Personal Bodies: A Corporeal Theory of Corporate Personhood

David Graver

Follow this and additional works at: http://chicagounbound.uchicago.edu/roundtable

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/roundtable/vol6/iss1/11
I. INTRODUCTION

Over the last two centuries, the Supreme Court has granted corporations more and more of the constitutional rights of persons. In the early nineteenth century, the autonomous (and eternal) life of corporations was strengthened by recognizing their rights under the Contracts Clause of Article I to unalterable terms of incorporation. The access of corporations to federal courts was also strengthened through rulings that counted corporations as citizens of the states in which they were incorporated for jurisdictional purposes. Near the turn of the century, the Court granted corporations the equal protection and due process
rights accorded persons under the Fourteenth and Fifth Amendments. In the twentieth century, the Court recognized corporate access to a broad array of Bill of Rights protections, beginning with protection from unreasonable searches and culminating in First Amendment speech protections.

In the early stages of the Court's consideration of the constitutional rights of corporations, the Justices relied on theories that counted corporate entities as "persons," at least in some circumstances. But, oddly, as the circumstances in which corporations enjoyed the rights of persons grew, the Court became more and more reluctant to speak of the personhood of corporations. As Carl Mayer points out, "[a]fter 1960, the Court abandoned theorizing about corporate personhood" yet went on to grant corporations the Seventh Amendment right to trial by jury in civil cases, Fifth Amendment double jeopardy protection, Fourth Amendment protection from unreasonable regulatory searches, and First Amendment protection for political and commercial speech as well as the negative right not to be associated with the speech of others.

In the First Amendment field, the Court, beginning in First National Bank of Boston v Bellotti, has stepped away from a consideration of the personhood of corporations and instead has invoked a marketplace-of-ideas theory to justify granting protected speech rights to corporations. The Court found that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." This theory, however, has come under strain as the speech rights of corporations have expanded. In Pacific Gas & Electric Co. v Public Utilities Comm'n, where the Court could not agree on a majority opinion, the plurality paradoxically invoked the marketplace-of-ideas theory to justify limiting the number of ideas available to the public. The Court decided a public utility corporation had the negative speech right not to be associated with, or compelled to answer, the speech of a public interest organization established to represent the interests of residential utility customers.

4. Santa Clara County v Southern Pac. R. Co., 118 US 394 (1886) (recognizing corporate equal protection right under Fourteenth Amendment); Minneapolis and St. L. Ry. Co. v Beckwith, 129 US 26 (1889) (recognizing corporate due process right under Fourteenth Amendment); Noble v Union River Logging R. Co., 147 US 165 (1893) (recognizing corporate due process rights under Fifth Amendment).
13. Id at 777 (cited in note 6).
14. PG&E, 475 US at 8 (cited in note 6).
In his dissent, Justice Rehnquist pointed out that "[t]he right of access [urged
for the public interest organization] constitutes an effort to facilitate and enlarge
public discussion; it therefore furthers rather than abridges First Amendment
values." 15 In contrast, "[t]he interest in remaining isolated from the expressive
activity of others, and in declining to communicate at all, is for the most part
divorced from this 'broad public forum' purpose of the First Amendment." 16 As
Justice Rehnquist points out, the plurality opinion in PG&E cannot logically rest
its argument for PG&E's right to remain silent and silence speakers within its
vicinity on the marketplace-of-ideas theory. In fact, the plurality opinion by Just-
tice Powell frequently personifies the corporation in order to make the opinion's
deerence to the corporation's expressive autonomy seem reasonable. 17 Puz-
zlingly, however, the plurality's de facto reliance on a theory of corporate per-
sonhood is never openly defended or even acknowledged and explicitly defined.

This Comment argues that the extent to which corporations have a right to
constitutional protections cannot be established without a theory of corporate
personhood. The lack of nuance and depth in the theories used thus far explain
why they have been abandoned. In place of these inadequate approaches, I pro-
pose a theory that draws upon phenomenological theories of the corporeality of
subjectivity, particularly in light of the way these theories have been used recently
to explain the ontology of theatrical performance. This theory will allow distinc-
tions to be made between different types of bodies inhabited by different kinds
of subjectivities with differing degrees of constitutional privilege. I will show
how this theory might strengthen the arguments Justice Rehnquist makes in his
dissents from decisions granting broad protected-speech rights to corporations. 18
Considering the type of subjectivity and the type of body attributable to a corpo-
ration can provide clear guidelines to the type of constitutional rights that the
corporation merits. In the interest of space, I will limit my discussion to pro-
tected speech rights.

