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# From Property Rights to Liberty Rights: We the Corporations, A Review Essay

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# From Property Rights to Liberty Rights: *We the Corporations*, A Review Essay

We the Corporations: How American Businesses Won Their Civil Rights. *By Adam Winkler*. New York: Liveright, 2018. xxiv + 471 pp. Illustrations, notes, index. Hardcover, $28.95. ISBN: 978-0-87140-712-2.
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Reviewed by Laura Phillips Sawyer

A long-standing, and deeply controversial, question in constitutional law is whether or not the Constitution's protections for "persons" and "people" extend to corporations. Law professor Adam Winkler's *We the Corporations* chronicles the most important legal battles launched by corporations to "win their constitutional rights," by which he means both civil rights against discriminatory state action and civil liberties enshrined in the Bill of Rights and the Constitution (p. xvii). Today, we think of the former as the right to be free from unequal treatment, often protected by statutory laws, and the latter as liberties that affect the ability to live one's life fully, such as the freedom of religion, speech, or association. The vim in Winkler's argument is that the court blurred this distinction when it applied liberty rights to nonprofit corporations and then, through a series of twentieth-century rulings, corporations were able to advance greater claims to liberty rights. Ultimately, those liberty rights have been employed to strike down significant bipartisan regulations, such as campaign finance laws, which were intended to advance democratic participation in the political process. At its core, this book asks, to what extent do "we the people" rule corporations and to what extent do they rule us?

A corporation is an artificial being, a legal fiction created by the state, for the purpose of bringing individuals into association for some particular purposes, such as aggregating capital, holding property, entering contracts, and engaging in litigation. Long before the nineteenth-century rise of general incorporation statutes, which democratized the corporate form and helped make it ubiquitous, scholars and citizens alike debated how to balance corporations' rights and responsibilities. The Constitution might protect corporations against certain kinds of state action; for instance, in 1819 the court intervened to stop the New

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Hampshire legislature from altering the charter of Dartmouth College, applying the contract clause in Article I, section 10, to a corporation. However, regulatory tools at both the state and federal level have also routinely adjusted the balance in response to the court; for example, in the decades before the Civil War, states inserted reserve clauses in corporation charters and constitutions, which allowed the state to alter public charters at any time without being retrospective. Today, American law holds an expansive view of what may constitute a corporation; we even have "special purpose acquisition corporations" that are formed by financiers purely to acquire a firm and take it public. Nevertheless, that tension has persisted between federal versus state power and constitutional versus statutory law. *We the Corporations* focuses on constitutional case law regarding business corporations; however, business and legal historians would do well to keep these tensions in mind as they embark on this three-hundred-year history of corporate litigation.

The episodes in this book begin before the revolutionary era, yet the story of how the Fourteenth Amendment came to protect corporations exemplifies the substance and tenor of the book. Ratified in 1868, the Fourteenth Amendment to the US Constitution states that no state shall "deprive any *person* of life, liberty, or property, without due process of law" or "deny to any *person* within its jurisdiction the equal protection of the laws." The amendment secured these constitutional rights for freed slaves in an effort to protect them from discriminatory state actions. It also overturned the infamous *Dred Scott* decision, which had refused to accept African Americans as "citizens" under Article III of the Constitution and thus had prohibited those persons from bringing suit in federal courts. (Corporations, Winkler explains, had already secured their rights to sue and be sued under Article III.) Nevertheless, by 1886 the US Supreme Court had interpreted the Fourteenth Amendment to extend to *artificial* persons as well—converting the amendment "from a shield for the rights of racial minorities . . . into a weapon for corporations to use against state laws regulating business activity" (p. 117). In turn, the court's docket swelled with suits brought by corporations under the Fourteenth Amendment to strike down regulations. By 1912, Fourteenth Amendment cases brought by corporations eclipsed those concerning the rights of African Americans by a factor of eleven.

