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## **On the Granting of Bill of Rights Protections to Corporations as Pertains to the Case of Nike Inc. v. Kasky**

BECAUSE CORPORATIONS ARE NOT “PERSONS” OR “CITIZENS” WITHIN THE MEANING OF THE FIRST AND FOURTEENTH AMENDMENT, THIS COURT SHOULD HOLD THAT CORPORATIONS CANNOT AVAIL THEMSELVES OF VENERABLE CONSTITUTIONAL PROTECTIONS DESIGNED FOR CITIZENS OF THE REPUBLIC.

- A. The Language and Legislative History of the Constitution And Relevant Amendments Thereto Reveal That The Framers Never Intended To Accord Corporations The Protections Of The Constitution, the 14<sup>th</sup> Amendment Or The Bill of Rights.

Neither the Constitution nor the Fourteenth Amendment and the Bill of Rights mentions corporations. A strict construction of the express language of the document demands that corporations should not be accorded any constitutional protections. The maxim of statutory interpretation *expressio unius est exclusio alterius*, moreover, dictates that because the Framers were aware of corporations at the time and decided not to expressly include them in the language of the Constitution, they did not intend for its provisions to protect corporations. See Personalizing the Impersonal: Corporations and the Bill of Rights By Carl J. Mayer, Hastings Law Journal, Hastings College of Law at University of California, March, 1990; Volume 41, No3. The Framers certainly were cognizant of corporations. In that era, most corporations were chartered by state legislatures for specific purposes, including banks, canal companies, railroads, toll bridge companies, and trading companies. See Henderson, The Position of Foreign Corporations in American Constitutional Law, in 2 HARVARD STUDIES IN JURISPRUDENCE 1 (1918); J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970). The severe statutory limitations placed on corporations was a Colonial reaction to the oppressions of the British East India Company and other unbounded British corporate enterprises. This hostility to powerful corporations also informed the decision of the Framers not to award specific constitutional protections to corporations, either under the Constitution itself or under any amendments thereto. Id.

The manifest importance of limiting corporate power and legal protections was embedded deeply in the Anglo-American legal system. As Chief Justice Marshall observed: “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 creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.” Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819)) (emphasis added) (quoted in Bellotti, 435 U.S. at 823 (Rehnquist, J., dissenting)). The Court consistently relied on the “artificial entity” theory viewing the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions. Sometimes called the creature, concession, or fiction, this view can be traced to Friedrich Karl Von Savigny. See G. HEIMAN, OTTO GIERKE: ASSOCIATIONS AND LAW 27-33 (1977; see also Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. VA. L. REV. 173, 178-87 (1985). This theory had its origins in antebellum legislatures’ practice of considering incorporation a special privilege, awarded by the state for the pursuit

of public purposes. See Butler, Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges, XIV J. OF LEGAL STUD. 129 (1985). Under this view, corporations cannot assert constitutional rights against the state, their creator. See A. J. JACOBSON, THE PRIVATE USE OF PUBLIC AUTHORITY: SOVEREIGNTY AND ASSOCIATIONS IN THE COMMON LAW 599 (1980); Dewey, The Historical Background of Corporate Legal Personality, 35 YALE L.J. 655 (1926); Vinogradeff, Juridical Persons, 24 COLUM. L. REV. 594 (1924); O. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES.

It was not surprising, then, that in the 19<sup>th</sup> Century this Court ruled that corporations are not “persons” or “citizens” for purposes of Article III of the Constitution. *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (corporations “as such” are not persons or citizens as the term is used in Article III and Judiciary Act of 1789). This Court also held that corporations are neither “citizens” nor persons for purposes of the Privileges and Immunities Clause. *Bank of America v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (foreign corporations cannot claim rights of a person under the privileges and immunities clause and immunities clause of article IV because a corporation is merely an “artificial being created by the charter” see also *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888) (corporations are not citizens for purposes of the fourteenth amendment privileges and immunities clause); See also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) (“[t]he term citizens . . . applies only to natural persons . . . not to artificial persons created by the legislature”).

