IS CONSTITUTIONAL DOCTRINE THE SOURCE OF CORPORATE RIGHTS?

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We the Corporations,[1] Adam Winkler's terrific history of the constitutional rights of corporations in America, does not have a surprise ending, but it does have what many readers will probably experience as a surprise beginning. Corporations, the reader learns, did not co-opt the language of the Constitution and civil rights for their nefarious purposes—not recently, nor even in the Gilded Age. On the contrary, (white colonial) America literally began as a consequence of the actions of two corporations: the Virginia Company and the Massachusetts Bay Company. Moreover, many of the key rights we now take for granted as the province of natural persons were first won by corporations.

There is more. Today, activists who oppose what they regard as undue political influence of corporations as a result of the Supreme Court's ruling in *Citizens United v. Federal Election Commission*[2] often single out corporate personhood as a target of their ire. The messaging of organizations like "Free Speech for People"[3] and the backers of proposed constitutional amendments that would confirm the power of Congress to regulate corporate speech[4] appear to assume that if only courts would stop treating corporations as people, We the Actual People could rule. Yet corporate personhood may be the solution, not the problem. Corporate personhood gives corporations legal duties and renders them amenable to being sued. Winkler shows that from the earliest days of the Republic, rights for corporations were typically won by lawyers who persuaded judges to look past corporate personhood—to pierce the corporate veil—in order to recognize the corporation as a mere vehicle for the assertion of the rights of shareholders. The title of Kent Greenfield's new book (a worthy companion volume to Winkler's) makes the normative point that Winkler's historical journey underscores: *Corporations are People Too (And They Should Act Like It)*.[5]

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

[2] 558 U.S. 310 (2010).

[3] FREE SPEECH FOR PEOPLE, https://freespeechforpeople.org [https://perma.cc/KM7G-L63F] (last visited Nov. 26, 2018).

[4] *See, e.g.*, H.R.J. Res. 23, 114th Cong. (2015); S.J. Res. 18, 113th Cong. (2013).

[5] KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018).

We the Corporations also highlights a more recent flip-flop. Today, liberals tend to favor, and conservatives tend to oppose, aggressive campaign finance regulation. But the modern doctrinal framework that facilitates constitutional recognition of corporate speech rights is in key respects a liberal creation.

Campaign finance scholars know that much of the apparatus deployed by the conservative majority in *Citizens United* dates back at least to the Court's 1976 decision in *Buckley v. Valeo*,[6] in which liberal hero Justice William Brennan joined in full.[7] Winkler focuses special attention[8] on a case decided just a few months after *Buckley*. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[9] the high Court sided with Public Citizen—the organization founded by progressive icon Ralph Nader and liberal attorney Alan Morrison, who argued the case for the plaintiffs—to strike down a state law banning drug price advertising. The fateful move was acceptance of Morrison's argument that First Amendment doctrine protects the rights of listeners, quite apart from any rights of speakers. That analytical step works to the benefit of corporate litigants, because it means that even if corporations do not have free speech rights themselves, the rights of listeners will give the corporations derivative rights. To be sure, the long string of citations in Justice Harry Blackmun's majority opinion in *Virginia State Board of Pharmacy* makes clear that the listeners' rights argument was not entirely novel.[10] Still, Winkler is no doubt correct that the ruling ultimately gave a boost to corporate rights, so much so that, as he notes, by 2011, "the president of Public Citizen[] called for the entire line of commercial speech cases to be overturned."[11]

Winkler also demonstrates a heads-I-win-tails-you-lose quality to Supreme Court cases siding with corporations. For example, in *Burwell v. Hobby Lobby Stores, Inc.*,[12] the Supreme Court upheld a claim of religious freedom asserted by a corporation on behalf of its owners. As Winkler observes, the Court's decision "was a near perfect embodiment of the more than two-hundred-year history of corporate rights jurisprudence."[13] On one hand, the Court held that corporations are covered by the Religious Freedom Restoration Act ("RFRA") in light of the Dictionary Act. On the other hand, the fact that a corporation itself cannot have religious beliefs proved no obstacle to the justices, because, "as with

[6] 424 U.S. 1 (1976) (per curiam).

[7] Five justices each wrote separately in *Buckley* to express disagreement with one or more of its many rulings. Brennan was not one of them. For a reconstruction of which justices wrote which parts of the very long per curiam opinion, see Deborah A. Roy, *The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?*, 46 U. MEM. L. REV. 1, 25 n.102 (2015).

[8] *See* WINKLER, *supra* note 1, at 289-300.

[9] 425 U.S. 748 (1976).

[10] *See id.* at 756-57.

[11] WINKLER, *supra* note 1, at 300.

[12] 134 S. Ct. 2751 (2014).

