

Courts rule inconsistently on corporate identities

October 5 2012

When the Supreme Court ruled in *Citizens United vs. Federal Elections Commission* in 2010, it effectively stated that corporations are people under the First Amendment, able to spend as much money on some forms of political speech as they wish—and the world inside and outside of politics took notice. A University of Kansas law professor has authored an article arguing the court failed to consider the real power brokers—corporate groups—and that the opinion illustrates how courts are often taking different views of what it means to be a corporation in the same area of the law, or as in *Citizens United*, in the same opinion.

Virginia Harper Ho, associate professor of law, authored "Theories of Corporate Groups: Corporate Identities Reconceived," which appeared in the June 2012 *Seton Hall Law Review*. While [Citizens United](#) may be the most well-known case regarding corporate identity, it is far from the only one. Harper Ho said it caught her attention because the court never clearly answered the basic questions of whose voice corporations represent.

"I think the court took an extreme position on the campaign finance question in *Citizens United* because they were less concerned about the power of corporate groups," Harper Ho said of the ruling. If they had, she notes, they might have been more concerned about corporations drowning out individual voice. "But I wanted to take a closer look at what the case means from the perspective of corporate law."

Her work identifies two views of corporate identity prevalent in the

courts and extends them to the corporate group.

Corporations are not mentioned in the Constitution, and the court has held that only certain constitutional rights should be extended to them, she notes. How the rights and duties of corporations extend to related entities is more complex. A year after the Citizens United ruling, the high court ruled in *Janus Capital Group Inc. vs. First Derivative Traders*, a case that also turned on the boundaries of the corporate group and the meaning of corporate speech. In that case, the court ruled Janus Capital Group was not responsible for misleading information made by an affiliated fund in the sale of securities—in other words, the court concluded that Janus Capital Group and its affiliate were not a single speaker, in contrast to the enterprise-level view of corporate speech the court appeared to take in *Citizens United*.

Harper Ho argues that these cases illustrate how the courts' view of corporate groups shapes case outcomes. She notes that a "real enterprise approach, which views a firm as a single economic organization, more closely meshes as a descriptive matter with the economic realities of corporate groups. This view also offers the best fit with research on organizational and corporate identity finding the dynamic interactions among senior managers and even key employees across separate divisions and affiliates within a corporate group can together produce an independent corporate identity or culture."

The challenge, she acknowledges, is that this view asks courts to look beyond the internal legal boundaries of the firm.

The Supreme Court is currently hearing the case *Kiobel vs. Royal Dutch Petroleum Co.*, which raises similar questions about the role and identity of multinational corporate groups under international law. The case centers on Nigerian forces that undertook a campaign of murder, rape and abuse against local activists who demonstrated against oil

exploration there, allegedly with the support of Royal Dutch Petroleum Company. There is not currently a single definition of a multinational corporation, and this case will go far in determining how the identity of multinationals under international law will be viewed by courts in the United States, Harper Ho said.

Regardless of how the court rules in Kiobel, the cases Harper Ho surveys show that how courts view corporate identity impacts how they apply legal rules to corporations, and that courts adopt inconsistent perspectives on that issue even within specific areas of the law. Legislators often look to the courts in forming policy that affects corporations, and both would be better served by being consistent in whether they view them as individuals or not.

"Courts and legislatures need to be more consistent in how they think about corporations," Harper Ho said. "And they should be transparent."

While it would be difficult to assign one theory of corporate identity that would apply to all cases, it could be possible to determine in advance which view courts will use in which types of cases. Such consistency would be beneficial for courts and legislatures when dealing with such complex questions and just to corporations in its clear standards of views and rules that will be applied.

"Lawyers and business people are creative and they'll find ways of dealing with the rules," Harper Ho said. "But they need to know what those rules are."

Provided by University of Kansas

Citation: Courts rule inconsistently on corporate identities (2012, October 5) retrieved 30 April 2024 from <https://phys.org/news/2012-10-courts-inconsistently-corporate-identities.html>

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