

Gorsuch's Gory Expansion of Corporate Personhood

by Greg Coleridge

Supreme Court Justice nominee Neil Gorsuch didn't invent "corporate personhood," the shorthand term used to describe the ludicrous decisions by U.S. Supreme Courts to sanctify corporate entities with inalienable constitutional rights intended exclusively for human beings.

As a federal judge, however, Gorsuch contributed to its expansion by applying it in creatively delusional ways in *Burwell v. Hobby Lobby*¹. That 2014 case established that a "closely held"² for-profit corporation, apart from the human beings connected to it, possesses religious rights.

Corporations were originally subordinate to *We the People*

Supreme Court Justices began more than a century ago twisting existing constitutional doctrines into a pretzel to justify with straight faces that corporate charters issued by federal and state governments possessed constitutional rights.

As followers of the Program on Corporations, Law & Democracy (POCLAD) are well aware, corporate entities were not intended originally at the nation's founding to possess inalienable constitutional rights. They were granted charters, or licenses, one at

a time by *We the People* via legislatures that precisely defined the limits of their actions. These included, among many others, limited charter durations and purposes, limits on the amount of land ownership, and stipulations of who could be corporate directors.

Never mind for the moment "fake news." Corporate personhood is "fake constitutional law." Corporations are corporations. People are people.

Corporate charters were deemed to be democratic tools wielded to ensure public authority and control over subordinate corporate creations by the public. The corporate charter conferred "privileges," not "rights." Corporations were designed to be publicly accountable. If a corporation violated the democratically determined terms of its charter, state legislators or courts often revoked its charter with its assets distributed to those negatively impacted.

In a 1900 ruling to revoke the charter of a dairy corporation, the Ohio Supreme Court stated:

The time has not yet arrived when the created is greater than the creator, and it still remains the duty of the courts to perform their office in the enforcement of the laws, no matter how ingenious the pretexts for their violation may be, nor the power of the violators in the commercial world. In the present case the acts of the defendant have been persistent, defiant and flagrant, and no other course is left to the court than to enter a judgment of ouster and to appoint trustees to wind up the business of the concern.³

The role of a corporation was to provide useful goods or services. It wasn't to lobby, contribute or invest in political campaigns, or even to engage in charitable activities.

Corporations become legal "persons"

All this changed when corporate agents began effectively influencing state legislatures and in the appointment of corporate attorneys to the Supreme Court. Corporations escaped democratic controls by pressing legislatures to adopt general incorporation laws (vs. one-at-a-time charters); and by shifting legal power from smaller

to larger and more inaccessible arenas:

- The state to federal level,
- Legislatures to regulatory agencies, and,
- The legislative and executive branches to the judiciary (i.e. courts, including the Supreme Court).

It didn't take long for corporate lawyers to appeal decisions limiting corporate actions to their peers on the Supreme Court, which "found" corporations as legal persons in a wide number of unforeseen places in the Constitution. These included within the 1st Amendment (right to speak and right not to speak), 4th Amendment (right against search and seizure), 5th Amendment (right against "takings") and 14th Amendment (right of due process and equal protection of the laws). Corporate attorneys also hijacked the Contracts and Commerce clauses, which became anti-democratic battering rams.

Scores of federal court decisions over the last century have widened and deepened corporate constitutional rights. These decisions overturned local, state and federal laws that had previously protected workers, consumers, communities and the environment. In this way, the occupants of corporate boardrooms increased the political and economic power of the corporation at the expense of ordinary people.

As evident from this brief historical account and despite what many believe, the 2010 *Citizens United vs FEC*⁴ Supreme Court decision didn't initiate the anointment with inalienable constitutional rights to corporate entities. The controversial 5-4 split decision by the Supremes merely widened the already existing 1st Amendment free speech rights of corporate entities to make political donations (or investments) in elections.

Gorsuch further expands "corporate personhood"

While serving on the 10th Circuit Court of Appeals, Neil Gorsuch played a prominent role in further widening and deepening constitutional "rights" bestowed on corporate entities in an entirely new arena: religion. He was among the majority who ruled in the *Hobby Lobby* case that federal law prohibited the Department of Health and Human Services from requiring closely held, for-profit secular corporations to provide contraceptive coverage as part of their employer-sponsored health insurance plans under the Affordable Care Act if it violated the corporation's religious beliefs.

