THE ESCHATOLOGICAL DRIFT OF CORPORATE CONSTITUTIONAL RIGHTS: A REVIEW OF ADAM WINKLER'S *WE THE CORPORATIONS*

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"Well, we're not in the middle of nowhere, but we can see it from here." – Thelma & Louise, 1991

It is often said that the capitalist will sell you the rope to hang him with. The idea is that although the profit motive may drive prosperity, unless it is retrained by some outside force, it may also be an inherently destructive force.[1] This may also be true of a society in which the profit motive and private industry have created an economy that is dependent upon many practices inconsistent with long term human survival; yet we seem helpless to reform those practices. For example, the conditions which led to the financial crisis of 2008 have not (by most accounts) been significantly changed;[2] our consumption practices threaten to exhaust important natural resources and to render some of the largest cities uninhabitable.[3] The interpenetration of advertising and editorial content, which is intended to overcome reader skepticism of advertising by making ads and public relations look more like editorial content, may, in the short term, generate sales, but in the long term threatens to decrease public trust.[4] The integrity and trustworthiness of higher education, the press, science, and government are all under attack and, as a consequence, there is a vacuum in the production of information which social media appears to be filling, with perhaps dire consequences for democracy.

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[1] I have not been able to determine the source, but it has been variously attributed to Marx, Lenin, and Stalin.

[2] Emily Stewart, *How Close Are We to Another Financial Crisis? 8 Experts Weigh In*, VOX (Sept. 18, 2018), https://www.vox.com/2018/9/18/17868074/financial-crisis-dodd-frank-lehman-brothers-recession [https://perma.cc/6WHU-KSB9].

[3] Perhaps this is the reason for the increase in the West of mood disorders like depression and the incidence of suicides. Amy Ellis Nutt, *'At What Point Is It a Crisis?' Suicide Rates Rise Across U.S.*, WASH. POST, June 8, 2018, at A02.

[4] *See generally* Tamara R. Piety, *Killing the Golden Goose: Will Blending Advertising and Editorial Content Diminish the Value of Both?*, *in* BLURRING LINES: MARKET-DRIVEN AND DEMOCRACY-DRIVEN FREEDOM OF SPEECH 101 (Maria Edström, Andrew T. Kenyon & Eva-Maria Svensson, eds., 2016).

There is fairly widespread agreement these problems exist,[5] but no agreement on how to fix them. Indeed, it is not obvious that some of them *can* be fixed. In the absence of solutions, most people keep doing the same things they have always done, candid about the need for change, but apparently helpless (or unwilling) to do so. Like Thelma and Louise, liberal democracy seems to be barrelling towards a cliff at top speed, and the question is whether anyone can turn the wheel before we plunge over the side.

The "corporate civil rights movement"[6] is one outgrowth of the primacy of profit in a system that puts few legal brakes on capital,[7] and is the subject of Adam Winkler's compelling new book, *We the Corporations*.[8] In *We the Corporations*, Winkler draws on law, history, and a feel for the drama and personalities behind the law to write a gripping story of this movement, one that will likely reveal new facets of the cases he discusses, even to those who know them well.

At the same time, Winkler's prose is so accessible to the general reader that the book propels you forward, almost like a "whodunit," so that even when you know how the story turns out, you are drawn almost compulsively from chapter to chapter until the end. I have only two critiques, the first of which goes more to style than to substance: (1) Winkler is frustratingly coy about whether he thinks this movement has been a boon or a blight to civil liberties, and (2) he treats the contemporary critique of corporate personhood and the historical treatment of corporate personhood as if the first necessarily entails the second. Winkler argues that the contemporary critique of corporate personhood is misplaced because, historically, personhood was a concept used to *restrict* corporate power, not expand it. This strikes me as anachronistic and unpersuasive when the legal attributes of the corporation have changed so much over the time in question.

[5] For some interviews of corporate executives who discuss this dilemma as it relates to the environment see JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF POWER AND PROFIT (2004).

[6] Tamara R. Piety, *The First Amendment and the Corporate Civil Rights Movement*, 11 J. BUS. L & TECH. 1 (2016).

[7] I say this because, as I argued at the time, *Citizens United* threatens the constitutionality of much existing regulation, as well as any new regulation which might be proposed to try to address problems like climate change, by offering a very broad conception of what is "speech" for purposes of the First Amendment and treating ordinary regulation of commerce as if it burdens free speech. Tamara R. Piety, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010); *see also* TAMARA R. PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA (2012).

