CORPORATE PERSONHOOD AND THE HISTORY OF THE RIGHTS OF CORPORATIONS: A REFLECTION ON ADAM WINKLER'S BOOK *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS*

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Adam Winkler's book *We the Corporations: How American Businesses Won Their Civil Rights* is an impressive work on several different levels. Because so much of the development of American constitutional law over the centuries has involved businesses, the book is a nearly comprehensive legal history of federal constitutional law. It certainly would be worthwhile reading for anyone interested in the constitutionality of economic regulation in the United States, spanning the controversies over the first and second Banks of the United States, through the *Lochner* era and present-day clashes over corporate campaign spending, and religiously-based exemptions to generally applicable laws such as the requirement that employer-offered health insurance policies cover birth control.

What I found most impressive about the book is how Winkler humanizes the evolution of the law by connecting legal developments to the personal stories of the lawyers and judges involved. Winkler's analysis is about as far from formalism as possible, showing how judges' philosophies, lawyers' ideologies and clients' interests contributed to important, even foundational, developments in American constitutional law. Just as today we can discuss important legal developments in light of the competing philosophies of Supreme Court Justices Antonin Scalia and Stephen Breyer, Winkler allows us to appreciate developments in early American business law through the eyes of important historical figures including John Winthrop, Daniel Webster, John Marshall, and Peter Deveaux, the Georgia tax collector who forcibly seized assets belonging to the first Bank of the United States to satisfy the state's tax bill.

One of the most interesting personalities discussed by Winkler is Roscoe Conkling, a highly successful nineteenth century lawyer and framer of the Fourteenth Amendment. Conkling made an originalist argument in favor of extending due process rights to corporations; that his journals of the framing of the Fourteenth Amendment reveal that he and his fellow drafters chose the word "person" instead of "citizen" in the amendment's due process clause to bring corporations under the clause's umbrella of protection. This turns out to have been a blatant fabrication—Conkling's journals showed no such thing. His co-counsels discovered this falsehood, and in later cases involving the same client,

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Conkling was no longer on the legal team and his "fake news" originalist argument was not repeated.

This is not to say that Winkler agrees with one of the standard criticisms of the Supreme Court's (in)famous *Citizens United* decision, that its recognition of corporate personhood was radical and unprecedented. In fact, Winkler easily debunks this view, demonstrating that beginning as long ago as 1809, corporations have racked up an impressive record of legal victories in the Supreme Court, beating back "broad public sentiment favoring business regulation."[1] Many of those victories involved constitutional protections for corporations that make sense only if corporations enjoy at least some of the constitutional protections textually granted to "persons," most prominently the right enjoyed by "persons" to be free from deprivations of life, liberty, or property without due process of law. Had corporations not been persons, or at least recognized as a conduit for the economic activities of those persons owning shares in them, the *Lochner* era's substantive due process protections against economic regulation would not have extended to regulation of corporations.

I agree wholeheartedly with Winkler's observation, that contrary to the long record of success for businesses that he documents, "[f]or most of American history, the Supreme Court failed to protect the dispossessed and the marginalized."[2] Because I teach and write in the civil rights area, I found Winkler's chapter on "Corporations, Race and Civil Rights" very interesting. Two of the cases discussed in this chapter illustrate that the consequences of recognizing separate corporate personhood are indeterminate, sometimes advancing the cause of minority rights and sometimes possibly hindering that same cause.

The first case I will discuss disregarded the corporate form and ruled in favor of protecting the NAACP from the State of Alabama's efforts to prevent it from acting against racial injustice in that state.[3] During the civil rights movement of the 1950s and 1960s, Southern state governments viewed the NAACP, a non-profit New York corporation, as a subversive organization. John Patterson, Attorney General of Alabama in the 1950s, sued the NAACP for failing to register as a "foreign corporation." As part of the lawsuit, Patterson demanded that the NAACP turn over various corporate records, including a list of its members. The organization did not want to reveal its membership list to the State of Alabama, fearing that its members would face legal action, harassment, or worse at the hand of the State of Alabama and other white supremacists resisting the NAACP's demands for racial equality. When the Supreme Court ruled in favor of the NAACP's right to keep its membership list secret, it did not hold that the NAACP itself had the freedom of association that protects membership

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

[2] *Id.*

[3] NAACP v. Ala. ex rel. Patterson, 357 U.S. 449 (1958); *see also* WINKLER, *supra* note 1, at 262-64.

organizations from government intervention. Rather, as Winkler describes it, the Court "pierced the corporate veil" and held that the members' associational rights trumped the state's demand for the group's membership list.

The second case arose in the Virginia state courts and resulted in the Virginia Supreme Court recognizing the corporate form and ruling in favor of the interests of the racial minority.[4] The People's Pleasure Park Company was a Virginia corporation owned by Joseph Johnson, a black former slave. The corporation opened an amusement park near Richmond in 1906 to serve blacks who would have been excluded from the many whites only places of amusement in the area under Jim Crow. The park's white neighbors were unhappy about the presence of blacks in their community, and they sued to shut the park down, pointing to a restrictive covenant in the title to the land on which the park was located that prohibited the sale of the land to "'a person or persons of African descent' or any other 'colored person.'"[5] Surprisingly, the Virginia Supreme Court ruled in favor of the corporation, holding that the corporation itself was a person separate and apart from its members, and as an artificial entity had no racial identity. Here, ignoring the corporation's membership worked in favor of the rights of the members, while in the Alabama case, the Supreme Court's decision to focus on the corporation's members and ignore the corporation itself had the same effect.

Through these and additional cases, Winkler analyzes the interaction of racial justice and the corporate status in American constitutional law. Unfortunately, issues of racial justice occupy only a small portion of Winkler's book. In a sense this is understandable since, as Winkler notes, the Supreme Court has addressed many more cases involving the status and rights of corporations than cases involving race discrimination and constitutional rights of individuals. Yet, given the centrality of race to the history of the United States and its law, I am left with a sense that there is more to say. Has the Court's historical focus on corporate rights crowded out efforts to protect individual rights, including the rights of racial minorities? What about the involvement of so many corporations in the perpetuation of the badges and incidents of slavery, such as discriminatory lending and insurance practices that prevented generations of black Americans from sharing in the wealth that has been generated by appreciation in the value of real estate? Do today's corporations have a moral obligation to right these wrongs, through reparations or special treatment of disadvantaged persons?

My wish that Winkler had paid more attention to the race problem that continues to bedevil American society and law is actually a compliment: this book is so rewarding and enjoyable that I wanted more of the same applied to my areas of special interest. My bottom line is that anyone who is troubled by or interested in the controversy over recognizing corporate rights in *Citizens*

[4] People's Pleasure Park Co., Inc. v. Rohleder, 109 Va. 439, 61 S.E. 794 (1908); *see also* WINKLER, *supra* note 1, at 260-62.

[5] WINKLER, *supra* note 1, at 260.

United and other cases would do well to read *We the Corporations*. I expect it will be recognized, deservedly, as an important work in American legal history.