In Wake of Wall Street Protests, Professors Illuminate ‘Corporate Personhood’

By Eric Williamson

The spread of the Occupy Wall Street movement to cities across the country has led to a national discussion on the role of corporations and brought the term “corporate personhood” to the fore in recent weeks.

Although the movement itself has drawn both criticism and praise, the protesters’ outrage resonates with many Americans who feel large corporations too often exert their will at the expense of the people. Before that, the issue became politicized following the 2010 ruling by the Supreme Court of the United States, Citizens United v. Federal Election Commission, which said a federal ban on corporate and union electioneering violated the First Amendment.

Law School professors Edmund Kitch, Frederick Schauer, and Richard Schragger, as well as Dean Paul G. Mahoney recently weighed in on the topic of corporate personhood, including what it means and why it sometimes puts everyday people at odds with big business.

How does the law define “corporate personhood” and what is its value?

Schragger: Corporations and similar organizations are classified as APs, or “artificial persons.” Corporations are treated as singular thinking and acting entities for legal purposes. The corporate person is a fiction; corporations and other organizations are made up of individuals or “natural persons” but are not “persons” themselves—the law is what personifies them.

Whether it is good or bad for the law to personify corporations depends upon one’s goals. Certainly it is useful to treat the corporation as an entity that can sue and be sued, that can own property, and that can enter into contracts and commit torts. These are all things that make corporations look like individuals for legal purposes. But it would be strange to permit corporations to vote in elections or to claim violations of their “human rights” or their political rights more generally. The corporate form of organization is just that—a form of organization. Corporations are useful organizations—they help coordinate large numbers of natural persons and encourage investment and give room for individuals to engage in productive enterprise. But there are lots of different ways to organize natural persons in the world. Families, churches, clubs, towns, cities and other governments are all institutions that engage in
productive activity. We do not have to treat any of them as persons for them to fulfill their missions.

**Is the term being used correctly within the context of the protests?**

**Kitch:** As far as I can tell, the Occupy Wall Street protesters do not care about whether or not the law treats corporations as legal persons for purposes of deciding whether or not they can make contracts, commit torts, own property, or bring lawsuits. When they refer to corporations they are not referring to the legal entities that are recognized by the law due to the operation of statutes for the incorporation of for-profit, nonprofit, and municipal entities. Rather, they are using the term corporations to refer to the social community of persons associated with the corporation: its leaders, its employees, its creditors, its shareholders, and even, perhaps, its customers.

This usage is fairly new to me. I first became aware of it when I realized that the press was aggregating contributions made by the employees of an entity and reporting them as contributions attributable to the entity. Thus reported contributions by “Goldman Sachs” would include contributions by all of the employees of Goldman Sachs.

So when Occupy Wall Street protesters object to “corporations,” they are not objecting to their corporate form. They are objecting to the behavior of the persons associated with the entity.

Consistent with this interpretation, the Occupy Wall Street protesters do not appear to be considering any changes in corporate and related laws related to the question of whether or not a corporation is treated as a legal person.

**Why do private corporations have personhood, while governmental or “public” corporations do not?**

**Schragger:** Because of the ubiquity of corporations, we sometimes forget that they are literally creatures of the state. One does not have a “right” to incorporate. Before incorporation became routine, bureaucratized, and widely available, state legislatures would grant charters to particular enterprises to engage in specific tasks for specific lengths of time—often tasks that served the public, like running a canal or a ferry service. Cities were often chartered as well, and were considered by the law to be corporate bodies indistinguishable from other 18th- and 19th-century corporate entities. Over time, however, commercial or “private” corporations came to be seen as legally different from governmental or “public” corporations. The former became imbued with personhood and were understood as vulnerable to state interference and thus in need of the protective armor of rights. In contrast, the “municipal corporation” was distinguished on the grounds that it pursued public purposes and thus should be susceptible to democratic control.

