DOES FEDERALISM PROVIDE A MEANS TO CIRCUMVENT *CITIZENS UNITED*?

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The thesis of this article is that the decision of the United States Supreme Court in Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), was incorrect. However, the author believes that the movement to overcome its pernicious effects has been misdirected; the critics have relied upon the possibility that a reformed Supreme Court will overrule it, or that a constitutional amendment will undo it. The author believes that both of these approaches are unlikely to succeed, at least in any reasonable period of time. The approach of this article to undoing the pernicious effects of* Citizens United *is entirely different. It is based on the premise that the Tenth Amendment to the Constitution provides the States the power to create corporations, which necessarily includes the ability to set the terms of their incorporation, including the powers that they may enjoy. The* Dartmouth College *case – never overruled in 200 years – enunciated the rule that corporations have only such powers as they may be granted by the terms of their incorporation, a matter left to the incorporating state.*[1] *Accordingly, the states have the authority to circumscribe the terms of their incorporation, a matter left to the incorporating state.*[2] *Therefore, the states have the authority to circumscribe the ability of corporations, as a condition of their very being, to engage in political activity and, as a concomitant, the authority to limit or prohibit their right to engage in political spending – contrary to* Citizens United.[3]

There are practical problems to approaching the undoing of Citizens United *through the action of individual states, and an effort to do so might precipitate a "race to the bottom" among corporations seeking to preserve the corporate right to make political contributions, to those jurisdictions willing to preserve that right. It is also possible that the present Supreme Court's view of the Constitution's protection of speech, as an abstraction entitled to protection, might lead the Court to conclude that a corporation may not be denied the right to spend*

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[1] Trs. Of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[2] *Id.*

[3] Citizens United v. FEC, 558 U.S. 310 (2010).

money for political purposes even though the corporation's very existence has been achieved only through an act which denies it that right. However, the author believes that these potential obstacles should not foreclose consideration of the approach described herein.

INTRODUCTION

In *Citizens United v. Federal Election Commission*, the Supreme Court voted to overturn federal and state bans on corporate political spending, and did so by interpreting the First Amendment of the Constitution to protect free speech as an abstraction, rather than as a protection of the rights of would-be speakers.[4] The opinion rested on the premise that the First Amendment protects speech; that speech, to be meaningful, necessitates that funds be expended to allow speech to reach listeners out of the immediate physical presence of the speaker; and that limitations on the expenditure of funds which would extend the range of the speaker's message pose impermissible restrictions on speech. Justice Kennedy's majority opinion stated that "we find no basis for the proposition that the Government may impose restrictions on certain disfavored speakers."[5] The opinion went on that "[in] the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."[6]

Justice Scalia, in his concurring opinion, joined by Justice Alito, and by Justice Thomas in part, importantly explained that the First Amendment is written in terms of "speech," not speakers, and that its text "offers no foothold for excluding any category of speakers. He further noted that the dissent offers no evidence to support any such exclusion."[7]

In fact, consistent with Scalia's observation, the decision does not address the rights of corporations as a class or category of speakers under the First Amendment. Rather, it merely assumes that the corporation has the right to engage in political speech. Having the right to engage in political speech, the corporation, under the reasoning of *Citizens United*, must necessarily also have the right to spend corporate funds to promote that speech. Based on this assumption and reasoning, it would be impermissible for the FEC to interfere with the corporate appellant's right to spend money to finance an advocacy movie critical of a political candidate; and therefore the McCain-Feingold Law operated unconstitutionally in

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4 *Id.*

5 *Id.* at 341.

6 *Id.* at 347 (stating "[i]t did not need to reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.").

7 *Id.* at 392-393 (Scalia, J., concurring).

making such spending illegal.[8] The opinion allows no room for the possibility that the protection assumed to be offered by the First Amendment may not in fact be available to all categories of speakers, from single individuals, to unincorporated associations of individuals, to incorporated associations of individuals such as corporations.[9]

The following discussion addresses two different weaknesses in the Court's decision, which leave open the possibility of a reexamination of the opinion. The first weakness is the fallacy implicit in the syllogistic logic of the Court's opinion: that because what is protected is speech itself, and that the expenditure of money to extend the reach of speech is a necessary incident to protection of speech, there can be no limitations placed on the expenditure of money to promote speech. Beyond this fallacy is another: that because the protection of speech in the abstract compels the conclusion that spending money without limitation to promote speech is an absolute right protected by the First Amendment, this protection must mean that the identity of the speaker can have no bearing on whether the speaker may be restricted in its ability to spend money to promote its speech. The majority opinion thus gives no consideration as to whether a corporate speaker might be created without any power of speech, and thus whether the corporation would be unable to avail itself of the First Amendment's protection of speech.

DISCUSSION

The protection afforded speech is not as absolute as Scalia's remarks would suggest. There are categories of persons whose speech is limited by law, either as to place or because of their position: government employees, teachers, persons serving in the military, and foreigners.[10] The majority in *Citizens United* acknowledged that the Court has upheld "a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.[11] The Court however went on to state that the corporate expenditures in the case before it "would not interfere with governmental functions," so that the precedents allowing such interference were inappropriate and stand "only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech."[12] The Court further explained that "[w]e find no

8 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 11 Stat. 81 (2002).

9 *Citizens United*, 558 U.S. at 362 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process"). It is difficult to reconcile that reservation with the broad language of the majority opinion.

10 *Id.* at 420.

11 *Id.* at 341.

12 *Id.*

basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers."[13] In a speech given subsequent to *Citizens United* and after his resignation from the Court, Justice John Paul Stevens made a pointed rebuttal to Scalia's premise, citing the whole variety of restrictions on the categories of "persons" able to engage in political activity in the United States.[14]

Scalia's explanation that all "speakers" must be treated similarly because they all engage in the constitutionally protected act of "speaking" disregards the possibility that there may be any inherent differences between the speech of corporate speakers and that of natural persons.[15] This discussion presumes that there are in fact vital distinctions between the two, which allow for differentiation between the rights which the Constitution accords to natural human beings, and the "rights" which states may confer upon legal entities when they are granted corporate status. It further presumes that this differentiation may provide a constitutional basis to limit the "speech" (and political spending) of corporations.

State laws relating to the act incorporation – something unavailable nor relevant to natural persons – provides both a legal and logical basis which would allow states to establish enforceable restrictions and even outright prohibitions upon what a corporation may do, including its ability to take political positions and to use corporate assets for the purpose of supporting such positions. Although *Citizens United* is said to protect "speech" as distinct from the speaker, if the speaker is an entity without the power of speech, and thus incapable, from the moment of its creation, of "speaking," the reasoning of *Citizens United* cannot give to the corporation that which it lacks *ab initio*: the right and power to speak. It has been an unchallenged principle of American law for two hundred years, since the Supreme Court's decision in *Trustees of Dartmouth College v. Woodward* (hereafter referred to as *Dartmouth College*), that corporations may only have the

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13 *Id.*

14 Speech at the University of Arkansas, May 30, 2012, Justice Stevens, who had authored the dissenting opinion in *Citizens United*, expressed his belief that the Supreme Court will in fact be obligated to revisit that decision. Justice Stevens noted that President Obama, in his State of the Union address given shortly after *Citizens United*, had criticized the decision as opening the floodgates to expenditures by special interests, including foreign corporations. It was in response to this specific criticism by the President that Justice Samuel Alito, attending the speech, had famously mouthed his silent rejoinder, "Not true." Justice Stevens suggested that such a denial was inconsistent with the statement in the majority opinion that the decision did not reach the question of whether foreign individuals or associations could be prevented from influencing the political process. "It will be necessary to explain why the First Amendment provides greater protection to the campaign speech of some non-voters than that of others," remarked Justice Stevens. He also noted that subsequent to *Citizens United*, the Supreme Court had summarily affirmed a lower court decision upholding restrictions on campaign spending by two foreign individuals living in the United States. Thus, Justice Stevens pointed out the problematical nature of the categorical and overbroad rule laid down in *Citizens United*. Speech available at www.supremecourt.gov/publicinfo/speeches.

