A Constitutional Amendment to Keep Corporate Money out of Elections: Corporations Are Not People

The U.S. Supreme Court's disastrous ruling in *Citizens United v. Federal Election Commission* decided that corporations should be able to make unlimited election expenditures. Corporations can now call for the election of one candidate, and spend millions smearing another. They can even do so in secret by passing corporate treasury money through 501c4 non-profits and trade associations.

The ruling marks the "touchdown end zone dance"[1] for those who claim for-profit corporations have the same fundamental constitutional rights as real, live people. We are calling for a constitutional amendment to firmly re-establish that individual constitutional rights were intended for human beings, and not state-created entities driven by profit. This handout is designed to explain in more detail what "corporate personhood" is, how it came about, and what we can do about it.

The idea of corporations being 'people' with constitutionally-protected 'rights' has dubious origins.

The idea that corporations have claims to constitutional rights is not new. Its first appearance was in a clerk's note in the 1886 Supreme Court case, *Santa Clara County v. Southern Pacific Railroad Company*, contending that the 14th amendment due process rights should apply to corporations.

- The Supreme Court first embraced corporate constitutional 'rights' at the start of the "*Lochner* era" at the turn of the 20th Century. At that time, the Court regularly interpreted the 14th Amendment's equal protection clause designed to protect the rights of African Americans, to block or undermine laws to protect our health and safety.

- During this era, (named for the U.S. Supreme Court case *Lochner v. New York*), the Court struck down minimum wage laws, child labor laws, limits on the length of work days and weeks, protections for workers who wished to join a union, even the progressive income tax.[2] Much of the pro-corporate precedent was reversed beginning in 1937 when a new set of Justices began to uphold progressive state regulations and New Deal programs.

- The tide began to turn again in favor of corporate rights in the 1970's, including in a 1978 case, *Bellotti v. First National Bank of Boston*. In *Bellotti*, a 5-4 majority struck down a Massachusetts ban on for-profit corporate spending to influence a ballot initiative. The court found that the corporate "identity" of the speaker did not deprive it of First Amendment protection, but suggested that direct giving to candidates would create a danger of real or apparent corruption. The Court cited this assertion of corporate constitutional rights when it removed limits on corporate spending in elections in its 2010 *Citizens United* ruling.

Corporations are not people— they are a legal fiction

A corporation is a "mere creature of law". From their origin, the corporation was seen as a legal creation that "possesses only those properties which the charter of its creation confers upon it."[3] Corporations were originally created by the state for specific purposes – to build bridges and roads, or to trade in a particular area. Corporations have the rights that *We, the People* decide. They should not be accorded the special protections afforded by the Bill of Rights and other constitutional provisions.

- For-profit corporations have special privileges and power that humans do not enjoy. These privileges allow the corporation to focus on maximizing profits without risking the personal assets of any investor. The corporate charter shields individuals running the corporation from liability for its actions and grants the entity perpetual life.

- Publicly-traded for-profit corporations are required to maximize profit for their shareholders above and beyond any other value. By contrast, individuals make decisions based on personal values and needs, and non-profit associations are formed to serve the public or to express the views of groups.

The rights protected by the Constitution were intended for natural people. Corporations are not the 'persons' or 'citizens' for which the Bill of Rights was intended; these protections were written for real people. Both the Framers of the Constitution and the Supreme Court up until the Gilded Age of the late 19th century were quite clear on this central constitutional issue.[4]

- It makes no sense to protect a corporation's right to liberty or to assure its right to the vote. Each of the citizens associated with a corporation has those rights. Large corporations spend money to improve their bottom line, not to reflect the values of its managers, employees or shareholders.

Granting corporations 'rights' comes at the expense of the public interest and individual rights. The Supreme Court has used the notion of corporate constitutional 'rights' to strike down reasonable public-interest regulations, diminishing the rights and power of real human beings.[5] Granting business corporations a constitutional shield helps the largest companies — organized by and profiting a privileged group of people — to increase their own relative power.[6] Corporate rights should not trump the rights of real people to be safe and healthy in their homes, schools and workplaces. Corporations have even been granted 4th Amendment protections that prohibit surprise inspections from agencies for unsafe working conditions or other hazards.