II. THREE THEORIES OF THE CORPORATION

Legal scholars actively discuss three theories of corporate rights. The names
for these theories differ slightly among the writers who examine them, 19 but I

---
15. Id at 34 (cited in note 6).
16. Id (cited in note 6).
17. For examples of the PG&E plurality's surreptitious invocation of personhood, see 475
US at 9 ("Compelled access...forces speakers to alter their speech"), 14 ("[Appellant] does have
the right to be free from government restrictions that abridge its own rights in order to 'enhance
the relative voice' of its opponents" (quoting Buckley v Valeo, 424 US 1, 49 and n 55 (1976)), and
16 ("For corporations as for individuals, the choice to speak includes within it the choice of
what not to say.")) (cited in note 6).
(cited in note 6).
19. See Mark M. Hager, Bodies Politic. the Progressive History of Organizational "Real Entity" Theory,
50 U Pitt L Rev 575, 579-80 (1989). Hager labels them the fiction paradigm, the real entity
paradigm, and the contractual-association paradigm. Larry E. Ribstein discusses virtually the
will call them the "fictional entity theory," the "real entity theory," and the "nexus of contracts theory."

The fictional entity theory was developed in Supreme Court decisions of the early nineteenth century. Chief Justice Marshall noted "[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 of its creation confers upon it, either expressly, or as incidental to its very existence." This theory has been most often invoked to justify limiting the rights of corporations. Since corporations are created by laws, they can be shaped and limited by laws as well. Then-Justice Rehnquist invoked this theory in his dissent from *Bellotti*, arguing that corporations have no intrinsic right to political expression.

While allowing for substantial limits on the constitutional rights of corporations, the fictional entity theory also acknowledges substantial rights. Chief Justice Marshall noted the rights to immortality and individuality as consequential from the contractual arrangements that create corporations. Because the Contract Clause of the Constitution gives real force to the fictional existence of the corporation, substantial property rights cling to the immortality and individuality of the corporation.

The Supreme Court has not been content to let corporations rest with the property rights sufficient for a fictional existence. In the late nineteenth century corporations began to gain the rights of real entities as well. Three cases involving the regulation of railroad companies granted corporations equal protection and due process rights under the Fourteenth and Fifth Amendments. These rights were not seen as consequent upon the terms under which the corporations were created but as essential constitutional protections for any individual entities acting in the world. The Court attributed a reality to the personhood of corporations that extended beyond the terms of their charters and granted them rights that were not guaranteed by specific contracts. In the realm of due process and equal protection, the Court held that distinctions between natural and artificial persons were irrelevant. Both were real persons for constitutional purposes.

While considering corporations real in respect to due process and equal protection rights, the Court was less willing to accord corporations a real entity status for other constitutional rights. The Court's decisions in the twentieth century illustrate a continuing tension between the recognition of either an artificial

---

same three kinds of theory but labels them the "corporate person" theory, the "unconstitutional conditions" theory, and the "contract" theory. *The Constitutional Conception of the Corporation*, 4 S Ct Econ Rev 95 at 112-116 (1995).


21. Ribstein makes this point repeatedly, 4 S Ct Econ Rev at 96, 105, 108, passim (cited in note 19).


24. See *Santa Clara County*, 118 US 394 (1886); *Beckwith*, 129 US 26 (1889); and *Noble*, 147 US 165 (1893) (cited in note 4). For further discussion, refer to note 1.
or a real constitutional personhood for corporations. In general the Court has held that corporations lack the complete constitutional reality of natural persons but are entitled to more than the minimal protections of a purely fictional existence.\textsuperscript{5}

While continuing to expand the constitutional protections available to corporations, the Court has become increasingly reluctant to sort the real and fictional aspects of personhood that apply to them. Peter d'Errico suggests that even before midcentury "The 'crisis' of legal imagination in grappling with corporate personality was settling into an agreement no longer to ask difficult questions about the 'essence' of personality."\textsuperscript{26} In the realm of First Amendment protected speech, the Court has refused to discuss the degree to which corporations deserve protection and has argued instead about how granting protections to corporations benefit natural persons. The Court has averted its attention from the personhood of corporations and looked instead at the "marketplace of ideas" to which corporations might contribute if offered First Amendment rights.\textsuperscript{27}

The nexus-of-contracts theory of corporations has received active scholarly attention, but the Court has not relied on it extensively. This theory dismisses the notion of corporate personhood and looks to the contracts between natural persons that create corporations. The proponents of the theory use it mainly to introduce freedom of contract arguments into discussions of the prerogatives of corporations and to argue for strict limits on state regulation of corporations.\textsuperscript{28} The theory has two major weaknesses when applied to the issues under discussion in this Comment.

