
BOOK REVIEW

CORPORATE PERSONHOOD V.
CORPORATE STATEHOOD

WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS. By Adam Winkler. New York, N.Y.: W.W. Norton & Co. 2018. Pp. xxiv, 471. \$28.95.

*Reviewed by Nikolas Bowie**

In 2011, at the Iowa State Fair, presidential candidate Mitt Romney gave a pitch for why fairgoers should support him in the upcoming caucuses.¹ As an audience milled around him munching on fried snacks, Romney promised to be responsible. “We have to make sure that the promises we make in Social Security, Medicaid, and Medicare are promises we can keep, and there are various ways of doing that,” he said. “One is we could raise taxes on people — ”²

Before he could continue, Romney was interrupted by a heckler who had his own idea of who should pay down the nation’s financial obligations: “Corporations!”³ Romney flashed a smile. “Corporations are people, my friend,” he said.⁴ When another audience member responded with a fact — “No, they’re not” — Romney persisted.⁵ “Of course they are,” he said.⁶ “Everything corporations earn ultimately goes to people. Where do you think it goes?”⁷ This answer prompted the first heckler to erupt into a belly laugh while a third responded, “It goes into their pockets!”⁸ At this point, Romney glowed with the triumph of a law professor giving the closing blow of a Socratic dialogue. “Whose pockets? People’s pockets!” he said before returning to entitlements.⁹

As soon as his remarks hit YouTube, Romney’s “corporations are people” comment was ridiculed as an inept defense of *corporate personhood*: the idea that corporations deserve the same legal rights as human

* Assistant Professor of Law, Harvard Law School.

¹ Ashley Parker, “Corporations Are People,” *Romney Tells Iowa Hecklers Angry over His Tax Policy*, N.Y. TIMES (Aug. 11, 2011), <https://nyti.ms/2vKK5JN> [<https://perma.cc/9LDT-2QX7>].

² CNN, *Romney: Corporations Are People Too* at 00:30, YOUTUBE (Aug. 12, 2011), <https://www.youtube.com/watch?v=FxUsRedO4UY> [<https://perma.cc/5FXB-9RXS>].

³ *Id.* at 00:40.

⁴ *Id.* at 00:42.

⁵ *Id.* at 00:44.

⁶ *Id.* at 00:45.

⁷ *Id.* at 00:46.

⁸ *Id.* at 00:52.

⁹ *Id.* at 00:54.

beings.¹⁰ Although the idea is older than the country Romney was running to lead,¹¹ recent events had made it newsworthy. One year before the candidate's Iowa appearance, in *Citizens United v. FEC*,¹² the U.S. Supreme Court had issued an opinion striking down a federal ban on corporate political expenditures.¹³ Like Romney's remarks, the decision had been interpreted as holding that "[c]orporations are people, with rights"¹⁴ — specifically, the First Amendment right to speak.¹⁵ And just as Justice Thomas's 1991 confirmation hearings once inaugurated the Year of the Woman,¹⁶ *Citizens United* inaugurated the Year of the Corporate Person.¹⁷

A few months before Romney's remarks, for example, lawyers for AT&T stood before the Supreme Court and argued that their client — and not just its customers — had a right to "personal privacy."¹⁸ The Supreme Court ultimately disagreed, quipping: "We trust that AT&T will not take it personally."¹⁹ But AT&T's lawyers were far from the only people in 2011 who interpreted *Citizens United* as a decision equating corporate rights with human rights.²⁰ Later that year, voters in Missoula, Montana, and other cities passed resolutions declaring that "corporations are not human beings."²¹ Nonprofit organizations involved in grassroots activism published reports with names like "Ten

¹⁰ See, e.g., Maureen Dowd, *Power to the Corporation!*, N.Y. TIMES, Aug. 14, 2011, at SR11; Robert Kinerk, *Corporations Are People*, N.Y. TIMES, Aug. 13, 2011, at A18; Editorial, "*Super Committee*" Doesn't Speak for Us, PHILA. TRIB., Aug. 21, 2011, at 10A.

¹¹ See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *467–69.

¹² 558 U.S. 310 (2010).

¹³ *Id.* at 372.

¹⁴ Clarence Page, *Court: Corporations Are People, with Rights*, PHILA. TRIB., Jan. 31, 2010, at 4A.

¹⁵ See, e.g., *Citizens United*, 558 U.S. at 394, 466 (Stevens, J., concurring in part and dissenting in part); Erwin Chemerinsky, *The Most Important Decision of the Term*, TRIAL, May 2010, at 54; Press Release, Senator Christopher S. Dodd, Sen. Dodd Introduces Constitutional Amendment to Reverse Supreme Court Campaign Fin. Ruling (Feb. 24, 2010) (2010 WLNR 3913103).

¹⁶ Jill Abramson, *Women's Anger About Hill-Thomas Hearings Has Brought Cash into Female Political Causes*, WALL ST. J., Jan. 6, 1992, at A16; Richard L. Berke, *The Year of the Woman: With Outsiders In, Female Candidates Come Forward*, N.Y. TIMES, Apr. 30, 1992, at A1.

¹⁷ Instead of women running for office with slogans like "women's rights are human rights," however, corporations seemed to be running campaigns with the message that "corporations are people, too." See, e.g., John Wagner, "*Candidate*" Is Just Not a People Person, WASH. POST, Mar. 13, 2010, at A1, A9; see also Nicholas Confessore, *Lines Blur Between Candidates and PACs with Unlimited Cash*, N.Y. TIMES, Aug. 28, 2011, at A1, A4.

¹⁸ Transcript of Oral Argument at 23, *FCC v. AT&T Inc.*, 562 U.S. 397 (2011) (No. 09-1279), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2010/09-1279.pdf [https://perma.cc/5JS3-BYHT].

¹⁹ *AT&T Inc.*, 562 U.S. at 410.

²⁰ See Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 212–13 (2011).

²¹ Keila Szpaller, *Missoula Voters Say Corporations Are Not People, Ask for Constitutional Amendment*, MISSOULIAN (Nov. 9, 2011), <https://missoulian.com/news/local/missoula-voters-say->

Things You Can Do to Abolish Corporate Personhood.”²² Senator Bernie Sanders even proposed the first constitutional amendment of his career, one that promised to “reverse the narrow 5-to-4 ruling in *Citizens United*.”²³ It would declare that “[t]he rights protected by the Constitution of the United States are the rights of natural persons and do not extend to for-profit corporations.”²⁴

Enter Mitt Romney. After his remarks, Romney was pilloried for his apparent inability to distinguish a human from Humana.²⁵ For the remainder of his presidential run, his sound bite was repeated again and again as a classic example of someone who had drunk the *Citizens United* Kool-Aid and believed that corporations were no different from individuals.²⁶

But that interpretation of Romney’s remarks was wrong. As the full dialogue makes clear, Romney didn’t mean that corporations are literally people. Romney was arguing that corporations are *groups of people* — and that to tax corporations was the same thing as taxing the individuals “whose pockets” funded them.²⁷ From Romney’s perspective, the hecklers couldn’t avoid burdening real-life people by taxing fictitious ones. It was precisely because corporations are *not* real people that Romney believed they shouldn’t be treated as if they were independent of the humans who ultimately pay their bills.²⁸

This sort of “but actually” about the role that corporate personhood plays in arguments about corporate rights is the central theme of Professor Adam Winkler’s wonderful recent book, *We the Corporations*. Corporate rights decisions such as *Citizens United* have often been interpreted as victories for the idea that corporations are rights-bearing

corporations-are-not-people-ask-for-constitutional/article_f9of0fo6-0a8b-11e1-99bf-001cc4c002e0.html [https://perma.cc/XV4U-TK56].

²² Ripken, *supra* note 20, at 230 & n.93.

