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We the Corporations:

How American Businesses Won Their Civil Rights

by Adam Winkler

Reviewed by Marc Alexander

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Adam Winkler, Professor of Law at UCLA, has written a remarkable history: *We the Corporations: How American Business Won Their Civil Rights.* The story is cinematic in scope, beginning in colonial times, ending with *Citizens United* (2010) and *Hobby Lobby* (2014), filled with larger-than-life characters

such as Justices John Marshall, Roger Taney, Stephen Field, Lewis Brandeis, Charles Evans Hughes, orators/attorneys Daniel Webster, and Roscoe Conkling, sprinkled with wit, and unified by big themes. While the story is too rich and detailed for a movie, it might just fit into a six-part Netflix series.

The story opens theatrically in 1882, with former Senator Conkling trying to con the Supreme Court into agreeing that corporations are "persons" under the Fourteenth Amendment, entitled to equal protection. As the last surviving person who participated in drafting the Amendment, Conkling sought to convince the Court that the drafters changed the wording of the Amendment from "citizen" to "person" so corporations, which are not natural citizens, could be protected as persons. Indeed, Conkling was a con, for historical scholarship has shown an utter lack of documentary evidence to support his legal legerdemain. This scene sets the stage for presenting a number of themes. Are corporations people? What are their legal attributes? How has the law evolved to establish the rights of corporations, such that today, "corporations have won a considerable share of the Constitution's most fundamental protections"? Who are the imaginative attorneys who have represented the corporations, and who are the business-minded Supreme Court Justices who have sided with expanding corporate rights? What push-back has there been against the corporate judicial juggernaut?

While Conkling's case was never decided by the Supreme Court, corporations would do well and gain many rights through the courts. Those successes, unlike the successes of the Civil Rights movement, were less the result of a bottom-up mass movement, and much more the result of top-down efforts by corporate leaders, their lawyers, and like-minded judges to protect corporations from taxation and regulation, and to promote a vibrant economy. While many outstanding books have been written about the efforts of African-Americans to obtain civil rights, such as Richard Kluger's *Simple Justice*, and Taylor Branch's three-volume history of the movement, Winkler's narrative about the development of corporate rights, existing in a sort of parallel universe relying greatly on civil rights, makes his book exceptional.

The colonists had some familiarity with corporations: "the Virginia Company of London, which brought the first taste of democracy to America; the Massachusetts Bay Company, which provided the Founders with a model for limited government based on a written constitution; and the East India Company, which helped inspire the Revolution that made the Constitution possible." The Constitution itself resembles a corporate charter. Many of the wealthy Founders invested in corporate stock.

The accretion of corporate rights begins in the Eighteenth Century with "core rights of corporations identified by Blackstone" – property, contract and access to court; later come due process and equal protection rights under the Fourteenth Amendment and the protection against unreasonable search and seizure under the Fourth Amendment. At first, corporate rights include property rights but not liberty rights associated with human beings; then the rights expand to include freedom of press and association, which are liberty rights. While for some, *Citizens United*, opening up the floodgates of corporate election financing, appeared to come out of right field, and break with legal traditions limiting corporate

rights, as Winkler decisively demonstrates, "*Citizens United* was in fact the culmination of a two-hundred-year struggle for constitutional rights for corporations."

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A theme running through Winkler's book is that corporate jurisprudence has divided over whether a corporation is a person to be treated as a separate entity, or whether a corporation is an association of individuals. Advocates and judges who have sought to limit the rights of a corporation have generally argued that the corporation must be treated as a separate "person" chartered by the state and susceptible to regulation. In contrast, those seeking to expand the rights of corporations have often pierced the corporate veil by treating the corporation as an association of individuals, with the rights of individuals to be free from discrimination, to be free to speak, to be free to make political contributions, and to have in some instances religious rights. One can also see the divided way in which the corporation is viewed as a manifestation of the Jeffersonian/Hamiltonian divide, with Jefferson as the advocate of a small, independent, educated yeoman class, and with Hamilton as the advocate of industry, and energetic growth. The split picture shows up throughout our country's legal history with, for example, Justices Stephen Field and Lewis Powell as cheerleaders for big business and the corporation, Louis Brandeis, thick in the Jeffersonian tradition, expounding on "The Curse of Bigness," and Ralph Nader seeking to promote corporate responsibility.