#### B. Nike Wrongly Relies On Santa Clara As Holding That Corporations Are Persons For Purposes Of The Fourteenth Amendment.

Nike asserts that its speech is protected under the First Amendment – as incorporated through the 14<sup>th</sup> Amendment against the state of California -- because as a “person” Nike enjoys the same level of 14<sup>th</sup> Amendment safeguards as individuals. Nike mistakenly relies on *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886) for the proposition that corporations were granted the same protections as “persons” under the 14<sup>th</sup> Amendment . In fact, *Santa Clara* has been misread and subsequently overruled. In *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), the Court specifically declined to address the issue. *Santa Clara County* sued the Southern Pacific Railroad Company for failure to pay taxes, and the railroad presented the Court with six defenses, including the argument that corporations were persons under the Equal Protection Clause of the Fourteenth Amendment. Because one of the other five defenses was successful, the Court had no occasion to decide the question of corporate personhood and specifically declined to do so:

If these [other] positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.

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As the judgment can be sustained upon this [other] ground, it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

*Id.* at 411, 416.

Nevertheless, it appears that the court reporter, J.C. Bancroft Davis, included a headnote stating, “The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.” See Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* 107 (2002) (quoting J.C. Bancroft Davis, 118

United States Reports: Cases Adjudged in the Supreme Court at October Term 1885 and October Term 1886 394 (Banks & Bros. Publishers).

Perhaps as a result of this famous but misplaced headnote, in dicta in three cases over the subsequent three years, this Court cited Santa Clara County without explanation for the proposition that corporations are persons within the meaning of the equal protection clause of the Fourteenth Amendment. See *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888); *Home Ins. Co. v. State of New York*, 119 U.S. 129, 133 (1886). Justice Field in a concurring opinion in a companion case laments that the “tax cases from California” did not “decide the important constitutional questions involved.” *San Bernardino County v. Southern Pacific Railroad* 118 U.S. 417, 422 (1886).

The Court today should clarify that Santa Clara did not hold that corporations are entitled to constitutional protections as “persons.”

C. Even If Santa Clara Is Interpreted As Granting Corporations The Rights of Persons, It Has Been Overruled By Subsequent First, And Fourteenth Amendment Opinions That Recognize That Corporations Are Not Persons Entitled To Constitutional Protections.

A careful reading of subsequent decisions by this Court reveal that Santa Clara has been overruled and that corporations are not entitled to protections under the First and 14<sup>th</sup> Amendments coterminous with persons. The central decision relevant to the case at bar is *Austin v. Michigan Chamber of Commerce* 494 U.S. 652 (1990). This Court in *Austin* held that that political speech of corporations can be regulated because “[s]tate law grants [them] special advantages,” *ante*, at 1397, and because this “unique state-conferred corporate structure ... facilitates the amassing of large treasuries,” *ante*, at 1397-1398. In so ruling, this Court upheld a Massachusetts statute that prohibited corporations from using corporate resources to spend money in support of or in opposition to candidates for election to state office. In upholding the regulation, the Court recognized the “distorting effects of immense aggregations of wealth . . . that have little or no correlation to the public’s support for the corporation’s political ideas.” *Austin*, 494 U.S. at 660. The holding of *Austin* plainly requires that this Court uphold the California statute prohibiting false corporate speech by Nike because it is much less restrictive than the Massachusetts statute in *Austin* which prohibited ANY corporate speech on a particular topic.

*Austin* should also be read as recognizing that corporations are “artificial entities” that have -- in the Court’s language “special advantages” -- conferred by state law. As such, these entities do not have the 1<sup>st</sup> and 14<sup>th</sup> Amendment protections of “persons.” This must be the reading of *Austin*, given that it upheld the ruling of the Court below which held that corporations – as artificial entities – are mere creatures of the state subject to state regulation.

