The History of Corporate Personhood

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In *McCutcheon v. FEC*, handed down last Wednesday, the Supreme Court built on the precedent of *Citizens United* by invalidating the federal aggregate contribution limit for individuals. But *McCutcheon* is not the only case that gives the Supreme Court chance to expand *Citizens United*'s reach this term.

In *Sebelius v. Hobby Lobby Stores*, the Supreme Court has to choose whether to extend the logic of 2010's *Citizens United* to allow a corporation to make a religious objection to a generally applicable law.

How we got to the point where a for-profit corporation – not a church mind you – can lay claim to religious rights is a bit complicated. It all goes back to a legal fiction known as corporate personhood.

Generally, corporate personhood allows companies to hold property, enter contracts, and to sue and be sued just like a human being. But of course some human rights make no sense for a corporation, like the right to marry, to parent a child, or to vote. As Professor Elizabeth Pollman explains when it comes to Constitutional rights for corporations there is a hodgepodge: "corporations enjoy Fourth Amendment safeguards against unreasonable regulatory searches, but do not have a Fifth Amendment privilege against self-incrimination."

If you're a fan of the Colbert Report, "corporate personhood" might sound familiar. Stephen Colbert got a well deserved Peabody Award for his work educating the public about campaign finance laws with his lawyer Trevor Potter. However, Mr. Colbert's verbal tick of saying that *Citizens United* granted corporate personhood is a tad misleading.

Citizens United did not grant corporations personhood. Corporations already had it. As lawyer David Gans has documented, despite the fact that the U.S. Constitution never mentions corporations, corporate personhood has been slithering around American law for a very long time. The first big leap in corporate personhood from mere property rights to more expansive rights was a claim that the Equal Protection Clause applied to corporations.

The 14th Amendment, adopted after the Civil War in 1868 to grant emancipated slaves full citizenship, states, "No state shall ... deprive any *person* of life, liberty, or property without due process of law, nor deny to any *person* ... the equal protection of the laws."

We have the likes of former U.S. Senator Roscoe Conkling to thank for the extension of Equal Protection to corporations. Conkling helped draft the 14th Amendment. He then left the Senate to become a lawyer. His Gilded Age law practice was going so swimmingly that Conkling turned down a seat on the Supreme Court not once, but twice.

Conkling argued to the Supreme Court in *San Mateo County v. Southern Pacific Rail Road*that the 14th Amendment is not limited to natural persons. In 1882, he produced a journal that seemed to show that the Joint Congressional Committee that drafted the amendment vacillated between using "citizen" and "person" and the drafters chose person specifically to cover corporations. According to historian Howard Jay Graham, "[t]his part of Conkling's argument was a deliberate, brazen forgery."

As Thom Hartmann notes the Supreme Court embraced Conkling's reading of the 14th Amendment in a headnote in 1886 in *Santa Clara County v. Southern Pacific Rail Road*: "Before argument, Mr. Chief Justice Waite said: 'The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does.'" This was not part of the formal opinion. But the damage was done. Later cases uncritically cited the headnote as if it had been part of the case.

Some Supreme Court Justices objected to the *Santa Clara* approach. Dissenting in *Wheeling Steel Corp.* in 1949 Justice William O. Douglas and Justice Hugo Black noted that the corporate personhood issue was not such an open and shut case: "[In *Santa Clara*] [t]here was no history, logic, or reason given to support that view. … [T]he purpose of the [14th] Amendment was to protect human rights-primarily the rights of a race which had just won its freedom." Justices Douglas and Black thought the question of corporate personhood should be decided by the people, not the Supreme Court. But they could not convince their fellow Justices.

In the 1970s, *Santa Clara* was used to justify granting corporations the First Amendment right to spend unlimited corporate funds on ballot initiatives in a case called *Bellotti*. The Court relied on *Santa Clara*'s reading when it stated that "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment." Justice Rehnquist, in his dissent, questioned the wisdom of extending corporations political rights: "those properties, so beneficial in the economic sphere, pose special dangers in the political sphere." Again Rehnquist could not convince his brethren.

In *Citizens United,* when the Supreme Court held that political speech is "indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation," they cited *Bellotti*. Thus it's only a hop, skip and a jump from *Santa Clara* to *Citizens United*.

In *Sebelius v. Hobby Lobby Stores*, the store chain is claiming that the corporation (and not just its proprietors) has a religious objection to providing certain types of birth control for its workers as required by the Affordable

Care Act. Thus, the Court is contemplating expanding corporate personhood to a new logical extreme: First Amendment religious rights. It's no surprise that Hobby Lobby's brief relies on *Bellotti* and *Citizens United*.

There are absurdities that flow from granting legal fictions Constitutional rights that were intended for humans. Corporations don't have minds, and without one it is hard to see how a corporation "thinks" about any political issue du jour from gay rights to the budget deficit. Without a soul, it's hard to conceptualize how a corporation could "believe" in anything whether it is transubstantiation of communion or the morality of birth control. But here we go again. A corporation makes a Constitutional claim to the righteousness of their legal position. The question is will the Justices fall for it?

The views expressed are the author's own and not necessarily those of the Brennan Center for Justice.

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