The Contribution of Corporation Law to Civil Society

Woods Bowman

*DePaul University, Chicago, United States*

The question is whether a national propensity to organize voluntary associations is due to cultural differences or to different legal institutions. The literature on differences between the U.S. and other countries tends to emphasize culture, although the Johns Hopkins Civil Society Project documents differences in legal institutions. The aim of this research is to cast light on the importance of legal institutions, specifically: (i) how corporation law was originally designed to promote civil society, not commerce, (ii) how it continued in this role until the early 17th century, and (iii) how it has influenced the growth in the number of U.S. nonprofit organizations in the second half of the 20th century.

The paper is in three sections. An introductory section is similar to a literature review because it relies on secondary sources to trace the evolution of corporation law as it affects foundations, charities, cooperatives, and membership associations beginning in Roman times. A middle section extends this line of research focusing on the U.S. experience in the early 19th century, challenging the Tocquevillian doctrine of American Exceptionalism. The third section features a statistical analysis of the growth in nonprofits relative to for-profit business corporations following liberalization of U.S. nonprofit corporation laws in the 1960s. A summary of findings follows.

The introductory section shows (i) how the law of corporations was invented by the ancient Romans to foster foundations and membership associations, (ii) how it adapted to forming cooperatives during the Italian Renaissance, and (iii) how the English used corporation law to protect the civil interests of the Church in the late Middle Ages. The second section adduces historical evidence from the U.S. in the early 19th century showing that American legislatures were liberal in granting corporate charters, likely more than English and French parliaments. (At the time, there was only one kind of charter; nonprofits did not have a separate identity until the late 19th century.) Further, American law was more protective of corporate interests than English and French law where parliamentarians were cautious about encroaching on royal prerogative.

These characteristics of the American legal system were important to formation of voluntary associations and deserve equal status with de Tocqueville’s cultural claims. This paper argues that the Netherlands would have been a better benchmark for de Tocqueville to judge U.S. voluntary activity because it was the birthplace of the modern corporation and it had a long history of republican rule – unlike England and France. It had a vigorous civil society in the early 19th century and even today it has a higher prevalence of volunteering and giving than the U.S.

The third section traces emergence of the modern nonprofit sector in the U.S. following the period when general incorporation laws became common, eliminating case-by-case legislative approval, and elevating formation of a business corporation to be a basic economic right. At this time the law began to distinguish nonprofits from for-profits. Until the middle of the 20th century, organizers of nonprofits had to persuade government gatekeepers that they would serve the public interest and denials of a corporate charter were common. But, in the 1960s a series of court cases liberalized nonprofit corporation laws, making incorporation a basic economic right for nonprofits too.

The third section goes on to examine data on the growth of tax exempt organizations and taxable business corporations since WWII. The key finding is that the oft-noted explosive
growth in the nonprofit sector peaked in the 1960s and subsequently steadily slowed until it is now equal to the growth rate of business corporations. This is consistent with a one-time event favorable to creation of nonprofits. Liberalization of incorporation laws is a leading candidate for such a transforming event but the paper also considers other possibilities. It predicts sedate growth in U.S. nonprofit corporations in the future — barring another transformational institutional innovation.

Sources:

