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CORPORATE RIGHTS AS SUBPLOT

LARRY YACKLE*

Adam Winkler makes an important contribution to the great body of academic work on corporations in American life. He concentrates on a small corner of the larger topic. He traces only the development of corporate “rights,” and he describes, but does not critique, what he uncovers. There is much to learn from this fine book. I want to applaud Winkler’s primary revelation—namely, that corporate rights are a creation of the courts, especially the Supreme Court.¹ Then I want to flag what Winkler (I think) would readily acknowledge: corporate rights are not the whole of the corporate story.

Winkler explains that corporate rights rest on no single principle, either consistently recognized from the outset or fashioned incrementally over time. At least two conceptions of corporations and corporate rights have competed for prominence, both with their own internal contradictions. The idea that a corporation is a freestanding entity independent of its shareholders might justify confining a company’s behavior to what is authorized by its charter. But it is hard to think that an artificial legal construct must necessarily count as a “person” within the meaning of the Due Process Clauses. And, anyway, modern general charters establish no serious conditions. The idea that a corporation is an instrument of the natural persons who own shares might explain allowing stockholders to assert due process claims indirectly through their chosen means of doing business. But if a corporation is not distinct from its owners, it is hard to explain why shareholders are not liable for the company’s debts. Of course, the real people who buy publicly traded stock in large corporations have little or no connection to the business decisions made by managers. Berle and Means taught us that much.²

The upshot is that the Court’s work product in corporate rights cases is the standard fare in American public law generally: reasoning backward from the desired outcome of the moment. No one with walking-around sense thinks that adjudication should be, or ever could be, objective in some value-neutral sense. The point here is not that the justices bring values to bear, but *what* values they choose to promote. In this instance, they have favored private business interests.

* Professor of Law Emeritus, Boston University School of Law. Steve Marks and Jeanette Yackle gave me good advice about this piece, some of which I took.

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

² ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

In this book, Adam Winkler neither seconds nor scorns the Court's manufacture of corporate rights. Nor does he advocate any policy prescriptions for the future. Others who do express misgivings counsel caution. Kent Greenfield, for example, contends that progressives who are disturbed by corporate power waste their energy on fruitless efforts to curb corporate rights.³ The constitutional amendments now on the table offer answers that are at best incomplete and potentially counterproductive. The "Democracy for All" amendment proceeds from the (perfectly sound) premise that corporate speech rights as currently conceived allow companies to use their wealth to skew the political process. Accordingly, it addresses only spending to influence elections and, at that, would leave it to Congress and state legislatures to decide what, if any, restrictions to impose.⁴ The "We the People" amendment engages the frustrating (and mistaken) debate over whether corporations are people. That amendment would confine constitutional rights to natural persons—a move that would put the independent press and other expressive institutions in jeopardy.⁵

For my own part, progressives dismayed by the justices' creation of corporate rights pay too little attention to their treatment of the claims corporations raise in litigation, typically claims that limits on commercial activities are unconstitutional or that enforcement officers misread regulatory statutes. Yet that is where the Supreme Court has done its worst in recent years. Instead of complaining that the Court recognizes corporate rights that (in some way or other) figure in corporate lawsuits, we should object that the Court so often gets the merits wrong. If restrictions on business behavior (including advertising) should be upheld against due process attack, it is not because corporations are not persons and so are not entitled to due process. It is because commercial regulation does not deny due process to anyone. Besides, the issues in which corporations are interested reach the Court in other forms. The constitutional claim in *Lochner* was raised by an individual criminal defendant;⁶ suits challenging the implementation of federal environmental and social welfare statutes are frequently pressed by recalcitrant states.

Most important, in my view, focusing on corporate rights neglects more salient aspects of corporate America. For now, Winkler does not stray beyond his topic. Perhaps in his next book he will examine other explanations for corporations' dominant position in this system, among them perpetual life and limited shareholder liability. And, of course, Milton Friedman's creed that corporations are duty-bound to advance the interests of shareholders to the exclusion of virtually anything else.⁷ You know the drill. The task set before corporate managers is as simple to state as it is tragic to endure: keep stock prices

³ See KENT GREENFIELD, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018).