First, the theory stretches unduly the notion of contracts. Corporations are made up of a complicated array of agreements between persons, groups, and institutions. Some of these agreements are explicit but others are only implied and many are arguably not necessarily understood or consciously agreed to by the parties involved. Because many of the agreements are between legal entities rather than natural persons, finding the natural persons at the base of these vast webs of contracts and working arrangements is neither easy nor particularly useful. Thus, calling a corporation a nexus of contracts involves as many suppositions and fictional constructs as calling it a person.

Second, the nexus-of-contracts theory fails to account for the ways corporations act in the world. Despite the vast array of explicit and implicit agreements between many parties that underlie corporations, they do exhibit a marked individuality in their actions. Corporations act with more or less unified intentions.

\textsuperscript{25} For a discussion of the areas in which corporations have been granted or denied constitutional protections equivalent to those of natural persons, see Mayer, 41 Hastings L J at 588-620 (cited in note 1); and Bill Shaw, Corporate Speech in the Marketplace of Ideas, 7 J Corp L 265, 266-69 (1982).

\textsuperscript{26} Peter d'Errico, Corporate Personality and Human Commodification, 9 (No. 2) Rethinking Marxism 99, 102 (Summer 1996/97).

\textsuperscript{27} Shaw, 7 J Corp L at 272 (cited in note 25); and d'Errico 9 (No. 2) Rethinking Marxism at 102 (cited in note 26).

\textsuperscript{28} See Frank H. Easterbrook and Daniel R. Fischel, The Economic Structure of Corporate Law, (Harvard, 1991); and Ribstein, 4 Sup Ct Econ Rev at 140 (cited in note 19).
They forward projects, incur liabilities, and make claims. Their actions are regulated by the state and judged by the courts. Whether the individuality of corporations is fictional or real, it is essential to their interaction with the world. The nexus-of-contracts theory fails to capture the importance of this individuality. Although this approach arguably may present a more accurate picture of the actual foundation of the corporation, the theory fails to come to terms with the real world behavior of corporations.

III. THE LACK OF CORPORATE THEORY AT THE SUPREME COURT

Since 1960 the Court has stopped theorizing about the nature of corporations. The difficulties of distinguishing between situations in which the personhood of a corporation is clearly fictional (and, hence, vulnerable to state regulation) and situations in which real personhood can be asserted (and firm constitutional protections enjoyed) became unmanageable in the eyes of the Justices. The Court retreated to more pragmatic means of deciding the degree of constitutional rights available to corporations. Rather than determine the extent to which corporations deserved to be treated like natural persons, the Court assessed the degree to which according corporations constitutional protections would benefit natural persons.

In the field of protected speech, the Court began to consider the effect of First Amendment decisions on the marketplace of ideas. This notion was particularly useful because it allowed the Court to weigh the value of commercial speech for those who receive it as well as for those who express it. It also eliminated the need to distinguish between corporate persons and natural persons, since both might under certain circumstances use commercial speech.

While considering the benefits of speech to the listeners as well as the speakers was a valuable addition to First Amendment decisions, focusing exclusively on these benefits obscured the consequences of granting extraordinary rights to corporations without any theoretical justification. The Bellotti, Consolidated Edison, and Central Hudson decisions may have expanded the marketplace of ideas, but they also decreased the participation of natural persons in that marketplace. The quality of the marketplace of ideas depends on the quality of the participants.


30. See Shaw, 7 J Corp L at 265, 283 (cited in note 25) (noting that the Court expanded free speech only "superficially," because the buying power of corporate speech overwhelms speech from individuals, resulting in a less diverse marketplace of ideas).
as well as the volume of exchanges. To regulate the quality of the participants, the Court must establish a theory of the kind of persons covered by constitutional guarantees.

Rather than establish such a theory, however, the Court continued to broaden the speech rights of corporations without even remaining entirely faithful to its marketplace of ideas criterion. In *PG&E* the Court granted negative speech rights to corporations, asserting their right not to be associated with the protected speech of others. The California courts had decided that under state property laws the extra space in PG&E's billing envelopes belonged to the public utility's customers and that, consequently, PG&E was not entitled to monopolize the use of this space with its newsletter. The Public Utilities Commission of California ordered PG&E to make this extra space available four times a year to Toward Utility Rate Normalization (TURN), a public interest organization representing residential utility customers. The Supreme Court declared this order unconstitutional because it infringed on PG&E's negative speech rights not to be associated with, or feel compelled to respond to, TURN's speech in PG&E's billing envelope.

