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Justice Antonin Scalia
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Scalia,

We are writing to inquire as to how the application of Bill of Rights and related constitutional protections to the artificial creations known as corporations can be squared with a constitutional interpretation theory of "originalism."

In a debate in January of last year with Justice Breyer, you concisely explained that, "My theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted." Similarly, in a speech to the Center for Individual Freedom in March of this year, you said, "Our [originalists'] manner of interpreting the Constitution is to begin with the text, and to give that text the meaning that it bore when it was adopted by the people."

In light of this approach, can you explain why you have adopted the jurisprudence under which the Fourteenth Amendment is applied to corporations?

Section One of the Fourteenth Amendment stipulates that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This provision was notable for extending due process protections and equal protection obligations to the states, and has been used by the Court as the vehicle to apply most of the Bill of Rights to the states.

As you know, the Fourteenth Amendment was a post-Civil War amendment focused on ensuring the rights of African Americans, not corporations.

The text of the amendment is not limited to prohibiting discrimination on grounds of race, nor has the Court so interpreted it. The text specifies that no state shall deny due process or equal protection to any *person*.

Yet the Court has interpreted the language to apply to corporations, and you have joined with this interpretation.

The jurisprudential origin of the doctrine that the Fourteenth Amendment's protection should apply to corporations is *Santa Clara County v. Southern Pacific Railroad* 118 U.S. 394 (1886). However, the Court's decision itself did not decide or even address the issue. Instead, a court reporter, a former railroad company president, simply wrote in the headnotes that "[t]he defendant Corporations are persons within the intent of the clause in section 1 of the Fourteen 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."

From an originalist approach to constitutional interpretation, or under any prevailing school of constitutional interpretation, is there a rationale for relying on a headnote, not reflective of the content of the Court's actual decision, as establishing precedent on an important matter of constitutional law?

The judicial activist decision to interpret the Fourteenth Amendment to apply to corporations was the premise not only for the now-abandoned *Lochner* line of decisions invalidating an array of state-based safety, health and other regulations, but also for the application of many Bill of Rights protections to corporations in the state context. The Court has similarly moved to apply Bill of Rights protections to corporations in the federal context.

The Bill of Rights and other amendments were intended to provide protections against government overreaching into real persons' lives. The application of such restrictions on government activity relating to conduct by the artificial creation of the corporation has had many deleterious consequences. To take one notable example, the courts now interpret the First Amendment to restrict significantly the scope of states' and the federal government's authority to regulate advertising of tobacco products -- even though such products are deadly when used as intended, even though their usage kills 400,000 or more Americans a year, and costs society dearly in terms of lives, suffering and monetary expense, and even though researchers have compiled compelling evidence -- including from internal industry documents -- that advertising restrictions would reduce the scale of this public health disaster.

How does an "originalist" make the leap from "nor shall any state deprive any person of life, liberty, or property, without due process of law" to impose restrictions on the

ability of a state to regulate death-inducing ads from state-chartered tobacco corporations?

We look forward to your reply to these questions.

Sincerely,

Ralph Nader

Robert Weissman