CONSTITUTIONAL RIGHTS OF CORPORATIONS[1]

A furious public debate was triggered by the recent judgment of the U.S Supreme court in Citizens United v. Federal Election Commission[2] wherein it was held that corporate funding of independent political broadcasts in candidate elections cannot be limited under the First Amendment. The Court overruled Austin v. Michigan Chambers of Commerce[3], which had previously held that that a Michigan campaign finance act that prohibited corporations from using treasury money to support or oppose candidates in elections did not violate the First and Fourteenth Amendments. The dissenting opinion by Justice Stevens [4] held that the Court's ruling "threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution." The judgment gave rise to heated debates about the nature of corporations, the rights given to them and the basis on which such rights are given. While on one side of the spectrum those opposed to the judgment cited the fiction theory to explain the limitations which sought to be imposed on corporations, others hailed it as a natural progression of the real entity theory. This judgment was not an isolated one but was rather a part of a series of judgment pronouncing constitutional rights for corporations.

While Corporations are entitled to rights is well settled, the ambit of the rights has been debatable. We know that the corporations are persons in the eye of law. This raises the issue as to why be corporations treated as persons[5]. One of the probable reasons could be that law confers

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[2] 558 U.S. 50 (2010), decided on Jan 21, 2010. Majority opinion by Kennedy, joined by Roberts, Scalia, Alito; Thomas (all but Part IV)

[3] 494 U.S. 652 (1989), decided March 27, 1990

[4] The dissenting opinion was given by Justice Stevens who was joined by Justice Ginsburg, Justice Breyer and Justice Sotomayor. The 90-page dissent of Justice Stevens concluded with: At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics

[5] The word “person” and “personality” are derived from the Latin word “persona”, a mask worn by an actor.

rights on the basis of personality. To confer legal rights or to impose legal duties is to confer legal personality.[6] Therefore the legal right holders need to have personality. So in order to know as to what rights the corporate personalities are entitled to we need to understand the nature of corporate personality, the kind of personality corporations have. We need to understand as to what we mean when we say that corporations are persons. Are they persons in the way we presume human beings to be persons or are their personality referred to in a more restricted sense? This is important also in the sense that all entities recognized as persons are not entitled to the same rights. Thus the rights made available to different persons differ. This again raises the issue as to why should corporations have any rights at all. However, given the present realities we all agree upon the fact that corporations are given some rights so any discussion into the viability of giving rights to corporations will be a futile journey into the past. The point of discussion of this paper is to find the basis for conferring personality on corporations so as to make them worthy of being right holders and on the basis of this analysis to chalk out the ambit of the rights to which corporations can lay a legitimate claim i.e., can they claim constitutional rights?

People have come up with various theories on the basis of which corporations are entitled to rights- firstly as grants from state, secondly as a collective name for group of individuals and thirdly on its own basis. However there is no complete theory of the basis on which corporations should be given rights. History of corporations being given personality sees it to be an overlapping exercise with different theories being brought in to justify Court decisions at the same time. The corporate theory waters are deeply muddled with different theories coming in to account for a decision at the same time. The legal growth has been haphazard with no clear thinking about the basis on which corporations are "persons" so as to justify them being holders of constitutional rights. The court has literally tried to fit the corporations in to the legal framework already available without giving a deep thought to the uniqueness of the corporate personality, often employing haphazard means of expanding or contracting rights in light of the difference of the nature of the right- holders.

[6] Gray, The Nature and Sources Of The law (2nd ed. 1921) 27; Salmond, Jurisprudence (5th ed. 1916) 272

The myth of corporations having personality in the legal sense finds its root in the feudal-religious background of the middle Ages. The middle Ages often represented as the era of the "group" gave a dominant role to guilds, communes, churches, monasteries, associations, universities etc. However contrary to popular belief the concept of corporate personality was not used for trading purposes. Trade was usually in the form of "*commenda*"[7] or "*societas*"[8]. So the concept of corporate personality was not used for trade. Rather it was used on the political and social level. We find the origin of corporate personality in canon law. According to the Christian community church was seen as the mystic body of Jesus Christ.[9]The different parts of the church and the various religious groups were represented as members of a body. The Pope was considered as the head and the other parts as arms and legs.[10] Practical exigencies required that chuch be given a separate legal existence. Accordingly, church was considered as a "*universitas*" and a "*persona ficta*". The church had a separate legal existence but was different from individual persons in the sense that it could not commit crime or be punished.[11] The "*persona ficta*" theory gradually came to be used for other religious entities. All these religious entities were recognized as legal persons who were separate in the eyes of law from the individual members who constituted them. These bodies were represented by a guardian .At the same time we find the medieval political structure as a thoroughly decentralized society with several quasi-independent political units having a feudal- contractual framework.[12] Feudalism required that any new economic activity be endorsed by feudal authorities in the form of grants and charters. The medieval city was a quasi-contractual community of city-dwellers who claimed political

