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LET US NOW PRAISE CORPORATE "PERSONS"

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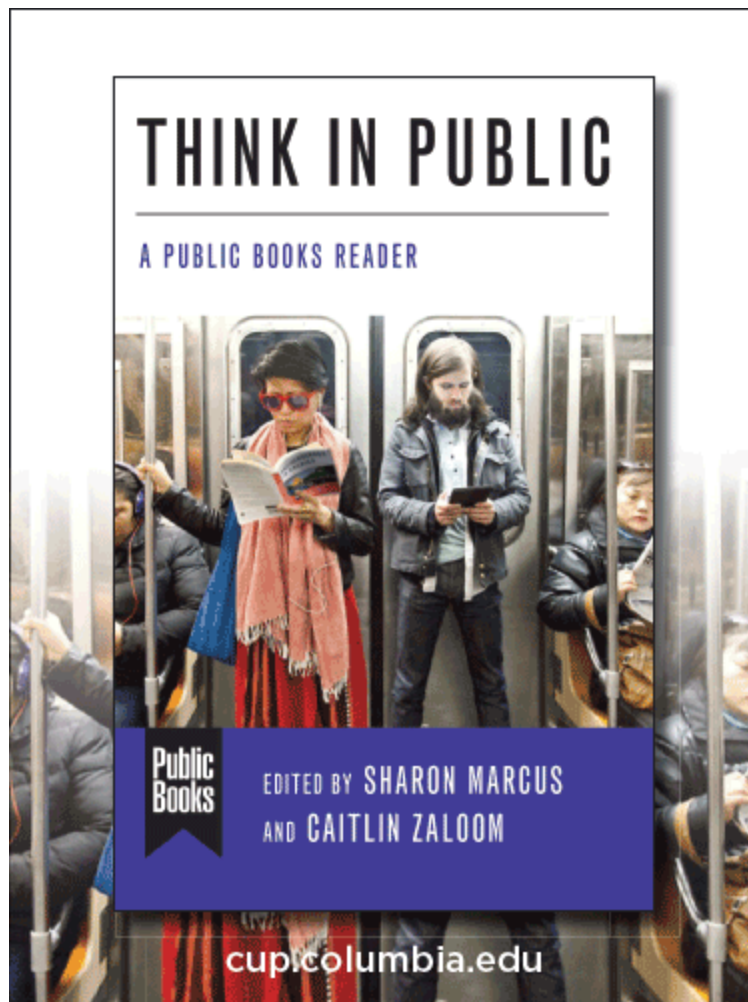


BY DONI GEWIRTZMAN

When presidential candidate Mitt Romney told a heckler that “corporations are people, my friend” during a 2011 campaign appearance at the Iowa State Fair, the world labeled him a gaffe-prone plutocrat. And yet, Romney’s statement isn’t as crazy as it sounds. American law and culture have a long tradition of assigning corporations the legal and personal attributes of human beings. In fact, today

marks a major holiday on the corporate rights Advent calendar: the 10-year anniversary of the Supreme Court's landmark decision in *Citizens United v. FEC*.

The belief that corporations are people has, in some sense, always been a sham. Over the course of two centuries, a diverse group of lawyers and clients—as law professor Adam Winkler shows in his book *We the Corporations*—performed a slow-motion legal magic trick. Corporations like *Citizens United* and *Hobby Lobby* (but also unexpected bedfellows like the NAACP and the *New York Times*) gradually worked to transform themselves: from fictitious legal entities, called into being *by* the state, into holders of individual rights, allowing them to claim constitutional protections *against* the very governments that created them. And if corporations *are* people—as law professor Kent Greenfield argues in *Corporations Are People Too (And They Should Act Like It)*—then perhaps we can use that dubious status to force them to clean up their acts.



Modern life makes Greenfield's rhetorical leap into corporate personhood easy. Corporations are hardwired into our individual pursuit of happiness and personal identity. They pay our salaries, generate the art we watch and listen to, distribute the journalism that informs us, set the rules for the online ecosystems where we spend our time, and structure the civic organizations that drive our political activism. Corporate Twitter accounts allow corporations to display the traits we commonly associate with sophisticated displays of humanity—empathy, irony, humor, the performance of a particular race or gender—in an

effort to build a meaningful personal relationship between brands and their customers. Boycotts of companies like Chick-fil-A ascribe deep personal beliefs and biases to corporate entities.