15 *Citizens United*, 558 U.S. at 392-93 (Scalia, J., concurring).

rights, the power and the authority which the state confers through the act of incorporation.[16]

Although the Constitution makes no reference to corporations, the concept of the corporation existed when the Constitution was adopted.[17] The Tenth Amendment stated that the powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[18] The ability and power of the states to create corporations through the issuance of charters, today more commonly known as certificates or articles of incorporation, derives from the Tenth Amendment and has never been questioned. It has made no difference whether the corporation created was to engage in business for profit, or was a non-profit or charitable organization. The power of incorporation has left the states with the ability, in the charter granted to a corporation, to set the terms and conditions of the corporation's future existence, including the rights, powers and authority which the corporation may enjoy. That ability includes the right to limit the permissible activities which the corporation will have the power to undertake. The power to create corporations has been interpreted to allow states not only to grant new charters, but also to modify the terms of previously granted charters, and even to terminate such charters entirely, subject to certain qualifications which are hereafter discussed.[19]

The nature of the corporation within our legal system was first acknowledged two centuries ago, in the *Dartmouth College* case, probably the most famous and important case in American law defining the nature of corporations.[20] That case involved an effort by the State of New Hampshire to alter the corporate charter of Dartmouth College so as to convert the school from a private to a public college.[21] The Court, deeming the college's charter to be a contract, denied the effort on the basis that what the State was seeking to do constituted a violation of the Constitution's rule against the impairment of contracts. In the process of reaching its conclusion, the Court made a number of critical findings concerning the nature of corporations. The Supreme Court declared the corporation to be "an

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16 *See Dartmouth College*, 17 U.S. (4 Wheat.) 518.

17 *See Citizens United*, 558 U.S. at 388 (Scalia J., concurring).

18 U.S. CONST. amend. X.

19 *Dartmouth College*, 17 U.S. (4 Wheat.) at 667-68 (Story, J., concurring); *see* Spring Valley Water Works v. Schrottler, 110 U.S. 347, 370 (Field, J., dissenting) (noting that following *Dartmouth College*, "the States acted very generally upon the suggestion of Judge Story, and few charters were subsequently granted without a clause reserving to the legislature the power to alter or repeal them. In some instances, a general law was enacted, declaring that all corporations subsequently created should be subject to this reserved power. The object of the reservation, in whatever form expressed, was to preserve to the State control over the corporate franchises, rights and privileges which, in her sovereign legislative capacity, she had called into existence; in other words to enable her to annul or modify that which she had created.").

20 *See Dartmouth College*, 17 U.S. (4 Wheat).

21 *Id.*

artificial being, invisible, intangible, and existing only in contemplation of laws [and] being the mere creature of law… *possesses only those properties which the charter of its creation confers upon it, either expressly or incidental to its very existence*."[22] This description of the corporation has never been repudiated. It allows a state to deny to a corporation the ability to engage in specified activities by either explicitly depriving it of the right to do so in its charter or by chartering a corporation with very limited powers which exclude the right to do those things which the incorporating state does not wish to allow a corporation to do. A corporation may be prohibited from engaging in any activity beyond the authority, which may be very limited, granted by the State in the corporation's charter.

Nothing in the Court's opinion in *Dartmouth College* suggests that a charter may not contain such limitations, which could include prohibiting or limiting a corporation's authority to expend corporate funds for activities beyond what its charter permits, either expressly or as incidental to its very existence. Hence, *Dartmouth College* may be seen to authorize restrictions on corporate political speech which restrictions would not run afoul of the First Amendment, being built into the corporation's very existence so as to forestall the claim that the corporation enjoys the characteristics of a person endowed with First and Fourteenth Amendment rights. This analysis would allow political activity and political spending on the part of corporations to be curtailed without the necessity of overruling either the reasoning and or the holding of *Citizens United*.

In the course of rendering his opinion in *Dartmouth College*, Chief Justice Marshall made a number of observations about the fundamental nature of the corporation which remain good law to this day and may provide the constitutionally acceptable way to limit corporate political activity and political spending.[23] Marshall described the corporation not only as "an artificial being, invisible, intangible and existing only in contemplation of law"; but also, being "the mere creature of law" as , "possessing only those properties which the charter its creation confers upon it, either expressly or incidental to its very existence."[24] The properties or characteristics of the corporation were only those which are:

> best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the

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22 *Id.* at 636 (emphasis added).

23 *See generally Dartmouth College*, 17 U.S. (4 Wheat).

24 *Id.*

> purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting by the promotion of the particular object, like one immortal being.[25]

Marshall's explanation is fully consistent with the notion that a corporation may be created without the power to do particular things that the state, for reasons of policy, wishes to prohibit. This provides the constitutional groundwork to propose that corporate political speech and political spending may be subject to such state-ordered limitations, and, most relevantly, that the rights of the corporation need to be so-extensive with those of natural persons.

When considering the implications of this route to the curtailment of corporate political activity and spending, it is important to note that receipt of a corporate charter is not a right but a privilege, and a state is under no compulsion to create corporations by granting charters, or even to permit the existence of corporations.[26] The charter may incorporate particular rights and powers accorded to the corporation and leave corporation without any rights or powers beyond those set forth either explicitly or by necessary implication. States in the past, through their incorporation power, routinely issued corporate charters prohibiting a corporation from making investments in other corporations, or from incurring debt, or issuing capital stock, either at all or in excess of specified limitations, or from engaging in any business other than the single activity set forth in the charter, the enforceability of which were assumed and never questioned. In modern practice, it has become customary to authorize corporations more broadly to engage in any lawful activity, but this does not render more restrictive grants of authority less enforceable than they once may have been.[27] Were a restriction on corporate political speech to be imposed in this manner, then the reasoning of the majority in *Citizens United* should not operate to protect the speech of a corporation lacking the legal capacity to speak. Scalia's explanation in *Citizens United* that the corporation had been unlawfully deprived of First Amendment free speech rights, should no longer be operative when the corporation's own charter denies it the ability to speak.[28]

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25 *Id.*

26 *See* Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583 (1926); *see also* Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).

27 *See, e.g.,* Rexford Flats Bridge Co. v. Canal Bd., 160 N.Y.S. 705 (Sup. Ct. 1916) (noting that while the state, at an early date, established a policy of liberality in the creation of corporations and their policy [and] has always continued with this policy, went another which has also been continued, that of retaining the right to control, regulate or even repeal the charter of corporations created under is laws).

28 *See* Citizens United v. FEC, 558 U.S. 310, 386 (2010).

Dartmouth College has never been overruled, nor have the decisions holding that corporate speech enjoys First Amendment protection ever directly confronted the implications of the *Dartmouth College* rule: that because corporations possess only the powers set forth in their charters, they would not inherently have a right to rely on First Amendment assurances in the face of charter limitations on their political speech and spending. *Dartmouth College* continues to be cited approvingly by courts, including by the United States Supreme Court. In 2002, in *Consolidated Edison Company of New York, Inc. v. Pataki*, the Second Circuit, citing *Dartmouth College*, described the corporation as "an artificial being, invisible, intangible and existing only in contemplation of law" while acknowledging that "a wide variety of constitutional rights may be asserted by corporations."[29] In *CTS Corp. v. Dynamics Corporation of America*, the Supreme Court recognized that the authority of states to enact laws regulating corporate governance did not violate the Constitution's prohibition against state interference with interstate commerce, specifically citing the dissent by Justice Rehnquist in *First National Bank of Boston v. Bellotti*.[30] That case, decided by a five-to-four majority, held a Massachusetts' prohibition against corporate political spending by banks for the purpose of opposing a referendum was constitutional. The two dissents in that case are germane because they focused on the differences between individual natural persons and corporations and found that such difference justified differing constitutional treatment of their right to free speech. The dissents did not specifically focus on the incorporation power as the basis for the state's right to treat corporate speech differently than the speech of natural persons, but their recognition of the distinction between natural persons and corporations implies that they understood that the incorporation power was relevant to the implementation of this distinction.

There were two dissenting opinions in *First National Bank of Boston v. Bellotti*, both of which are relevant: one by Justice White, joined by Justices Brennan and Marshall; and one by Justice Rehnquist. In his dissent, Justice Rehnquist cited *Dartmouth College* for the proposition that corporations were merely artificial creations of the state and thus not entitled to all rights of natural persons.[31] Applying the principle of *Dartmouth College* to the facts in *First National Bank of Boston v. Bellotti*, Justice Rehnquist declared that corporations could be denied certain rights available to natural persons, and rejected the proposition that the Fourteenth Amendment required states to endow business corporations with the power of political speech.[32] In a much later case, *O'Neill v.*

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[29] Consol. Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338, 346 (2d. Cir. 2002) (citing *Dartmouth College,* 17 U.S. (4 Wheat.) at 636).

