SCALIA KILLS CORPORATE PERSONHOOD

Eli alluded to this in his post on Antonin Scalia's claim that women and gays are not included under the 14th Amendment, but I wanted to expand on it.

Scalia, one of corporate America's biggest friends on SCOTUS, just killed corporate personhood.

What other conclusion can you draw after reading Scalia's assertion that the 14th Amendment only applies to slaves and not women or gays or—he doesn't say it but it would follow logically—corporations?

> In 1868, when the 39th Congress was debating and ultimately proposing the 14th Amendment, I don't think anybody would have thought that equal protection applied to sex discrimination, or certainly not to sexual orientation. So does that mean that we've gone off in error by applying the 14th Amendment to both?
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> Yes, yes. Sorry, to tell you that. … But, you know, if indeed the current society has come to different views, that's fine. You do not need the Constitution to reflect the wishes of the current society. Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things called laws. You don't need a constitution to keep things up-to-date. All you need is a legislature

> and a ballot box. You don't like the death penalty anymore, that's fine. You want a right to abortion? There's nothing in the Constitution about that. But that doesn't mean you cannot prohibit it. Persuade your fellow citizens it's a good idea and pass a law. That's what democracy is all about. It's not about nine superannuated judges who have been there too long, imposing these demands on society.

It was the Fourteenth Amendment, after all, that was used to grant railroad corporations the same rights as you and me. Here's how Thom Hartmann describes it.

> But in any case, before the Supreme Court the Southern Pacific Railroad argued in this case that the 14th amendment which says 'no person shall be denied equal protection under the law' should apply to them as a corporation. In other words, that as a corporation they should have rights under the constitution because the 14th amendment, when it was written to free the slaves in the 1870's, the 14th amendment didn't say 'no natural person shall be denied equal protection under the law.' Instead it says 'no person.' And for hundreds of years of common law we had this distinction between natural persons, you and me, and artificial persons: churches, governments, corporations.

If the Fourteenth Amendment shouldn't be applied to women and gays, then it sure as hell shouldn't be applied to railroads, right?

Is there something more going on (and I'm sure there are a lot of you out there that will explain this to me)? I'm wondering whether, in anticipation of severely reversing the application of the Fourteenth Amendment (perhaps in anticipation of a gay rights case, perhaps to

support conservative efforts to overturn birthright citizenship), Scalia is laying the basis for corporate protections elsewhere?

After all, in Citizens United, Scalia very carefully rooted his concurrence in the First Amendment alone, not the Fourteenth. But note how he very carefully takes the opposite approach to the First Amendment that he does with the Fourteenth Amendment: that in spite of the dissent's extensive description of the founding fathers' caution about corporations, so long as they didn't explicitly exclude any speakers, they must be assumed to have included corporations—incorporated associations—in their intent.

> The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment . It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form.
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> [snip]
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> There were also small unincorporated business associations, which some have argued were the " 'true progenitors' " of today's business corporations. Friedman 200 (quoting S. Livermore, Early American Land Companies: Their Influence on Corporate Development 216 (1939)); see also Davis 33. Were all of these silently excluded from the protections of the First Amendment ?
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> The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak.
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> [snip]
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> The dissent says that when the Framers

> "constitutionalized the right to free speech in the First Amendment , it was the free speech of individual Americans that they had in mind." *Post,* at 37. That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*.
>
> [snip]
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> But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment . The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion.

Maybe the answer is just that Scalia's a raging hypocrite and we shouldn't take his inconsistencies very seriously because he's always inconsistent. But I do wonder whether there's something more going on, and would love to know what you all think?