Rather than encourage the increased flow of information into the marketplace of ideas, *PG&E* constricted that flow. It transformed the potential public forum of the extra space in PG&E's billing envelope into the private domain of the corporation despite the California court's ruling on the ownership of this space. The "chilling" of corporate speech that an oppositional voice in the envelope might create was deemed a harm not offset by the increased exchange of ideas that would have been possible in this no-cost public forum.

The Supreme Court cases that established the right not to speak all involved putting words in the mouth (or on the license plate) of real human beings.31 It is easy to see how the autonomy of real people in these cases would outweigh any benefits to the marketplace of ideas that might accrue from forcing people to voice opinions that are not their own. When the issue was not compelled speech but compelled association with the speech of another and the party compelled was not a real human being, the Court has more often turned away from the issues of autonomy and personhood and allowed the compelled association in the interest of enhancing the marketplace of ideas.32

Before *PG&E*, the major exception to compelling non-human persons to associate with the speech of others in the interest of spreading ideas was *Miami Herald Publishing Company v Tornillo*.33 *Tornillo*, however, held to the marketplace of ideas theory by arguing that a right of reply discourages newspapers from voicing

---


32. See *Red Lion Broadcasting Co. v FCC*, 395 US 367 (1969) (requiring broadcast stations to provide free air time for individuals to reply to previously broadcast criticisms); and *Pruneyard Shopping Center v Robins*, 447 US 74 (1980) (upholding the constitutionality of a state law giving speakers access to privately owned shopping centers).

criticisms and, hence, "inescapably dampens the vigor and limits the variety of public debate."\(^{34}\) \textit{Tornillo} essentially sees individual newspapers as speakers within the public forum of printed matter available on the street and allows them freedom from association with the speech of others in order to encourage them to speak. There is no need to force papers to print responses to their speech because the targets of their criticism can easily find another paper within which to voice their own opinions.

Unlike \textit{Tornillo}, \textit{Red Lion Broadcasting Co. v FCC} and \textit{Prunyard Shopping Center v Robins}, both of which do compel association with third-party speech, concern access to forums for speech rather than access to the mouth of a particular speaker within a larger forum.\(^{35}\) In these cases the Court held that a corporate person can be compelled to offer others access to an expressive forum that the corporation controls, whether this expressive forum is a broadcast station or a shopping center. Strangely, the plurality in \textit{PG&E} followed \textit{Tornillo} rather than \textit{Red Lion} and \textit{Prunyard}, failing to recognize the extra space in the billing envelope as a unique expressive forum and failing to see how the marketplace of ideas theory upon which \textit{Tornillo} relied could not be used to justify the power company's exclusive control of the expressive forum in the billing envelope.

As disturbing as the Court's unprecedented extension of corporate speech rights in \textit{PG&E} is the Court's failure to reach any consensus on the reasons for this generosity. The Justices could come to no majority agreement on the theoretical grounds for privileging the negative prerogatives of corporate speech over the rights of other speakers and the richness of the marketplace of ideas in general.

The theoretical disarray of \textit{PG&E} shows that the Court needs to come to terms with the implications of allowing entities other than humans to claim the status of persons accorded the protections of the Constitution. The marketplace of ideas is influenced by the agents who inhabit it as well as the ideas they exchange. A richer theory of personhood than the artificial and real entity theories promulgated in the past might allow for a more rational regulation of the type of nonhuman speakers that are allowed to contribute to and potentially exert their influence over the marketplace of ideas.

\section*{IV. TOWARD A RICHER THEORY OF PERSONS}

The narrow scope within which the Court has attempted to define persons has hampered the Court's previous theories of personhood. Only two aspects of personhood have been given substantial attention by the Court: (1) the person as an agent or actor and (2) the person as a legal subject.

To recognize an entity as a person, the Court asks to what extent the entity acts as an individual agent. Because corporations can act with purposes distinct from those of the people that comprise them, the Court is disposed to accept

\begin{itemize}
\item \textit{Tornillo}, 418 US at 257 (cited in note 33).
\end{itemize}
corporations as people. After all, corporations are vividly in action before the law. They obligate themselves (but none of the humans that make them up) through contracts. They sue and are sued. They carry out projects, deliver goods and services, collect and distribute money, hire and fire employees. An extreme version of the real entity theory would end its analysis here and declare the corporation just as much a person as any living human being because it acts individually in the world and is liable for its actions just like any human being.