[30] CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89-90 (1987) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 822-24 (1978) (Rehnquist, J., dissenting)).

[31] *Bellotti*, 435 U.S. at 823-24.

[32] *Id*. at 828.

U.S., the *Dartmouth College* case was again cited approvingly and Chief Justice Marshall's description of the corporation said to be "as good now as it was at the time it was announced…It expresses the common understanding of what a corporation is under present law."[33] Not only has *Dartmouth College* never been overruled, but such decisions as *Citizens United*, holding that corporate speech enjoys First Amendment protection, have not been asked to consider how the holding of *Dartmouth College* that corporations possess *only* the powers set forth in their charters or inferable therefrom might have bearing on the issue of corporate political speech.

The minority opinions in *First National Bank of Boston v. Bellotti*, although they are dissents, are cited and discussed here at length for their particular relevance to this article's proposed solution to *Citizens United*'s rejection of restraints on corporate speech and spending. Both dissents focused on the factor not addressed in the majority opinions in either *Citizens United* or *First National Bank of Boston*: the nature of the corporation as an artificial legal entity with the implication, as a constitutional matter, that corporations may be treated differently from natural persons where free speech issues are involved.[34] Both dissents imply, even if they do not actually address (although see below concerning Justice Rehnquist's dissent) that the constitutionally acceptable route to limiting corporate political expenditures may lie in the incorporation process.[35] These dissents are particularly relevant because they detail the factual characteristics inherent in the corporation but not in natural persons, providing ample reason to treat the corporation and the natural person differently.[36]

Such differences undermine any insistence on treating natural persons and corporations alike where speech rights are concerned, pointing out that the nature of such differences justifies doing so. The corporation may have perpetual life, whereas the individual does not. The corporation has limited liability, whereas the individual does not. Only the positive action of government may bring corporations into being, and the state's authority to do so allows the corporation to be treated differently, where political speech and spending is concerned, rather than natural persons.

Missing from the analysis of *Citizens United* is the realization that the provisions of the Constitution – the First, Tenth and Fourteenth Amendments, read together – allow states to create corporations endowed with only limited powers and lacking others which belong to natural persons, as well as to grant to corporations rights and powers, and the ability to do things, which natural persons lack. Both dissents in the First National Bank of Boston case suggest that, contrary

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33 O'Neill v. U.S., 410 F. 2d 888, 895 (6th Cir. 1969).

34 *See Bellotti*, 435 U.S. 807 (White, J., dissenting); 823-24 (Rehnquist, J., dissenting).

35 *See id.* at 805, 823-24.

36 *See id.* at 805-06, 823-24.

to *Citizens United*, there is a constitutionally acceptable route to limiting corporate political activity, including the use of corporate funds for political purposes – even though that route had not been taken by Massachusetts in the case before the Court. Justice White's dissent stated,

> governmental interest in regulating corporate political contributions, especially relating to electoral matters, also raises considerations which differ significantly from those governing the regulation of individual speech. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life and the accumulation, distribution and taxation of assets ate normally applied to them. States have provided corporations with such attributes in order to in- crease their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if unregulated, dominate not only the economy but also the very heart of our democracy, the electoral process.[37]

Justice White went on to note that the state, in seeking to limit certain corporate political expenditures, had acted to prevent

> institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire unfair advantage in the political process, especially where…the issue involved has no material connection with the business of the corporation. *The State need not permit its own creation to consume it.*[38]

Justice White also explained another basis for the Massachusetts statute: that, apart from what he called Massachusetts' "overriding interest related to the prevention of corporate domination which is substantially advanced by Massachusetts' restrictions on corporate contributions," the state had a further interest in seeing that,

> shareholders are not compelled to support and financially further beliefs with which they disagree where…the issue involved does not materially affect the business, property or other affairs of the corporation. The State has not interfered with the prerogatives of

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[37] *First Nat'l Bank of Bos.*, 435 U.S. at 809.
[38] *Id.* (emphasis added).

> corporate management to communicate about matters that have material impact on the business affairs entrusted to them, however much individual stockholders may disagree on economic or ideological grounds. Nor has the State forbidden management from formulating and circulating its views at its own expense or at the expense of others, even when the subject is irrelevant to corporate business affairs. But Massachusetts has chosen to forbid corporate management from spending corporate funds in referenda elections absent some demonstrable effect of the issues on the economic life of the company. In short, corporate management may not use corporate monies to promote what does not further corporate affairs but what is in the last analysis the purely personal views of the management, individually or as a group.[39]

Justice White found that this purpose was not only consistent with the First Amendment but served to protect the very freedom which the Court has held to be guaranteed by the First Amendment, the right not to be compelled to support political objectives with which one disagrees. Justice White noted how corporate political expenditures could embody a corporate management's perspective that was not consistent with that of shareholders. This circumstance had been deemed reason for the state legislature to enact legislation cutting off the right of corporations to make certain political expenditures, Justice White noting that,

> [a]lthough it is arguable that corporations make such expenditures because their managers believe that it is in the corporation's economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of the shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse an electoral or ideological cause which would tend to increase the value of a particular corporate investment.[40]

Justice White considered inadequate the majority's suggestion that the rights of dissenting shareholders should in such circumstances be determined under ordinary corporate governance rules as "the alternative means for the expression of shareholder disapproval," considering that it was wrong for the Court to "predicate a constitutional adjudication" [invalidation of the law] upon the right of shareholders to vote.[41] He concluded that corporations,

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[39] *Id.* at 813.
[40] *Id.* at 806.
[41] *Id.* at 815, 818-19.

> are created by the State as a means of furthering the public welfare. One of their functions is to determine, by their success in obtaining funds, the uses to which society's resources are to be put. A State may legitimately conclude that corporations would not serve as economically efficient vehicles for such decisions if the investment preferences of the public were significantly affected by their ideological or political activities. It has long been recognized that such pursuits are not the proper business of corporations. Indeed, the Securities and Exchange Commission's rules permit corporations to refuse to submit for shareholder vote any proposal which concerns a general economic, political, racial, religious, or social cause that is not significantly related to the business of the corporation or it not within its control.[42]

Justice White concluded that the State could lawfully prohibit corporate political expenditures to prevent the use of corporate funds for purposes upon which shareholders may disagree.[43]

In his separate dissent, Justice Rehnquist advanced the potentially even more far-reaching argument that the Fourteenth Amendment did not require states to endow business corporations with the power of political speech. Rehnquist concluded that federally-chartered banks were prohibited under federal law from making political contributions or expenditures, and that it was not necessary to consider whether Congress would have the power to permit national banks to participate in political activities.[44] Justice Rehnquist stated that corporations were not "persons" within the meaning of the Fourteenth Amendment and were not entitled to protection under the Fourteenth Amendment. Rejecting the "corporate personhood" argument, he, further concluded that corporations did not have a constitutionally protected right to engage in political activity. In his view, the corporate appellants had either been created by Massachusetts law or, if they were corporations created under the law of a different jurisdiction, had been admitted into Massachusetts to do business "only for the limited purposes described in their charters. The mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons."[45]

Justice Rehnquist's dissent relied on the *Dartmouth College* case, where Chief Justice Marshall had described the status of a corporation under federal law thus:

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[42] *Id.*
[43] *Id.* at 812.
[44] *Id.* at 826 n.6 (concluding that federally-chartered banks were prohibited under federal law from making political contributions or expenditures, and that it was unnecessary to consider whether Congress would have the power to permit national banks to participate in political activities).
[45] *Id.* at 823-24 (citing *Dartmouth College*, 17 U.S. (4 Wheat.) at 660).