At the center of this story stood "the fraud" Roscoe Conkling and "the octopus," Southern Pacific Railroad, alongside Justice Stephen Field and Supreme Court reporter J. C. Bancroft Davis (p. 115). Conkling, a former US senator from New York, "was the last surviving member of the Joint Committee" on Reconstruction that drafted the Fourteenth Amendment (p. 114). But in 1882 he represented the railroad in a suit to overturn a

California tax law that allegedly violated the railroad's constitutional right to equal protection and due process. In *San Mateo*, Conkling told the court that the amendment's framers had intended it to apply to corporations as well as freed slaves. He did so by presenting original committee meeting minutes supposedly to that effect. Further examination, however, later proved that Conkling "purposefully misled the justices" and that the framers never had such an intention (p. 115). Nevertheless, Conkling's conceit became embedded in Supreme Court precedent in another test case with strikingly similar attributes: *Santa Clara Co. v. Southern Pacific Railroad*. Conkling was dropped from the legal team and his duplicitous evidence was not introduced in the second case. Yet in that case, too, manipulation and subterfuge seemed to carry the day. Even though the court decided the case on narrower grounds, Davis's Supreme Court report misrepresented the justices' ruling and simply stated that the justices had all agreed that corporations were persons under the Fourteenth Amendment. Then, a few years later in another railroad case challenging a state regulation, Justice Field simply cited *Santa Clara* as the last word. *Stare decisis* apparently reigned unquestioned thereafter.

The court, however, was careful to parse the clauses of the Fourteenth Amendment, applying the clauses related to property protections to corporations but not those protecting liberty and privileges and immunities. Justice Field's Gilded Age jurisprudence played a pivotal role in the construction of a national market as a "free trade unit," as legal historian Charles McCurdy has argued, as well as the "Lochner era" of judicial activism striking down labor laws. (*Lochner* refers to the court's 1905 ruling that struck down a New York maximum-hours law for bakers and interpreted the Fourteenth Amendment's due process clause to protect working men's "liberty of contract.") In the post–Civil War era, the rise of big business created new pressures to overturn the state regulation of "foreign" corporations, which is not to say that the state regulation withered away—historians William Novak and Naomi Lamoreaux have shown that it did not. Rather, these new forms of aggregated financial capital were now used to advance novel constitutional arguments through protracted legal battles, as reflected in both the scale and scope of corporate litigation.

Through the late nineteenth century, the court protected and extended rights associated with property but refused to extend to corporations the liberty rights associated with personal freedom and autonomy. For example, the court ruled that corporations would not be allowed Fifth Amendment protections against self-incrimination; yet, corporations did earn limited Fourth Amendment protections against unreasonable search and seizure, because these were "more like a

property right" (p. 187). In turn, early twentieth-century justices refused to extend political speech rights to corporations and instead upheld state laws, such as the California law that required nondiscrimination in admittance to "places of public amusement" in *Western Turf Association v. Greenberg* (1907) as well as the Kentucky law that prohibited any school from having a racially integrated student body in *Berea College v. Kentucky* (1908).

"Paradoxically," Winkler tells us, progressive efforts to "break down the *Lochner* court's distinction between property rights and liberty rights . . . further set the course of the Constitution toward *Citizens United*" (p. 228). In the late 1930s, the Supreme Court underwent a constitutional revolution, solidified and exemplified by Justice Harlan Fiske Stone's famous footnote number 4 in the case of *US v. Carolene Products Co.* (1938). The footnote suggested that when it came to economic matters the political process is sufficient and the judiciary should defer to the legislature; but when it came to laws that restricted "the normal operation of the political processes," then the court must intervene in order to "reopen the pathways of democracy" (p. 232). In turn, the court would take a more aggressive approach to reviewing laws that targeted "discrete and insular minorities," to quote Justice Stone, which contributed to *Brown v. Board of Education*, prohibiting racial segregation in schools; *Reynolds v. Sims*, establishing one person, one vote; and *Obergefell v. Hodges*, guaranteeing same-sex couples the right to marry.