Justice Rehnquist responded to the enticing individuality of corporations by pointing out that they are created by states and not by the higher powers of nature that are responsible for humans. He would acknowledge that the corporation is an individual legal subject but would not equate it with the legal subject position that natural persons occupy. The artificial entity theory of corporations holds that the rights and duties of corporations are different from the rights and duties of human beings. Unfortunately, it is hard for this theory to specify the differences between the rights and duties of natural and artificial persons without simply begging the question as to what those differences should be.

The Court needs a theory of personhood that says more than that the rights of natural human beings are those enshrined in the Constitution and the rights of artificial persons are a subset of these. What makes the constitutional rights of humans seem reasonable and to what extent might these rights be reasonably extended to corporations?

In asking what makes the constitutional rights of humans reasonable, I am not advocating an analysis of natural law but something closer to original construction. The Framers thought they were bestowing rights on human beings. If the theory of persons with which they started and which developed over two centuries in the courts has obscured the uniqueness of human beings, perhaps we need to go back to the original referent of constitutional rights and define it with more theoretical precision.

A. THE PERSON AS EMBODIED CONSCIOUSNESS

The phenomenologists of the twentieth century were the first to suggest that the being of humans could not be explained to full satisfaction by reference only to consciousness and action as was the case in the philosophical systems of Descartes, Kant, and Hegel. Maurice Merleau-Ponty in particular argues that personal existence is not based primarily on having a fixed identity in the abstract but on being embodied, having internal and external perceptions that create worlds around and within a body.

37. Edmund Husserl, considered the founder of phenomenology, urged a rigorous analysis of sense perceptions (rather than the conceptual abstractions of previous philosophers) as the only firm foundation for a science of existence. See his Ideas: General Introduction to Pure Phenomenology, (Collier, 1972) §§ 55, 75 (original German publication 1913).
38. See Maurice Merleau-Ponty, Phenomenology of Perception, 67-199 (Routledge, 1962). Husserl noted the relationship that sense perceptions have to the perceiving subject's body but did not
The law has been reluctant to acknowledge the importance of the body to human existence. The legal theorist Alan Hyde points out that legal discourse tends to alienate the body from the person to whom it belongs: "Law is rich in constructions of the body that emphasize its thingness, its distance from us, that treat the body as object, property, machine." He argues that these metaphors that divide people from their bodies fuel repressive legal theories that trample on human rights. To combat such repression he urges us "never to forget that legal subjects have bodies, strive for a law and politics of embodied subjects...lest we forget that law is about people and people interact in the world through the media of their bodies."

One way to combat legal alienations of the body would be to redefine the legal subject as an embodied consciousness. Rather than abstractly view the legal subject as an agent with certain proprietary rights over a body, we could follow Merleau-Ponty and see the body as an intrinsic element of consciousness. Under this view humans do not have bodies; they are (particular kinds of) bodies.

But what, then, is a body? How is it different from an object or an image? Hyde cannot help us here because he draws from scholarship that sees the body as a social construction and, thus, does not establish a clear distinction between it and other social texts or images. I do not intend to argue that the body is not a social construction, but I do maintain that the body has a particular form that cannot be modified by discourse without destroying its intrinsic corporeality.

For living bodies to be more than just objects, images, or texts, they must have three elements: interiority, exteriority, and autonomy. The interior harbors volitional mechanisms and motivating forces that lead to observable behavior. A living body organizes itself from within. This unseen region is the source of its energy and activity. The philosopher Gilbert Simondon suggests "the entire activity of the living being is not, like that of the physical individual, concentrated at its boundary with the outside world. There exists within the being a more complete regime of internal resonance requiring permanent communication and maintaining metastability that is the precondition of life." The interior of a body is obscured from view and private. Being embodied means having an epistemologically privileged access to the body's interior. The internal workings of one's body are not necessarily completely known to the embodied consciousness, but this consciousness has greater access to knowledge about the body's interior than does anyone else.

A body's exterior marks the boundary between body and world. It is the surface that both hides what is within and offers a conduit of communication be-

accord the subject's body the importance it has in the philosophy of Merleau-Ponty. Compare Husserl, Ideas § 97 (cited in note 37).