²³ Press Release, Senator Bernie Sanders, Saving American Democracy Amendment (Dec. 8, 2011), <https://www.sanders.senate.gov/newsroom/recent-business/saving-american-democracy-amendment> [https://perma.cc/H59S-4BP6].

²⁴ S.J. Res. 33, 112th Cong. § 1 (2011).

²⁵ See, e.g., Scott Adams, *Notable & Quotable*, WALL ST. J., Sept. 26, 2011, at A17; Karen Tumulty & Jia Lynn Yang, *Romney’s “Real Economy” Is Unfamiliar to Most*, WASH. POST, Sept. 5, 2011, at A1, A4; Paul Waldman, *How the Media Turns a Mistake into a Gaffe*, WASH. POST, Aug. 14, 2011, at B3.

²⁶ See, e.g., Barack Obama (@BarackObama), TWITTER (May 5, 2012, 10:33 AM), <https://twitter.com/barackobama/status/198827771844247552> [https://perma.cc/J3PK-LZX6] (“I don’t care how many ways you try to explain it: Corporations aren’t people. People are people.”); Colbert Report, *Colbert Super PAC — Mitt Romney Attack Ad*, COMEDY CENTRAL (Jan. 16, 2012), <http://www.cc.com/video-clips/buf78z/the-colbert-report-colbert-super-pac---mitt-romney-attack-ad> [https://perma.cc/5FXB-9RXS].

²⁷ Ashley Parker, *Romney Stands by Corporations Remarks*, N.Y. TIMES, Aug. 25, 2011, at A17.

²⁸ Philip Rucker, *Romney Loses GOP Front-Runner Status*, WASH. POST, Aug. 25, 2011, at A2.

people (p. xx). But actually, Winkler shows, corporate lawyers throughout American history have been like Romney (p. 378). They've convinced the Supreme Court that "[a] corporation is a mere collection of men";²⁹ an "association[] of individuals";³⁰ a "democracy . . . [of] shareholders"³¹ — not a person itself — and that corporations deserve legal rights because those rights ultimately protect the corporations' real-life constituents (pp. xiii–xxiv). In virtually every seminal corporate rights case — including *Trustees of Dartmouth College v. Woodward*,³² *Santa Clara County v. Southern Pacific Railroad Co.*,³³ *NAACP v. Alabama ex rel. Patterson*,³⁴ *First National Bank of Boston v. Bellotti*,³⁵ and even *Citizens United* — corporate lawyers have argued that their clients should be understood as collections of real-life people whose rights (and pockets) the Court should protect (pp. 83–84, 145, 308–09, 364).

Ironically, Winkler notes, it has been these corporations' opponents who have argued that corporations are legal persons distinct from their rights-bearing members (pp. 75, 107–09). That is, supporters of corporate personhood have usually been like Romney's hecklers: populists who want to restrain corporate power by treating corporations as legal persons that pay their own taxes and have their own, limited rights (pp. 101–02). Although Winkler doesn't offer any explicit takeaways from this irony, he implies that Senator Bernie Sanders and other opponents of corporate power might be doing themselves a disservice by arguing against the idea of corporate personhood (pp. 375–76). "Over the course of American history, corporate personhood has *not* led to expansive constitutional protections," Winkler concludes (p. 387). "In fact, when the Supreme Court has broken from its usual pattern and treated a corporation as a truly separate legal person with distinct rights of its own, the result has usually been more limited rights for business" (p. 387).

Winkler arrives at this conclusion after a historical narrative that is insightful, filled with memorable characters, and enjoyable to read. He convincingly demonstrates how "American businesses won their civil rights" with colorful biographies of the elite corporate lawyers and Supreme Court Justices who collaborated with them to protect the legal power of business executives. Indeed, this narrative is so engaging that

²⁹ *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 65 (1809), *overruled in part by* *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844).

³⁰ *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

³¹ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794–95 (1978).

³² 17 U.S. (4 Wheat.) 518 (1819).

³³ 118 U.S. 394 (1886).

