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## THE LONG HISTORY OF CORPORATE RIGHTS

ADAM WINKLER\*

Corporations have been fighting for equal rights since America's earliest days. Although *Citizens United v. Federal Election Commission*<sup>1</sup> first drew broad public attention to the rights of corporations under the Constitution, businesses have quietly amassed a remarkable track record of success in the Supreme Court over the course of the past two centuries. Today, corporations have nearly every right a corporation might want under the Constitution: free speech, freedom of religion, Fourth Amendment privacy rights, due process, equal protection, property rights – rights corporations use to challenge laws regulating the economy and the marketplace. Yet the constitutional law textbooks typically used in law school classes do not include sections on the rights of corporations. Law students learn about civil rights, women's rights, gay rights, even states' rights, but not corporate rights.

Corporations did not win rights the same way that women and minorities did. The latter groups made public appeals for equal rights, backing up litigation efforts with public protests, advocacy campaigns, and media efforts designed to move popular opinion. For women and minorities, scholars stress that judicial victories were only possible when accompanied by changes in the hearts and minds of the public. Corporations, however, did not engage in public advocacy; they never marched with signs demanding, "Corporations are People Too!" But corporations have waged a sustained campaign of lawsuits over generations designed to spur the Supreme Court to recognize ever broader rights for corporations. The audience those corporations found in the nation's highest court has, by and large, been receptive and accommodating.

Although often overlooked, the rise of corporate rights in the Supreme Court should not surprise us. As Larry Yackle observes, judging is inherently value-laden, and the justices have traditionally leaned favorably towards private business, capitalism, and the free market.<sup>2</sup> Despite our habit of labelling the Supreme Court "liberal" or "conservative," justices are often united in business cases (even in the otherwise ideologically divided Roberts Court). This tendency to favor business leads to what Tamara Piety terms "judicial activism" in favor of corporate rights.<sup>3</sup> For all the handwringing over how courts have abandoned the original understanding of the Constitution to protect abortion and gay

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\* Professor of Law, University of California-Los Angeles School of Law.

<sup>1</sup> 558 U.S. 310 (2010).

<sup>2</sup> Larry Yackle, *Corporate Rights as Subplot*, 98 B.U. L. REV. ONLINE 36, 36 (2018).

<sup>3</sup> Tamara Piety, *The Eschatological Drift of Corporate Constitutional Rights: A Review of Adam Winkler's We the Corporations*, 98 B.U. L. REV. ONLINE 49, 56 (2018).

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marriage, business corporations have been a primary beneficiary of courts reading the Constitution to recognize imaginative new rights unmoored from history.

The pattern began early, in the very first corporate rights case in the Supreme Court, *Bank of the United States v. Deveaux*,<sup>4</sup> decided in 1809. The case was an outgrowth of the battle between Alexander Hamilton and Thomas Jefferson over a national bank – a dispute that also gave rise to the two-party system. Hamilton’s Bank of the United States was chartered by Congress as a private corporation, with publicly traded shares and a board of directors accountable to stockholders. When Jeffersonians in Georgia imposed a tax on the Bank, the company sought to challenge the Georgia law in federal court. The case posed a now familiar question: Are corporations people?

More specifically, the Bank’s case turned on whether corporations were “citizens” under Article III of the Constitution. That provision, which is the basis of what law students learn as diversity jurisdiction, authorizes federal courts to hear disputes between “citizens” of different states. It is not clear that anyone who voted to ratify the Constitution would have understood this provision guaranteeing the right to sue in federal court to “citizens” to also include corporations. Nevertheless, Chief Justice John Marshall’s opinion for the Court sided with the Bank. Marshall frankly admitted the lack of any plausible argument that the text of Article III extended to corporate entities.<sup>5</sup> And even though the case was brought in the name of the Bank to recover property belonging to the corporate entity, Marshall held that the people who organized the corporation—“the members of the corporation” – were citizens and the corporation should be able to stand in and assert their rights.<sup>6</sup> Marshall’s creative argument was as much a departure from corporate law as it was originalism; even in the Founding era, corporations were independent entities in the eyes of the law, with legal rights and duties separate and distinct from the rights and duties of their owners.