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

Corporate Rights Movement: Boon or Blight?

Winkler is frustratingly coy about whether the corporate civil rights movement has been, on balance, a positive or a negative force. No matter which side you are on with respect to this question, you can find a passage in *We The Corporations* that will support your position. For example, in the Introduction, Winkler writes, "[i]t is not fanciful to say that on more than one occasion, corporations have been among *the unsung heroes* of civil rights."[9] Yet he follows this rather rosy view of the phenomenon with the reassurance that: "*[t]here is no moral equivalency between the civil rights movement, women's rights, and gay rights movements on the one hand, and the corporate rights movement on the other*."[10] However, the idea that the corporate rights movement is "*another* centuries-long push for *equal rights* that has remainly largely unnoticed"[11] implies there is such an equivalency, as do words like "hero."

It is peculiar to use this sort of rhetoric while also saying, "*[d]espite the fact* that corporations *have never been subjected to systematic oppression* like women and minorities, they too have pushed to gain constitutional protections since America's earliest days."[12] Of course they have. It is not surprising that corporations have sought to benefit from rights. What is open to question is whether they ought to have gotten them. In this passage Winkler does not acknowledge that it was precisely *because* of their minority or oppressed status that the Court justified its exercise of its counter-majorian power to invalidate a legislative enactment. Anytime courts strike down an act of Congress there is the risk that some will say the courts have overstepped their bounds. However, protection for minorities has long been an accepted justification for doing so, albeit an often controversial one. There is no such justification when courts thwart the legislative will on behalf of the powerful.

It makes Winkler's characterizations, such as, that corporations have "fought" for their rights, border on satire. Based on Winkler's research, it might be more accurate to say they have "bribed," "pressured," "conspired," or "tricked" their way to the "rights" they now enjoy. So the reader is left unsure whether he means for such rhetoric to be seen as tongue-in-cheek, or whether he is sincere. Given his discussion in the last chapter of the book about how this movement undermines environmental protection[13] and does violence to corporate law,[14] it is difficult to conclude that Winkler views the corporate rights movement as having been a positive one. But he does not resolve this tension, and it makes for a somewhat discordant note in an otherwise beautifully written book.

[9] *Id.* at xxiv (emphasis added).

[10] *Id.*

[11] *Id.* at xv-xvi (emphasis added).

[12] *Id.* at xvi (emphasis added).

[13] *Id.* at 389-95 (discussion of court decision ruling county ordinance banning fracking violated First Amendment).

[14] *Id.* at 377-95 (discussing Justice Leo Strine's critiques).

What Kind of Person is This?

As noted above, the second critique I have of *We the Corporations* is that Winkler argues that contemporary critics of corporate personhood are wrong to think that the personhood concept is the reason for the expansion of rights of corporations because the personhood argument has historically been to *limit* corporate power, not to expand it.[15] I think the observation about its historical use is demonstrably true. However, I do not think that undermines contemporary personhood critiques because as I have discussed elsewhere, I believe the contemporary critique has more to do with the rhetorical and political force of the word "person" than it does with the legal doctine.[16] Moreover, the contemporary corporate "person" has few of the attributes of its forebearers. The word "corporation" does not represent the same sort of legal entity today as it did in 1809 when the first case he discusses, *Bank of United States v. Deveaux*,[17] was heard.[18]

So although the word is the same—"corporation"—the entities described by this name have changed out of all recognition. As Winkler discusses at some length, early corporations were chartered for limited purposes, often ones intended to secure a public benefit, not just a return for investors.[19] Usually, they were chartered with a fixed lifespan, and their powers were quite circumscribed. Moreover, the corporate form was not generally available to the average person.

In contrast, today, anyone with the small filing fee may form a corporation. And it is an extremely flexible form, with potentially perpetual life, and with many advantages and few restrictions on its activities. And, as Winkler also shows, it is a form that has gradually acquired most of the liberty rights human beings possess.

This metamorphosis might explain why "historically, the logic of personhood has usually been employed by populists seeking to *narrow or limit* the rights of corporations,"[20] while many of today's critics of *Citizens United* (of which I am one) seek instead to *curb* corporate power by arguing that corporations are *not* "persons" who require freedom of speech or religion because they are not human. Winkler presents this as a paradox or a conflict when arguably the apparent conflict is readily explained by these changes.