The *Austin* court upheld *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986) which relied on the “artificial entity” theory of the corporation to rule that corporations, unlike persons, are not protected from state regulation of speech. *Id.* at 403. The court held that “favours from government often carry with them an enhanced measure of regulation.” *Austin*, 643 F. Supp. at 403 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)). “The Michigan legislature has granted corporations the advantages of perpetual life, limited liability, and wide-ranging powers to encourage economic expansion and prosperity [and] such advantages allow corporations to amass great aggregations of capital and influence... such power coupled with the faceless nature of corporations may very well create an atmosphere of distrust or the appearance of corruption in the electoral process.” *Austin*, 643 F. Supp. at 403 (citation omitted). In so holding, the Court relied principally on *United States v. Morton Salt Co.*, 338 U.S. 632, 641 (1950), which held that corporations do not have Fourth Amendment rights that would allow them to thwart an FTC subpoena for corporate documents . “[C]orporations can claim no equivalent. with individuals in the enjoyment of a right to privacy . . . . They

are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities," held the Court. "The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation." *Id.* at 652.

Austin and Morton Salt were built on a long line of cases, stretching back to the turn of the century, that rejected Nike's argument that corporations are persons for constitutional purposes. In *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906) (an estate sued an insurance corporation that refused to honor certain policies [\*628] due to alleged misrepresentation. A Missouri statute prohibited the use of the misrepresentation defense. The corporation charged that the statute deprived it of liberty and property rights without due process. Although the Court conceded that liberty included the right to pursue lawful claims and enter contracts, it ruled that corporations cannot enjoy this liberty right because "[t]he liberty referred to in . . . [the fourteenth] amendment is the liberty of natural, not artificial persons."\*248 *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (liberty guaranteed by fourteenth amendment extends only to natural persons and not to corporations). See also *California Banker v. Schultz*, 416 U.S. 21, 65 (1974) (corporations do not enjoy a right of privacy equivalent to that of individuals under the fourth and fourteenth amendments.); *Virginia State Board Of Pharmacy*, 425 U.S. at 749 n.1), "is the liberty of natural, not artificial persons." *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906)(quoted in *Bellotti*, 435 U.S. at 822 Rehnquist, J., dissenting)).

These cases effectively overruled *Santa Clara*, to the extent that opinion was relied on to suggest that corporations are persons for the Fourteenth Amendment. Justice Rehnquist, in dissent in *Bellotti*, suggested as much that *Santa Clara* was overruled: "This Court decided at an early date, with neither argument nor discussion, that a business corporation is a "person" entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886). Likewise, it soon became accepted that the property of a corporation was protected under the Due Process Clause of that same Amendment. See, e. g., *Smyth v. Ames*, 169 U.S. 466, 522 (1898). Nevertheless, we concluded soon thereafter that the liberty protected by that Amendment "is the liberty of natural, not artificial persons." *Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906)."

These same cases, beginning with *Riggs* and ending with *Austin*, also incorporated a long line of distinguished dissents and concurrences by Justices who found it fundamentally important to the direction of the country that an activist court not read into the constitution and the amendments thereto a corporate right to challenge the very free market and state's rights principles so critical to the Republic. Justice Hugo Black famously remarked, "I do not believe the word 'person' in the Fourteenth Amendment includes corporations." *Conn. General Life Ins. v. Johnson* 303 U.S. 77, 85 (1938). Justice Douglas observed:, "There was no history, logic or reason given to support that view nor was the result so obvious that exposition was unnecessary." *Wheeling Steel Corp. v. Glander* 337 U.S. 562, 577 (1949). "Justice Rehnquist's argued that '[t]he insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.'" *P G & E*, 106 U.S. at 922 (Rehnquist, J., dissenting).