> A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter its creation confers upon it, either expressly or incidental to its very existence.[46]

In Rehnquist's dissenting view, corporations were not "persons" within the meaning of the Fourteenth Amendment and were not entitled to protection under the Fourteenth Amendment.[47] This contention was irrelevant to the majority opinion in *First National Bank of Boston v. Bellotti*, just as it would be to the majority opinion in *Citizens United*, which saw the issue as turning on the First Amendment's protection of "speech" and not on the identity of the speaker. [48]

Rehnquist's criticism did not, however, depend upon revisiting whether corporations were "persons" and thus automatically entitled to the same free speech rights of natural persons capable of "speech." Rehnquist reasoned that the banks which were before the Court in *First National Bank of Boston v. Bellotti* had either been created by Massachusetts law or, if created under the law of a different jurisdiction, had been admitted into Massachusetts to do business, in either case,

> only for the limited purposes described in their charters. Being the mere creatures of law, [the corporation] possesses only those properties which the charter of creation confers upon it, either expressly or as incidental to its very existence. These are such as are best calculated to effect the objective for which it was created … The mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons. [49]

Since, under Justice Rehnquist's analysis, it was indisputable that "the mere creation of a corporation does not invest it with all of the liberties enjoyed by natural persons," it was necessary to determine which constitutional protections are "incidental to its very existence."[50] Justice Rehnquist concluded:

> [A] State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its

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[46] *Id.* at 823 (citing *Dartmouth College*, 17 U.S. (4 Wheat.) at 636).
[47] *Id.* at 826-27 ("Any particular organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regulation, whether the organization is a labor union, a partnership, a trade association or a corporation") (Rehnquist, J., dissenting).
[48] This article does not address the separate issue, once controversial but now settled, whether corporations are "persons" who are thus automatically entitled by reason thereof to 14th Amendment protection and hence First Amendment protection. *See* Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).
[49] *First Nat'l Bank of Bos.*, 435 U.S. at 823 (citing *Dartmouth College*, 17 U.S (4 Wheat.) at 636).
[50] *Id.*

> efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere…it might reasonably be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist…Indeed, those States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.[51]

In Justice Rehnquist's opinion, the "right of political expression is not…necessary to carry out the functions of a corporation organized for commercial purposes."[52] Rehnquist concluded that it was perfectly within the power of the state to "permit the operation of business corporations with limited rights of political expression."[53] This was the critical distinction between the rights of corporations and the rights of "[all] natural persons, who owe their existence to a higher sovereign than the [state], remain as free as before to engage in political activity."[54]

While relying on *Dartmouth College* and rejecting the view that corporations necessarily enjoyed the speech rights of natural persons, the dissenting opinions in First National Bank of Boston failed to consider that Massachusetts might have limited the plaintiff's right to engage in political activity and expend corporate funds for that purpose through limitations that the State might have imposed through the chartering process in the corporate charter, as proposed in this article, rather than through a general law restricting political contributions by a particular category of businesses. The dissents failed to focus on the fact that that because it is the state to which, under the Tenth Amendment, the power to create corporations falls, it is the Tenth Amendment which allows the state to set the limits on the possible political involvement of its corporations free of at least certain mandates imposed by the Federal Constitution.

If one accepts the premise that state incorporation statutes may limit the activities of the corporations which they create, including the political speech of such corporations, and if one's goal is to limit or eliminate the political speech of business corporations, there are two related issues which require attention. Although a state wishing to restrict corporate political speech may do so through its incorporation laws with respect to corporations which it creates subsequent to

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51 *Id.* at 825-26.
52 *Id.* at 826.
53 *Id.* at 828.
54 *Id.* Because of his position respecting the non-applicability of the Fourteenth Amendment, and the non-existence of a corporate right of free speech, Justice Rehnquist found it unnecessary to address Justice White's position in a concurring opinion that the Massachusetts law should be upheld as a protection for the rights of shareholders who dissented from the political views being advanced through the expenditure of corporate monies.

the enactment of necessary legislation, what of existing corporations which have already been created without such restrictions, and what of foreign corporations which have already been admitted to do business (or where seek admission to do business)?

Justice Story's concurring opinion in *Dartmouth College* posited the ability of a state retroactively to amend the existing charter of a corporation previously incorporated.[55] This would depend upon whether the state's ability to do so has been established by legislation which had reserved that ability. Cases decided since *Dartmouth College* have held that states may compel the amendment of corporate charters under the police powers that are reserved to the states, provided that the power of retroactive charter amendment has also been reserved.[56] The expansive potential of the *Dartmouth College* case for purposes of this discussion is highlighted in a case decided by the Supreme Court 65 years after *Dartmouth College*, *Spring Valley Water Works v. Schrottler*, particularly in the majority opinion of Chief Justice Waite.[57] This case involved the right of the State of California to alter the membership of a public body charged with setting water rates. The water company had been incorporated pursuant to a California law which gave the company the right to select certain members of the rate-setting board. California subsequently passed legislation modifying this right. The majority opinion addressed and vindicated the broad right of California to affect the rights of corporations under the state's reserved power to modify, alter or revoke corporate charters, relying, in upholding the right of the state to change the membership of the rate-setting board contrary to the corporation's charter, relying in doing so upon both Chief Justice Marshall's description in *Dartmouth College* of the corporation as an artificial being dependent for its existence upon the action of the state in granting it a charter in the first instance, and upon Justice Story's concurring opinion in the same case. Chief Justice Waite explained in *Spring Valley* that,

> [t]he *Spring Valley* Company is an artificial being created by or under the authority of the legislature of California. The people of the State, when they first established their government, provided in express terms that corporations should not be formed except under general laws, subject at all times to alteration or repeal. The reservation of power to alter or repeal the charter was not new, for almost immediately after the judgment of the court in the *Dartmouth College* case that States, many of them in granting

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55 *Dartmouth College*, 17 U.S. at 666.

56 *See, e,g.*, *Spring Valley Water Works*, 110 U.S. 347; Erie R.R. Co. v. Williams, 233 U.S. 685, 701 (1914).

57 *Spring Valley Water Works*, 110 U.S. at 347.

> corporate charters, acted on the suggestion of Mr. Justice Story in his concurring opinion [in *Dartmouth College*] and inserted provisions by which such authority [to alter or repeal] was expressly retained. Even before this decision it was intimated by the Supreme Judicial Court of Massachusetts that such a reservation would save to the State its power of control. In California the Constitution put this reservation into every charter, and consequently [the Spring Valley Water Company] was from the moment of its creation subject to the legislative power of alteration and, if deemed expedient, of absolute extinguishment as a corporate body.[58]

The majority opinion in *Spring Valley* elicited a lengthy dissent by Justice Field, who believed that the Court wrongly sanctioned legislation which impaired the constitutional guaranty against impairment of contracts. Field sought to distinguish between those corporate rights and privileges which might be altered by a state subsequent to the granting of a corporate charter, and those rights and privileges which could not be so altered. He sought to counter what he considered the majority's over-broad reliance on Justice Story's concurrence in *Dartmouth College*:

> When this court, in the *Dartmouth College* case, decided that the charter of a private corporation was a contract between the State and the corporators, and therefore within the protection of the inhibition of the federal Constitution against impairment of contracts by State legislatures, it was suggested by Justice Story, who concurred in the decision, that the unalterable and unrepeatable character of the contract might be avoided by a reservation of power in the original charter. 'In my judgment,', he said, 'it is perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them…is a violation of the obligations of that charter. If the legislature means to claim such an authority, *it must be reserved in the grant.*[59]

Continuing his discussion of Justice Story's concurrence in *Dartmouth College*, Justice Field observed:

> In another part of [Justice Story's] opinion, he refers to an early decision of the Supreme Court of Massachusetts, which had

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[58] *Id.* at 352.
[59] *Id.* at 369 (emphasis added) (citing *Dartmouth College*, 17 U.S. (4 Wheat.) at 518).

> declared that rights legally vested in a corporation could not be controlled or destroyed by a subsequent statute 'unless a power for that purpose be reserved to the legislature in the act of incorporation. When the general character of the decision in the *Dartmouth College* case became known, the States acted very generally upon the suggestion of Judge Story, and few charters were subsequently granted without a clause reserving to the legislature the power to alter or repeal them. In some instances, a general law was enacted, declaring that all corporations subsequently created should be subject to the reserved power; and in some cases, where a new Constitution was adopted by a State, a clause of similar import was inserted. The object of the reservation, in whatever form, was to preserve to the State control over the corporate franchises, rights and privileges which, in her sovereign or legislative capacity, she had called into existence; in other words, to enable her to annul or modify that which she had created.[60]

Justice Field then sought to distinguish between those matters affecting corporations over which he believed that the states could maintain control following the act of incorporation through appropriate reservation of authority in the state's Constitution or in its other laws, and those matters which he considered to be beyond the reach of such authority.[61] It was only the former which the state "in her sovereign or legislative capacity had called into existence" and which alone remained subject to the state's "retained right to annul or modify."[62] Field explained that a state's reserved rights would apply

> only to the contract of incorporation, to the corporate existence, franchises and privileges granted by the State. With respect to everything else, it gives no power that the State would not have had without it. Necessarily, it cannot apply to that which the State never possessed or created and, therefore, could not grant.[63]

Justice Field went on to say that any doctrine going beyond the foregoing

> would be subversive of the security by which the property of corporations is held, and in the end would destroy the security of all private rights. Behind the artificial body created by the legislature stand the corporators, natural persons, who have united

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[60] *Id.* at 370 (citations omited).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 371.