⁴ S.J. Res. 5, H.J. Res. 22, 114th Cong. (2015).

⁵ H.J. Res. 48, 115th Cong. (2017).

⁶ *Lochner v. New York*, 198 U.S. 45, 52 (1905).

⁷ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

up every quarter. Which pleases both shareholders and managers themselves (whose personal income is invariably tied to stock values). Nothing else matters; nothing else can matter. Not the interests of employees. Not public welfare now or in the future. Not food, clothing, and shelter for the citizenry at large. Not breathable air and drinkable water. Not health care, education, or the arts. And certainly not the consequences of corporate activities for climate change or, indeed, the long-run survival of the earth and its inhabitants. By contrast, corporations routinely cripple the pursuit of societal desiderata. They extract and burn ever more carbon fuel; they fill our roads with gas gulping SUVs and our bodies with junk food and sugary drinks slurped up in plastic straws. Corporations do these dreadful things, all the while marshalling their enormous resources to persuade us that we should applaud their efforts—because they serve the one interest to which all other interests are reduced: the current price of common stock.

You will say this may be true, if exaggerated. But there is no alternative. Nothing motivates humans like avarice. No attempt to reorganize our economic system around public-regarding goals could be successful. Moreover, corporations' pursuit of shareholder value has spillover effects. Corporations press for private gain to raise capital, which enables their own growth, which generates growth of the economy as a whole, which produces general prosperity by indirection. This is why greed is good—because it yields public benefit as a by-product. To adopt any other arrangement would be to abandon private enterprise, to forsake capitalism itself. And that we cannot do. For beyond capitalism there be dragons. Or so we are told.

But it ain't necessarily so. Knowledgeable critics contest the Friedman thesis. In economics, the rising tide does not raise all boats. Wealth at the top tends to stick there. Steven Brill sketches some of the reasons why: speculation based on NASDAQ numbers, hedge fund machinations, stock buybacks.⁸ Moreover, there are alternatives. Greenfield and others propose quite different models for corporate behavior, at least ways to adjust the legal baseline from which corporations operate. Socialists of various shades would make more fundamental changes. What's more, the argument that corporations must be allowed to carry on as they are loops back on itself. Climate change alone refutes the notion that our future depends on growth that only carbon combustion can provide. Business as usual will destroy us and the planet beneath our feet.

Julian West, the protagonist in Edward Bellamy's *Looking Backward*, places himself in a trance in hopes of getting some sleep one night in 1887.⁹ Things go wrong, he is not revived next morning as planned, but, instead, is awakened 113 years later. West then finds himself in a utopian state in which the national government controls both production and distribution (free from the oppression and inefficiency of a Soviet-style command economy). Everyone receives the

⁸ STEVEN BRILL, *TAILSPIN: THE PEOPLE AND FORCES BEHIND AMERICA'S FIFTY-YEAR FALL—AND THOSE FIGHTING TO REVERSE IT* (2018).

⁹ EDWARD BELLAMY, *LOOKING BACKWARD 2000-1887* (1888).

same ample income, waste is all but eliminated, and surpluses are willingly devoted to institutions and programs that foster both collective comforts and individual autonomy.

Impressed by this new world, West asks why people in his own time failed to appreciate the madness of entrusting public welfare to corporations seeking only private profit. A Mr. Barton provides the answer. Even after people in the Gilded Age realized the wanton savagery of their economic structure, they nonetheless believed that “the only stable elements in human nature, on which a social system could be safely founded, were its worst propensities.”¹⁰ They believed that “greed and self-seeking were all that held mankind together, and that all human associations would fall to pieces if anything were done to blunt the edge of these motives or curb their operation.”¹¹ They genuinely thought that “the evolution of humanity” had led to “a *cul de sac*, and that there was no way of getting forward.”¹²

In Bellamy’s novel, Americans in 2000 had long since escaped this suicidal thinking. Bellamy himself professed to believe that life would follow fiction. Yet here we are nearly a century and a half later, still committed to business arrangements we know are ruinous.

¹⁰ *Id.* at 282.

¹¹ *Id.*

¹² *Id.* at 283.