³⁴ 357 U.S. 449 (1958).

³⁵ 435 U.S. 765.

it more than compensates for the one shortcoming of the book: it purports to tell a complete story about a civil rights “movement” with reference only to a handful of Presidents, Supreme Court Justices, and other great men (pp. xvi–xviii).³⁶ It’s no surprise that the only alternative Winkler offers to *Citizens United* involves a change in litigation strategy as opposed to mass mobilization.

But given that the current Supreme Court is often described as the most business-friendly in history,³⁷ it seems unlikely that a tactical shift will fool the Justices. A better solution to the problems unleashed by *Citizens United*, one that doesn’t rely on the Court, might be for reformers to pursue on the streets a more radical vision of Romney’s own understanding of corporations. Romney was right that corporations are, literally, “groups of people”³⁸: institutions whose rules govern how shareholders, workers, directors, executives, creditors, consumers, and other groups can represent and exert power over one another.³⁹ Outside the corporate context, we call these sorts of representative, power-balancing institutions *governments*. And even within the corporate context, corporations are often referred to as “corporate democrac[ies]”⁴⁰: a form of government in which elected directors, theoretically, express the will of their constituents.⁴¹

³⁶ The main characters of the book include John Winthrop (p. 21), Alexander Hamilton (p. xxi), President Thomas Jefferson (p. xxiii), Horace Binney (p. xxii), Chief Justice John Marshall (p. xix), Daniel Webster (p. xxii), Chief Justice Taney (p. xix), Roscoe Conkling (p. xii), Justice Field (p. xix), President Theodore Roosevelt (p. xxiii), Justice Brandeis (p. 192), Justice Stone (p. 231), Huey Long (p. xxiii), Justice Thurgood Marshall (p. xxii), Justice Harlan II (p. 272), Ralph Nader (p. xxiii), Justice Powell (p. 16), James Bopp (p. 325), and Theodore Olson (p. xxii). Cf. 1 FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II*, at 21 (Siân Reynolds trans., 1972) (criticizing “traditional history — history, one might say, on the scale not of man, but of individual men,” as the history of “surface disturbances, crests of foam that the tides of history carry on their strong backs”). For excellent histories of corporate rights that don’t focus on the Supreme Court, see, for example, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* (2003); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996); KIM PHILLIPS-FEIN, *INVISIBLE HANDS: THE BUSINESSMEN’S CRUSADE AGAINST THE NEW DEAL* (2009).

³⁷ See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1431–32 (2013); see also Matthew Goldstein, *Brett Kavanaugh Likely to Bring Pro-Business Views to Supreme Court*, N.Y. TIMES (July 10, 2018), <https://nyti.ms/2KQkOdJ> [<https://perma.cc/J8SW-4WF8>].

³⁸ Rucker, *supra* note 28, at A2 (quoting Romney).

³⁹ See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 138–40 (1933); LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 7–8 (1914).

⁴⁰ *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (quoting *Bellotti*, 435 U.S. at 794).

⁴¹ *Id.*; see also Bayless Manning, Book Review, 67 YALE L.J. 1477, 1489 (1958) (reviewing J.A. LIVINGSTON, *THE AMERICAN STOCKHOLDER* (1958)).

But if corporations are governments — groups of people — whose rights are protected because they represent rights-bearing constituents, they rarely embody the norms we expect of other governments in the twenty-first century. Rather, corporate governments today often look like the governments of a bygone era. Americans long ago rejected the idea that only people who own property should be allowed to vote for representatives — yet most business corporations operate under a principle of one-share, one-vote.⁴² Americans have also rejected the idea that women, people of color, and other groups that contribute to the country’s welfare should be denied the right to vote — yet few corporations allow workers, consumers, or even shareholders to vote on which political causes their corporation will support.⁴³