> their means to accomplish an object beyond their individual resources, and who are as much entitled, under the guaranties of the Constitution, to be secured in the possession and use of their property thus held as before they had associated themselves together. Whatever power the State may possess over corporations in their creation or in passing or amending the laws under which they are formed and altered, *it cannot withdraw them from the guarantees of the Federal Constitution*. [emphasis added] The State cannot impose the condition that the corporation shall not resort to the courts of law for the redress of injuries or the protection of its property; [or when in court that it shall be subjected to different rules of evidence and be required to prove by two witnesses what individuals may establish by one;] that it shall make no complaint if its goods are plundered and its premises invaded; that it shall ask no indemnity if its lands be seized for public use, or be taken without due process of law, or that it shall submit without objection to the unequal and oppressive burdens arbitrarily imposed upon it; that, in other words, towards it and its property the State may exercise unlimited and irresponsible power. Whatever the State may do with the creations of its own will, it must do so in subordination to the inhibitions of the Federal constitution. It may confer by its general laws upon corporations certain capacities of doing business, and of having perpetual succession in its members. It may make its grant in these respects revocable at pleasure; it may make it subject to modifications; it may impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporation acquires in the exercise of the capacities conferred, it holds under the same guarantees which protect the property of individuals from spoliation. It cannot be taken for public use without compensation; it cannot be taken without due process of law; nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstance."[64]

Justice Field's analysis reflects his concept of the corporation as an aggregation of the natural persons whom he describes as "corporators" and that, in protecting the rights of the corporation, the law really operates to protect the rights of the natural persons who are its shareholders.[65] Field's dissent in *Spring Valley* is an extended explication of the concept of "corporate personhood" as reflected in subsequent cases involving modification of railroad taxation despite contractual

[64] *Id.* at 372.
[65] *Id.* at 371-72.

promises to the contrary.[66] Although Field's dissent describes certain rights of which corporations may not be deprived, he does not provide either a broadly conceptual or a precise analytical framework for distinguishing between those rights which corporations may enjoy in common with natural persons, and those rights which are mere "privileges" and which may be taken away.[67] His dissent in *Spring Valley* does not therefore provide any bright line rule to identify "privileges" which may be denied or withdrawn from corporations under the *Dartmouth College* principle and those which may not. Perhaps the key ambiguity regarding what the state may not withhold from the corporation is to be found in Fields' observation that whatever power the state might possess over corporations of its creation, including the power to amend or revoke corporate charters previously issued, the State may not withdraw the guarantees of the federal Constitution.[68] But for purposes of the present discussion, this does not answer whether the Constitution does guaranty to any corporation whether existing or to be created, the capacity of speech (specifically, political speech), which Justice Scalia has claimed to be a constitutional attribute existing without regard to the nature of the speaker.[69]

Only a few years after dissenting in *Spring Valley*, Justice Field himself wrote an opinion for the Court that is almost breathtaking in its recognition of the broad authority which states may exercise over corporations.[70] In this later opinion, Justice Field stated that "a corporation, being the mere creature of the legislature, its rights, privileges and powers are dependent upon the terms of its charter…The granting of the rights and privileges which constitute the franchise of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with such conditions as the legislature may deem most suitable to the public interest and policy."[71] This case involved the right of New York to tax foreign corporations doing business in New York. The Supreme Court held that there was no constitutional inhibition against the legislature adopting any mode of taxation which it might exact as a condition of the creation of a corporation or of its continued existence, nor to the admission of a foreign corporation to do business in New York.[72]

More recently, the case of *Looker v. Maynard*, relying upon Justice Story's concurring opinion in *Dartmouth College*, held:

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66 *See, e.g.*, *Santa Clara Cty.*, 118 U.S. at 394.
67 *See Spring Valley Waterworks*, 110 U.S. at 371.
68 *Id.*
69 Citizens United v. FEC, 558 U.S. 310, 393 (2010) (Scalia, J., concurring).
70 *See* Horn Silver Mining Co. v. N.Y. State, 143 U.S. 305, 313 (1892).
71 *Id.*
72 *Id.* at 317-18.

> It was perfectly clear that any act of a legislature which takes away any powers or franchises vested by its charter…or which restrains or controls the legitimate exercise of them…without its assent, is a violation of that charter…If the legislature means to claim such an authority, it must be reserved in the grant.[73]

Looker v. Maynard involved the exercise of a state's authority, reserved in its constitution to its legislature, to alter, amend or repeal subsequent acts of incorporation, in that case by imposing upon corporations the requirement that they permit cumulative voting by shareholders (notwithstanding that their existing charters provided to the contrary).[74] The Supreme Court acknowledged that *Dartmouth College*, had ushered in the practice of the states to enact laws which reserved to their legislatures the right to alter, amend or repeal acts of incorporation.[75] The Supreme Court found that the reserved power enabled the legislature to act as it did so as to override charter provisions rejecting cumulative voting**.** The Court, in *Looker v. Maynard* explained that "[a]fter [*Dartmouth College*], many a state…in order to insure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature."[76]

Since creation precedes life, and assuming that corporation may be created without the power of speech, under a charter which does not permit, or which actively prohibits, the corporation from engaging in political activity or making political expenditures, then the state which creates a corporation by issuing it a charter can at the time of creation, reserve the right to change the charter. If states were generally to enact laws decreeing that existing corporate charters be amended to forbid or limit political activity or spending, as well as requiring that new corporations be similarly limited, that would provide a constitutional way to eliminate corporate money from the electoral process.[77]

But recognition of the power to create the terms of corporate existence, including the power to create corporations without the power of speech, is insufficient fully to address all of the legal issues which may arise should a state condition incorporation on the surrender or waiver of the corporation's ability to act in a particular manner, or should the state retroactively seek to claw back rights

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[73] Looker v. Maynard, 179 U.S. 46, 52 (1900).
[74] *See id.*
[75] *Id.*
[76] *Id.* at 51.
[77] Corporations could still be permitted to expend monies for lobbying efforts to advance non-partisan business objectives clearly related to the corporation's business.

previously granted by a corporation's charter at the time of incorporation.[78] There are limits upon the power of the state to require the relinquishment or waiver of rights previously granted notwithstanding that a state has reserved the right to alter, amend or repeal acts of incorporation. The scope of such limitations was considered in the case of *Phillips Petroleum Co. et al v. Jenkins*, addressing the extent to which matters would fall outside the scope of a reserved power of a state to affect existing corporate charters against the contention that use of such power had been exercised unconstitutionally; in *Phillips*, the power had been exercised to withdraw from corporations the protection of the old common law fellow-servant rule which immunized employers from liability for damages inflicted by one employee on another.[79] In *Phillips*, that rule had been enshrined in the corporation's charter and it was argued that changing the charter to delete that protection by legislation improperly impaired vested corporate rights.[80] The Court rejected that claim, addressing the extent of the reserved power:

> The reservation of power to amend is part of a contract between the State and the Corporation and therefore Section 10 of Article 1 of the Federal Constitution does not apply…The reserved power is not unlimited and cannot be exercised to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations which are inconsistent with the scope and object of the charter or to destroy or impair any vested property right. On the other hand, it extends to any alteration or amendment which does not defeat or substantially impair the object of the grant, and which the legislature may deem necessary to carry into effect the purposes of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to protect the due administration of its affairs.
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> As the State may not surrender or bind itself not to its duty to exert its police power [the common law master servant rule] may be abrogated by statute even when included in the charter of a corporation.[81]

Relevant to a state's ability to prohibit corporate political speech is the state's authority to restrict activity of foreign corporations by conditioning admission of foreign corporations into the state to do business upon such corporation's compliance with the laws of the admitting state. As in the case of its

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[78] Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).
[79] *Id.*
[80] *Id.* at 634-35.
[81] *Id.* at 635.