- For example, Barlow's, Inc., an electrical and plumbing installation company, argued that inspectors for the Occupational Safety and Health Administration (OSHA) needed a warrant to perform an unannounced check for dangerous conditions in workplaces. The Supreme Court agreed, holding that the legislatively designed enforcement mechanism was an unconstitutional violation of the *corporation's* privacy rights.[7]

The idea that corporations also have 'free speech rights' protected by the Constitution is relatively new. The notion that corporations may claim First Amendment political speech rights only gained strength in a the *Bellotti* Supreme Court ruling which asserted that corporations have a right to spend money to influence state ballot initiatives. This opinion was written by Justice Lewis Powell, who 7 years earlier, as a corporate attorney, wrote an influential memo advising corporate America to focus on the courts as an "instrument for social, economic and political change."[8] Conservative Justice William Rehnquist dissented from the Court's decision. In his dissenting opinion, he recognized the long-standing constitutional difference between the inherent rights of people and the government-given rights of for-profit corporations.[9]

Corporations and their ideological allies have increasingly used their expanded First Amendment rights to advance policies that promote profit at the expense of public health and well-being.

Citizens United is the culmination of this trend, under which corporate advertising and data-mining have also been granted First Amendment protection.[10] Asserted corporate First Amendment rights have been used to challenge:

- Rules limiting tobacco advertising likely to be seen by children;[11]
- Regulations restricting alcohol advertising.[12]
- Limitations on casino and gambling marketing.[13]
- Pharmaceutical marketing, including direct-to-consumer advertising and promotion of off-label uses of pharmaceuticals.[14]
- Rules designed to force disclosure of hidden ads (product placements and product integration) on television and radio.[15]

Non-profit associations and unions play a very different role than for-profit corporations in society. They are created to express the political and social views of people. Non-profits must retain key constitutional rights to safeguard their role as a voice for associations of people. That does not mean, however, that they should have a constitutional right to spend money on elections. All election spending should be subject to Congressional or state rules, and ideally all elections should be publicly funded. For more on this topic see Public Citizen's *Non-Profits and Union Rights Factsheet (forthcoming)*.

<u>We must reclaim our rights and make it clear democracy is for people, not for corporations</u>

The idea that "corporations are people," with the same constitutional protection as human beings is untenable if we are to have a functional democracy. Ultimately, the Constitution empowers *We, the People* to clarify once and for all that for-profit corporations derive their rights and substantial privileges from their charters, and are subject to regulation within the constitutional powers of government. Government should regulate corporate activity to protect the public interest and general welfare.[16]

As Justice Oliver Wendell Holmes wrote in response to *Lochner*, the Constitution was written to protect individual rights, not promote any particular economic theory.[17] In service of the same ideology that gave birth to corporate constitutional rights, the Supreme Court has radically departed from that essential truth by asserting that corporations are people.

We need a constitutional amendment that clearly and firmly states that for-profit corporations are artificial state-created entities, that do not possess the same rights that the Constitution recognizes as belonging to natural persons.

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[1] Clements, J. (2012). Corporations Are Not People. pp. 3.
[2] Purdy, J. (Winter 2012). The Roberts Court v. America. Democracy: A Journal of Ideas. pp. 47.
[3] *Dartmouth College v. Woodward,* 17 U.S. 518 (1819) (Marshall, C. J.)
[4] Gans, D. & Kendall, D. (2010). A Capitalist Joker: The Strange Origins, Disturbing Past & Uncertain Future of Corporate Personhood. pp. 6, 16. CAC. Retrieved Feb. 23, 2012 from http://bit.ly/SozWrG.
[5] Mayer, C. (March 1990). Personalizing the Impersonal: Corporations and the Bill of Rights. Hastings Journal of Law; Volume 41, No. 3 at pp. 658. Retrieved Feb. 23, 2012 from http://bit.ly/9Lafq3
[6] Ellis, A. (2011). Citizens United and Tiered Personhood. 44 J. Marshall L. Rev. 717, 747
[7] Mayer, C. (March 1990). Personalizing the Impersonal: Corporations and the Bill of Rights. Hastings Journal of Law; at pp. 658.
[8] Ibid. at 47.
[9] *Bellotti v. First National Bank of Boston*, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).
[10] Purdy, Id., pp. 46, 47, 52. C.f. *Sorrell v IMS Health, Inc.,* 564 U.S. No. 10-779 (2011); Weissman, R. Let the People Speak: The Case for a Constitutional Amendment to Remove Corporate Speech From the Ambit of the First Amendment. 83 Temple L. Rev. 979 (Summer 2011). [10] See *Lorillard v. Reilly*, 533 U.S. 525 (2001).
[11] See *Lorillard v. Reilly*, 533 U.S. 525 (2001).
[12] See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).
[13] See *Greater New Orleans Broadcasting Association, Inc. et. al. v. United States*, et. al. 527 U.S. 173 (1999).
[14] See David Vladeck, The Difficult Case of Direct-to-Consumer Advertising, Loyola of Los Angeles Law Review, Vol. 41, 2008. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014134
[15] See Robert Weissman, Reply to comments submitted *In the Matter of Sponsorship Identification Rules*, MB Docket No. 08-90, FCC, Nov 21, 2008, available at http://fcc.us/Nnozzp.
[16] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).
[17] *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).