Othering & Belonging Institute at UC Berkeley

A brief history of the evolution of corporate power

This article is derived from, but not a synopsis of "Beyond Public/Private: Understanding Excessive Corporate Prerogative" by john a. powell and Stephen Menendian, which makes the case that corporations have overstepped their appropriate role in diverse democracies.

INTRODUCTION

The concentration of wealth and influence held by corporations in the US is clear evidence of a serious structural distortion in our economy and political system. Apart from the inequities produced by high levels of income and wealth disparity (which have reached levels not seen since the Gilded Age), centralized economic power inevitably leads to centralized political power, which weakens and subverts the basic democratic norms and structures that were designed to better address the concerns of ordinary citizens.

Among other things, centralized economic power has allowed corporations to finance candidates through direct expenditures and campaign contributions that are sympathetic to their interests, giving them an outsized influence relative to the average citizen. Further, the private interests of corporations do not always (or even very often) align with the public good, contributing to poor public policy outcomes in the longterm.

Some argue that the lopsided power of corporations in our society is the inevitable outcome of capitalism, but history shows that to be untrue. Corporations can, and should, in fact, play an important role in our society—but one that is subservient to a state centrally concerned with the broader public good. This is not only for the advancement justice, equity, and belonging, but also to maintain a healthy form of capitalism that offers true competition to all players in the market.

Corporations have not always held undue economic and political power over our society. In early US history, they were chartered explicitly to serve public good functions, suggesting that it is possible for corporate entities to better align with public interests while continuing to advance whatever private goals for which they were founded.

In the pages that follow, we chart the corporate form's development from public good entities to powerful political actors, purposely or otherwise working to distort policy outcomes for private gain, but often at the expense of the minority and marginalized groups who depend on government action to protect their rights and maintain channels for correcting injustice.

Further, as we survey the basis of excessive corporate influence, we find a linkage between jurisprudence that advances corporate power to jurisprudence around race, suggesting that the rise of corporations has come at the expense of the concerns of marginalized groups. Ultimately, we argue that racial and social justice cannot be achieved without a realignment of corporate power. Corporations make good servants, but bad masters.

EARLY US CORPORATIONS: CHARTERED FOR THE PUBLIC GOOD

A product of the Enlightenment and Reformation, the prevailing ideology of early US society was classical liberalism, a central tenet of which was distrust of centralized power. The Founding Fathers were not only wary of the concentration of political power, however, but also of economic power, and as a result, early corporations were created exclusively through state charters, operating to serve the public and the interests of the state.

Held under the direct control of government, these corporations were chartered to serve the public, as with public facilities like bridges and water systems, where investors derived profits from tolls and user fees.

America's Founding Fathers were heavily influenced by classical liberal thinkers like Adam Smith and John Locke, who warned of the excesses of concentrated power.

As a public institution, the legal theory of the corporation was that of an artificial entity. Chief Justice Marshall articulated this theory for the Supreme Court: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." Further, Marshall explained that "[t]he objects for which a corporation is created are universally such as the government wishes to promote."

Indeed, corporations were not merely creatures of the state, they were wholly public entities.

DARTMOUTH COLLEGE V. WOODWARD: CORPORATIONS BEGIN THEIR EMANCIPATION FROM THE STATE

One of the first steps in the liberation of corporations from state control was the 1819 Dartmouth decision, where the Supreme Court had to determine whether Dartmouth was a private institution or subject to the control of the state. Throughout the colonial era, educational institutions like Dartmouth were understood to be public, or at least quasi-public institutions serving particular public needs, and were given generous tax abatements, land grants, subsidies, and other forms of public support.

The specific issue in the Dartmouth case was whether the New Hampshire Legislature could replace Dartmouth's president. To make that determination, the Court confronted the question of whether the 1769 charter was a "grant of political power...[to create]...a civil institution," or if the charter created a private institution for the "bounty of the donors."

In spite of generous public investment and a clear public purpose, the Court decided that Dartmouth was a private institution, laying the foundation for the privatization of most of the colonial (Ivy League) colleges during the 19th Century. Ultimately, the progressive release of corporate charters from the control of the state and the resulting expansion of corporate rights was a product of the work of lawyers and judges removed or safely insulated from democratic processes. The Dartmouth decision was merely the beginning.

CORPORATE PERSONHOOD DEFINED IN SANTA CLARA V. SOUTHERN PACIFIC

In 1886, the Supreme Court heard the case of Santa Clara County v. Southern Pacific, concerning whether taxes assessed to a railroad were constitutional. California imposed taxes on the value of property, but distinguished between natural persons and "railroad[s] and other quasi public corporations" in making property valuations. The importance of the case is in an extraordinary insertion into the court syllabus, ostensibly in the name of Chief Justice Waite, stating:

"The Court does not wish to hear argument on the question whether the provision of the 14th Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of laws, applies to these corporations. We are all of the opinion that it does."