The final third of the book explains how the court's postwar expansion of liberty rights to corporations began as a project to enhance democratic participation but later became a tool for corporations to advance seemingly antidemocratic ends. In *Grosjean v. American Press Company*, the court unanimously struck down a Louisiana law that imposed an advertising tax on large-circulation newspapers as an infringement on the First Amendment's freedom of the press. The law had targeted Huey Long's political opponents and attempted to silence their political participation. Similarly, when Alabama governor John Patterson attempted to expel and intimidate the NAACP from operating in that state, the court intervened and extended to that nonprofit corporation the constitutional right to freedom of association. In *NAACP v. Alabama ex rel. Patterson*, the court "pierced the corporate veil" to protect the rights of its members. Winkler explains, "In time, the notion that business corporations were a form of association dedicated to constitutionally protected advocacy on economic matters would fuel the expansion of political speech rights for business" (p. 275).

The narrative climax begins with the "Powell Memorandum" of 1971, written by Lewis Powell, who had joined the Supreme Court that same year. Written for the US Chamber of Commerce, the memo asserted

that "capitalism was under siege from within" and laid out a strategy for business leaders to advocate for the free enterprise system and litigate against regulation (p. 286). Powell's deregulatory impulses coalesced with the court's liberal justices in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council* (1976), which created a listener's right to speech. Then, two years later, First National Bank of Boston leveraged the *Virginia Pharmacy* ruling to challenge a Massachusetts campaign finance law as an unconstitutional abridgment of corporations' right to speech. Powell penned the decision striking down the law. Fast-forward to the early twenty-first century and these rulings laid the groundwork for *Citizens United v. Federal Election Commission* (2010), wherein the court invalidated part of a federal regulation that prohibited corporations and unions from spending from their general funds on election campaigns. The court came to this conclusion by affirming corporations' First Amendment right to free speech.

This "wildly unpopular" ruling incited a maelstrom of legal commentary and popular debate, and it renewed scholarly attention to the place of "corporate rights" in modern society (p. xvi). In response to that maelstrom, Winkler, who specializes in constitutional law, has provided a timely analysis of some of the most important episodes in the long durée of American corporate rights. The conclusion of these colorful and highly accessible legal battles suggests that we ought not be surprised by *Citizens United* given the popularity of the legal device, the profound financial resources a corporation may aggregate, and the successive legal victories of the corporate bar. At every turn, a cast of corporate attorneys advanced constitutionally cutting-edge arguments to thwart regulation, and they often found sympathetic audiences on the bench. Undoubtedly, few business historians will be surprised by the argument that over the course of American history business corporations have deliberately, surreptitiously, and quite successfully lobbied and litigated to alter the rule of law in their favor. Yet Winkler presents an important insight into American constitutional law, as told through the prism of corporate law: the critical moments of American constitutional rights explain *both* conservative campaigns to "strike at unwanted regulation" *and* progressive efforts to resist oppressive state action and enhance democratic participation (p. xv). The constitutional law cuts both ways and corporations, especially given their various forms and functions, are not monolithic—they might cut both ways, too.

Winkler presents a historical narrative wherein the legal battles over corporate rights have yielded both conservative and progressive results, and those battles have been inextricably intertwined with the expansion of actual human beings' civil rights. The problem is, of course, that not all types of corporations are the same and that conflating the structure and

purposes of nonprofit advocacy groups with their for-profit corporate cousins belies a fundamental distinction that has deep historical roots in constitutional law. Yet this is precisely what Powell did in *First National Bank of Boston v. Bellotti* when he erroneously argued that *Santa Clara* had extended Fourteenth Amendment protections to all corporations.

*We the Corporations* has already proven to be an immensely popular legal history—it was a National Book Award Finalist. It is based on the work of numerous business historians, such as Lamoreaux, Ruth Bloch, Alfred Chandler, Thomas McCraw, Kim Phillips-Fein, and Benjamin Waterhouse, but it is not business history as such. Nevertheless, it does offer lessons for business historians, particularly those interested in synthesis that reaches general readers and engages in contemporary debates. Graduate students in business history would be well served to read this as a brief introduction to American corporate law and politics; then, they might follow up with trenchant classics from Willard Hurst, Charles McCurdy, and Morton Horwitz, as well as newer works, such as those in *Corporations and American Democracy* (2017), a collection edited by Lamoreaux and Novak in which Winkler has an essay, too.

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