[13] WINKLER, *supra* note 1, at 380.

many previous Supreme Court cases invoking corporate personhood, the underlying logic of *Hobby Lobby* reflected instead piercing the corporate veil."[14]

Yet the ability of corporate litigants to win in the Supreme Court by selectively emphasizing or downplaying corporate personhood raises a question about Winkler's study. Perhaps the real lesson of over two centuries of case law is that high-priced lawyers representing corporations and their allies on the bench will use law opportunistically. If so, then Nader, Morrison, and Public Citizen are off the hook. Yes, the listeners' rights doctrine they secured in the name of consumers was appropriated by clever lawyers representing powerful business corporations, but if *Virginia State Board of Pharmacy* had not been there for them to exploit, they would have found some other argument.

Consider a reversal that Winkler does not explore. In the landmark 1990 *Peyote Case*,[15] the Supreme Court divided over the question whether free exercise of religion entails exceptions from general laws that do not specifically target religion but burden it in particular cases. A majority consisting mostly of conservative justices said no; a group of mostly liberal justices said yes.[16] By 2014 the ideological valence had flipped. *Hobby Lobby* divided the Court 5-4 on ideological grounds, but this time the conservatives favored an exception, while the liberals opposed it. What changed?

One can point to the fact that *Hobby Lobby* involved RFRA rather than the Constitution, but that seems too technical. Occam's razor suggests a much more straightforward explanation. The *Peyote Case* involved a claimed exemption from a state ban on a type of drug use by practitioners of a Native American religion; *Hobby Lobby* involved a claim by the evangelical Christian owners of a business corporation to an exception from an obligation to pay for employee health insurance covering forms of contraception that they considered abortion. The liberal justices were sympathetic to the Native Americans; the conservative justices were sympathetic to the evangelical Christians. More abstract views about the desirability and scope of religious exemptions appear to have been subordinated to ideological priors.

"General propositions do not decide concrete cases," Justice Oliver Wendell Holmes, Jr. famously proclaimed.[17] That is undoubtedly an overstatement. Where the ideological stakes are low and the law quite clear, there will frequently be widespread agreement about the application of general propositions. But disputes over corporate rights, even when they do not also involve cultural issues (as in *Hobby Lobby*) will usually have high stakes. Accordingly, the pre-existing legal doctrine will be substantially less than fully determinative.

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[14] *Id.* at 381.

[15] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[16] I say "mostly," because the majority included Justice Stevens, while the minority included Justice O'Connor, who concurred in the result but not the no-exceptions rule adopted in Justice Scalia's opinion for the Court. *See id.* at 894-95.

[17] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

Given the ability of first-rate lawyers for business corporations to use legal doctrine opportunistically, perhaps the story that Winkler tells, though highly interesting, is ultimately unimportant. Had American constitutional law taken different twists and turns, business corporations would still have come out on top, just by some other route. *We the Corporations* leaves open the possibility that its tale of corporate lawyers creating and exploiting constitutional law is merely the product of political forces that produce justices sympathetic to arguments for corporate rights.

Winkler even gestures in the direction of such a political account. For example, he notes that under the leadership of Chief Justice Roger Taney—who would eventually earn infamy for his authorship of *Dred Scott v. Sandford*[18]—the Supreme Court pushed back against corporate interests.[19] Taney was named to the Court by President Andrew Jackson and largely shared Jackson's view that corporations "were too often a way by which politically connected insiders obtained special economic privileges unavailable to others."[20] Perhaps the crassest account is also the most accurate: corporations have succeeded in the Supreme Court except when the justices shared a populist anti-corporate ideology with the president who appointed them.

If that is right, then activists seeking to reduce corporate power and influence should not bother framing legalistic constitutional amendments that seem highly unlikely to attract the supermajority support needed for adoption. Instead, they should be trying to elect a populist president and populist Senators who will respectively nominate and confirm justices inclined to rein in corporate rights.

Yet a populist turn carries clear risks. Today, as in the past, American populism comes tinged with racism and xenophobia.[21] Moreover, even if more enlightened critics of corporate power were willing to form an alliance of convenience with racist and xenophobic populists, Donald Trump and the modern Republican Party have hijacked populism, turning it into a vehicle of cultural resentment that uses all branches and levels of government it controls to promote the economic interests of corporations and high-wealth individuals.

Thus, the challenge for those who think that the Supreme Court provides corporations with too much constitutional protection turns out to be the very same challenge that confronts progressives in the political realm: How to reclaim populism? Winkler's book cannot answer that question, but it can and does show how, at previous historical moments, genuine populists were able to assert their

[18] 60 U.S. 393 (1857).

[19] *See* WINKLER, *supra* note 1, at 88-97.

[20] *Id.* at 90.

[21] Jack Balkin notes that "[t]here is considerable controversy among historians over the degree to which American populism succumbed to nativism, racism, and anti-Semitism, and over the question of whether populism is an inherently intolerant political philosophy." J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1951 n.42 (1995). Note that Balkin says the controversy concerns the *degree* to which ugly animus taints American populism, not over *whether* it does. *See id.* and sources cited therein.

interests in the face of well-funded and well-organized opposition from the artificial persons we call corporations.