40. Id at 262.
41. Hyde acknowledges a particularly strong theoretical debt to Judith Butler. Her books Gender Trouble, (Routledge, 1990) and Bodies That Matter, (Routledge, 1993) have been influential in establishing the theory of the body as an element of social discourse.
between the interior and the world. The exterior presents the body's image to the
world, but this image is not an objective, self-contained image. It is, rather, an
image marked at least in part by the interior that lies behind the body's surface.
The body's exterior is thus both object and expression, a thing and a sign, a pres-
ence and a communication, a physical fact and a conceptual postulate.

Although bodies exist within particular contexts or communities, they exhibit
an autonomy that separates them from their surroundings. I have previously
noted that

although the meaning of a particular body may depend on the group to which it
belongs or the environment in which it is situated, its existence as a body de-
ends on its separation from its group or environment on some level. Essent-
ially, the bond between a body's interiority and exteriority must be stronger
than its bond to its environment or context. The body's autonomy from its
context need be only strong enough for the bond between its inside and outside
to dominate its existence and for a boundary to be discernible between the
body and its world.43

The body's autonomy underscores a fusion between its interior and exterior
and a separation of both from the rest of the world.

The body's autonomy is a porous, communicative autonomy. If a body were
completely separate from the world, it would be inert. A living body is constantly
interacting with its world, taking in information and sending messages, moving
toward what it desires and away from what it fears. Not only does a living body
communicate with the world around it, it is also sustained and threatened by that
world. The beauty of living things arises, I think, from their poignant combina-
tion of courage and vulnerability. At the mercy of the world, they heroically as-
sert their distinctness from that world. They make targets of themselves to pro-
claim an individuality that will inevitably lapse. The communication with the
world that makes life possible also makes death inevitable. The body's autonomy
necessarily involves communication with its enemies as well as its friends.

B. THE CONSTITUTIONAL RIGHTS OF BODIES

If the Framers were not thinking of constitutionally recognized persons as
embodied consciousnesses, the rights they bestowed on individuals are, never-
theless, consistent with such a conception. Some rights, such as freedom of
speech, due process, and equal protection, help foster beneficent forms of com-
unication between bodies. These guarantees reduce the chances that a body's
communications will create enemies. Rules are established by which threats to a
body will be processed (for example, in the courts). Other rights, such as privacy,
religious tolerance, and protection from cruel and unusual punishment, protect
the integrity of the body's interior. In general, constitutional protections allow
individuality to flourish within the interiors of bodies and to express itself
through these bodies' exteriors without undue fear of a loss of autonomy.

43. David Graver, The Actor's Bodies, 17 Text and Perform Q 221, 222 (July 1997).
C. Fictional Bodies

Natural human bodies are not the only kind that assert a presence and efficacy in the affairs of people. Recent performance theory has noted the ways in which actors exhibit a number of distinctive bodies on the stage, each with its own dynamic interplay of interior, exterior, and autonomous elements. In the world outside the theater, it is not hard to find other bodies at work once we know what to examine. Commercial corporations, labor unions, ideological organizations, charitable foundations, and government institutions could all be described as “fictional” bodies that assert a real presence in the lives of human beings. The advantage of describing these entities as bodies rather than as actors or agents is that an analysis of their corporeality yields more points of comparison and offers a more orderly means of noting how they differ from natural human bodies and, hence, may be less worthy of constitutional protections.

What sort of body does a commercial corporation possess? Its unity before the law, its liability, and its ability to bind itself to contractual relationships all create a sort of exterior. Its publicity about itself, the image it creates in the media, the ways in which it disseminates products and services, and the effects it has on people and organizations around it fill out this external presence.

The interior of a corporation is trickier to define. Shareholders, directors, managers, workers, and capital all contribute to the life of a corporation and are “inside” it in a way that customers, suppliers, and creditors are not. But to what extent do these elements contribute to the volitional mechanisms of the firm? Most scholars acknowledge that managers dominate corporations with directors, shareholders, and workers having (in descending orders of significance) only very limited influence over operations. Capital exerts considerable influence over a corporation’s actions in two ways. First, the access a corporation has to capital will determine the scope of its operations in that nothing can be done without the money to finance it. Second, most corporations exist only for the purpose of maximizing profits, so the human managers of corporations are not free to express their own wills through the corporation’s actions, but instead must make decisions that maximize the corporation’s financial returns. The humans involved in a corporation are its servants rather than its master. The innermost volitional impulse of a corporation arguably is found in its charter and the fiduciary responsibilities that force managers, directors, and others involved in running a corporation to take particular lines of action.