**Is the concept of corporate personhood essential for corporations to do business effectively in today’s society?**

**Kitch:** [Without corporate personhood, the] business and other activities would have to be carried out through alternative legal arrangements. Whether that would be good or bad would turn on the structure and practicality of the alternative arrangements. Before the general corporation statutes became available in the middle of the 19th century, lawyers used the trust device as an alternative. Experience showed that the trust device involved a somewhat higher degree of legal uncertainty and required slightly more complex structures.
Mahoney: Corporate personhood actually benefits creditors and customers of corporations. Without personhood, they wouldn’t be able to sue “the corporation” but would have to sue individual shareholders, from whom it would be much more difficult to recover.

*Are corporate “rights” at odds with the rights of natural persons, constitutional or otherwise?*

Kitch: Corporations are not creatures of constitutions, but rather of the legislative power recognized by constitutions. It is the legislature that sets out the rules governing their existence.

Corporate personhood has no constitutional implications across the board. Courts decide on an issue-by-issue basis as to what provisions of a constitution affect corporations. Corporations, for instance, can’t vote, while people can. But corporations can assert a constitutional claim for compensation when their property is taken by the government, just as people can.

Schragger: For as long as there have been corporate bodies, their exercise of power has generated concern. In the 1920s and ’30s, Justice Louis Brandeis argued that the large corporations caused economic dislocation, distorted democracy, and undermined individual welfare. In his famous dissent in Ligget v. Lee, Brandeis wrote: “Through size, corporations, once merely an efficient tool employed by individuals in the conduct of private business, have become an institution … which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state.” Brandeis further argued that the states can regulate these corporations; states had in the past limited their size and lifespan and dictated their purposes. “Whether the corporate privilege shall be granted or withheld is always a matter of state policy,” he wrote.

Brandeis was echoing other constitutional thinkers of the 19th and early 20th centuries, who worried that under the guise of corporate rights, “the most enormous and threatening powers in our country have been created”—to quote constitutional scholar Thomas Cooley, writing in the 1880s. Current-day constitutional scholars, like [University of Wisconsin–Madison professor Marc] Galanter, also worry about the capacity for artificial persons to dominate the legal and political landscape. “At the moment,” Galanter wrote in 2005, “it appears that APs are well on their way to capturing the legal profession and overwhelming or circumventing the courts.” This was prior to the recent Great Recession, which was precipitated in significant part by the risky lending practices of giant financial corporations. It was also written before the Citizens United decision, in which the Supreme Court struck down (in a 5–4 decision) a ban on corporate electioneering on First Amendment grounds.

Brandeis would have a lot to say about both events. He warned against corporate gigantism, arguing that it made the American economy vulnerable to economic collapse. He called it “the curse of bigness;” we call it “too big to fail.” He further railed against treating corporations as if they had rights over and above the state, and he urged extensive regulation of their activities in order to preserve democratic government. Justice John Paul Stevens wrote similarly in his 2010 dissent in the Citizens United case. He argued “at bottom, the Court’s opinion is … a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.”

Schauer: In the context of the First Amendment, and in particular freedom of speech and freedom of the press, revisiting the capacity of corporations to exercise First Amendment rights is implausible. Virtually
all newspapers, magazines, motion pictures, and books, among other message-deliverers, are corporations, and to suggest that these entities do not possess First Amendment rights would undercut the information- and idea-providing function of the First Amendment, and would, in addition, be the occasion for a dramatic alteration in longstanding First Amendment doctrine and theory.

But to say this is not to foreclose careful thinking about the extent to which elections, like other First Amendment settings and institutions, are or should be subject to distinctive and institution-specific First Amendment rules, doctrines, tests, and principles. Thus, some election-specific regulations of corporate contributions and expenditures in the electoral process would be consistent with the increasing institution-specific nature of First Amendment doctrine, and would do far less violence to the general principles of freedom of speech and press than would the broad acceptance of the implausible proposition that corporations cannot be the holders or claimants of First Amendment rights. In a world in which many of our messages and information are created and transmitted by corporations and similar large organizations, limiting generally the constitutional right to transmit messages and information to natural persons only would be highly unfortunate.

**Is there validity to the argument that corporations essentially represent the will of a group of people, both within the organization and outside of it, through “voting” with one's dollars?**

**Kitch:** Yes. People who associate with a corporation whether as shareholders, employees, or customers are indicating at some level an approval of its activities. The Occupy Wall Street protesters are perfectly aware of this, and recently urged the participants to close their accounts at large New York banks.