Thus, in the syllabus to the Santa Clara decision, the Court asserted that corporations unequivocally were people under the 14th Amendment. The question of corporate personhood had not been argued or briefed in the case, nor did the Court's opinion explain this mysterious dictum.

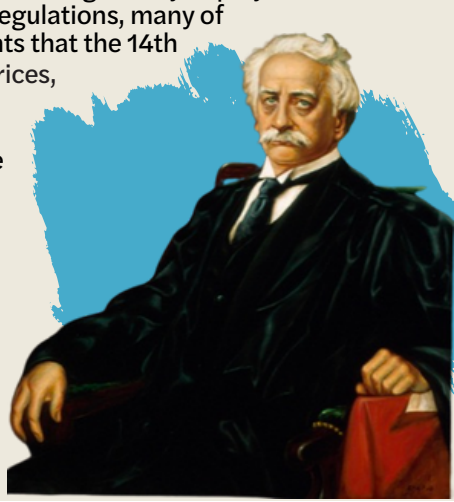
The syllabus does not have any legal force, but regardless of its origin, Santa Clara's infamous dictum became accepted law.

THE LOCHNER ERA & THE 14th AMENDMENT: CORPORATE INDEPENDENCE AND ATTACKS ON CIVIL RIGHTS

The Lochner era was a seminal period in the early 20th Century when the Supreme Court struck down numerous state regulations of corporate entities. Although this era was also the height of Jim Crow, which eviscerated civil rights protections, the connection between judicial curtailment of economic regulations and judicial attacks on civil rights is seldom made. Both of these realities were made possible by the Court's interpretation of the 14th Amendment, which was passed in 1868 following the end of the Civil War to protect the rights of freed slaves. Yet between 1890 and 1910, just 19 cases brought under it dealt with descendants of slaves, whereas 288 dealt with the interests of corporations.

One of the principal mechanisms for using the 14th Amendment to protect corporate interests was its Due Process Clause, which stated that no person shall be "deprived of life, liberty, or property without due process of law." Since corporations were determined to be "persons" under the amendment noted above in Santa Clara, it followed that they enjoyed personhood rights provided in that provision. The Court began to vigorously deploy the Due Process Clause to strike down labor laws, minimum wage laws, and economic regulations, many of which directly or indirectly protected those very same former slaves or slave descendants that the 14th Amendment was meant to help. From 1905 to 1935, nearly 200 state laws regulating prices, labor, or labor conditions were struck down as violating that clause.

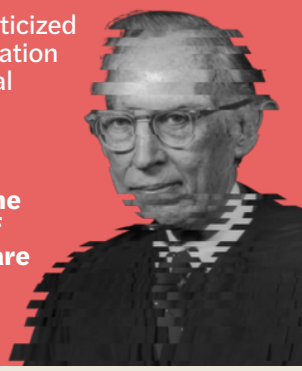
The name for this era comes from the seminal case of Lochner v. New York, in which the Court struck down a New York State law limiting the number of hours that bakers in the state could work on the grounds that it violated their "right to contract." The majority opinion was written by Justice Rufus Wheeler Peckham (right).



THE 1970s: THE POWELL MEMO & POLITICAL SPEECH FOR CORPORATIONS

Supreme Court Justice Lewis Powell was more than the author of the Court's 1970s commercial speech decisions, (including a seminal 1977 decision concluding that the First Amendment protects corporate funding in support of ballot initiatives), he was also their architect. A corporate lawyer who sat on the board of 11 companies, Powell drafted a comprehensive strategy to expand corporate prerogative just prior to his nomination to the Court. Known as the "Powell Memo," this 6,000–word confidential memorandum to the Director of the Chamber of Commerce was a blueprint for expanding corporate power.

In the 1971 memo, Powell asserted that America's free enterprise system was under "broad attack" and criticized the "apathy" of business to engage in politics. He called for the development of sustained political organization by corporate elites, with specific objectives for universities and colleges, media, scholarly research, political engagement, and most importantly, the courts.



Most importantly, Powell saw corporate interests as in tension with those of civil rights groups and labor unions, as he recognized that the expansion of corporate prerogative is checked not only by the state, but also by organized labor and other public interest groups, which call upon the apparatus of the state to enforce law and promote the public good. Indeed, the critique that corporate interests are often realized at the expense of marginalized groups was not only understood by those fighting for social justice, but also by those concerned with expanding corporate power, as well.

THE MODERN ERA: EXCESSIVE CORPORATE POWER IMPEDES DEMOCRACY AND BLOCKS EFFORTS TOWARDS SOCIAL & RACIAL JUSTICE

In its 2010 Citizens United v. FEC decision, the Supreme Court held that corporations enjoy First Amendment rights to spend money on political campaigns. As explored in prior pages, this decision represents more than several decades of expansion of corporate speech rights, and the culmination of nearly two centuries of jurisprudence that decoupled corporations from the public good.