So rather than respond to cases like *Citizens United* by learning to stop worrying and love the corporate person, perhaps opponents of corporate power should fight to apply the same norms to corporate governments that we expect of other democratic governments. The first Part of this Review describes the role of what Winkler calls the “*association*” theory (p. xx) — and what I call *corporate statehood* — in the development of corporate rights. The second Part offers a historical episode to complement Winkler’s focus on the Court, describing a moment when a popular movement attempted to expand the constituency that these corporate states purported to represent. During the *Lochner* era, workers and progressive reformers used strikes, boycotts, muckraking, and other extralegal tools to convert the typical corporation into an “industrial democracy” — to win reforms that were unavailable in the courts.⁴⁴ As then-activist Louis D. Brandeis wrote at the time: “The American people have as little need of oligarchy in business as in politics.”⁴⁵ The example of *Lochner*-era mobilization shows that the alternative to corporate statehood isn’t necessarily corporate personhood. It might be advocacy that brings corporate governments into the American fold.

⁴² See HOLGER SPAMANN, CORPORATIONS § 2.1, at 29 (2017); cf. *Violence and Democracy*, 100 THE OUTLOOK 352, 352–53 (1912) (“We call our Government democratic: and so it is, substantially. . . . But when we turn to the processes of industry . . . power is exerted by an oligarchy that controls capital . . .”).

⁴³ Cf. *The Lawrence Strike: A Review*, 100 THE OUTLOOK 531, 536 (1912) (“The conditions under which workers in an industry are not allowed to have anything to say in regard to their conditions of work or their wages are undemocratic . . .”).

⁴⁴ *Id.*

⁴⁵ BRANDEIS, *supra* note 39, at 207–08.

I. THE CORPORATE PERSON: A BIOGRAPHY

A. *The Transition from Public to Private*

One of the most unappreciated facts of American history is that most of the colonies that declared independence in 1776 were founded by corporations.⁴⁶ Trading corporations such as the Virginia Company of London recruited investors for the first Protestant explorers.⁴⁷ The Massachusetts Bay Company and other colonial corporations crossed the Atlantic on the first colonists' ships.⁴⁸ When these corporations disembarked, they then served as the colonies' first governments.⁴⁹ Virginia, Massachusetts, Delaware, New York, Connecticut, Rhode Island, and Georgia all began their histories as colonies governed by, and sometimes for, corporations.⁵⁰ As the Dutch governor of Manhattan allegedly promised residents in 1647, "I shall govern you as a father his children, for the advantage of the chartered West India Company."⁵¹

Corporations didn't disappear with the American Revolution, of course. Immediately after the colonies declared independence, their new governments modeled their new written constitutions on the old charters they inherited from their corporate predecessors — if they bothered to change their charters at all.⁵² Even though the U.S. Constitution didn't mention corporations, members of all three of the federal government's branches considered the power of incorporation such an inherent feature of sovereignty that they authorized Congress to charter corporations as the Constitution's first implied power.⁵³ States did the same, passing laws to incorporate local governments like the City of Baltimore, schools like the University of Pennsylvania, central banks like the Bank of New

⁴⁶ See Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. (forthcoming June 2019) (manuscript at 4) (on file with the Harvard Law School Library).

⁴⁷ See 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY* 98 (1934).

⁴⁸ See Bowie, *supra* note 46 (manuscript at 11–19).

⁴⁹ See *id.* (manuscript at 5–6).

⁵⁰ See generally 1 ANDREWS, *supra* note 47; JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1917); JAAP JACOBS, *THE COLONY OF NEW NETHERLAND* (2009); *NEW SWEDEN IN AMERICA* (Carol E. Hoffecker et al. eds., 1995); PAUL M. PRESSLY, *ON THE RIM OF THE CARIBBEAN: COLONIAL GEORGIA AND THE BRITISH ATLANTIC NEW WORLD* (2013).

⁵¹ 4 FREDERICK ROBERTSON JONES, *THE HISTORY OF NORTH AMERICA* 93 (Guy Carleton Lee ed., 1904).