own corporations, where the state may not require, as a condition to incorporation, the surrender by a corporation of rights which are protected under the Constitution or which are "vested," nor do so retroactively under a reserved right to modify charters, neither may the state do so as a condition to the admission of a foreign corporation to do business within that state. Receipt of a corporate charter is not a right but a privilege, and a state is under no compulsion to grant charters. In *Phillip Petroleum Co et al v Jenkins*, citing *Dartmouth College*, the Court said that a state "might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the State.[82] But, just as it could not impose upon a domestic corporation any provision which was unconstitutional, neither could it make admission of a foreign corporation subject to a requirement that violated the U.S. Constitution."[83]

Phillips Petroleum Co. v. Jenkins involved the enforceability, against a Delaware corporation, of an Arkansas statute making all corporations operating within the state liable for job-related injuries sustained by one employee and caused by another, thereby, abrogating the common-law fellow-servant rule.[84] The Supreme Court, in a unanimous opinion, held that the federal constitutional provision against impairment of contracts did not prohibit a state, which had reserved the power to alter corporate charters, from abrogating provisions in existing corporate charters which contained the objectionable common-law rule.[85] The Court upheld the action of the state, declaring that as to domestic corporations, they were subject to the exercise of the state's reserved power to prescribe the terms of corporate existence of corporations organized under its law.[86]

However, there are limitations upon the state's authority over foreign corporations as well as over domestic corporations.[87] In *Terral v. Burke Construction Company*, the Supreme Court unanimously rejected the right of the State of Arkansas to revoke a corporation's license to do business within that state if the corporation, in violation of state law, removed a lawsuit to federal court or instituted an action against an Arkansas citizen in federal court.[88] Overruling prior precedents, the Court held that:

> a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver of the exercise of its constitutional right to resort to the

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[82] *Id.* at 634.
[83] *Id.*
[84] *See Phillips Petroleum Co*., 297 U.S. 629.
[85] *Id.*
[86] *Id.* at 633-34.
[87] *See* Terral v. Burke Constr. Co., 257 U.S. 529 (1922).
[88] *Id*. at 532.

> federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not…[This rule] rests on the ground that the Federal Constitution confers upon citizens of one State the right to resort to federal courts in another, that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme constitutional law.[89]

A few years later, in *Frost & Frost Trucking Co. v Railroad Company of California*, the Court made a similar statement:

> As a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in this regard is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of a constitutional right.[90]

In *Erie Railroad Company v. Williams, as Commissioner of Labor of the State of New York*, the Court rejected a corporation's challenge to a state law requiring that employees be paid twice monthly, instead of monthly, such challenge being based on a conflict between the state's law and the corporation's charter:

> We may in answering the contention, put aside the rights of natural persons and the rights which might exist under a constitution which did not reserve control in the State. The effect of the control reserved was to make plaintiff, from the moment of creation, subject to the legislative power of alteration and, if deemed expedient, of absolute extinguishment as a corporate body[91] …the effect of the reserved power of amendment is said to be to make any alteration or amendment of a charter subject to which it will not defeat or substantially impair the object of the grant or any right vested under the grant.[92]

The Court concluded that as the State may not surrender or bind itself not to exert its police power to protect the safety of workers, the common-law fellow-servant rule could be abrogated by statute even though it forms part of the charter

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89 *Id.*
90 Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583, 593-94 (1926).
91 *See Spring Valley Waterworks*, 110 U.S. at 352.
92 *Erie R.R. Co.*, 233 U.S. at 701.

of a corporation.[93] The same power could be enforced by the State as a condition to the admission of a foreign corporation. The analysis in the *Phillips Petroleum* case as to the constitutionality of state-imposed restrictions on a domestic corporation's rights turns on an analysis of the nature of the rights or powers (the "privileges") which the corporation is required to surrender as a condition of its existence, and specifically upon whether the deprivation of any such rights exacted by the state fundamentally impairs a corporation's ability to conduct its business, or deprives it of vested rights.[94] Where a foreign corporation seeks admission to do business in another state, the latter state may impose conditions upon the corporation's right to engage in particular activities which are inimical with the policies of the state to which admission is sought. A state whose policy is to forbid domestic corporations from engaging in political activity and expending corporate funds for political purposes, should have the authority to extend that prohibition to out-of-state corporations seeking admission to do business in that state, at least insofar as the prohibition would apply to activities conducted within the admitting state.[95] The only limitation should be that the restriction does not run afoul of the conditions set forth in *Looker v. Maynard* and reiterated in *Phillips Petroleum*, nor of the "internal affairs" doctrine.[96]

The "internal affairs" doctrine is a long-accepted rule that matters relating to the internal workings and governance of a corporation are to be determined by the laws of the state of its incorporation.[97] Application of this rule would not allow a foreign corporation to be subjected to limitations upon its political activity if undertaken outside of the jurisdiction to which admission was sought. But leaving that special circumstance aside, the ability of a state to make the admission into that state, for purposes of doing business, of a foreign corporation, upon the latter's surrender or waiver of the ability to act in a particular manner, will face the same problems as would a state's effort to make such surrender or waiver the condition of receipt of a corporate charter from that state.

The words "surrender" or "waiver" may not be the most accurate words to describe limitations which a state may impose upon the ability of a corporation to act in a particular manner. A corporation has no existence prior to the moment when it receives its charter: before it receives the charter; the corporation neither exists, nor has any rights, power or authority to act in any manner; once it receives

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[93] *Phillips Petroleum Co*., 297 U.S. at 629.

[94] *Id.*

[95] *First Nat'l Bank of Bos.*, 435 U.S. 765 (1978).

[96] *See Looker*, 179 U.S. 46; *see also Phillips Petroleum Co.*, 297 U.S. 629.

[97] *See, e.g.*, CTS Corp. v. Dynamics Corporation of America, 481 U.S. 69 (1987); *see also* Vantagepoint Venture Partners v. Examen, Inc. 871 A.2d 1108 (Del.Sup. Ct 2005) (citing the CTS case for the proposition that the internal affairs doctrine is a "long-standing principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs – the state of incorporation. The internal affairs doctrine applies to those matters that pertain to the relationship between the corporation and its officers, directors and shareholders.").

its charter, it has only the power to act in accordance with its charter. It can therefore be argued that prior to that time, the corporation will have no rights or privileges at all, and therefore no rights to "waive" or "surrender." This is not a matter of mere word play, nor an excursion into metaphysics, but a simple statement in such instance of what the corporation may or may not do.

It is only under the reasoning of cases suggesting the existence of "corporate personhood" that it can it be argued that there may in fact be "rights" which precede the corporation's existence (or which cannot be severed from the corporation), which "rights" belong to the corporation's shareholders or incorporators (as distinct from the corporate entity itself); and that the corporation may not be deprived of these "rights" notwithstanding that the state alone may create corporations on terms fixed by the state, and that the state holds the power to withdraw or curtail such "rights" if done pursuant to a reserved power retained by the state.

The more recent case of *Burwell v. Hobby Lobby Stores Inc.* (hereafter referred to as *Hobby Lobby*) suggests a possible challenge to what is posited in this discussion: the state's right, under the Tenth Amendment and through the incorporation process, to limit a corporation's right to engage in a political speech and to expend corporate funds in furtherance thereof because it suggests that shareholder opinion may play a role in determining whether action taken by corporate management alone, without shareholder input, may violate the freedom of dissenting shareholders who are natural persons.[98] *Hobby Lobby* involved the right of a for-profit corporations to be exempted from the requirements of the Affordable Care Act because of the Act's requirement that certain contraceptive drugs be provided under the companies' health insurance plans.[99] The claim was that such requirements violated the right to the free exercise of religion on the part of the shareholders, whose religious views opposed such drugs.[100] The majority opinion in this case accepted the proposition that under the circumstances, the religious views of the shareholders required governmental deference.[101] This analysis would seem to conflict with the proposition that a corporation's shareholders are distinct from the corporate entity, and enjoy entirely different rights and constitutional protections – unless "corporate personhood" were accepted, in which case the corporation would be seen as embodying a reflection of shareholder opinion.