[7] In the middle ages the profit making companies were ventures between financiers and merchants. The financier was only a borrower of funds. By this method the financier could put a limitation on his liability. See, for instance, Tom Hadden, Company Law and Capitalism (London, 2nd ed., 1972)9.

[8] This was an old Roman model where there was no limitation on personal liability. It was a simple partnership with full and joint liability.

[9] Pollock and Maitland, History of English Law, Vol 1 (Cambridge, 1968) 445

[10] This canonical theory was developed more particularly by pope innocent IV.

[11] This later on came to be introduced as the criminal immunity of the corporations.

[12] For a detailed analysis see F.L.Ganshof, (Talandier, 5th ed., 1982).

autonomy for themselves[13]. These communities claimed this within the feudal structure. This raised the question as to whom should the charters be granted. It was felt that it should be granted to a corporate body and for this purpose cities were considered as corporate persons. Besides them, guilds were also considered corporate persons[14]. Later with the rise of the absolute king the power to assign grants to associations shifted to the king. Colonialism made the king enter into ventures with financiers and merchants. Colonial companies were setup having a number of privileges like monopoly of trade, power to frame laws to regulate trade and to tax the population. These kinds of powers reflective of the states' control required a stable character on the basis of which companies could be given such powers. So, the notion of corporations being entitled to personality for being active partners in the new form of business organization grew up. These corporations were the result of a grant of the state, thus maintaining its exclusive character. Nineteenth century saw the end of the medieval- mercantilists grant theory. Specific incorporation acts were replaced by general laws. In England the Bubble act that made the establishment of a corporate company without incorporation an offence was repealed in 1825[15]. The Companies Act was passed in 1844-1862 providing for free incorporation and limited liability.[16] We find similar developments in France and United States during 1850-1870.[17] This change was the result of free trade being recognized as a general principle rather than a privilege, emergence of the modern bureaucratic state, church which provided the religious background for the existence of corporate personality becoming a separate institution and the general inadequacies of the grant theory to define the nature of corporate personality. The grant theory took the corporations to be created by the grant of a state and so being nothing more than an artificial entity conferred personality for specific purposes. Under this view, a corporation was a legal fiction, an artificial entity. However, this made it difficult to make corporations accountable

[13] See Tom Hadden, *op.cit. supra n.*3,at 9; see M.de. Juglart and B. Ippolito, *Droit Commercial*, vol.2 (1970) 13; see H. Burman, law and Revolution. The Formation of the Western Legal Tradition (Harvard University Press, 1983)

[14] See A. Black, Guilds & Civil Society (1984) 18

[15] See Tom Hadden, *supra* n.4, at 14-16

[16] See Tom Hadden, *supra* n.4, at 19-20

[17] See M.de. Juglart and B. Ippolito , *supra* n. 20, at 14-15, See M. Horwitz, " Santa Clara Revisited" *in Corporations and Society*, W.J. Samuels and A.S. miller, eds. (New York, 1987) 20.

for tasks falling outside the ambit of the grant. Working upon as a natural progression of the corporations being artificial entities was the reasoning that corporations could not do anything which they were not authorized under the grant. It meant that they could not be held accountable for torts and other crimes committed by them as it was not provided for in the grant. Bringing the corporation inside the legal circle employing notion of agency was an implied acceptance of corporations having an individual will of their own, not provided in the charter, proving that artificial entity-grant theory[18] was inadequate to explain the nature of the corporation. This lead to the search for a different set of answers to explain the nature of corporations which culminated in the aggregate entity theory- corporations being seen as contracts in the individualistic sense giving priority to the natural persons behind the corporations to the corporations. According to this new theory individual has to be considered as the necessary element in legal relationship, .Aggregate entity theory drew from the partnership analogy and was largely successful in gaining acceptance. However, it too was found to be deficient, being unable to recognize "that part of the value of corporate property was that corporations were ongoing operations premised on the ability to maintain property as a unit."[19] Also, shareholders, who were originally viewed as the owners of a corporation, did not have the common law rights of ownership.[20] This was followed by an organicist view of society, which "saw society as a collection of collectivities, each a legitimate outgrowth of individual"[21]. Under this view, corporations were natural entities, which were equally capable of participating in society as an individual person. The organicist theory bridged the gap between the aggregate theory and the search for corporate autonomy by making the corporate entity seem to be a natural way of conducting business. So, we have a split formed