For all of the power and individual rights accumulated over the past century, corporations still cannot vote, but rather must persuade voters to overturn laws and regulations that impinge on their profits. Their ability to "persuade," of course, has increased exponentially since Citizens United, a basic strategy of which is to argue that these laws and regulations harm ordinary people, that they are a product of an overbearing, interventionist state. In each case, it is implied, the government is infringing the liberties and rights of private citizens, not corporations, even if the opposite may, in fact, be true.

In Ohio, for example, corporations have sought and achieved legislative victories that preempt local communities from passing ordinances outlawing risky horizontal hydraulic drilling for natural gas (known as "fracking"), while in California, Amazon sponsored a 2011 ballot initiative asking state voters to overturn a law that would tax its online sales. More recently, in 2021, gig economy companies like Uber and Lyft spent $224 million on Prop. 22, which exempted these companies from following labor law and from paying certain taxes in CA.

In pursuit of ever greater profits, corporations can further threaten both local government and government agencies with divestment or investment elsewhere unless they receive tax concessions, incentives, subsidized utilities, regulatory exemptions, and other benefits, forcing local and even state governments to compete in bidding wars to offer maximum incentives. Unless local politicians bend to their demands, major corporations can threaten to close a factory and move jobs to another state, harming both workers and the local governments that depends on basic tax revenue to enact public good activities, including those that seek to protect and uplift marginalized and minority groups.

Ultimately, unchecked corporate power not only contributes to high levels of wealth inequality—leading to inequality in education, housing, health, and opportunity—but also stands in the way of achieving social and racial justice, which relies on the protection of workers' rights, the collection & fair redistribution of public funds, and the just consideration of the needs of those with less power.

TACKLING MISALIGNMENT OF THE CORPORATE SPHERE

"The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them...that it is useless to try to get any adequate regulation and supervision of these great corporations by State action. Such regulation and supervision can only be effectively exercised by a sovereign whose jurisdiction is coextensive with the field of work of the corporations–that is by the National Government."

-Theodore Roosevelt, 1905

RECONSIDERING "PRIVATIZATION"

The ideology of privatization has been erected upon the sharp categorical distinction between the public and private spheres, the latter of which has come to broadly include a wide spectrum of actors ranging from individuals to globe-spanning corporations. This superficial public/private binary has been used as a sword to expand corporate power and influence, and as a shield to protect corporate prerogatives from government regulation by lumping the needs and rights of private individuals with those of multinational conglomerates.

While privatization is generally conceived as the process of relinquishing the private sphere from the coercive, concentrated power of the state, what generally replaces the state is the coercive, concentrated power of the corporation over private individuals, ultimately serving to enlarge the corporate space as opposed to private space. The privatization of public entities is more than a mere shift in categories of domains–public to private–it is a shift in power. Privatization is, in many cases, an expansion of corporate prerogative, and in our vernacular is more accurately described as "corporatization," which entails risks for the public, private, and non–public/non–private spheres. As the corporate sphere expands through "privatization," the space for people in terms of accountability and privacy shrinks.

WHAT IS THE ROLE OF CORPORATIONS TODAY?

Possible answers to this question are not difficult to imagine: the private sector is an engine of economic growth, serving the economy and nation by creating jobs, promoting prosperity and generating wealth. It cannot be denied that private business is the most important employer of American workers, the source of entrepreneurial innovation, and catalyst for improvement in US standards of living. However, it has not been shown that these goals are best served by limiting the role of government and minimizing the intrusion of government in the marketplace.

Rather, we find that the growth of corporations has actively harmed the private sphere, taking space from private citizens and small businesses as well as our collective pursuit of social justice and civil rights by reducing the size of the public sphere, which holds the main infrastructure to enforce laws and promote the public good. Some will argue that on the issue of civil rights corporations have been a force for good. This is questionable, but the record is probably mixed. Our point is not that corporations will always use their excessive prerogative for harm, but that excessive prerogative itself is a structural distortion. The enforcement of civil rights, the protection of workers and the environment—all of which call upon the apparatus of the state to enforce these protections—ultimately threaten to limit corporate prerogative.

This article suggests that corporations make good servants, but bad masters. The rapid expansion of the corporate space is not only a threat to individual liberty and democratic accountability, it is a threat to the broadest public good. To make corporations our servant, we need as, Theodore Roosevelt argued a century ago, a strong federal government, and perhaps an international regulatory regime as well as strong collective action by citizens. To accomplish that goal, we must clarify a misleading public/private distinction and tame the Court as Franklin D. Roosevelt managed to do in the 1930s.

The danger we all face is not simply a weak democracy and anemic public space dominated by corporate elites, but a distorted private space surveilled and invaded by corporate actors. The expansion of corporate space is a threat to everyone, and should not be confused with the liberty of the private sphere.