

Ronald J. Colombo

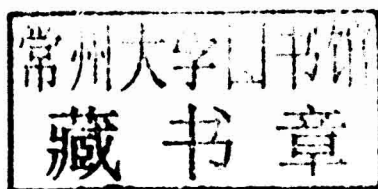
**The
First Amendment
and the
Business
Corporation**

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Ronald J. Colombo



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PREFACE

As this book went to print, the U.S. Supreme Court handed down its joint decision in *Sebelius v. Hobby Lobby* and *Conestoga Wood v. Sebelius* (renamed *Burwell v. Hobby Lobby* and *Conestoga Wood v. Burwell*). These two cases feature prominently in Chapter 7, and implicate matters that are central to this book and addressed throughout. Namely, whether a for-profit business corporation may invoke the religious liberty protections of the First Amendment to the U.S. Constitution. As such, a brief mention of this development is warranted.

In its 5-4 decision, the Supreme Court granted a religious exemption to two closely held, religiously grounded for-profit corporations from the Affordable Care Act's "contraceptive mandate," thereby recognizing and protecting their rights to religious liberty. Critically, the court predicated its decision on the Religious Freedom Restoration Act (RFRA), and explicitly declined to address whether the same result would be compelled via recourse to the First Amendment's free exercise clause. Further, the court also made clear that its holding concerned the claimants before them: two *closely held* corporations, and reserved for another day the question of whether a publicly traded corporation could also avail itself of religious liberty protections (statutory or constitutional). Finally, as with most of its other recent decisions adjudicating corporate rights and freedoms, the Court once again avoided any sustained discussion of corporate theory, in its majority opinion, concurring opinion, or its dissents.

The narrowness of the Court's decision underscores the importance and continued timeliness of this book's undertaking. The Court did not decide the cases before it on constitutional grounds, nor did the Court's holding extend to large, publicly traded corporations. The Court failed to justify its opinion via recourse to any theoretical conceptualization of the corporation, or to fit its ruling into a larger framework of corporate rights. As a result, the very questions and matters this book was written to address remain open and neglected.

For my wife, Kimberly, and my children, Isabella,
Christina, Ronald, Thomas, and Gabriella, with love.

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This book would not have been possible but for the tremendous support I have received over the years from several individuals.

For a lifetime of love and encouragement, I thank my parents.

I thank my friend and colleague Julian Ku, who, in 2006, invited me to make the jump from private practice to academia. Without that leap, chances are this book would have never been written. Further, I count myself among the many who have received inspiration from Julian's example as a scholar.

I thank Crystal Glynn and Timothy Glynn for their assistance in preparing me for legal academia, and David Gregory and Mark Movsesian for their support and mentorship throughout my transition into the academy.

My colleagues at the Maurice A. Deane School of Law at Hofstra University are to be thanked for their encouragement and assistance since 2006. Special thanks in this regard goes to Dan Greenwood, Norm Silber, Robin Charlow, Vern Walker, and Akilah Folami for their help in sharpening my thoughts on the matters covered in this book.

I am especially indebted to Julian Velasco, Robert Miller, Brian McCall, and Lyman Johnson for their contributions not only to my thoughts on the matters presented herein but to my development as a scholar and also for their friendship.

Other scholars who have, over the past few years, contributed to my thinking about the matters addressed in this book include Marc DeGirolami, Rob Vischer, Richard Garnett, Susanna Riken, John McGinnis, Usha Rodrigues, Chapin Cimino, and Judd Sneirson. Thank you.

My students must be thanked for allowing me countless opportunities to discuss these issues with them, and for the benefit of their insights. This applies most especially to those students who have taken my seminar, "Controversies in Corporate Law."

Invaluable assistance was provided to me by Toni Aiello, one of the finest librarians I have ever known. No source I requested was too obscure for her to expeditiously find and procure for me. Substantial help was also provided to me by my research assistants Alyssa Galinsky and Lola Yellico, for which I am extremely thankful.

My assistant, Maria Filotti, must also be thanked for her tireless and cheerful help with a variety of administrative matters regarding this project.