Although corporations have long been treated as "persons" under the Fourteenth Amendment and entitled to the protections thereunder, legal decisions prior to Hobby Lobby did speak of corporations in terms of "corporate

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[98] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).
[99] *Id.* at 682.
[100] *Id.* at 683.
[101] *Id.*

personhood," a concept different from merely treating the corporation as a "person." In his dissent in *Spring Valley*, Justice Field described the corporation as an artificial being behind which, "stand the corporators, natural persons who have united their means to accomplish an object beyond their individual resources." The action of the California legislature at issue in that case intruded, in Field's view, upon the rights of the individual owners to the security of their property as guaranteed to them under the Federal Constitution.[102] Corporate personhood has not played much of a role in the development of corporate law. Its potential implications to the corporate free speech issue were not raised in *Citizens United*, nor in the corporate free speech cases which preceded *Citizens United*. Its relevance was clearly rejected in Justice Rehnquist's dissent in *First National Bank of Boston v. Bellotti*, where Justice Rehnquist declared that the mere creation of a corporation "does not invest it with all of the liberties enjoyed by natural persons."[103]

It was necessary to determine which constitutional protections are incident to the very existence of the corporation, and, in Rehnquist's opinion, the right of corporate political speech is not necessary to carry out the functions of a corporation organized for commercial purposes. The majority opinion in *First National Bank of Boston* did not take issue with that proposition. It is the thesis of this article that *Citizens United* did not address nor rebut Rehnquist's analysis, and therefore that, despite *Citizens United*, it is possible to create a corporation without the free speech rights of a natural person. However, if Justice Field's concept of the corporation as an enterprise embodying the rights of shareholders were to prevail, this could justify limiting the reach of the state's authority over the incorporation process as proposed in this article. It is for that reason that this article addresses the implications of the majority decision in the Hobby Lobby case, conveying, as it does, resonances of Field's notion of corporate personhood and its implications.

Picking up on Rehnquist's reasoning in his dissent in *First National Bank of Boston*, an obvious question is whether it can be said that the "right to religious freedom" is necessary to carry out the functions of a corporation organized for commercial purposes. The majority's explanation in *Hobby Lobby* as to why the corporation should be able to avail itself, or be entitled to the benefit of, the religious freedom clause, is not persuasive, and would be particularly inapt if applied in the context of a free speech claim. A corporation is traditionally, under corporate law, something entirely separate from and different than its shareholders. "Corporate personhood" should not be a basis for determining what a corporation may, or may not, do. By what means, for that purpose, is shareholder sentiment even to be known. Perhaps *Hobby Lobby* should be treated as a "one-off," a decision without general application, to be explained only by the close family

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102 *Spring Valley Waterworks*, 110 U.S. at 371.
103 *See First Nat'l Bank of Bos.,* 435 U.S. at 822-24.

relationship that existed among the owners and managers, and their total control of the corporate entity. Perceived thus, it does not detract from the perspective that corporations can constitutionally be deprived of the right of political expression, without regard to the political views of its shareholders. Or is *Hobby Lobby* instead to be seen as establishing the principle that all constitutional rights and protections which would be available to natural persons who are corporate shareholders are also to be imputed to corporations which may, by some methodology, lay claim to and assert such rights and protections?

To discern the existence of a corporate right by reference to and by reliance upon the opinions of shareholders is not consistent with the modern theory of the corporation, which maintains a strict distinction between the entity and those who own it. "Corporate personhood," apart from its implicit deviation from accepted legal principles separating corporations from their shareholders, presents serious practical difficulties of application. It must also be distinguished from the separate issue of whether corporations are "persons," a matter long settled by the Supreme Court's 1886 decision in *Southern Pacific Railroad Co. v. Santa Clara County*, holding that for constitutional purposes corporations were "persons" entitled to the protections afforded by the Fourteenth Amendment, including the Bill of Rights.[104] "Corporate personhood," by contrast, if applied to determine a corporation's free speech entitlement, would mean that corporations enjoy or obtain First Amendment rights not necessarily, or merely, because they are "persons" within the Fourteenth Amendment sense, entitled to such rights by reason thereof, but because they represent, in an almost metaphysical sense, the individual "corporators" (i.e., shareholders), to use Judge Field's terminology in dissent in *Spring Valley*.[105]

It would be not only at variance with the great body of American corporate law, but also highly problematical in implementation, to allow "corporate personhood" to serve as a sort of legal metaphor for shareholder opinion which opinion would be deemed to represent a manifestation of shareholder "rights" entitled to legal recognition to the point of replacing or superseding a state policy that had been enacted into law. This would be the case if "corporate personhood" were allowed to manifest itself so as to permit a corporation to engage in political activity and to make political expenditures in the face of a state-imposed rule, implemented through the incorporation process, that purported to preclude the corporation from doing such things. Moreover, the extraordinary empirical difficulties in establishing any sort of shareholder consensus as to whether a corporation owned by them should engage in such proscribed behavior presents another reason why the rationale of *Hobby Lobby* should not be extended to bar restrictions which the state may elect to place on corporate political speech and spending through the incorporation process. Whatever justification, or

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104 *Santa Clara Cty*., 118 U.S. 394 (1886).
105 *Spring Valley Waterworks*, 110 U.S. at 371.

rationalization, may have existed in the *Hobby Lobby* case to allow shareholder sentiment to overcome the legal distinction between the corporation and its owners, this cannot be allowed to extend to the typical business corporation organized for profit and owned by shareholders of presumably varying political opinions. If more need be said on the subject, how would shareholder sentiment, or shareholder consensus, ever be sufficiently measured where the issue was to the extent to which the corporation would or could take partisan political positions and promote those positions through the use of the corporate treasury. Although corporate business lobbying is often interwoven with quasi-political issues, in such cases the decision-making process can be rationalized as in aid of the corporation's business and profit-making objectives, and can be justified under the business judgment rule. But it is otherwise where partisan political issues are the matter at hand.

In *Hobby Lobby*, the majority opinion seems to have struggled with connecting the sentiments of shareholders with the notion that the corporation could be imbued with religious sensibilities which required legal recognition. The majority opinion rejected the proposition that the law upon which the shareholders were relying was inapplicable because the corporation was for-profit.[106] The majority found modern corporate law "expressly or by implication allows corporations to be formed for any lawful purpose…" and that "for-profit corporations with *ownership approval* support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives…*So long as its owners agree,* a for profit-corporation may take costly pollution control and energy conservation measures that go beyond what the law requires…if for- profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well."[107] The Court dealt with the possibility that the owners might not share the same views on religious objectives by emphasizing that each of the corporations before it was owned and controlled by members of a single family; the court said that in the case of disputes among the shareholders about religious practice, state law can provide through its certificate of incorporation how the corporation was to be managed, that "courts will turn to their structure and the underlying state law in resolving disputes."[108]

Although corporations have long been treated as "persons" under the Fourteenth Amendment and entitled to the protections thereunder, there are no exact legal precedents addressing whether the state, through its right to create corporations and to set the terms of their existence, may place limitations upon what corporations, under the terms of their state-approved charters may do, or be forbidden to do, where free speech is concerned . Does the majority's apparent

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[106] *Hobby Lobby*, 573 U.S. at 711-12.
[107] *Id.*
[108] *Id*. at 718.

acceptance in the *Hobby Lobby* case of some notion of "corporate personhood" detract from a state's right to limit corporate political speech under the Tenth Amendment because doing so would violate inchoate First Amendment rights of the corporation's shareholders (whether such shareholders already exist, in the case of a required charter amendment, or will exist following incorporation)? Does *Hobby Lobby* give new significance – in the context of attempting to limit corporate political activity – to Justice Field's reliance on the concept of corporate personhood in his dissenting opinion in *Spring Valley Water Works v. Schottler*, where he had described the corporation as an aggregation of natural persons whom he called "corporators."[109] Field's dissent argued that "[b]ehind the artificial body created by the legislature stand the corporators, natural persons, who have united their means to accomplish an object beyond their individual resources, and who are as much entitled, under the guarantees of the Constitution, to be secured in the possession and use of their property they held before they had associated themselves together."[110] *Citizens United* did not rely on such reasoning; protection of "speech," and not the identity or the presumed right of the speaker, nor of the corporation's shareholder, was the linchpin of *Citizens United*.[111] However, the majority decision in *Hobby Lobby* did introduce this concept into a determination as to the extent to which government (in that case not the state but the federal government) might dictate corporate behavior so as to violate the claimed constitutional rights of shareholders.[112]

Other considerations aside, a state should be constitutionally entitled to decide that a corporation's capacity to engage in political activity and to expend corporate funds for political purposes should be denied or limited because doing so fails to respect the existence of divergent views among shareholders. By what means, short of canvassing the shareholders, can the views of shareholders on a matter ever be known? If shareholder input is to be an element, or even the critical element in determining authorization for corporate political activity or spending (in *Hobby Lobby*, unanimity of shareholder opinion was not an issue; it was assumed), how is that input to be obtained? How would the corporation know, or obtain, the electoral opinion of a mass of shareholders as to their willingness to allow the use of corporate funds to promote a particular political view? By what plurality, majority or supermajority? Would anything less than a formal shareholder vote meeting all of the requirements for a proxy solicitation, be sufficient? How else could the opinion of the owners be determined? What mathematical calculation would determine the dominant opinion of the shareholders? What metric – plurality, majority or supermajority – would be sufficient for such purpose? None

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109 *Spring Valley Waterworks*, 110 U.S. at 371 (Field, J., dissenting).