[18] A subtle variation of grant theory was the fiction theory. Both these theories took the will of the legislating authority to be the creative moment of birth of the corporate person. The difference between the "grant theory" and this new theory was that while incorporation was earlier was considered as a privilege, granted at the wish of the king, the new theory was in favor of a more general rules for incorporation.

[19] Mark at 1464

[20] Michael D. Rivard, Comment, Towards a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species, 39 UCLA L. REV. 1425, 1456 (1992) at 1460. During the same period, we find the rise of the managerial- centered model of the corporation. The corporations were technically owned by shareholders but run by management. Separation of corporate ownership from control took away part of the justification from the aggregate entity theory as the autonomous shareholders did not have the ability to control their property.

[21] Mark, at 1469

in corporate theory. On one side, individualists advocated a contractual theory and the second approach was legal realism, which followed the organicist movement by focusing on the reality of the corporate actor[22] as an individual actor. It declared Corporation laws and other acts of incorporation as being merely declaratory. Laws merely recognized a corporate person. There was no need to create them. One of the main propounders of realist theory was the German legal theorist, Otto von Gierke. Gierke in his famous work *Das Deutsche Genossenschaftrecht* argued that society as a whole should not be conceived as a sum of individuals, but rather as an integrated network of supra-individual entities, such as families, churches, municipalities, guilds, economic corporations, non- profit- societies, etc.[23] According to Gierke[24], it was impossible to conceive the identity of a specific individual person apart from the groups in which he was living. Each man is in a certain way the product of the communities to which he belongs. In this respect the personality of the individual is as "artificial" or as "natural" as that of the group. The real entity theory was the chief driving force behind the liberalizing of the laws of incorporation, ultimately responsible for driving the claim for corporation's constitutional rights.

Thus we find that the concept of a body distinct and separate from its members was employed to determine the character of the Church, which later on spilled over into the political structure due to the peculiar federal setup prevalent in those days. This was followed by the demand put forward by colonialism which demanded an active body having a strong existence of its own to justify its various dealings entered in the course of trade. Thus, the notion of personality being conferred on artificial bodies equating them to a capacity as to be made subject to certain rights and duties emerged out of the necessary social and political situations existing in that time. We really find no basis for it flowing from any deep legal thought employed prior to its use.

If we see how the Courts have taken this journey we come across the artificial entity concept being deeply embedded in the English law which was carried over to America, responsible for paving the course for further development of corporate theory, especially as to the availability of

[22] See Ernest Freund, The Legal Nature Of Corporations 12-14, 48-5, 55-56, 77-83 (1884)

[23] See his Die *Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorieen*, (Berlin, 2nd ed., 1915) 94-99.

[24] He was against the denial of the social reality of the corporations by adherents of the Fiction theory. He perceived the corporation to have a real social and legal personality existing prior to any recognition by the state.

constitutional rights to corporations. The most important case adopting the artificial entity theory is Trustees of Dartmouth College v. Woodward.[25] In this case, the Court considered whether a state could unilaterally modify a corporate charter that it had previously granted.[26] The court ruled that corporation was "an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence", firmly establishing the artificial entity. This decision of the Court lead to artificial entity theory becoming the predominant view of the corporate entity throughout the nineteenth century. The Court's adoption of the artificial entity metaphor in Dartmouth College is an early example of the Court's use of corporate theory to adjudicate a corporation's constitutional rights.