I must also thank a number of institutions and organizations for affording me the opportunity to present and discuss many of the ideas that ultimately found their way into this book. These would include the Robert M. School of Business at the University of Maryland, the Annual Law & Religion Roundtable, Suffolk Law School, the Notre Dame School of Law, the Gruter Institute for Law and Behavioral Research, the Peter J. Tobin College of Business at St. John's University, the Association for the Study of Law, Culture, and the Humanities, and Villanova University School of Law. My own Hofstra Law School must be thanked for its support of my scholarship, in the form of research grants and special leave, among other things.

Some of the ideas expressed herein were previously articulated by me in other publications. I would like to thank those publications for giving me the first opportunity to work out my thoughts on these matters in print. I would like to especially thank the *Houston Law Review*, Sage Publications, the *Temple Law Review*, and the *Washington & Lee Law Review* for also permitting me to reuse certain portions of these prior publications in this book (specifically set forth in *The Naked Private Square*, 51 HOUS. L. REV. 1 (2013); *Rights and Responsibilities of the American Business Corporation*, in BUSINESS AND HUMAN RIGHTS (Manoj Kumar Sinha, ed., SAGE 2013; *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1 (2012); and *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3 (2012)).

Finally, and most of all, I need to thank my family, to whom this book is dedicated. The time I spent working on this project was time I could have spent with them. My sacrifices to see this book through to completion were their sacrifices as well. I have been blessed by their love, patience, support, encouragement, and prayers throughout this undertaking. For this and the countless other ways in which they enrich my life and everything I do, I am eternally grateful.

INTRODUCTION

Few institutions receive as much scrutiny as the modern business corporation. Whether it be from adulators (sometimes), or critics (more frequently), corporations and corporate conduct are consistently the subject of attention and discussion. This plays out on both a micro level (in which particular, individual corporations are the targets, such as, “How could *Apple* do such a thing?”) and a macro level (in which corporations in general are the targets, such as, “How come so many companies get lucrative tax breaks?”). This is completely understandable, if not to be expected. For particular individual corporations, and corporations as a group, play a tremendously significant role in our society today.

Indeed, it would not be hyperbole to suggest that in these opening decades to the twenty-first century, the business corporation is well poised to becoming (if it has not already become) the dominant institution in most societies around the globe.¹

By “dominant institution” I mean the force that has, to a varying degree, asserted its influence over the peoples and lesser institutions of its times. Institutions that, whether directly or indirectly, help shape law, culture, and practices. Institutions that might even set the pace and rhythm of daily life.

Nearly every age has such institutions. The ancient world was marked by kings and kingdoms, emperors and empires. In the West, as these figures and structures faded into history, the church and its bishops rose to supplant them—which, in turn, helped to define the Middle Ages. The ruptures and decline of the church birthed yet another era, one that led to the ascendancy of the nation state—a situation that has generally persisted to our present time.

It can be argued, however, that the nation state is ceding (or perhaps has ceded) the high ground to the business corporation. To assert this is not to disregard the continued presence and role of national governments. States and governments certainly remain important societal pillars (and for that matter, so does the church in many regions of the world). But in an era of globalization, where technology and mobility have made national boundaries look increasingly irrelevant, corporations have found ways to spread their

influence and generate wealth across borders which many modern governments would envy. Indeed, in terms of sheer size, some corporations today enjoy revenues that dwarf the gross domestic product of all but the largest and most prosperous of countries. According to one recent study, “of the 100 largest world economies in 2010, forty-two were private corporations.”²

That is, however, only half the story. For the influence of the modern business corporation is as deep as it is far-reaching. In modern, free-market countries such as the United States, business corporations essentially set industry wages and working conditions. They determine, in very large part, what products will be sold, and what services will be offered. They decide what movies and television shows will be produced, and what music and programming is played on the radio. They select the foods that will be made available for us to eat, and the clothes and fashions that will be made available for us to wear. In short, it is difficult to imagine any facet of modern living that is entirely devoid of corporate influence.

In recent years, corporate influence over society has expanded further still. Via lobbying, corporations have long played a behind-the-scenes role in politics, exerting influence over the legislative and regulatory process. But today, corporations are more openly involved in this than perhaps ever before. Corporations increasingly bankroll political advertising campaigns to support or oppose causes of concern to them. This extends to the sponsorship of advertisements in favor of or in opposition to particular candidates for office as well.