What's sauce for the goose is sauce for the gander, might well be another theme. Lawyers who represented the corporations deftly used the rights developed to protect persons to expand corporate rights. Examples abound. The Fourteenth Amendment, developed to protect former slaves, has been used to provide equal protection of the laws, and protection of property rights, to corporations. The Fourth Amendment, making us safe from unreasonable search and seizure, has been used by corporations to protect against searches and seizures of corporate documents. Alan Morrison, a colleague of Ralph Nader, developed the doctrine protecting commercial

speech to obtain the right of pharmacists to advertise prices, for the benefit of consumers. From doctrines protecting commercial speech and the right of the audience to know, Justice Powell was able to write an opinion protecting the right of a national bank to fund a ballot initiative campaign. By 2011, the President of Public Citizen, the consumer protection organization created by Ralph Nader and Alan Morrison, was calling for the entire line of commercial speech cases to be overturned. "It was," writes Winkler, "a poignant, First Amendment version of buyer's remorse." In the end, legal doctrines developed to protect persons have protected corporations, sometimes more than the original beneficiaries.

'First Amendment protection did not depend on the identity of the speaker, and whether a corporation was a person, but rather depended on the abridgment of speech under the First Amendment.'

Judge Leo E. Strine, Jr., the current Chief Justice of the Delaware Supreme Court, might just possibly serve as the proxy for Winkler's own views about corporate rights. Strine, delivering the 2015 Ralph K. Winter Lecture at Yale, spoke about how *Citizens United* and *Hobby Lobby* were mistaken from the perspective of corporate law. "Strine took issue with the view expressed in *Citizens United* that stockholders unhappy with corporate political spending could use 'the procedures of corporate democracy' to stop it, or simply sell their shares." The problem, as Strine explained, was that the shareholders who invest in corporations have no realistic control over corporate decisions. For one thing, corporations rely on proxies, and for another thing, investors invest through intermediaries such as pensions and mutual funds. Therefore, the argument that the course of a corporation's conduct can be corrected through corporate democracy is often unrealistic.

Additionally, the Supreme Court's piercing of the corporate veil to treat the corporation as an association of individuals endowed with the rights of individuals is at odds with the very point of corporate law: to create a separate entity shielding shareholders from liability. It does not seem realistic to assume that management is a good proxy for the political

and religious beliefs of shareholders in the modern corporation.

The argument that corporations should be treated as a separate legal entity (which is really what critics mean when they say "a corporation is not a person") is also supported by the much earlier work of Berle and Means in *The Modern Corporation and Private Property* (1932): the managers and directors of corporations have the ability to manage day-to-day corporate operations, and dispersed shareholders often play a passive role. In other words, control and management are separated, and it is management that calls the shots. Therefore, equating the rights of shareholders with the rights of the corporation is a false equation, because the political causes and interests of the corporate managers may not be the same as those of the corporate shareholders.

It is a virtue of Winkler's book that he puts legal views about corporate rights in historical perspective. For example, the restrictions on corporate election spending, put into effect by the Tillman Act of 1907, arose as a result of scandals in the insurance industry, revealing that insurance companies were funding a presidential candidate to promote interests that did not advance the interests of policyholders. The "money of others" was not being used to advance the interests of the little persons who purchased life insurance policies. From the historical example of the insurance industry scandal, Winkler draws the greater lesson that when the corporation was treated legally as a truly separate person, rather than the embodiment of an association of persons, it has been easier to regulate business and limit the rights of corporations.

