

WHAT IS A CORPORATION?

by: Anthony Kammer



corporation is a legal structure that enables individuals to contribute and pool resources, capital, and labor in order to generate a profit. Corporations are created by state law in the state in which they are incorporated.

The corporate legal structure receives a number of advantages and obligations from the state. These laws enable the corporation to overcome the limitations of any one individual—like a human lifespan or limited productive capacity—and to accumulate and distribute profits among the various stakeholders.

1 WHAT IS CORPORATE PERSONHOOD?

The term ‘corporate personhood’ has become a shorthand way of disagreeing with the way decisions like *Citizens United* expanded the First Amendment rights of corporations. The term, however, tends to conflate two distinct legal concepts.

The first concept, legal personhood, is a doctrine under corporate law that enables a company to be treated as a single legal entity. This doctrine is what enables corporations to enter into contracts, be subjected to state and federal laws, and to sue and be sued.

The second concept is the notion that corporations have rights protected under the U.S. Con-

stitution. As a legal matter, the Supreme Court has held that corporations do have a number of protected constitutional rights (*see below*). But, as the popular reaction to *Citizens United* demonstrates, the scope of constitutional protections that apply to corporations—particularly under the First Amendment—remains highly contested.

2 WHAT CONSTITUTIONAL RIGHTS DO CORPORATIONS CURRENTLY HAVE?

The U.S. Supreme Court has held that the Constitution ensures corporations are afforded due process property protections,¹ have the right to trial by jury in a criminal case,² are protected against double jeopardy,³ and cannot be subjected to unlawful searches and seizures.⁴ Beginning in the 1970s, the Supreme Court held that corporations engaging in “commercial speech” are protected by the First Amendment from state interference.⁵ The origins of many of these rights can be traced to several influential 19th century cases.

However, because corporate rights limit the

ability of the democracy to act, it is important that these rights are not expanded in ways that conflict with other constitutional values.

Since the 1970s, there has been a well-financed movement to extend First Amendment rights to corporations, and subsequent court decisions re-characterized food and safety labels as “corporate speech” and held reasonable labeling requirements unconstitutional. A similar push took place with respect to campaign finance laws, where money in the form of political expenditures re-characterized as speech. Citizens United represents a new high-water mark in this effort to exempt corporations from regulation under a banner of First Amendment rights.

3 WHY DID COURTS EVER GIVE CORPORATIONS RIGHTS?

The court decisions that have given corporations rights have relied, either implicitly or explicitly, on one of three major theories of the corporation’s legal status. These theories are in some tension with one another, and each of these theories imagines a very different relationship between corporate power and the democracy:

- a. The “Natural Entity” or “Artificial Being” theory posits that corporations are distinct legal persons with rights independent from the rights of the individual stakeholders.
- b. The “Associational” or “Aggregate” theory says that corporations have rights that can be derived from the rights of the individuals in the corporation.
- c. The “State Charter” or “State Creature” theory views the corporation as a product of state laws and recognizes the state’s power to define the parameters of the corporate form, so long as the rights of the individual stakeholders are not violated.

In recent years, the “Natural Entity” view has found a number of adherents among conservative members of the judiciary. This view has resulted in corporations receiving many of the same rights as individuals and has placed many corporate activities beyond democratic control.

4 IF CORPORATIONS AREN’T PEOPLE, WHAT ARE THEY?

We need to get back to the simple fact that corporations are institutions created by law, and not naturally occurring entities with inherent, inalienable rights. As Justice Stevens stated in his Citizens United dissent, “Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”

The “State Charter” view of corporations offers a promising alternative the currently dominant paradigm. Unlike the Natural Entity theory, the recognition that corporations are created by state charters would better enable the democracy to set the rules that corporations must follow. As Boston College Law Professor Kent Greenfield recently noted, changes to the corporate form are too often overlooked by democracy advocates.

As creations of state law, corporations could be defined in a manner that is more compatible with democratic governance. Nonprofit corporations, in exchange for the benefits they receive from the state, are limited as to the types of political activity they can engage in. Similar standards could apply to business corporations. Corporations could be reformed to adopt the model of Benefit Corporations (or B-Corps), for example, which are required by law to benefit both society and shareholders and to consider how their decisions affect their employees, community, and the environment. Alternatively, corporate gover-

nance could be changed to require greater input from employees and other affected constituencies. In the more inclusive German system, employees are given seats on corporate boards.

Changes like these would be transformative. So long as individuals' associational rights are protected, there is no constitutional reason the state should not be permitted to define corporations in such a way that commercial winnings cannot be used to buy outcomes in the political system. That is precisely what we should demand from a private sector that has ceased to work in the public interest. ■

ENDNOTES

1. See *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
2. *Armour Packing Co. v. United States*, 209 U.S. 56, 76-77 (1908); *United States v. R. L. Polk and Co.*, 438 F.2d 377, 379 (6th Cir. 1971).
3. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).
4. See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1976); *See v. City of Seattle*, 387 U.S. 541 (1967).
5. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

DĒMOS MEDIA

LAUREN STRAYER
LSTRAYER@DEMOS.ORG
P: (212) 389-1413

DĒMOS

220 FIFTH AVE, FL 2
NEW YORK, NY 10001
P: (212) 633-1405

ENGAGE

WWW.DEMOS.ORG
WWW.POLICYSHOP.NET
@DEMOS_ORG