For example, he writes, "[w]hen the Supreme Court has ignored the corporate form and looked to the rights of the individuals who make up the corporation, the rulings naturally tended to give corporations nearly all the same rights as

[15] *Id.* at xx.

[16] *See* Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015) (explaining why *Citizens United* Court's version of corporate personhood was significant, despite fact that label itself was not new).

[17] 9 U.S. (5 Cranch) 61 (1809).

[18] Winkler conscientiously and thoroughly discusses the corporation's ancient roots in the first chapter. *See* WINKLER, *supra* note 8, at 3-31.

[19] *Id.*

[20] *Id.* at 62 (emphasis added).

individuals."[21] Here Winkler is using the word "individuals" as if it was synonymous with "natural persons." However, this is one of those changes in corporate law that may make a difference in how we understand that earlier interpretation.

In the past, the individuals who "make up" the corporation *would* have been natural persons because no corporation could own shares of another corporation, and so to think of the corporation as "made up" of human persons would not be strange. Today it is commonplace for corporations to own other corporations, as in the parent and subsidiary arrangement. In such cases, the "individuals who make up the corporation" may *themselves* be corporate "persons," presenting a problem of potentially infinite regress.

Moreover, in corporate law, the *whole point* of the corporation being a separate "person" is to offer a shield to "the individuals" who own its shares.[22] So the idea that it is appropriate to pierce the corporation veil for purposes of constitutional law, but not on behalf of creditors, seems inconsistent with basic corporate law, not to mention rather self-serving. If, on the other hand, what ties these various positions together is not their internal logic, but their rhetorical value to advance a client's agenda at a particular moment in time, we should not be surprised to encounter inconsistencies over time. And Winkler shows that over the course of some 200 years, although various arguments have been presented to the Court for expansive rights, the consistent theme is the opportunistic use of available materials—both legal and extra-legal.

Power Shapes Law

One of the many strengths of the book is that *We the Corporations* does a terrific job in setting out in stark detail the degree to which concentrations of wealth have had and exercised substantial power to influence the law. Winkler describes them as "constitutional leveragers" and notes that: "[a]s constitutional leveragers, corporations have successfully exploited constitutional reforms originally designed for progressive causes, transforming them to serve the ends of capital."[23] Thus, Winkler convincingly demonstrates that *Citizens United*[24] was not the *first* encroachment of corporate interests into individual liberties, merely the latest.

Where there is great economic power, political power almost inevitably follows. The Framers knew this and were concerned about it. The concentration of economic power in today's multinational corporations would likely have

[21] *Id.* at 62.

[22] Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 CORNELL L. REV. 335, 348 (2015). It is not clear if Winkler meant to limit the category of "persons who make up the corporation" to shareholders, or if he meant to include employees and others. The latter understanding would present even more complications.

[23] WINKLER, *supra* note 8, at xxiii.

[24] 558 U.S. 310 (2010).

alarmed them. Certainly in the legal struggles Winkler recounts, we see over and over again corporations using the law to fight off attempts to regulate them. Whatever the various jurisprudential theories employed—corporate personhood, separate entity, contract theory—the disputes always seem to have been about the same thing—whether the government could regulate in the public interest when these concentrations of power threatened public welfare in some way.

Although, as Winkler shows, the government has won a few rounds in these struggles and it has sometimes succeeded in restricting corporate power, at present, corporations have won more fights than they have lost, and corporate power is dominant. Indeed, we may have arrived at the point where the government is *almost* (but not quite) wholly captured by the corporate constituency on which its elected representatives rely upon for re-election rather than the voters.

Law is inherently conservative in that it is backward looking. How we have always done something, i.e. "precedent," is a principal source of legitimacy. And that precedent contains all manner of standards and assumptions that make it hard to reverse course on this corporate rights movement. Rules like what constitutes a "legitimate" business purpose, what sorts of wrongs the law can redress, and who has standing to bring them, all contribute to reading the law in ways that reinforce existing distributions of power, whether that power lies in the hands of a particular race, gender, or class. This is especially true of power derived from capital.

