1-1-2018

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Recommended Citation
98 B.U. L. Rev. 44 (2018)

WRONG TURNS WITH CORPORATE RIGHTS

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For over two centuries, the Supreme Court has heard corporations' claims for rights under the U.S. Constitution. A growing body of legal literature has examined in scholarly detail the contours of this jurisprudence and the history of corporate rights.[1] Yet there is something important and different about giving this case law and cast of historical actors the space to breathe over the length of a book, particularly in the hands of a deft storyteller like Adam Winkler, who can write for the People and give a taste of what it might have been like to sit in Long's Tavern or on the red velvet benches of the former Senate Chamber and hear a bank or railroad argue for constitutional protection.

We the Corporations is a brilliant, meticulous, and colorful account of how corporations pursued and won constitutional rights.[2] It reminds us that the legal device and social institution of the corporation helped build the nation, while also serving as a tool for moneyed interests and social justice reformers. It reminds us that we can refer to the Court as a singular actor but also understand it as a series of individuals with their own beliefs, biases, friendships, and enmities. It reminds us that although there have been instances of setting limits

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[1] This literature includes, *inter alia*: John Dewey, *The Historical Background for Corporate Legal Personality*, 35 YALE L.J. 655 (1926); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970); Herbert J. Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION (1995); Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO L.J. 871 (2004); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629 (2011); Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015); John C. Coates, IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015); Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309 (2015); James D. Nelson, *The Freedom of Business Association*, 115 COLUM. L. REV. 461 (2015); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877 (2016); CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017) (citations listed in chronological order).

[2] ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

on the constitutional protection of corporations, the overall trend has been one of significant expansion, especially with respect to liberty rights in the past several decades.

Winkler sets out a specific aim at the outset:

> The goal here is simply to show how corporations have pursued a long-standing, strategic effort to establish and expand their constitutional protections, often employing many of the same strategies as other well-known movements: civil disobedience, test cases, and the pursuit of innovative legal claims in a purposeful effort to reshape the law.[3]

He tells the reader not to take the book "as an endorsement of the broad protections for corporations—or, for that matter, as an attack on corporate rights."[4]

Yet a distinct undercurrent of provocation flows through this tale of a "corporate rights movement," daring the reader to question the merits of these legal developments and to see that corporations will continue to push for more and more protections from regulation.

What goes largely unsaid in the explicit argument, in my view, is that two key conceptual challenges and the controversies they engender have improperly allowed this flawed jurisprudence to expand. First is the issue of how to take into account the separate legal identity of the corporation in determining whether it can assert a particular right. Second is the matter of differentiating between corporations and the various constitutional protections they can claim in a world with a broad spectrum of business and nonprofit corporations.

I. CORPORATE PERSONHOOD AND THE RIGHTS OF CORPORATIONS

All corporations share in common the essential characteristic of their nature: they are legal persons, separate from the human persons who form them, own stock in them, or in any other way participate in their activity. The rights and duties of corporations are distinct from the rights and duties of their participants. As a matter of longstanding law, chronicled in Blackstone's *Commentaries*, corporations have the ability to hold property, contract, and sue and be sued in the corporate name. This separate-ness or entity-ness allows for other notable features of corporations such as perpetual existence, capital lock-in, and limited liability.

Courts have failed to develop an intellectually robust method for factoring the essential characteristic of corporations into the determination of whether to grant them protections. Instead, courts have acknowledged that corporations are not the same thing as the people behind them but have simultaneously displayed a troubling willingness to broadly treat them as such when it comes to the Constitution. It is the rare instance in which the Court has recognized that "corporate personhood," as Winkler uses the term, logically limits the rights that

[3] *Id.* at xxiv.

[4] *Id.*

corporations can claim.[5] More commonly, courts, jurists, and advocates have pushed for a conception that treats the corporation as invisible, asserts the "corporate identity" of the actor does not matter, or maintains that in reality corporations represent aggregates or associations of persons.[6] Once a court disregards the corporate nature of the claimant, it ineluctably grants protection.

Resolving this analytical challenge is difficult and contestable. To exclude corporations from all constitutional protection in light of their nature as legal entities strikes many observers as overly formalistic. If corporations did not enjoy basic contract and property protections, their utility would be sharply reduced. Moreover, the rights that the Court granted to corporations in the nineteenth century are similar in nature to the incidental powers of corporations to hold property, enter into contracts, and access courts. And, in any event, the opportunity to write on a blank slate about corporate rights is long gone, and overturning precedent dating back two centuries is unlikely.