In recognition of the corporation’s ascendancy, concerned individuals have reacted differently. Some have pushed for greater regulation of corporate enterprises, in order to rein in their influence. They seek the reassertion of state authority over the course of society, an option they consider fairer and more democratic. Further, and critically, they seek to free the state itself from the tentacles of corporate influence. For what faith can we have in additional regulation if the regulators are themselves controlled by the regulated?

Others, however, have chosen a different route. To them, the ascendancy of the corporation is as much an opportunity as a potential threat. For despite the long-term power shift toward the corporation, the state shows no signs of withering away. Indeed, in the wake of the global financial crisis of 2008–2009 (the effects of which have persisted well into the subsequent decade), many governments have flexed their muscles and asserted powers to a greater degree than generations can recall. If the late twentieth century was the era of deregulation and privatization, the early twenty-first century can be considered an era of re-regulation and, in some instances, nationalization. Further, not wishing to let “a serious crisis go to waste,”³ many governments that rode into power during the financial crisis have turned their energies and regulatory zeal to matters well beyond a reform of financial

markets. Within such a context, some have seen the power of the corporation as a counterweight (perhaps the only effective modern counterweight) to the state.

Additionally, some have worked to harness the power of the corporation for what they consider to be more positive ends. They have attempted to supplement the corporation's focus on private goods (such as shareholder returns) with greater consideration of the common good. They have attempted to dislodge the corporation's typical, single-minded focus on profits and introduce elements of prosociality.

The fruits of these efforts are visible everywhere. Corporations are increasingly committing themselves to philanthropic undertakings, via charitable giving or by establishing nonprofit organizations of their own. Corporations are today leading initiatives that have helped alleviate humanitarian suffering and crises when governments were unwilling or unable to get involved.

Some corporate boards and executives have taken these efforts to an even higher level. Not satisfied with limiting their concern over the common good as merely an add-on component to corporate decision making, they have endeavored to build corporations that are intrinsically prosocial: corporations that are organized around a set of moral and ethical principles that guide their conduct as concretely as the desire to turn a profit.

An example of this is the large number of corporations today that have embraced a commitment to environmental stewardship, and as such have pledged to conduct their operations in environmentally friendly ways that minimize their carbon footprint. Many corporations have also adopted principles regarding the treatment of employees and customers that go well beyond that which is required by either regulation or market forces. Some also make it a priority to patronize only those suppliers who themselves ascribe to certain standards of ethical conduct.

Some corporations have been pushed further still. Recognizing the power and ubiquity of the corporate form, certain individuals have combined to build and sustain corporations that adhere to their most deeply held convictions of all: their religious values. Motivating these individuals has not been a desire to proselytize *per se*, but rather a desire to serve their own needs—and the needs of other people of faith. This should not be surprising, as many people of faith, from a variety of religious backgrounds, feel alienated from if not downright excluded from a marketplace and corporate world driven primarily by the pursuit of profit, in which the accumulation of wealth and other and secular concerns predominate. Predictably, they have created niche enterprises where individuals of shared religious convictions can pool resources, coming together as directors and employees, investors and customers. These corporations are commonly committed not simply to honorable business practices broadly speaking, but rather to the principles of certain, particular religious traditions.

Taken together, these undertakings to broaden the perspective of corporate purpose (whether driven by a concern for environmental stewardship, social responsibility, or religious values) arguably transform the corporation in profound ways. Indeed, it can be plausibly maintained that we have witnessed the genesis of an entirely new organizational form. For modern corporate theory is predicated upon conceptualizing the business corporation as a profit-maximizing commercial actor, created for the purpose of private enrichment. In recalibrating the focus of the corporation away from these traditional objectives, and more toward the common good and holistic personal fulfillment, we have brought corporate practice into conflict with this prevailing conceptualization.

It is within this dynamic context that our society is currently reassessing the corporation. Thus, in considering the corporation's proper role in our society, we find ourselves addressing a quickly moving target. Moreover, we address a target that manifests itself in dramatically divergent ways. Indeed, given the widely disparate reactions to the corporation, ranging from adulation to antipathy, it may very well be the case that when individuals discuss "the corporation," they have vastly different entities in mind. This observation alone, I suggest, goes a long way in explaining the apparent interminability of our society's debate over corporations.

This makes any serious discussion of the corporation and its role in our society a considerably more difficult one. It is, nevertheless, one we must persevere in having. For the choices we make today regarding the corporation may have profound consequences for us tomorrow.

