The Untold Story of the Corporate Rights Movement
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Forthcoming in the Wall Street Journal

The Supreme Court has stoked controversy by recognizing business corporations to have free speech rights in *Citizens United* and religious freedom in the *Hobby Lobby* case. This spring, the justices will decide whether a for-profit business has a right to refuse to sell a wedding cake to a same-sex couple.

How did corporations come to have our most fundamental rights? Unlike women and minorities, corporations do not parade down Main Street demanding equal rights. The corporate rights movement has focused instead on winning expansive Supreme Court rulings recognizing corporations to have the same rights as people.

In the process, corporations have been unexpected innovators in constitutional law and civil rights litigation.

The first Supreme Court case on the rights of business corporations was decided in 1809—a half century before the first such cases on the rights of racial minorities and women. Far from an oppressed minority, the Bank of the United States, which brought the case, was among the most prominent and powerful corporations in the new nation.

After opponents in Georgia imposed a special tax on the bank, the corporation claimed a constitutional right of access to federal court. Yet the relevant provision of the Constitution only guaranteed that right to “citizens” suing the citizens of other states.

Unlike racial minorities and women, who lost their earliest Supreme Court cases, the Bank of the United States won. Legendary chief justice John Marshall insisted the Constitution be read expansively to include corporations, even in the absence of any evidence the Framers meant to protect them.

Decades later, in the *Dred Scott* case, the Supreme Court would say that blacks could not be “citizens” under that very same provision of the Constitution. Unlike racial minorities, corporations *did* have rights the white man was bound to respect.

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Corporations have been pioneers in civil rights litigation. A half-century before the NAACP’s famous campaign to overturn segregation, the Southern Pacific Railroad Company launched a groundbreaking effort to persuade the Supreme Court to read the Constitution to protect corporations from discrimination.

Chafing at a special tax imposed by California on railroads, the Southern Pacific employed many of the same tactics later used by other civil rights movements. First the railroad engaged in civil disobedience and refused to pay the tax. Then the company

launched a series of what its lawyers called “test cases,” more than 60 in all, seeking to expand corporate rights.

Lawyers, from Thurgood Marshall to Ruth Bader Ginsburg, have played a starring role in all the great civil rights movements. Among those who argued for corporate rights were Daniel Webster, John Quincy Adams, and Ted Olson, the dean of today’s elite Supreme Court bar. Unlike traditional civil rights organizations, corporations have long had the resources to hire the best, most experienced lawyers in the country.

More than a century before Olson joined up with David Boies to fight for same-sex marriage, the Southern Pacific assembled an all-star team of some of the nation’s leading lawyers, including Roscoe Conkling. A leader of the Republican Party in Congress for over a decade, Conkling had even been nominated and confirmed to the Supreme Court himself, only to decline the post.

Conkling told the justices the Fourteenth Amendment, which requires “equal protection of the laws,” was adopted not just for the freed slaves but also to protect business. It was an audacious argument but Conkling was uniquely situated to make it. While a young congressman, he had served on the committee that drafted the Fourteenth Amendment.

The only problem with Conkling’s story was that it wasn’t true. No evidence shows any of the drafters endorsed the idea that corporations were covered too. As one historian concluded, the trusted Conkling had engaged in “a deliberate, brazen forgery.”

Although the Supreme Court never ruled directly in Conkling’s case, another of the Southern Pacific Railroad’s test cases came before the justices a few years later. The Court declined to rule on the constitutional issue but the Reporter of Decisions, who publishes the official volumes of the Court’s opinions, added a headnote to the case saying the Court had ruled that corporations had equality rights.

The Reporter’s headnote was wrong but within a few years courts around the country, including the Supreme Court, began citing the Southern Pacific case for holding that corporations had Fourteenth Amendment rights. By 1912, the Court had decided 312 Fourteenth Amendment cases on the rights of businesses compared to only 28 on the rights of African Americans.

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Corporations have also been first-movers in securing individual rights. Some of our most important rights were first given judicial protection in cases brought by businesses.

One of the earliest successful freedom of the press cases was brought by newspaper corporations fighting back against Louisiana’s iron-fisted demagogue, Huey Long. Railing against fake news, Long pushed for a tax on the newspapers’ advertising revenue. The tax, he said, “should be called a tax on lying, two cents per lie.”

The Supreme Court issued a landmark ruling in favor of the newspaper companies and established new protections for press freedom. Indeed, corporations would be involved in many other freedom of the press cases, including *New York Times v. Sullivan*, which established the right to criticize public figures, and the Pentagon Papers case.

In a modern society, newspapers published by corporations play an essential role in checking the government.

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Critics of *Citizens United* often blame corporate personhood for broad corporate rights. But the idea that corporations are people, however, has not played the role many imagine—and has usually been used to restrict, not expand, the rights of corporations.

Although controversial today, corporate personhood is well established in the law. In 1757, Blackstone in his influential *Commentaries on the Law of England* wrote that corporations were "artificial persons." Open any corporate law casebook used in law schools and one of the first lessons will be that corporations are legal persons.

Corporate personhood means that a corporation has its own independent identity in the eyes of the law, wholly separate from the people who comprise it. Because of this legal separation, if you slip and fall in a Starbucks, you have to sue the company not the shareholders.

The Supreme Court has often ignored this basic principle in corporate rights cases. Consider the *Hobby Lobby* case, where the justices said the chain of craft stores was exempt from Obamacare's birth control mandate. Rejecting the separation required by corporate personhood, the Court said the law burdened the religious beliefs of the company's owners, the Green family.

In the 1830s, the Court under Roger Taney refused to extend new rights to corporations precisely because of corporate personhood. When "a corporation makes a contract," Taney explained, "it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members."

In the early 1900s, the Supreme Court refused to recognize corporations' right against self-incrimination in a case arising out of Teddy Roosevelt's famous effort to break up the trusts. Requiring corporate officers to testify against their company was not self-incrimination because the corporation and its members were separate legal persons.

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Which rights, if any, should corporations have? If corporations had no rights, then the government could seize their property to build a highway without paying compensation

or declare them guilty of crimes without due process. Yet corporations should not have the right to vote or the right to sexual privacy.

Perhaps the answer is in corporate personhood. Instead of basing the rights of corporations on the rights of members, the Court should treat corporations as independent entities and ask which rights are necessary for the corporate person.

History can help us here too. In the early twentieth century, the Supreme Court said that corporations had “property” rights but not “liberty” rights, such as those associated with personal autonomy, conscience, or political freedom. In a case evocative of this term’s same-sex wedding cake case, the Court in 1907 said corporations did not have a constitutional right to refuse service to unwanted customers.

In another instance of déjà vu, brewing corporations fighting temperance in the 1910s tried to overturn campaign finance limits on corporate money. They were turned away, with courts saying the right to influence elections belonged to “natural and not artificial persons.”

After *Citizens United* and *Hobby Lobby*, corporations today have those liberty rights once denied them. Yet, while novel is some ways, these cases should be understood as the latest chapters in the much older story of the corporate rights movement.