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Dear Tom:

Your excellent pieces on the U.S. Constitution led me to ponder why corporations aren't organized in the same way as our government. The answer, it seems to me, lies in the different goals and constituents of each.

In most corporations, the locus of power is the CEO. The Board has the power to approve certain decisions and to remove the CEO; the Board's role vis-à-vis the CEO is supervisory but limited. In contrast, the Constitution gives Congress at least as much power as the President, and arguably more power; at least in domestic affairs, the President generally cannot act unless Congress grants power.

There are other differences between the design of the Constitution and corporate governance. The Board is a unicameral entity, whereas Congress is bicameral (both Houses must concur as to most decisions). The ultimate source of power for a corporation is the shareholders, who elect the Board and approve executive compensation, but generally do not elect the CEO directly. The ultimate source of power for the U.S. government is the voters, who elect Congress directly and elect the President indirectly (through the Electoral College, which is pretty close to, but not quite, direct election). The judiciary evaluates whether the actions of the Executive Branch conform to statutory and constitutional limits; corporations usually do not have an internal mechanism for evaluating whether the CEO's actions conform to the directions of the Board, and the external mechanism (judicial resolution of litigation) is limited. What can we infer from these differences?

The design of the U.S. Constitution is conservative, in the sense that its checks and balances make it difficult to act, at least in domestic affairs. Typically, the President's actions require congressional authorization, which usually

(though perhaps not so much at the moment) constrains the President from acting quickly or at all. A simple majority of Congress generally cannot act without the concurrence of the President. Congress has the power to remove the President but only in extremely limited circumstances and with a supermajority vote. The CEO, however, usually can act quickly and decisively. If the President wanted to create a new Cabinet position, it might take years; if the CEO wanted to create a new department, it could happen instantly.

It seems to me that these differences reflect the distinct objectives and entry/exit rights of the constituents of each entity. The objective of the government is to promote the common good for all people in the nation —in the words of the Preamble to the Constitution, to "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty." Government actions affect different stakeholders in different ways, and reaching a decision that fairly balances those competing interests is complex and time-consuming. The multiple steps and impediments built into the Constitution are designed to ensure that all those interests are carefully considered before action is taken.

In contrast, the corporation has essentially a single objective (maximizing shareholder return) and a single group of stakeholders (shareholders). (There are some exceptions to both descriptors, but they don't change the basic analysis.) That singular focus makes it desirable to reach decisions more easily, with less process needed to ensure that those decisions balance the interests of diverse interests.

A related reason for the Constitution's bias toward conservatism, compared to the corporation's bias toward more rapid action, is the difference in entrance and exit rights. As to entrance: children born in the United States through no actions of their own are bound by the federal government's laws, even though they have not individually assented. As to exit: if the U.S. government acts in a way that a person feels is unfair, it's difficult to move to another country. By contrast, corporations are entirely creatures of contract and agency law, a domain in which (putting aside inherited corporate assets) willing adults choose to buy shares and thereby enter into agreements and organizational relationships that empower and constrain corporate entities. Someone opposed to a corporation's governance structure or values can decline to buy in (as some people do in the age of ESG). And if a corporation acts in a way that shareholders feel is contrary to their interests, they usually can sell their shares, at least if the company is public. If enough shareholders sell, the stock price of the public company falls and the corporation feels the heat; the same

isn't true when people renounce their citizenship. In other words, broad exit rights both protect the constituents of the corporation and check the actions of the CEO and Board, making it less necessary to have internal checks as compared to the federal government.

Another reason the CEO faces relatively modest constraints is that the corporation generally operates in competitive markets. As competitors innovate, the corporation must respond quickly. The need for rapid response is incompatible with extensive procedural requirements and consent rights. One could analogize business competition to the relationship between nation-states, and the U.S. Constitution contemplates that the President will have greater freedom of action in foreign affairs.

That said, I would not go so far as to say that all businesses are inherently less susceptible to process constraints as compared to the government. A business partnership, for example, may have a governance structure that more closely resembles the Constitution than does a corporation's. And, one could envision additional elements of the Constitution's design for corporations as they expand their missions (think, B-corp), or, perhaps, based on their expansive power over people's lives. But at least in its classical and dominant structure, there are good reasons the design of corporate governance differs from that set forth in the Constitution.

Very truly yours,

Henry Weissmann

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