Because it takes money to pursue a legal case, the poor and oppressed often face a basic obstacle to pursuing justice through the courts: lack of money. So even where an enactment is meant to benefit the poor and oppressed, enterprising lawyers, with clients who have the funds to pursue a case, can often turn the law to their advantage. *We the Corporations* offers ample evidence of this phenomenon. The most dramatic illustration is that, as Winkler reports, of the 604 cases brought between 1868 and 1912 under the Fourteenth Amendment, only 28 were brought by racial minorities, and most of *those* plaintiffs lost.[25] The remainder were brought by corporations, and the corporations won many of those cases, unlike the former slaves for whose benefit the Amendment was passed.[26]

Even when they did not win, corporations persisted in bringing these cases,[27] perhaps because such expenditures represented an investment which might pay such handsome dividends that it was worth the risk. As Winkler shows, corporations' practice of using litigation to push the boundaries of the law and to get benefits under the Constitution, first from the Fourteeth Amendment, and now from the First Amendment, has had dramatic consequences for our economic and political system. Some of those consequences are dire. Yet we may be stuck in a web of dysfunctional, and even destructive, practices unless

[25] WINKLER, *supra* note 8, at 157.

[26] *Id.*

[27] *Id.* at 159.

the Court does a fundamental reassessment of some of its recent decisions. The prospects for such a reexamination do not look good.

Shamelessness

What *We the Corporations* also reveals in some detail is the propensity of the powerful not only to make the law that suits them, but to use questionable means to do so. One of those questionable means was by having inside help from one or more Justices of the Court. Sometimes this "inside help" was no more than that the Justice's own political sympathies ran in favor of business. In other cases, there appears to have been simply fraud. But it is remarkable how often pro-business rulings have been offered with little or no attempt by the Court to provide a justification for its holding, or with no attempt to explain or distinguish contrary precedent.

Thus, in the *Santa Clara*[28] case, Winkler describes what for all intents and purposes is a blatant power grab by the Southern Pacific Railways to exploit the Fourteenth Amendment for its own benefit. Aided by its attorney Roscoe Conkling, with the pretty clearly unethical assistance of Associate Justice Stephen J. Field and the similarly ethically challenged assistance of Supreme Court reporter, J.C. Bancroft Davis, Southern Pacific succeeded in smuggling into the law the proposition that corporations enjoyed the protection of the Foureenth Amendment on the grounds that they were "persons" for purposes of that Amendment, despite the other justices' opposition to this argument.[29] Conkling even claimed that this reading was one those who drafted the Fourteenth Amendment had intended, a claim not supported by the historical record.

The *Santa Clara* case has been cited *many* times for this proposition, even though the text of the opinion itself contains no such holding, and despite the fact that there is no explanation offered for this assertion. Moreover, at the time, such a conclusion was sufficiently controversial that it would seem to require an explanation. Instead, this "holding" is reported only in the headnotes by Davis, the Reporter who had suspicious ties to the railroad interests. Winkler convincingly argues that Davis probably deliberately misrepresented Chief Justice Waite's declaration that the Court did not wish to hear argument on the issue of Fourteenth Amendment coverage because the Court already agreed that the Fourteenth Amendment covered corporations, when in fact, Waite and other justices did not wish to hear argument because they preferred to avoid deciding

[28] Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

[29] WINKLER, *supra* note 8, at 113-57. Particularly striking was Field's shameless assertion in a later case that *Santa Clara* had held that corporations were "persons" for purposes of the Fourteenth Amendment when he clearly knew that it had done no such thing. Winkler pulls no punches: "Field . . . was willing to resort to deception when it came to the cause of corporate rights . . . ." *Id.* at 156.

it precisely because it was controversial.[30] The controversy makes it unlikely that the Court would have so casually disposed of such an important question.

Yet, as noted, there was no discussion of this question in the opinion. Instead, Davis put in the headnotes a declaration, attributed to the Court, that the Court did not wish to hear argument on this question because it *had already concluded* that the Fourteenth Amendment *did* protect corporate "persons." This declaration was exactly the opposite of what Chief Justice Waite had said, but because he died not long after the *Santa Clara* decision was rendered, and his death shifted the balance of opinion on the Court, Justice Field had the opportunity to treat the headnote as if it accurately reflected the holding of the Court by citing it for that proposition in a subsequent case.[31] The evidence Winkler adduces makes fairly clear that the "principle" announced in the *Santa Clara* case was not legitimately obtained. Although the backroom maneuvering and potential conflicts of interest were not obvious on the face of the opinion, the absence of any rationale whatsoever in the opinion for such a counter-intuitive interpretation of the Fourteenth Amendment was. Yet its supposed holding was taken up with alacrity in the years that followed rather than challenged as unsupported by the decision itself.