In addition to the artificial entity theory, the aggregate view of the corporate entity was also prevalent in corporate theory in the nineteenth century which later on became a dominant theory during the latter half of the nineteenth century. It was instrumental in the Court's first cases dealing with corporate constitutional rights and is present in the Court's modern cases as well. In Bank of the United States v. Deveaux[27], the Court held that a corporation was not a citizen under the constitution.[28] "As a result, diversity of citizenship for federal jurisdictional purposes was the citizenship of the corporation's shareholders rather than the state of incorporation or the corporation's principal place of business." This aggregate view of corporate citizenship persisted until the Court's decision in Louisville, Cincinnati & Charleston Railroad Co. v. Letson[29]. Letson reversed the decision, adopting the artificial entity theory of the corporation to hold that a corporation would be deemed a "citizen" of the state of incorporation for purposes of jurisdiction.[30] In Marshall v. Baltimore & Ohio Railroad Co., the Court reclarified that a

[25] 17 U.S. (4 Wheat.) 518 (1819)

[26] Id. At 637-38

[27] 9 U.S. (5 Cranch) 61 (1809)

[28] Id. At 86. While this view departs from the artificial entity theory, Chief Justice Marshall made it plain that the associational view was superimposed upon, rather than replacing, entity law.

[29] 43 U.S. (2 How.) 497 (1844)

[30] Id. At 558-59

corporation was not a constitutional citizen, yet adopted a legal presumption that a corporation's shareholders were citizens of the state of incorporation.[31] During this time, states started passing general incorporation laws, allowing individuals to incorporate their businesses without first seeking a special charter from the state legislature. The general incorporation acts altered the legal conception of the corporate entity by undermining a central premise of both the Dartmouth College case and the artificial entity theory- that corporations were created by the state and existed only for the purposes contained in the charter granted by the state.[32] Free incorporation made the corporate entity available by a simple procedure on equal terms. "The process of chartering ceased to be a legislative matter and became an administrative and procedural one."[33] The immediate effect of the general incorporation acts was that the predominant role in corporate organization shifted from the state to the incorporators. Due to the general incorporation statutes, the corporate entity came to be seen "as merely one form of voluntary association, an aggregation of talent and resources, consciously entered into by individuals." [34]This made it difficult to ignore the individuals behind the corporate fiction. This led to the adoption of the aggregate entity metaphor in corporate and constitutional jurisprudence. Corporate theory reached a crossroads at the end of the nineteenth century. The aggregate entity theory became more prevalent as individual citizens began taking advantage of the general incorporation statutes to form business corporations. Yet the artificial entity theory was still relied on by advocates of regulation. The aggregate entity metaphor effected decisions affecting corporate constitutional rights. In the Railroad Tax Cases[35], Justice Field held that corporations could claim

[31] 57 U.S. (16 How.) 314 (1853)

[32] The first large corporations to surface after the general incorporation acts were railroads and banks. These types of corporations were supervised by the States quite strictly because of their quasi- public nature. Late in the nineteenth century, however, the use of corporations as a method of doing business exploded as individual citizens began taking advantage of the ready availability of the corporate entity. See Hovenkamp, The Classical Corporation in American Legal Thought, 76 GEO, L. J. 1593, at 1634 (1988)

[33] Gregory A. Mark , comment, "The Personification of the Business Corporation in American Law, 54 U. CHI. L. REV. 1454. In effect, citizens were able to incorporate their business ventures by simply filling out the necessary paperwork.

[34] Redish & Wasserman, What's Good for General Motors: Corporate Speech and the Theory of Free Expression, 66 GEO. WASH. L. REV. 254 (1998)

[35] 13 F. 722 (C.C.D. Cal. 1882)

equal protection of the laws under the Fourteenth Amendment[36]. The court stated that "to deprive the corporations of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value." [37] Thus, the court imputed the corporation's constitutional personhood from that of the individuals who formed the corporation. Four years after the Railroad Tax Cases, the aggregate entity metaphor of the corporation was adopted by the U.S Supreme Court in Santa Clara County v. Southern Pacific Railroad Co., a case that has proven to be a watershed moment for corporate constitutional rights.[38] In that case, the Court held for the first time that a corporation is a 'person" under the equal protection clause. The Court's holding contained no reasoning or analysis, but merely stated: The Court does not wish to hear argument to the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to corporations. We are all of the opinion that it does."[39] Santa Clara may be viewed as the watershed case for corporate constitutional rights, for by holding that a corporation is a constitutional "person" under the Fourteenth Amendment, it provided the foundation for all corporate constitutional rights. The Court likened the corporate entity to the natural "person" described in the Fourteenth Amendment by focusing on the rights of the natural persons who had founded the corporation. But, the Santa Clara decision also employed the artificial entity description, as the corporation, rather than its shareholders were to remain the named party in all corporate litigation. Thus, the legal "person" recognized by the Court was a complete legal fiction. The inherent problem with the use of both metaphors in Santa Clara is that the Court granted constitutional personhood to corporations without inquiring whether corporations should be entitled to it as a matter of law. Corporate theorists at the time could not even agree as to whether the artificial entity metaphor or the aggregate entity metaphor properly defined the corporate entity. The Court used both the metaphors to justify the results. The "real entity" metaphor of the corporation first appeared in the twentieth century.