Rehnquist even went further, arguing that the " . . . The State need not permit its own creation to consume it." [435 U.S. 765, 810] He also opined that that corporations have neither political nor commercial free speech rights and to accord them such rights would bring back the discredited judicial philosophy of *Lochner* style substantive due process. Rehnquist also dissented from the majority's opinion in *Central Hudson* that corporations enjoy commercial speech protections. In his dissent he noted that corporations -- especially utility monopolies -- are chartered by the state, and subject to enhanced supervision. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 583-85 (1980) In dissent, Justice Rehnquist protested that striking down state economic regulation was nothing more than a contemporary version of *Lochner*. See also, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) (The Court noted that "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. . . . [A] corporation is an artificial being, invisible,

intangible, and existing only in contemplation of law. . . ." (quoting Trustees of Dartmouth College v. Woodward, 4 U.S. (Wheat.) 518, 636, (1819); Bellotti, 435 U.S. at 822-24 (Rehnquist, J., dissenting));

The Rehnquist majority in Austin incorporated not only established precedent, but eloquent dissents and concurrences to build a firmly established consensus that corporations are not entitled to constitutional protections as persons.

C. Because The Court Recognizes That Other Organizational Entities Are Not "Persons" Under The Fourteenth And First Amendments, The Same Logic Should Apply To Deny Corporations Personhood Status.

When Austin held that corporations do not enjoy the same First Amendment privileges as individuals, it harmonized this Court's prior rulings which held that other artificial state created entities – particularly labor unions – do not have 14<sup>th</sup> Amendment and 1<sup>st</sup> Amendment privileges. The Court adopted the Riggs artificial entity analysis to deny an incorporated labor union first amendment rights in Hague v. CIO, 307 U.S. 496 (1939) Justice Stone noted in his concurring opinion that "[a corporation] cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons." Hague invalidated a Jersey City ordinance prohibiting individuals, labor associations, and the American Civil Liberties Union (ACLU) from distributing literature. Only the individual plaintiffs, not the labor union or the ACLU, could invoke first amendment protections. Just as Morton Salt largely deprived corporations of fourth amendment privacy rights in 1950, so Hague deprived at least one form of corporate entity free speech rights in 1939. Id. at 527 (citing Northwestern Nat'l Life Insurance Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907)).

Justice White observation in his Bellotti dissent that even if corporations are denied First Amendment rights, the individuals that comprise those corporations still are protected in their right to speech. This logic applies equally to labor unions or any other artificial entity. As Justice White remarked: "Even the complete curtailment of corporate communications concerning political or ideological questions not integral to day-to-day business functions would leave individuals, including corporate shareholders, employees, and customers, free to communicate their thoughts. Moreover, it is unlikely that any significant communication would be lost by such a prohibition. These individuals would remain perfectly free to communicate any ideas which could be conveyed by means of the corporate form." Bellotti at 807

D. The Decisions Of This Court Have Consistently Circumscribed The Bill Of Rights Protections of Corporations Which The Court Recognizes Are Artificial Entities Created By State Government And Therefore Not Persons Entitled To Constitutional Protections.

The Court has also denied corporations Bill of Rights protections under the Fifth Amendment In Hale v. Henkel, 201 U.S. 43 (1906). The Court utilized the artificial entity theory to deny corporations fifth amendment privileges against self-incrimination. Hale involved a criminal antitrust action, brought under the Sherman Act, against two tobacco corporations: the American Tobacco Company and the MacAndrews & Forbes Company. A subpoena duces tecum was issued to Hale, the secretary and treasurer of MacAndrews & Forbes, requesting that he appear and produce a battery of letters and contracts executed between his corporation and several other tobacco firms. Id. Hale refused to comply, invoking the fifth amendment's privilege against self-incrimination. Id.