You read it right: the corporation's "religious rights." The U.S. Supreme Court upon appeal affirmed the decision in a controversial 5-4 decision.

Hobby Lobby Corporation's owners claimed they shouldn't have had to be forced to comply with federal laws that violated their personal religious convictions. They referenced the 1993 federal Religious Freedom Restoration Act, which prohibits the government from imposing a "substantial burden" on a person's exercise of religion, even in a generally enforced law.

Just to be clear about the decision: Gorsuch and others didn't just rule that Hobby Lobby's owners had constitutionally-protected religious beliefs, but that the artificial legal creation of the state itself, Hobby Lobby Incorporated, possessed religious convictions.

To extend and pretend that private, personal religious rights apply to public entities such as business corporations is a breach of a constitutional firewall with potential discriminatory implications. Dissenting in the case, Justice Ruth Bader Ginsburg said, "[t]he exercise of religion is characteristic of natural persons, not artificial legal entities," the ruling was "a decision of startling breadth" and "[t]he court...has ventured into a minefield."⁵

The *Hobby Lobby* case opens the door as never before to requests for exemptions by private business corporations to laws that apply to human beings based on any number of claimed religious beliefs. Some individuals, for example, currently hold strong religious convictions about everything from racial, religious and sexual-orientation discrimination to the role of women in society. Hiring, paying, treating and providing benefits to employees are potentially up for grabs. Providing service (or not) to customers based on any number of factors is potentially at the whim of certain business corporations. Even specific for-profit charter schools could impose religiously motivated racial segregation policies on their students.

What existing or potential civil rights laws would not be impotent to claims that corporate discrimination against employees was motivated by strongly held religious beliefs of its owners? Thanks to *Hobby Lobby*, the corporation provides cover for business owners to impose racism, sexism, homophobia and classism. Those wishing to discriminate were handed a powerful weapon in the Hobby Lobby decision.

This isn't just fantasy. It's already happening. A federal district judge last year ruled that a transgender employee could be fired by a funeral home owner who believed that gender transition violated his biblical teachings⁶.

Ending corporate personhood

Corporate personhood has been normalized for too long – with disastrous legal, political, economic, social and environmental consequences. It's not legitimate. It's not democratic. It's not human.

Never mind for the moment "fake news." Corporate personhood is "fake constitutional law." Corporations are corporations. People are people. Corporations are legal, subordinate creations of *We the People*. These artificial

entities should receive only privileges, not rights, as authorized by the public.

It's way past time to affirm that only human beings, not corporate entities, possess inalienable constitutional rights. Move to Amend's We the People Amendment⁷ does just this. It should be our long-term goal.

In the immediate term, Neil Gorsuch has played a role in the gory expansion of corporate personhood. If we're serious about protecting what little democracy remains in our nation, his nomination for the Supreme Court must be defeated.

The *Citizens United* decision was for many people the first time they had ever heard of "corporate personhood." Thanks to the Gorsuch nomination and his ruling on Hobby Lobby, many more are becoming aware.

Call it the "Corporate Personhood Awareness and Wake Up Call 2.0." This is a teachable moment to educate. It's also an actionable moment to resist. Let's take full advantage of these opportunities.

Notes

¹573 U.S. ____ (2014)

²"Closely held" corporations are defined by the Internal Revenue Service as those which a) have more than 50% of the value of their outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time

during the last half of the tax year; and b) are not personal service corporations. By this definition, approximately 90% of U.S. corporations are "closely held", and approximately 52% of the U.S. workforce is employed by "closely held" corporations. [Source: Wikipedia]

³*State ex rel. Monnett v. Capital City Dairy Co.*, 62 OS 350 (1900)

⁴558 U.S. 310 (2010)

⁵<https://www.scribd.com/doc/231974154/Ginsburg-Dissent>

⁶<https://assets.documentcloud.org/documents/3031818/Son-of-Hobby.pdf>

⁷<http://wethepeopleamendment.org>

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By What Authority (ISSN: 524-1106) is published by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation and plunder the earth. **By What Authority** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

POCLAD is a group of 10 people instigating democratic conversations and actions that contest the authority of corporations to govern. Our analysis evolves through historical and legal research, writing, public speaking and working with organizations to develop new strategies that assert people's rights over property interests.

BWA is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions and suggestions.

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