If our fears of corporate ascendancy are misplaced, actions we take to rein in the corporation could very well forestall one of the most powerful forces for good that the world has ever seen. Having already proven itself a tremendously powerful entity for the creation of wealth, the corporation might also prove itself a tremendously powerful entity in service of the common good as well. The corporation might also serve as a powerful bulwark against an ever-expanding state, preserving an important sphere of private activity and perhaps even the expression of countercultural values no longer shared by public majorities.

On the other hand, if our hopes are misplaced, allowing corporate power to amass unchecked could undermine our central democratic institutions, including fair elections and majoritarian rule itself.

In the United States, the flashpoint of this debate has been the First Amendment to the U.S. Constitution. Although not necessarily the most predictable battleground for this contest, the First Amendment is nevertheless an appropriate one.

Few constitutional provisions are as hallowed as the First Amendment. Recognized worldwide, this 1791 addition to the U.S. Constitution explicitly guarantees freedom of religion and freedom of speech (in addition to

freedom of the press, the right to assembly, and the right to petition government for redress of grievances). It has famously been interpreted to guarantee other implicit freedoms as well, including the freedom of association. As such, the First Amendment protects elements essential to nations considered to be free and democratic; elements essential to individuals as a matter of personal autonomy and to society as a whole as constitutive of democratic processes.

With the rise and spread of corporations across America, coupled with changing views regarding the corporation's purpose and role in society, the applicability of the First Amendment's protections to corporate activity is a question that has squarely and forcefully been raised. As business corporations increasingly engage in conduct that had previously been limited to political groups, civic associations, charities, and other such organizations, they have increasingly sought the same rights and constitutional protections that these other entities have enjoyed. Further, as individuals create corporations for these very purposes, to pursue aims that are not solely profit-driven but also imbued with concerns that are ethical, moral, political, and/or religious in nature, they too have clamored for application of the Constitution's protections to their (corporate) undertakings.

These attempts have been fiercely resisted. As with many constitutional disputes, a fair number of the adversaries appear to be simply attempting to advance political causes under the guise of constitutional argument. To the extent that corporate First Amendment rights are viewed as favoring one set of political interests or another, proponents and opponents of such rights predictably line up along the expected lines. For such combatants, arguments are pretextual—party rather than principle governs their advocacy (unless the principle subscribed to happens to be that the ends justify the means).

Far more interesting (and the subject of this book) are those arguments that tap into deeper, more sophisticated principles and concerns. What are the natures of freedom of speech, religion, and association? Are these liberties that can effectively be exercised in isolation, by individuals alone, or do they require a communitarian component in order to be fully realized? If they do require a communitarian component, what makes a business corporation qualified, or unqualified, to serve as that component? Do the vast resources of many modern business corporations counsel in favor or against recognition of corporate constitutional rights? Would such recognition serve to crowd out individual voices and rights, or would such recognition serve as a greater safeguard to individual liberty and a more effective check on government? These questions, and others like them, have driven the writing of this book.

This book is organized into ten chapters (not including this introduction and a conclusion). Chapter 1 will explain how freedom can rarely be exercised in a vacuum. Rather, to truly flourish, freedom requires the support

and opportunities that only “associations” can provide. Indeed, associations and a vibrant associational life are critical components to any society that wishes to remain free, democratic, and healthy. Chapter 1 will then introduce a claim central to this book’s thesis: that a business corporation can serve as an association. Not all corporations and perhaps not even most corporations can serve this role. But, as shall be explained in later chapters, certainly some corporations can. This is important for constitutional purposes because associations have long been recognized (as they should and must) as bearers of First Amendment rights.

Chapter 2 will set forth the modern business corporation and its history. In its current, typical manifestation, coupled with our prevailing understanding of its nature, the corporation does not come across as a particularly strong candidate for the “association” appellation. This is largely because the modern corporation is characterized as a *sui generis* organization where ownership is separated from control, and where management is duty-bound to prioritize profits over all else. A review of the corporation’s history, however, demonstrates how the corporation has continually changed and adapted to meet the needs and wants of its time. Further, past understandings of what the corporation was, or how it ought to be viewed, have similarly evolved. This suggests, I posit, a certain openness to other ways of envisioning the corporation even within our own times. It suggests that the prevailing conceptualization of “the corporation” need not be a static one, nor be considered particularly correct, but rather can and should continue to evolve.