Justice Lewis Powell, generously feted by the tobacco industry immediately before ascending to the Supreme Court in 1972, is Winkler's exemplar of "the Corporation's Justice", and the corporate attorney, in our time. In 1971, Powell authored an enormously influential memorandum that became a playbook for expanding corporate influence, arguing that business and capitalism were unfairly attacked by communists, socialists, and misguided leftists, and proposing education, advertising, think tanks, and lobbying to counteract the baleful influences. Justice Powell was a strong voice for corporations on the Supreme Court. In *First National Bank v. Bellotti*, Justice Powell latched on to an ingenious argument to hold that a Massachusetts law limiting corporate contributions to elections, unless the contributions related to issues pertaining to the corporation's business, violated the First Amendment. Powell explained that First Amendment protection did not depend on the identity of the speaker, and whether a corporation was a person, but rather depended on the abridgment of speech under the First Amendment. Later cases, such as *Citizens United*, would build upon this ruling that speech was for the benefit of the audience, not just the speaker, and thus it did not matter that the speaker was a corporation.

Winkler's retelling of *Grosjean v. American Press Co.* (1936) makes for a whopping good tale. The case involved a blustery, loud-mouthed politician who persecuted his political opponents and worked to silence opposition, including newspapers criticizing the Kingfish – Governor Huey Long of Louisiana. Describing Long as "conscienceless," "dangerous", and an "unbalanced dictator", the Louisiana press was nasty and hard-hitting. Complained Long, "These daily newspapers have been against every progressive step in the state and the only way

for the people of Louisiana to get ahead is to stomp them flat." As the Kingfish elegantly put it, "lying newspapers should have to pay for their lying." The message was clear: the demagogue's media opponents were the enemy of the people. Long's demagoguery, however, eventually backfired, turning the media corporations into victims.

Long retaliated against the unfriendly newspapers, imposing an advertising tax on newspapers with a circulation of more than 20,000, striking at the thirteen papers of largest circulation, twelve of which were urban, and predominantly opposed to Long, in contradistinction to the small rural newspapers supported by his loyal populist base. Arguing for freedom of the press, the newspapers struck back, suing Alice Grosjean, the state official who supervised public accounts. Grosjean, the first woman to occupy a statewide office in Louisiana, was, as it happens, Long's mistress. Grosjean, however, was a high-school dropout, and Long needed an attorney to defend the tax. Predictably, Long chose a crony to defend the tax. The attorney proved to be incompetent, not to mention, he had been expelled from the state bar at one point for ethics violations. The case resulted in a ringing affirmation of First Amendment rights – of great significance, because it was the first time that corporations were endowed not just with property rights, but with liberty rights. Long, however, was not around to endure the agony of defeat, having been assassinated a year earlier.

Two things make this book uncommonly enjoyable legal history.

First, Winkler manages the hat-trick of creating a bit of suspense when telling the stories of the milestone legal cases. He does this by presenting the legal puzzle early on, following up by weaving together interesting narrative strands, telling the story from the perspective of the actors who do not yet know the outcome, and then presenting and explaining the Supreme Court's ruling as the magician's reveal.

Second, Winkler describes evocative details, plucks the colorful quotation, and turns the memorable phrase. Writing about the location of Conkling's Supreme Court hearing in 1882, Winkler quotes a journalist's description of a "rather dingy and ill-lighted passage" in the United States Capitol, with an entryway that looked like a "closet door", and a room with red velvet cushions for seating Washington's society women. "Tall, affable, and a bit gaunt, the bespectacled Lewis Powell was said to resemble a 'kindly country pharmacist.'" Judge Leo Strine, presenting his lecture at Yale, tells his audience, "I'm a judge, so I'm going to do this," and pulls off his jacket, "revealing colorful suspenders busy with vivid cartoons of jazz musicians." Mark Hanna, a pioneer in campaign financing, "advertised McKinley as though he were patent medicine." Henry C. Frick, the steel magnate and union buster, complained about Theodore Roosevelt, "We bought the son of a bitch and he didn't stay bought." A.J. Liebling, the journalist perhaps best known for his sportswriting about boxing, *The Sweet Science*, explains, "Freedom of the press is guaranteed only to those who own one." And Winkler writes, "Money in politics is often likened to water: it seeps inevitably into any cracks in the barriers that campaign finance law erects to restrain it . . ."

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