44. For an overview of the types of bodies present on stage, see 1d (identifying seven bodies that one actor can display: a character, a performer, a commentator, a personage, a member of a socio-historical group, physical flesh, and a locus of private sensations) (cited in note 43).

45. “The most common form of control among the large corporations may be termed management control. When stockholding is sufficiently diffuse the position of management becomes almost impregnable.” United States Temporary National Economic Committee, [Bureaucracy and Trusteeship in Large Corporations], Monograph No. 11 (1940) quoted in Robert W. Hamilton, Corporations, 539 (West, 1998). For a broader discussion of corporate governance see 1d at 525-93; and Easterbrook and Fischel at 1-39 (cited in note 28).
A corporation knows who it is in a way that most humans do not. Humans create themselves through their actions in the world, whereas a corporation's actions in the world are determined by the contracts that created it. This fact alone might be grounds for limiting the constitutional rights of corporations. Corporations are not engaged in a process of finding themselves and their time to do so is not as limited as that for human beings (since corporations might live forever), so why grant them the protections and freedoms that are given humans to make their lives more livable?

One reason for granting fictional bodies the constitutional guarantees accorded humans is that doing so ultimately benefits humans. This reasoning lies behind the marketplace-of-ideas theory in protected speech cases. But to know whether granting such rights would benefit humans, one needs to look at the uses to which a fictional body is likely to put such freedoms and protections. On this point various fictional bodies exhibit distinct purposes. Commercial corporations wish to maximize profits; labor unions wish to enhance the rights and wealth of workers; ideological organizations champion various social or ethical causes; charitable organizations support certain groups or issues; government institutions forward particular mandates.

Thus far, the Court has been reluctant to deal with these distinctions. The Court seems implicitly to be saying, "if the varying motivations of humans are not constitutionally distinguishable (as long as they are not criminal), then why should the motivations of artificial persons be distinguished and limited?" The response might be, "because the motivations of fictional persons are fixed and open to view, while the motivations of humans are in constant flux and not always easily discernible." We do not compare the motivations of humans because we know they are open to change, whereas the life of a fictional entity such as a corporation is linked inexorably to its fixed motivations through its charter. Constitutional guarantees give humans the freedom they need to make changes in how they view the world and behave; corporations cannot change their fundamental motivations. Why not draw sharp distinctions among the fictional bodies of various types of organizations and accord each type of body constitutional rights based on the benefits or harms such rights for such bodies will bestow on humans? For protected speech rights this approach would involve looking beyond the marketplace of ideas to the types of corporeal persons allowed to speak in the market and the extent to which the allowed speech benefits real people.

V. CORPOREALITY IN PACIFIC GAS & ELECTRIC

In his dissent from PG&E, Justice Rehnquist makes a factual observation that a theory of personal corporeality could develop: "PG&E is not an individual or a newspaper publisher; it is a regulated utility." The problem with the plurality's opinion in this case is that it does not distinguish between these three kinds of persons. Because past cases have acknowledged the negative First Amendment

46. PG&E, 475 US at 35 (cited in note 6).
right not to be associated with the speech of another for humans and newspapers, the plurality feels compelled to grant this right to public utilities as well. It has not developed a theory of personhood that can distinguish a public utility from a newspaper.

The plurality pays lip service to the marketplace of ideas rationale for granting First Amendment rights to corporations, but the rationale is inappropriate to the issue of negative First Amendment rights, which can limit the number of ideas in the marketplace in the interest of personal autonomy and privacy. In Wooley the Court held that the state could not compel people to be associated with the state motto, “Live Free or Die,” by requiring its display on license plates. The Court reasoned that humans had a right to be silent on the political issue broached by the motto. The right to autonomy implicit in silence trumps the right to information implicit in the marketplace of ideas. In Tornillo freedom from compelled association with another's speech was extended to newspapers on a marketplace-of-ideas theory through implicit assumptions about the corporeality of a newspaper's personhood. A newspaper lives to disseminate ideas. If freed from compelled association with the speech of others, a newspaper will not fall silent but speak out longer and in greater detail on the subjects of interest to it. A newspaper is only likely to fall silent when speaking would carry penalties such as compelled dissemination of opinions with which it does not agree. Thus, the corporeal nature of a newspaper, its place in the world, its motivations and desires, insure that more ideas will enter the marketplace if newspapers are allowed to speak without being obliged to offer a venue for contradictory opinions. In contrast, the corporeality of a public utility such as PG&E offers no assurances that more ideas will be expressed because the utility is free from association with the ideas of others.