Rejecting this argument, the Court held that the words "no person" in the privileges portion of the fifth amendment do not suggest that corporations should be included within the amendment's protections. The majority then rendered its most expansive rendition of the artificial entity theory, drawing a sharp distinction between the individual and the corporation. "The individual exists antecedent to the state and

therefore owes no duty to the state and cannot be deprived of any constitutional rights. The corporation, however, is a mere "creature of the State." Its powers are limited by law, and the legislature reserves a right to investigate the corporation.. An individual may refuse to answer incriminating questions, but a corporation may not if it is charged with an abuse of its state-conferred privileges. *Id.* at 74-75.

In a separate concurrence in *Hale*, Justice Harlan advanced the artificial entity theory to suggest that corporations should not be accorded fourth amendment protections. "In my opinion a corporation -- "an artificial being, invisible, intangible, and existing only in contemplation of law" -- cannot claim the immunity given by the fourth amendment, for it is not a part of the "People," within the meaning of that amendment. Nor is it embraced by the word "persons" in the amendment". *Id.* Subsequently Justice Harlan's concurrence became the majority in *Morton Salt*. See also. *Oklahoma Press Publishing Co. v. Walling*, 238. 327 U.S. 186 (1946). in which the Court permitted the Department of Labor broad access to a newspaper corporations documents. Furthermore, the Court found that corporations are not entitled to all of the constitutional protections individuals have "in these and related matters." *Id.*

#### E. The Court Should Reject Judicial Activism, A Threat To State's Rights And A Return To The Era Of *Lochner* and Substantive Due Process.

Neither the language nor the legislative history of the Constitution or the 14<sup>th</sup> and 1<sup>st</sup> Amendments suggest that corporations are entitled to constitutional protections as "persons". Therefore this Court must deny Nike's efforts to utilize the First Amendment to strike down state regulations that protect the integrity of the marketplace and prevent corporations from deceiving consumers and investors. To do otherwise would be to engage in extraordinary judicial activism.

In the eighteenth and nineteenth century no legal fiction bedeviled the institution of the Supreme Court and raised the question of the legitimacy of the American legal system more than the fiction that persons are property. In the 20<sup>th</sup> and 21<sup>st</sup> century, the legal fiction that corporations are persons – i.e. that property is a person – promises to provoke controversy and dissent. The issue of whether corporations are persons for purposes of the 1<sup>st</sup> and 14<sup>th</sup> amendments is squarely before the court. The Court should clarify the constitutional status of corporations broadly rather than rely on a narrow reading of the type of speech employed by Nike.

Unless the Court upholds the line of twentieth century opinions stretching to *Austin* that hold that corporations are not protected by the first and fourteenth amendment as persons, corporations will use this provision to undermine the ability of free markets to function. Corporate advocates plan to use the various Bill of Rights provisions as a wedge to bring back the *Lochner* era of substantive due process, long since discredited. In that era, corporations and other business enterprises used the fourteenth amendment to strike down all manner of laws necessary to an orderly working of the marketplace, including child labor, maximum hours and minimum wage. The false economic distinctions imposed in the *Lochner* era have often been criticized by commentators. L. TRIBE, *CONSTITUTIONAL CHOICES* 202, 211-215 (1985).

To revive the doctrine of corporate personhood would usher in a new era of corporate substantive due process that would threaten to undermine state's rights. Corporations and their advocates even plan to use the First Amendment to challenge the first amendment to invalidate a range of federal regulations, including Securities and Exchange Commission disclosure requirements governing corporate takeovers and rules affecting stock offerings. See *Personalizing the Impersonal: Corporations and the Bill of Rights* By Carl J. Mayer *Hastings Law Journal*, Hastings College of Law at University of California, March, 1990; Volume 41, No3. To eliminate these laws would lead to the collapse of markets as investors and consumers would simply have no way to secure the information necessary for commerce to function.

Apart from being a particularly bad moment in the nation's history to make these arguments, it would undo established Court precedent. To grant corporations personhood protections would also severely

undermine state's rights. Only this Court can stand as a last line of defense, ensuring that artificial entities are not given special societal powers that allow corporations and their managers to overwhelm the executive and legislative branches of government with an awesome power enhanced by constitutional privilege.