110 *Id.*

111 *See generally Citizens United*, 558 U.S. 310.

112 *See generally Hobby Lobby*, 573 U.S. 682.

of these problems are discussed in *Hobby Lobby*, presumably because the operative fact was that the company was closely held and entirely owned by the members of a single family. If one were to apply the reasoning of *Hobby Lobby* to a claim of free speech rights asserted on behalf of corporate shareholders in order to frustrate a limitation on corporate political activity, these same questions would bedevil any effort to align corporate political involvement and expenditures with shareholder opinion.

Citizens United and *Dartmouth College* both rely for their conclusions upon the Constitution itself, but implicitly recognize that the different sovereignties existing under the Constitution – that of the national or federal government, and that of each state – may operate differently, relying upon different substantive provisions which create different rights and powers of the two governments and impose different limitations upon each.[113] That structure allows the states to create "persons" who are not human beings but who, once created by a state, have rights which cannot, following creation, be ignored by the parent state to which they owe their existence. The Constitution may rest supremacy in the national government pursuant to the supremacy clause, but not all decisions and all power will rest within the sole purview of the national government.

To understand the relevance of federalism to a discussion about the import of *Citizens United*, it is useful to examine whether there is any conflict between the most recent free speech decisions which broadly interpret the First Amendment, and which are said to protect speech detached from the identity of the speaker, and the power which the Tenth Amendment implicitly affords to states, through their unique role in corporate creation, to curtail claims by corporations of unlimited First Amendment protection. The Tenth Amendment gives to states the right to incorporate restrictions on the speech rights of incorporated entities that would not exist for where the speakers are natural persons. There is no evidence that the framers, when they wrote the Constitution, and again later, when the Fourteenth Amendment was adopted, saw a conflict (or potential conflict) between what they wrote and the operation of the Tenth Amendment. So it is today appropriate to address the prospect that a state's incorporation process as it exists under the Tenth Amendment may override the expansive free speech rights which the Supreme Court has, in *Citizens United*, bestowed upon corporations.[114] And to suggest that in the states rests the power, through the incorporation process, to limit or even silence the political speech of corporations. And to ask, with whom, if anyone, does there lie any right to protest such interference: in the corporate entity itself, speaking presumably through its management, or with its incorporators or

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113 *Compare* Citizens United v. FEC, 558 U.S. 310 (2010) *with Trs. Of Dartmouth College*, 17 U.S. 518.

114 *See Citizens United*, 558 U.S. at 364.

shareholders? And through what procedures, since none are set forth in the applicable constitutional text, may such questions even be raised?

CONCLUSION

Because of the power which the Tenth Amendment has conferred upon the states in matters such as the creation of corporations, and under the Supreme Court's analysis of the corporation in the *Dartmouth College* case, it can be said with some degree of assurance that the Constitution does not require that the Supreme Court's holding in *Citizens United* protecting all "speech" must necessarily extend to corporations when they may be bound by their charters to silence in political matters. The Constitution is silent as to the powers that states may give to or withhold from corporations. That is a matter which the Constitution, by virtue of the Tenth Amendment, has generally left to the states.[115] That subject is discussed not in terms of constitutional text but in case law interpreting that text and inferring from that text certain applications of constitutional provisions to corporations.

There is a textual and a practical distinction between the legal consequences of creating a corporation which is empowered to engage in political speech and to make political expenditures, and the consequences of creating a corporation denied, by its charter, the right, despite explicit constitutional language to the contrary to transfer a lawsuit from state to federal court. In the first case, the corporation's ability to engage in political speech and/or political spending, does not derive from any specific text in the Constitution, either the First Amendment or the Fourteenth Amendment, but solely from the terms of the corporation's charter (the right to obtain which and the terms and conditions thereof, derive from the empowering language of the Tenth Amendment and the principles of *Dartmouth College*, and not from any limiting language of the First or Fourteenth Amendments). In the latter instance, the right to require that a case be transferred from state to federal court arises under Article III, Section 2, of the Constitution itself.[116] That section affords the right of removal to all litigants whose domicile differs from that of a plaintiff, regardless of the status or form of the defendant, and completely independent of anything in the defendant's charter. Whether denominated right or privilege, it is something which the state cannot take away,

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[115] The exception would be those instances in which exercise of that power would purport to override an explicit constitutional provision which, on its face, would be applicable to the corporation, such as the provision specifically assuring any party made defendant in a lawsuit of the right to remove such lawsuit to federal court where the defendant's citizenship differed from that of the plaintiff, a right not dependent upon the status of the party seeking removal, whether such party be a natural person or an artificial legal entity such as a corporation.

[116] U.S. CONST. art. III § 2, cl. 2.

and it is something which cannot be waived away or surrendered by the terms of the corporation's charter.[117]

The foregoing analysis suggests that, within the four corners of the Constitution, *Citizens United* notwithstanding, there can be found the means to limit and even eliminate entirely the ability of business corporations to inject themselves into American electoral politics. The steps that need be taken to this end are not simple to achieve, because they involve persuading the legislatures of the many states to amend their respective corporation laws to require that the charters of corporations to be newly created limit the permissible political activity which such corporations may undertake, and to require that the charters of previously created domestic corporations be amended so as to delete any express or implied authority in such charters that would allow them to engage in political activity and spending.

Given the majority's holding in *Citizens United*, a failure to undertake, or to at least explore, such steps would have the effect of perpetuating the business corporation as an entirely new and different creature, more powerful than for-profit business corporations as presently existing but also endowed with the special qualities of corporations which individuals lack, such as perpetual existence and limited liability. In short, a monster endowed with power vastly beyond what the writers of the Constitution could possibly have foreseen, or intended.

There remains, of course, the threshold issue of obtaining public support for enactment of the changes to a state's incorporation laws that would be required to implement the proposal contemplated in this discussion. Although it can be argued that many corporate managers would welcome a situation where they could no longer be importuned for political contributions, there is no assurance that such sentiments will coalesce into active support for a measure that would take away or substantially diminish the ability of corporations to influence political decisions that might impact their businesses. As in all matters relating to restricting corporate power, there also remains the possibility that if an effort is undertaken to reform the corporation laws of the several states for the purposes discussed herein, there will follow a corporate "race to the bottom" in which management opposition to the limitations discussed will precipitate a backlash whereby many corporations will either actively oppose such efforts in their home states or, alternatively, will, through repatriation, flee the states of their incorporation to foreign jurisdictions maintaining more permissive laws concerning corporate political involvement. Having said this, corporate repatriation may be complex and costly and not all corporations, even if confronted in their home states with potential restrictions on their political activity, will want to take advantage of moving to a different legal home. Moreover, departing a state where the law has become more restrictive does

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[117] *See id.*; Terral v. Burke Constr. Co., 257 U.S. 529 (1922); Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583 (1926).

not guarantee total freedom from similar restrictions; the repatriated entity may still want to do business in its erstwhile home state and find itself forced to submit, at least in that state, to restrictions on its political activity which may be substantial.

Federalism has created two sovereignties, that of the federal government and that of the states. And although the federal government is supreme in some spheres, so are the states in others. To the states the Constitution has allocated certain powers, such as the right to create corporations, the exercise of which powers may be seen to, but may not actually, conflict with provisions of the Bill of Rights and the Fourteenth Amendment. To be faithful to the Constitution, the distinctions, and the possibilities for divergent government impositions, reflected in the constitutional structure, should be seen as allowing for the pursuit of different objectives even in areas so sensitive as the right of free speech, and the free speech rights of different speakers.