While *Citizens United* did not involve any obvious conflicts of interest, it was similar to *Santa Clara* in that the Court seemed to be rather nakedly intervening on behalf of corporate interests without much attempt to acknowledge its rather abrupt change of course. In *Citizens United*, the same justices who often bemoan judicial "activism"[32] not only overruled precedent that was only four years old in order to rule for Citizens United, they did so without having been asked by the parties to do so (almost the definition of "activist" and typically a no-no) and despite there being narrower grounds on which to decide the case.[33] It was the Court *itself* that decided it wanted to address the issue of corporate speech, and, having asked for re-briefing and re-argument on this question, it did not confine its ruling to the non-profit corporation actually before the Court but explicitly applied its ruling to *all* corporations.[34] Many of the other leading cases Winkler discusses in *We the Corporations* have this same brazen quality. It does not make for reassuring reading.

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[30] *Id*. at 152.

[31] *Id*. at 156-57.

[32] *See*, *e.g.*, Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L. J. 412, 420-29 (2013) (discussing some shortcomings of decision and alternative reading); Geoffrey R. Stone, Citizens United *and Conservative Judicial Activism*, 2012 U. ILL. L. REV. 485, 489-90 (2012).

[33] WINKLER, *supra* note 8, at 324-70 (discussion of case and of the many departures from conventional conservativism); *see also* Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), https://blog.harvardlawreview.org/not-conservative/ [https://perma.cc/5668-9TGX] (discussing *Citizens United* and more recent manifestations of this willingness to ignore conservative, interpretive strategies).

[34] WINKLER, *supra* note 8, at 358.

If you would know who wields power in a society, look at the law and how it is enforced; what kinds of harms are legally cognizable, and what kinds are not; the sorts of disabilities of which the law will take cognizance and those it will not. *We the Corporations* convincingly demonstrates that it is the largest corporations, and those who run them and profit from them, who have the largest hand in making the law.[35] Winkler's account suggests that if we look at history this is a phenomenon that runs in cycles. Power accumulates. It overreaches. There is backlash and then, for a time, it *seems* that the process has been halted and progress made. But it has never really halted; it has simply retrenched to find a new angle of attack.

We have to wonder whether this process can go on forever or whether with each iteration, we are inching closer to a sort of political and social "end times," a time at which the imperatives to profit and the power of capital may prove to be our undoing because they undermine government's ability to restrain activities that are harmful to the public welfare in the long run. Domination of the political process by the accumulation of capital that the corporate form makes possible erodes government's ability to buffer the depredations of private power.

And perhaps not coincidentally, it is often difficult to determine where corporate power ends and government power picks up. Social media like Twitter and Facebook are said to operate like public fora; large corporations like Exxon generate more revenue than most countries. All of them may have more influence on our lives than government. Corporate values shape higher education. Corporate jobs may provide an entrée to high government positions. Corporations influence how inclusive the society is, but they do so on the basis of markets. "Truth" has become defined as that which you can convince the most people, rather than a fact capable of being verified. Everything else becomes "fake news." In this reality, consequences do not matter because by the time the customer knows that he has been sold a bill of goods, the conman will have moved on to another town.

This is an attitude that works well for the rational, self-interested utility maximizing huckster; it is a dangerous way to run anything—a company or a government—with the long run in mind. If we believe that sometimes things are true and sometimes they are false, that some actions are beneficial to the public welfare and others are not, that some are conducive to long-range thriving and others are not, then we should be worried that this mind set, driven by the corporate juggernaut of strategic litigation Winkler describes, may make it difficult to protect human life against catastrophic climate change, to prevent or

[35] This might just be a case of the "rich getting richer," but it plays out at even the personal level. For example, Winkler chronicles how Ted Olson, the more famous lawyer and the well-known "brand," came to be associated with the win in *Citizens United*, even though James Bopp was the lawyer who had actually come up with the strategy that Citizens United employed and he was the one who had successfully pushed this theory (despite the common wisdom that it was not a winner) all the way to the Supreme Court, only to see the case snatched from his hands at the last minute. *Id*. at 370.

cushion against market shock, to build a more just society, or to preserve the peace and protect the general welfare. The corporate rights movement is alarming at an existential level. Are we living through constitutional "end times"? It is hard to know. But Winkler's book made me think it was possible.