Building upon chapter 2, chapter 3 will assert that the evolution of the corporation has continued, and introduce what I have labeled the “post-modern corporation.” Unlike the modern corporation, the postmodern corporation is not fixated solely upon the maximization of profits, but rather balances profitability with a regard for other values and principles. This is a critically important distinction, as it enables the postmodern corporation to plausibly lay claim to associational status. Harkening back to chapter 1, with this status comes a presumption of the First Amendment’s applicability.

Chapter 4 explores the theory of “corporate personhood”—the vehicle through which corporate constitutional rights have traditionally been recognized. It will show how the list of corporate rights has generally grown over time and will set forth the current reach of such rights. It will show how recognition of corporate rights has proceeded without much theoretical consideration of the corporation itself, or of the appropriateness of treating the corporation as a right-bearing entity. Chapter 4 will then suggest a different approach to First Amendment jurisprudence regarding the corporation, an approach that does indeed take the nature of a corporate claimant into account when weighing questions of constitutional rights. Not only does the proposed approach lead to more just results, it also follows the traditional

wisdom of linking rights with responsibilities, as it would afford greater constitutional rights to those corporate entities that embrace social responsibilities, and lesser protections to those entities that shun such responsibilities.

Chapters 5 through 8 will turn to the First Amendment. Chapter 5 will provide a background to the amendment, and chapters 6, 7, and 8 will delve into the freedoms of speech, religion, and association (respectively). This examination will reveal how the courts, when applying the First Amendment to corporate claimants, have increasingly prescinded from any detailed exploration of the corporation *per se* and its nature. To the extent that courts and judges have entertained corporate theory in their constitutional decision making, they have largely predicated their decisions on rough, outdated, corporate stereotypes. When one considers the values that animate these First Amendment freedoms, one quickly realizes how some corporations today (namely, post-modern corporations) can justly lay claim to First Amendment rights—a realization that has been lost upon the courts due to their undertheorized (if not incorrectly theorized) approach to the corporation. Given the timeliness and novelty of corporate claims to religious liberty, this particular question will be examined especially closely.

Chapter 9 will tie the preceding together and set forth a taxonomy of the corporation. Fundamental to doing so is the recognition that our conceptualization of the corporation need not be locked in time and wedded to a one-size-fits all paradigm. To the extent that the corporate landscape is marked by a significant amount of diversity, we ought not to adhere to a singular conceptualization of the corporation, but rather should embrace a multiplicity of conceptualizations. These conceptualizations need not be created from whole cloth, but can borrow from theoretical conceptualizations of yesteryear. Although certain understandings of the corporation are no longer popular today, they appear quite applicable to particular corporate entities of our own time given their makeup and operation.

Having suggested that we should view different corporations differently, chapter 9 will then suggest that, for First Amendment purposes, we should treat different corporations differently. A means of doing this shall be set forth in the form of a taxonomy, which will divide the universe of corporations into different categories based upon constitutionally salient characteristics. The chapter will explain why corporations falling within a particular category should (or should not) be entitled to assert the freedom of speech, religion, or association.

A number of concerns have been voiced in opposition to affording business corporations greater First Amendment protections. The most common of these concerns is that such protections would undermine the political process by giving business corporations disproportionate influence in elections and over government officials. This particular concern is raised most

often in connection with corporate free speech rights and will be addressed in chapter 6 along with our discussion of freedom of speech.

Another cause of concern, however, is the specter of discrimination that corporate First Amendment rights might herald. Granting corporations freedom of religion and freedom of association threatens to undo decades of civil rights progress, some have argued, by inviting businesses to deny service or employment to certain groups of people. Chapter 10 will directly address this important concern.

The book's conclusion will make some parting observations regarding the consequences of its assessment and underscore the need to get the question of corporate constitutional rights correct.

NOTES

1. See Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936 (1984).
2. Roy Peled, *Occupy Information: The Case for Freedom of Corporate Information*, 9 HASTINGS BUS. L.J. 261, 265 (2013); see also Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why a Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1331 (2012).
3. *NPR Morning Edition* (National Public Radio broadcast, Dec. 23, 2008), available at 2008 WLNR 24606394 (recounting the (in)famous remarks of Rahm Emanuel, the Obama administration's incoming chief of staff in 2008).

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