Rehnquist hints at a corporeal analysis in arguing that a regulated utility has neither privacy nor autonomy to protect. The Court has never recognized a right of privacy for corporations and “[a]ny claim [PG&E] may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.”

We could extend Rehnquist's analysis by noting the corporeal distinctions between public utilities, nonprofit public interest organizations, and newspapers, all of which are elided by Justice Powell’s plurality opinion. Powell essentially takes a right to be free from association with the speech of third parties that was recognized for newspapers, extends it to public utilities, and treats a public interest organization dedicated to advocating for lower rates for residential utility users as a generic third party who is infringing upon the utility's “right to remain silent.” But are these three fictional persons really equivalent in the way the Constitution deems all natural persons equivalent?

A newspaper and a public utility are both commercial corporations. Their volitional interiors are very similar in that they are dominated by the desire to maxi-

49. *PG&E* at 34 (cited in note 6).
mize profits and the decisions put forward by the managers and influenced somewhat by the directors and shareholders to achieve that goal. The nature of the exteriors and autonomy of these two commercial corporations, in contrast, are markedly different. Newspapers are known outwardly by the words and information they offer their customers. A public utility is known by the manner in which it supplies a homogenous good to its clients. Newspapers have a sharply defined autonomy because each must set itself clearly apart from competing papers and be readily identifiable by its style of operation and expression (interior and exterior elements).

A public utility has less need of a clearly defined autonomy because it has no competitors from which it needs to distinguish itself and it is not in the business of selling unique opinions and information concerning matters of public interest. Government regulation and oversight of a utility dilutes considerably the autonomy of its interior. Its exterior also makes a weak show of autonomy, not only because the government may require it to make certain kinds of announcements or present its product in a certain way, but also because the utility itself may want to downplay the autonomy it actually does enjoy by claiming to share the interests of its customers and to be more committed to providing a service than to making a profit.

From this comparison we can see that the newspaper mimics the corporeality of natural persons more completely than does the public utility. This mimicry does not in itself confer constitutional rights on newspaper corporations. But, insofar as newspapers are public goods (they are conduits through which people can exercise their First Amendment rights) and insofar as their person-like corporeality is essential to their existence, newspapers have a claim to person-like rights, such as protection of their expressive autonomy from association with the speech of others and being able to remain silent on a particular topic if they so choose.50

A public utility is also a public good, but a person-like corporeality is far from essential to its existence. The public may gain from a utility's expressing its opinion on rates and regulations, but the public does not gain appreciably from according utilities the right not to speak up on such issues or not to be associated with the speech of others on this topic. As a government regulated monopoly, the utility has no need of the autonomy necessary for a newspaper to thrive.

A public interest organization such as the one involved in PG&E (TURN) displays another type of corporeality. Its interior is dominated by its charter to serve the public interest by, in this case, working in various ways to lower utility rates and champion the interests of residential utility customers. Its exterior is seen in the lawsuits, mobilization, and lobbying it performs. Its autonomy separates it pointedly from the utility it monitors and critiques, is weaker in relation to the government agencies that have helped nurture it in various ways, and is meant to become vanishingly slight in relation to the utility customers on whose behalf it works. Allowing TURN to communicate freely with utility customers and to oppose pointedly the policies of the public utility would enhance the spe-

50. See Tornillo, 418 US at 256 (cited in note 33).
cial nature of its corporeality which in turn would benefit the public good. Al-
lowing TURN to speak in the extra space of PG&E's billing envelope does no
harm to the intrinsic corporeality of the utility, no matter how inappropriate such
an invasion might be for the constitutional rights of a natural person in the same
situation.

VI. CONCLUSION

A corporeal analysis suggests that juxtaposing the interests of two fictional
persons, the public utility and the public interest organization, without regard to
the nature of their bodies is not the best way of preserving or enhancing the
rights of natural persons. Instead, one needs to determine what rights particular
kinds of fictional bodies need in order to bestow their benefits upon human
beings. The body of a newspaper clearly requires fairly full First Amendment
protections to contribute meaningfully to informing people and offering them
opportunities to exercise their own First Amendment rights. The body of a pub-
lic utility requires less of these rights to bestow its benefits upon human society.
A public interest group such as TURN can even be allowed privileges over the
corporate body of a utility that the Constitution would never sanction one hu-
man to exert over another because such privileges would enhance the constitu-
tional rights of humans. Rather than accord the same constitutional rights to all
artificial persons, a theory of corporeality allows us to grant and withhold rights
in order to make the bodies of these artificial persons most supportive of the
constitutional rights of human beings.