Nonetheless, corporations are not humans and some references to "persons" in the Constitution plainly do not encompass corporations in their meaning, such as the first sentence of the Fourteenth Amendment guaranteeing citizenship to "all persons born or naturalized in the United States."[7]

In between corporations having some rights but not all rights are hard questions regarding liberty protections such as for speech and religion. Winkler does not tell the reader what to think about these issues, but rightly points out that to get to results like the Court's decision in *Hobby Lobby*[8] it collapsed the distinction between the for-profit business corporation claiming the statutory religious liberty right and the beliefs of the shareholders.[9] Furthermore, he highlights that the foremost expert on corporations and corporate law, the Chief Justice of the Delaware Supreme Court, has called out *Citizens United*[10] as reflecting a grave misunderstanding of how corporations work and their separate personhood.[11] The subtext that emerges is that the failure to account for the special characteristics of corporations has facilitated the expansion of corporate rights.

[5] *See id.* at 102 (discussing Court's rejection of Article IV privileges and immunities clause protection for corporations).

[6] WINKLER, *supra* note 2, at 144. For a further discussion of the Court's approach to corporate rights as derivative of the persons associated with the corporation, see Blair & Pollman, *supra* note 1. In describing this treatment that looks through the corporation to its members or shareholders, Winkler instead imports the language of "veil piercing" from the corporate law context in which it typically refers to the different notion of allowing a creditor to hold shareholders liable for the corporate debts. WINKLER, *supra* note 2, at 145.

[7] WINKLER, *supra* note 2, at 130-31.

[8] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

[9] WINKLER, *supra* note 2, at 381.

[10] Citizens United v. FEC, 558 U.S. 310 (2010).

[11] WINKLER, *supra* note 2, at 382-89.

II. DIFFERENT RIGHTS AND DIFFERENT CORPORATIONS

Arriving at the current state of corporate rights jurisprudence has involved an additional failure. Not only has the Court failed to account for the separate legal identity of corporations, it has also disregarded differences between corporations.

A careful reader of *We the Corporations* will not miss the jump that occurs from the early nineteenth century in which the Court recognized Contracts Clause protection for Dartmouth College to the late nineteenth century in which the Court, through a series of headnotes and dicta, recognized Fourteenth Amendment property protections for powerful railroad corporations.[12] The corporate form enabled the rise of big business in the United States, providing a mechanism for pooling vast resources and limiting investor risk. It proved an extraordinarily versatile tool. The range of corporations with different purposes and dynamics grew to include everything from nonprofit institutions and voluntary membership organizations to large, multinational businesses.

In the twentieth century, corporations grew bolder with claims for liberty rights. In a 1936 case, the Court extended freedom of press and freedom of speech protection to newspaper corporations, eviscerating the line it had previously drawn between property rights and liberty rights.[13] During the mid-century civil rights era, the Court recognized freedom of association protection for the NAACP, a nonprofit membership corporation.[14] By the later part of the century, business corporations wielded these precedents to expand rights for all corporations.

In groundbreaking cases recognizing commercial speech and political spending rights, the Court relied on the earlier case law regarding different rights for different kinds of corporations. This trend culminated in 2010 with *Citizens United*, in which the Court went out of its way to grant corporate political spending rights to all corporations, not only political advocacy organizations like the one that brought the case. As I have argued elsewhere, few people would claim that large public corporations such as ExxonMobil or the Coca-Cola Company are expressive associations of citizens coming together for political speech; however, in *Citizens United*, the Court referred to corporations generally as "associations of citizens" rather than acknowledge the meaningful differences between them.[15] In the final chapters of Winkler's compelling book, he captures the public backlash triggered by these broad expansions of rights for business corporations. Even without knowing the detailed history leading up to recent decisions, many citizens—living and breathing people—decried that the Court had gone too far.

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[12] *Id*. at 75-110.

[13] *Id*. at 250-55 (discussing Grosjean v. Am. Press Co., 297 U.S. 233 (1936)).

[14] *Id*. at 262-72 (discussing NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958)).

[15] Elizabeth Pollman, *Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597, 615 (2016).

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Although Winkler claims to simply show how corporations have won rights, his book, and the literature it builds on, does much more by revealing where the Court has taken its wrong turns. What comes next is predictable: corporations will continue to push for expansions of rights. Getting these cases right requires courts to better account for the separate legal identity of corporations and the vast diversity of organizations that exist in the corporate form.