[36] Id. At 744

[37] Id. At 747

[38] 118 U.S. 394(1886)

[39] Id. At 396

Today corporations have come to be accepted as a legal actor and the bulk of the focus is towards management pushing for reforms and accountability. Courts have continued to use the different theories in the cases concerning corporate constitutional rights. The expansion of corporate constitutional rights has been so extensive that modern corporations have almost come to acquire the same constitutional status as natural persons. The real entity theory has been applied by the Court numerous times in recent years to extend various constitutional rights to corporations. For example, in United States v. martin Linen Supply Co.,[40] the Court relied on the real entity theory to extend Fifth Amendment double jeopardy protection to corporations.[41] Likewise, in Dow Chemical Co. v. United States,[42] the Court relied on the real entity theory to extend the Fourth Amendment prohibition against unreasonable search and seizure to corporations. In Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n[43], the Court adopted the real entity theory to address the free speech rights of corporations. So, the real entity theory became the most important definition of the corporate "person" in the early twentieth century.

Thus we find that the notion of a body separate from the members constituting it emerging from the demands of canon law and the prevailing social conditions of the middle ages. Colonialism demanded companies with a certain amount of autonomy to effectively handle matters strictly falling within the purview of state. This lead to the notion of artificial personality being imputed upon corporations. With time corporations emerged as the dominant force of trade and soon corporations emerged as the single most important method of conducting business, yielding enormous power. The theories explaining the nature of corporations have grown with the growth of the power of the corporation. At one time, artificial entity theory was able to explain the limited role the corporations were supposed to fulfill. With corporations becoming the most preferable mode of conducting business, they demanded more autonomy supplied by the aggregate theory which was successful in bringing it on par with an individual. This process was further carried forward by the real entity theory which firmly established the corporations on the

[40] 430 U.S. 564 (1977)

[41] Id. At 568-69

[42] 476 U.S. 227 (1986)

[43] 475 U.S. 1, 8-9 (1986)

same pedestal as the individuals. However, throughout this whole exercise, the basis on which rights available to corporations were being promoted was not given a serious thought. Further it's not that the three theories have replaced each other. There have been overlapping applications, with the court often citing more than one theory in the same judgment. One of the probable reasons was that the whole notion of a body separate from the members constituting it has been a tool employed for convenience. It's true that the initial convenience did not lay in commercial purposes but once this flexible concept was introduced in the commercial arena, it continued to be twisted and elongated as per the requirement of the time. The courts have obliged with their willing acceptance to advance the notion to meet the demands put forward by time. But any notion employed and created solely on the basis of flexibility can have repercussions. This is the result of the absence of a solid base which could justify by itself the position and the rights given to corporations without resorting to the needs of that period of time. From a positive angle it could be called its flexibility and on the flip side it can be said that it does not have a shape of its own. The notion of corporate personality somewhere falls in this category. The lack of clear reasons can have disastrous effect. Present efforts to fit corporate personality into the existing legal framework by drawing up an analogy between individuals and corporations is ill fated. It's like equating a chair and a table as both of them is made of wood. Legal theory confers personality so that one can be a right holder. Person as a concept has itself been flexibly used to accommodate or alienate according to present wish. Thus unborn persons and slaves came to be recognized as persons after a long battle. Similarly corporations came to be recognized as persons to execute to meet the economic and other exigencies. Imputing this artificial notional personality served various useful purposes. This was carried forward to impossible heights and has landed up with the corporations being equated to persons. So by the current trend constitution of a country provides for the rights of the citizen/people/ persons of that country and the corporations. This is a defective conclusion arrived at upon a treacherous reasoning. This is not to suggest that corporations should not be given any rights but the rights available to corporations should flow from commercial statutes created according to the will of the legislature and not from the fundamental rights available to under the constitution.