “human mind’s (con)fusion” (*idibem* p. 670) and drive decisions confronted with transactions and collective relations. Actually, he mentioned the traditional association of the ideas of “agency,” “responsibility” and “guilt” (*ibidem*, p. 663, note 10 at the end) which can be connected to the *functional* definition of the firm as a “real entity,” but he did not notice this logical and heuristic development. Cf. also Dewey (1931).

“Oh!” said Alice. She was too much puzzled to make any other remark.

Let me follow Alice through the looking glass of law and move the Dewey’s walk a step upward with her. Take the instrumental role of legal wording and look through its mirror to underlying reality. No doubt that struggles for money and control happen in that land, including money to pay extras to legal wording-makers, and the struggle to master the rules of the game:¹⁰ struggles between brides and maids, parents and sons, whites and blacks, Jews and Muslims, master and underling. They face each other and struggle like opposite football teams and their supporters. No doubt that legal words, and theories of those words, can be and actually have been framed by those struggles, exploited as rhetoric instruments, even over and beyond their meaning. This actually relates to the fundamental privilege of liberty and speech, but results to be the way to foster noise and eventually reduce Alice and all the opponents to silence. This eventually makes both, men and words, slaves of the overwhelming forces playing in the battle field. Aware of this struggle, institutional perspective argue against the Adam Smith’s belief: they gauge that social life is fraught by war instead of peace, as for conflicts are immanent to social reality (Commons, Veblen). However, is social life only plunk and silent war? *Should* it be indeed? *Can* it be otherwise? Perhaps. If we collectively believe it is true, and act on that basis, it *will* be increasingly real, as far as it *can* be. This is one secret of our surreal and human (too human) world.

Institutional perspectives believe that (legal systems of) words can help to make the real world (more) meaningful, and peaceful. They can help leveling the playing field by introducing a vertical dimension orthogonal to the horizontal dimension of argument and transaction. Dewey starts looking at reality, and makes legal words instruments of and framed by immanent conflicts. No essence of law, no difference between law and the law from the Humpty Dumpty’s viewpoint. Institutional perspectives do appreciate such pragmatist step, but transcend it by looking through the mirror of legal wording not only downward to underlying reality, but also upward to overarching principles (and ideas) which can foster the unfolding formation of transient social orders. They adopt transcendental pragmatism, following Josiah Royce.

The entity principle is no exception. It constitutes the legal-economic idea and principle (and functional definition) that may assist public or private rule-makers and rule-keepers. The pragmatist insight is that different principles drive different implications and have distinctive consequences on legal-economic

¹⁰ « The struggle to establish the frame of exchanges » (la lutte pour fixer le cadre de l’échange), in François Perroux (1961)’s words.

orders. Take the Dewey's example of the legal definition of the family. The legal decision that illegitimate children are not "sons," legally speaking, does shape their real life in modifying their social position and role in the family dynamics, and their enforceable duties and rights related to the family legal-economic order (or disorder).¹¹ Some alternative cultural order can suspend that order, but the latter ever stands as an outside frame for argument and transaction within the family system. To the question: is the quest of principles useful? The institutional answer is then: may the Law avoid that quest? As a consequence of their unavoidable role, legal-economic principles acquire duties and rights. They have the right to be tentatively free, which implies two distinctive duties: They are responsible towards reality, because they are expected to guide human actions in situation; and they are responsible towards society, because they are expected to facilitate welfare and justice and liberty in ordering human activities. If the Republic is wonderland, the entity principle is Alice: the stranger coming from outside the immanent struggle between red and white queens; the stranger who solves the conflict between power and fear against reason and sympathy; the hero who eventually tames the corporate monster: the Jabberwocky. Confronted to this Frankenstein Inc. (Wormser), the Republican order has to choose its champion, and find out the true Alice, the Hookah-Smoking Caterpillar said: Institutional perspectives welcome the enterprise entity as their very champion in the corporate field.

At the end, Alice becomes free to choose and speech and enterprise by following her father's visionary steps, according to Tim Burton's telling of her story. Citizens may eventually follow those Alice's steps, if corporations cannot.

The Cheshire Cat in Paris, 24 March 2010

¹¹ In fact, Dewey opened the way to this functional analysis of law by distinguishing two radically different types of definitions: "the metaphysical conception regarding the nature of things" and "another mode of definition which proceeds in terms of consequences" (*ibidem*, p. 660-661). Drawing upon this distinction, I am further suggesting a way to reconcile these distinctive perspectives.

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