A nuanced form of corporate humanism flows through Winkler's and Greenfield's timely accounts of the Constitution's long and rocky relationship with corporate America, spotlighting the actual people that own, manage, work for, and represent corporations. Best of all, they both explore the counterintuitive idea that treating corporations as independent "persons" might, in fact, actually *advance* progressive ideals and make it *easier* to regulate corporate America.

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But getting there isn't going to be simple. Imagine the following scenario: in 2021, President Elizabeth Warren, backed by Democratic majorities in the House and Senate, launches a reformist era in comprehensive government regulation of for-profit corporations and financial markets. Relying on newly enacted federal statutes and emboldened regulatory agencies, the Warren administration begins to impose significant legal limits on American businesses, countering a 40-year post-Reagan trend toward deregulation.

In response, corporate America files an avalanche of lawsuits to challenge these regulatory initiatives, claims that are heard by a federal judiciary shaped by decades of business-friendly judicial appointees. In courts around the country, corporate lawyers push a legal argument they have been steadily refining for over two centuries: corporations have rights under the United States Constitution, and just like flesh-and-blood human beings, they can use the Constitution as a shield against government regulation.

Winkler and Greenfield show us that there are very real stakes in the identity politics of these artificial social constructs, and that questions of corporate personhood are at the heart of the most pressing debates in American life. Any serious effort to roll back decades of deregulatory federal-policy making, from whichever president comes next, will first need to confront how corporations fit into our constitutional framework.

Whether the Constitution limits the government's ability to regulate corporations depends on the answer to some critical questions: Who or what is a "person"? Are

corporations “persons”? If so, what constitutional rights do corporations have? If not, what are corporations, exactly?

Sadly, the Constitution’s text doesn’t offer much in the way of guidance. It doesn’t mention “corporations” at all. And while the Constitution does grant certain rights to “persons” and “citizens,” it says nothing about who or what a “person” or “citizen” is.

Since so much hinges on the term, it’s no surprise that constitutional “personhood” has been a holy grail for social movements seeking constitutional protection against a hostile government. Enslaved African Americans, women, and undocumented immigrants have battled for recognition as legal “persons.” Comparable claims have been made for fetuses and nonhuman animals. Indeed, it’s easy to imagine a world in the not-too-distant future where claims to legal personhood are made on behalf of artificial intelligence, human-robot hybrids, Skynet, or anything else that might pass the Turing test.

Winkler’s National Book Award–nominated *We the Corporations* provides a deeply researched historical narrative, treating corporate America’s long struggle for constitutional rights like any other major civil rights movement, with its own heroes, villains, and landmark victories. His book does for corporations what Richard Kluger’s *Simple Justice* (1975) did for the racial justice movement, revealing a hidden history of legal struggles—a history now woven right into America’s constitutional fabric—as well as spotlighting the human faces behind those battles.

Winkler shows how corporations have been nimble and relentless constitutional innovators. Sometimes they have led the way with novel arguments about constitutional rights that were eventually welcomed into the mainstream—it’s corporate lawyers that brought the earliest cases to enforce the Fourteenth Amendment in order to fight the government’s efforts to deny equal protection and due process rights. At other times, they have skillfully capitalized on gains by other social movements to protect corporate interests. For example, corporate litigators have ingeniously used consumer rights cases brought by Ralph Nader to claim constitutional protections for tobacco companies in ways that hurt consumers.

Greenfield’s angle is less historical and more normative. He believes the Constitution should treat corporations as “persons” when it comes to constitutional rights, but that all “persons” are not created equal. Corporations, in Greenfield’s ideal world, should enjoy a sort of second-class personhood, where they could claim some, but not all, of the rights granted to “persons” under the Constitution.