*Bank of the United States* was a landmark decision that laid the foundation for the two centuries of corporate rights to come. Corporations did not win every case over that span, of course, but their frequent success serves as a reminder of the multifaceted nature of corporate power. Especially in the era of *Citizens United*, when corporations can spend unlimited sums on election ads, we often conceptualize corporate power in terms of its influence on legislators and administrative agencies in shaping policy. The history of corporate rights cases highlights how corporations have also expanded and solidified their power and influence through the judicial branch and constitutional doctrine. Lady Justice may be blind, but the court system is well suited for corporations. Unlike many traditional civil rights organizations, business corporations have always had the financial resources to afford the best lawyers money can buy to pursue

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<sup>4</sup> 9 U.S. (5 Cranch) 61 (1809).

<sup>5</sup> *Id.* at 73.

<sup>6</sup> *Id.* at 87-88.

expensive, cutting-edge lawsuits challenging burdensome regulation. Much of the corporate rights litigation has been brought by rich, large corporations for whom risky lawsuits are just another business expense that might pay off handsomely in profits.

One of the most surprising things about the history of corporate rights is how corporations' appetite for litigation would lead them to be innovators in constitutional law. Just as the pursuit of profit can lead businesses to be at the vanguard of the economy, it has also led corporations to be first-movers in shaping constitutional doctrine. While one might imagine that corporations won constitutional rights only after those same rights had been well established for ordinary people, in fact several fundamental rights won early protection in the courts in lawsuits brought by corporations. Corporations won cases that were among the first to breathe life into the Contract Clause in the early 1800s<sup>7</sup> and the equal protection and due process clauses of the Fourteenth Amendment at the end of the 1800s.<sup>8</sup> Businesses were behind some of the earliest and most important cases reading unwritten rights into the Constitution and establishing broad protections for freedom of speech. First Amendment law is marked by historic decisions involving corporate rights claims, including *New York Times Company v. Sullivan*<sup>9</sup> and the *Pentagon Papers Case*.<sup>10</sup> Readers who saw the popular recent movie, *The Post*,<sup>11</sup> might well have found themselves rooting at the end for a for-profit business corporation fighting for its First Amendment rights.

Even though corporate rights litigation contributed to the development of individual rights that we now take as sacrosanct, Jack Beermann asks the necessary question: has the Court's commitment to corporate rights crowded out the claims of truly oppressed groups like minorities and women?<sup>12</sup> There is reason to suspect it has. Certainly the Court often appears willing to go further to protect the rights of corporations than the rights of minorities and women. The success of corporations in winning constitutional protections stands in stark contrast to minorities and women, who won few cases in the Supreme Court until the mid-twentieth century. The early history of the Fourteenth Amendment, adopted to protect the rights of the newly freed slaves after the Civil War, is revealing. During the same time the Court was reading the amendment narrowly to allow Jim Crow laws and deny African Americans equal citizenship in cases like *Plessy v. Ferguson*,<sup>13</sup> the *Lochner* justices were striking down laws

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<sup>7</sup> See *Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

<sup>8</sup> See *San Mateo Cty. v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885).

<sup>9</sup> 376 U.S. 254 (1964).

<sup>10</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>11</sup> *THE POST* (20th Century Fox 2017).

<sup>12</sup> Jack Beermann, *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*, 98 B.U. L. REV. ONLINE 32, 34 (2018).

<sup>13</sup> 163 U.S. 537 (1896).

regulating wages, labor relations, and zoning.<sup>14</sup> Between 1868, when the Fourteenth Amendment was ratified, and 1912, the Supreme Court heard 28 cases on the rights of African Americans and 312 cases on the rights of business corporations.

The Fourteenth Amendment is an example of how corporations have been able to exploit progressive reforms, like the promise of equal rights, to serve the ends of capital. More recently, corporations have leveraged free speech principles that were first firmly established by Ralph Nader's public interest group to protect consumers. In 1976, Nader's organization won a landmark free speech case striking down a ban on pharmacists advertising the price of prescription drugs.<sup>15</sup> For years, the Court had said that speech on commercial matters like advertising was not protected by the First Amendment. In the wake of Nader's victory, corporations used the precedent to challenge a variety of disclosure laws, labeling requirements, and limits on advertising. A recent study by John Coates found that nearly half of all First Amendment cases today are filed by corporations or business trade groups.<sup>16</sup>

