CORPORATE CONSTITUTIONAL RIGHTS: EASY AND HARD CASES

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Adam Winkler has written one of the most important books of legal history of the last decade. The story of corporate constitutional rights is as long as our nation's history, yet few have plumbed it like Winkler does. *We the Corporations* is a brilliant work—beautifully written and exhaustively researched. It is a book that few scholars have the capacity to write. His key insight is that the efforts by businesses to expand their constitutional rights were in effect a civil rights movement.[1] All of us who are interested in the questions of corporate "personhood" owe him a debt of gratitude. If you care about corporate constitutional rights, ignore Winkler's work at your peril. *We the Corporations* will be consulted and studied for years to come.

I am not alone in my assessment of the book's quality and importance. As of this writing, *We the Corporations* has been named a finalist for the National Book Award.[2] By the time this essay is published, we may have even better news.

Winkler and I have labored in this same area for many years. His focus in *We the Corporations* is descriptive; I have focused more on the normative. When should corporations be able to claim constitutional rights? More colloquially, under the Constitution, are corporations people? My answer: sometimes.

As Winkler describes, the question has bedeviled the Supreme Court and commentators for two centuries. In defining the question, few general statements can improve on Chief Justice John Marshall's in *Dartmouth College v. Woodward*[3] two centuries ago: "Being the mere creature of law, [the corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[4] In effect,

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

[2] *2018 National Book Awards, Nonfiction*, NAT'L BOOK FOUND., http://www.nationalbook.org/awards-prizes/national-book-awards-2018/?cat=nonfiction [https://perma.cc/DP43-DPDE] (last visited Nov. 26, 2018).

[3] 17 U.S. 518 (1819).

[4] *Id.* at 636.

the proper analysis of corporate constitutional rights asks what rights are "incidental to its very existence."[5]

This inquiry must begin with a discussion of the nature of corporations and what purposes they serve. There is much disagreement about whether corporations should be managed primarily to serve shareholder interests or to serve a more robust set of stakeholder interests. But there is broad consensus that corporations are economic entities, created for the purpose of benefiting society by creating wealth through the production of goods and services. The constitutional analysis should begin with the presumption that corporations should receive the rights incidental to serving that economic purpose and should not receive those that are not germane to that purpose. This presumption may be overcome in specific contexts or to further other constitutional values, but that is the starting place for analysis.

This framework helps identify the easy cases and the hard cases.

As for easy, begin with the obvious point that corporations cannot vote or serve on juries. It does not make any sense to think of corporations asserting those rights, both because of the nature of the right and the nature of the corporate entity. Service on juries and voting are rights that do not make sense to bestow on any collective body, whether it be corporate, charitable, or familial. By the same token, it is easy to conclude that corporations should be able to assert takings claims and procedural due process claims. If corporations can have their property taken without compensation or cannot depend on fair judicial process, no one would invest in them.

Hard cases include religious rights and speech rights.

Religious exercise rights protect the freedom of conscience, and only actual human beings have a conscience. There should be allowances for genuine associations of religious people, such as churches. As Winkler reminds us, the Catholic Church is organized as a corporation. But because of corporate separateness—that is, corporate personhood—it will be quite difficult for businesses to show that they are genuine associations of religious people. And notwithstanding the Court's mistakes in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[6], it should not be the shareholders' views that control. (A group of corporate law professors filed an amicus brief in *Masterpiece Cakeshop* on this very point[7], but other than a handful of Sonia Sotomayor questions at argument[8], the Court did not explicitly consider the issue.).

[5] *Id.*

[6] 138 S.Ct. 1719 (2018).

[7] Brief for Corporate Law Professors as Amici Curiae Supporting Respondents, *Masterpiece Cakeshop*, 138 S.Ct. 1719 (No. 16-111).

[8] Oral Argument at 99, *Masterpiece Cakeshop*, 138 S.Ct. 1719, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f29g.pdf [https://perma.cc/ UP4K-Y5M3].

Should corporations be able to claim First Amendment free speech rights? The short answer is that it depends. It will depend in part on whether the speech at issue is necessary for corporations to fulfill their economic purpose and whether protecting a corporation's right is important to fulfill the purpose of the right. The New York Times, a for-profit company, of course has rights of free speech and press, both because of the purpose of the company and the purpose of the right.

But sometimes granting corporations a speech right would be inconsistent with the purpose of corporations. Securities laws, for example, routinely require businesses to disclose their financial wellbeing to the public. If human beings were required to reveal personal finances, they would rightly object to the requirement as coerced speech, a violation of the First Amendment. But corporations' arguments along those lines would fail and they should. Similarly, because corporations are organized as economic entities that operate in markets of various kinds and because the efficiency of markets depend on truthful information, corporations can be required to tell the truth whether it be about about their products or their lobbying expenditures. For example, arguments by corporations that they have a constitutional right to be protected from fraud claims (as in *Nike, Inc. v. Kasky*[9]) or be relieved from disclosing their use of conflict minerals (as in the 2015 D.C. Circuit case *National Association of Manufacturers v. Securities Exchange Commission*[10]) should fail.

What about corporate political expenditures, the issue in *Citizens United v. Federal Election Commission*?[11] There is no question that the billions of dollars flooding the electoral process skews it—and the legislative process that follows—toward the moneyed and well-heeled. But there is reason to be less worried about *corporate* money in elections than one might think. By a large margin, most of the money flowing into Super PACS in both the 2012 and 2016 presidential election cycles originated not from the coffers of for-profit corporations but from the wallets and purses of mega-rich individuals and from labor unions. Spending by publicly-traded corporations appears to have accounted for less than one percent of the total independent expenditures in the 2012 presidential cycle, and data indicates that corporate spending in 2016 was in the same ballpark.[12]

Having said that, it is completely appropriate (and should be constitutionally permissible) to regulate corporate political expenditures differently from those of human citizens. Corporations are collective entities, run by managerial agents, with narrow economic purposes. Each of these characteristics could give rise to differences in regulation. The collective nature of corporate entities means that they could be required to vet their expenditures with members of the collective—

[9] 539 U.S. 654 (2003).

[10] 800 F.3d 518 (D.C. Cir. 2015).

[11] 558 U.S. 310 (2010).

[12] *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 24-26 (2018).

shareholders and employees. The fact they are run by managerial agents means that the law can appropriately constrain expenditures to ensure they inure to the benefit of the entity not management. The economic nature of corporations means that courts can be skeptical of assertions (as in *Masterpiece Cakeshop* and *Burwell v. Hobby Lobby Stores, Inc.*[13]) that political or religious beliefs should relieve them of regulatory obligations—subterfuge is a real risk.

I hope it is obvious that this is just a sketch of the range of arguments and considerations that scholars will have to balance in asking about the normative implications of *We the Corporations*. If one wants to do the deep dive, one place to start is my new book *Corporations Are People Too (And They Should Act Like It)*.[14] Released in October, eight months after Adam's, it can be seen as the sequel. I just hope this sequel is along the lines of *The Godfather: Part II* rather than *Caddyshack II*.

[13] 134 S.Ct. 2751 (2014).

[14] GREENFIELD, *supra* note 12.