As for sins of corporate excess, influence, and corruption, Greenfield would address them through corporate governance reform, rather than through a blanket denial of constitutional protection. He argues for using corporate law reforms to nudge corporations to become “more like persons” that have a social conscience, and to foster their ability to seek a range of goals beyond a single-minded focus on increasing shareholder value.

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Both Winkler and Greenfield position the modern battle over corporate constitutional rights as a debate between two different ways of thinking about how corporations—fictitious legal entities that don't have feelings or thoughts of their own—relate to the real people that own, manage, and work for them.

The first theory sees corporations as "associations of citizens," which can assert constitutional rights *on behalf of their members*. Under this theory, the corporation is indistinguishable from the flesh-and-blood people that own and operate it. A corporation is just another vehicle for human beings to interact with one another, like a church or a political party or a sewing circle or a family. And the rights of its members don't disappear just because they chose a corporation as the mechanism for coordinating their behavior with others.

In this light, a corporation can claim the legal protections of its human members. These include the ability to claim constitutional protection if, for example, a government regulation prevents its shareholders or managers from exercising their religious beliefs through the corporation's policies (even though the corporation has no religious beliefs of its own).

When the Supreme Court expanded corporate speech rights in *Citizens United*, the Court *didn't* say that corporations were separate legal persons under the Constitution. To the contrary, it held that corporations were "associations of citizens" entitled to constitutional protections that came not from their own "personhood" but, rather, from their ability to claim the constitutional rights of their human members.

The second approach, the "entity" theory, treats corporations as entirely separate from their shareholders, managers, and employees. In this view, corporations are *distinct legal persons* that, in fact, have their own unique rights and obligations. It's the corporation's status as an independent legal entity that allows a person to buy stock and yet not have to pay the corporation's debts if it goes belly-up. Just like a person can't sue *you* to get the money *your neighbor* owes them, that person can't sue *an individual shareholder* for the *corporation's* debts. And this is because the corporation is a separate legal "person."

Entity theorists argue that this same idea should apply to constitutional rights. If corporations are distinct legal "persons" when it comes to legal questions of money and risk,

then they *can't* turn around and also claim the constitutional rights of their members. This leaves corporations with a much more limited range of legal protections against government regulation.

This idea puts those opposed to expanding corporate constitutional rights in the odd position of agreeing with Mitt Romney. Yes, corporations *are* people, and, as separate "persons," corporations don't get to assert the constitutional rights of the flesh-and-blood human beings that own and manage them.

In the topsy-turvy world of corporate rights litigation, it's the political *opponents* of corporations that usually argue that corporations are legal "persons." And it's their distinct personhood, therefore, that gives the government greater latitude to regulate them.

Underlying these competing theories of corporate rights are two starkly different visions of exactly what corporations are. The "associations of citizens" theory treats them as collective and deeply human endeavors: embodiments of the feelings and thoughts and aspirations of their human hosts, and integral to the exercise of individual rights the Constitution views as worthy of protection. The entity theory treats them like Terminators: synthetic, soulless creations that are built for immortality, relentless in their focus on maximizing shareholder value above all else, and capable of feats of superhuman strength. These feats include the ability to raise capital on an astronomical scale, shield their owners from legal liability, and wield financial firepower that leaves their opponents helpless on the political battlefield.

The Framers never had to take a position on these dueling narratives. At the time of the Constitution's ratification, corporations were bit players in American life. Their rights simply weren't an issue of public concern. Moreover, because corporations were entities created by the state, it seemed reasonable to believe that government was free to regulate their behavior and to define whatever legal rights or obligations they might have.

Today's Constitution confronts a very different world, where the corporate form is everywhere in our lives. The corporation is on par with the family as the dominant institution for structuring social and economic relationships, and it rivals the nation-state in its ability to concentrate wealth, power, and influence.

This means that any meaningful effort by a President Warren (or anyone else) to address the great challenges of our time—income inequality, globalization, or climate change—will involve placing legal limits on corporate behavior. And ironically, the success of those efforts may require embracing separate corporate "personhood" when corporate lawyers inevitably invoke the Constitution to beat back regulation. In order to make the world safe for human beings, we may have to recognize the humanity of our corporate overlords as well.

This article was commissioned by [Caitlin Zaloom](#). 