Which if any rights should corporations have? The Roberts Court has been expanding the rights of corporations in cases like *Citizens United* (political speech) and *Masterpiece Cakeshop*<sup>17</sup> (religious liberty). At the other end of the spectrum, there is a lively movement pushing to amend the Constitution to declare corporations are not people and have no rights whatsoever.<sup>18</sup> Such all-or-nothing approaches to corporate rights has little appeal to many of the scholars who have studied the question in depth. If corporations have no rights whatsoever under the Constitution, government could seize any property owned by corporations without paying just compensation. If corporations have no guaranteed due process rights, then they can be fined for having committed crimes without the benefit of trial. Media corporations like the New York Times Company and Fox News would be easily censored without free press rights. This is not to say that corporations should have all the same rights as people. Rather, the point is that eliminating all constitutional rights for corporations might create as many problems as it would solve.

Perhaps the Supreme Court has just reached the wrong conclusion in some of these corporate rights cases, as Yackle suggests.<sup>19</sup> Elizabeth Pollman points the way for courts to do a better job, arguing for courts to offer a more persuasive and consistent conceptualization of the corporation<sup>20</sup>: Is it an association or is it

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<sup>14</sup> *Lochner v. New York*, 198 U.S. 45, 52 (1905).

<sup>15</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>16</sup> See John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223 (2015).

<sup>17</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018).

<sup>18</sup> See, e.g., H.J. Res. 48, 115th Cong. (2017); S.J. Res. 5, H.J. Res. 22, 114th Cong. (2015).

<sup>19</sup> Yackle, *supra* note 2, at 37.

<sup>20</sup> Elizabeth Pollman, *Wrong Turns with Corporate Rights*, 98 B.U. L. REV. ONLINE 44, 45-46 (2018).

a person? Does the corporation have the rights of its members, as Chief Justice Marshall said, or does it have its own rights separate and apart from its members, as corporate law traditionally requires? How the courts answer that question could have surprising results. In the public debate since *Citizens United*, corporate personhood is often blamed for expansive rulings favoring corporations. Yet decisions like *Bank of the United States* and *Citizens United* tend to view the corporation as an association, where the members assert their own rights through the corporate form.

When the Supreme Court has treated the corporation as its own independent entity with rights wholly distinct from the rights of its members – that is, as a person – the rulings have tended to afford corporations fewer and less expansive rights than ordinary individuals. In 1839, for example, the Court held that corporations were not entitled to the privileges and immunities of citizenship under Article IV, even though the members of the corporation had that right. “Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter, and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state.”<sup>21</sup>

Equally important is Pollman’s suggestion that courts in corporate rights cases recognize the differences among entities that take the corporate form.<sup>22</sup> Although business firms are often what spring to mind when discussing “corporations,” many other types of entities use the corporate form too, including charitable organizations, voluntary membership associations, and political advocacy groups. Although corporations all, they have different organizational structures, internal dynamics among stakeholders, and roles in society. The courts have rarely accounted for this variation in corporate rights cases, often treating all these corporations as having the same rights without distinction. One might ask, however, if multinational business corporations should have all the same political speech rights as membership groups that take the corporate form; at least courts should address the differences and explain why they matter.

Perhaps it is foolish to rely on a constitutional amendment or revamped judicial doctrine to cabin the power and influence of corporations. Given corporations’ track record in court and in exploiting progressive reforms to further business, Michael Dorf warns that we should have a certain skepticism about the effectiveness of constitutional change to curtail business.<sup>23</sup> Kent Greenfield suggests a bold, and possibly more promising solution: reform American business corporations so that they are not so committed to the bottom

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<sup>21</sup> *Bank of Augusta v. Earle*, 38 U.S. 519, 587 (1839).

<sup>22</sup> Pollman, *supra* note 20, at 47.

<sup>23</sup> Michael Dorf, *Is Constitutional Doctrine the Source of Corporate Rights*, 98 B.U. L. REV. ONLINE 59, 59 (2018).

line.<sup>24</sup> By democratizing the corporation so that stakeholders other than stockholders are represented on corporate boards, more of the public's voice will be heard in shaping corporate policy. Indeed, American corporations might begin to behave a bit more like the human beings for whom constitutional rights were originally designed.

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<sup>24</sup> See generally KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018); Kent Greenfield, *Corporate Constitutional Rights: Easy and Hard Cases*, 98 B.U. L. REV. ONLINE 40 (2018).