⁵² See Bowie, *supra* note 46 (manuscript at 86–88). See generally Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006). Connecticut and Rhode Island retained their seventeenth-century corporate charters as their constitutions well into the nineteenth century. See *id.* at 556 n.293.

⁵³ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421–22 (1819); Act of Feb. 25, 1791, ch. 10, 1 Stat. 191 (authorizing incorporation of the Bank of the United States); Alexander Hamilton, Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank (Feb. 23, 1791), in 8 *THE PAPERS OF ALEXANDER HAMILTON* 97, 100 (Harold C. Syrett et al. eds., 1965).

York, infrastructure projects like the Pennsylvania Railroad, health and welfare agencies like the Massachusetts General Hospital, and every other service that the public demanded but which state legislatures didn't have enough resources or time to finance or manage directly.⁵⁴ Corporations were the nation's original administrative agencies, its original provincial legislatures, its original public-private partnerships — its original governmental institutions. "The United States of America will be admitted to be a corporation," wrote the country's first Supreme Court Justices.⁵⁵ Its early encyclopedias agreed: "All the American governments are corporations created by charters, viz. their constitutions."⁵⁶

Winkler begins his narrative with a handful of these early corporations, including the Massachusetts Bay Company (p. 19), the Bank of the United States (p. 52), and Dartmouth College (pp. 75–76). All of these corporations functioned internally as governments and externally as agencies for larger governments. The Massachusetts Bay Company was, literally, the government of seventeenth-century Massachusetts: its chief executive was the colony's "governor," its board of directors was the colony's legislature, and both were elected by shareholders, who were the colony's only voting constituents (pp. 19–25). Although the company was dissolved before the Revolution, its corporate structure continued to guide not only the states that declared independence but

⁵⁴ For a sampling of the many histories about early American corporations, see generally SEAN PATRICK ADAMS, *OLD DOMINION, INDUSTRIAL COMMONWEALTH* (2004); CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800–1890* (1960); OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH* (1947); LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776–1860* (1948); HORWITZ, *supra* note 36; HARRY N. SCHEIBER, *OHIO CANAL ERA* (1968); ANDREW M. SCHOCKET, *FOUNDING CORPORATE POWER IN EARLY NATIONAL PHILADELPHIA* (2007); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 *J. ECON. HIST.* 1 (1945); and Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *WM. & MARY Q.* 51 (1993). Several of these works specifically discuss the early American corporations listed in the text above. See, e.g., GOODRICH, *supra*, at 71–74 (Pennsylvania Railroad Company); HANDLIN & HANDLIN, *supra*, at 140 (Massachusetts General Hospital); Handlin & Handlin, *supra*, at 9–10, 10 n.47 (Bank of New York); Maier, *supra*, at 63–65 (Baltimore, *id.* at 63 n.34, and the University of Pennsylvania, *id.* at 65). There are many context-specific reasons why states used corporations to finance public projects rather than building them directly. One major reason was lack of financial innovations like income taxes, and another was the possibility of bankruptcy, which could threaten an entire state that accepted all of the risk of its investments: indeed, unprofitable canal projects and the Panic of 1837 left Illinois and Pennsylvania, among other states, broke. See WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 64–68 (1991); HARTZ, *supra*, at 161–62.

⁵⁵ *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (No. 3934) (Marshall, J.); see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 468 (1793) (opinion of Cushing, J.) ("[A]ll States whatever are corporations or bodies politic."); James Wilson, *Considerations on the Bank of North America* (1785), in 1 *COLLECTED WORKS OF JAMES WILSON* 60, 67 (Kermit L. Hall & Mark David Hall eds., 2007) ("States are corporations . . . of the most important and dignified kind.")

⁵⁶ 3 *ENCYCLOPAEDIA AMERICANA* 547 (Philadelphia, Francis Lieber ed., 1830).

also the business and educational corporations that followed in its footsteps (p. 31). Two of those corporations were the Bank of the United States and Dartmouth College. Even though neither oversaw any territory, they had a similar governmental structure — with elected board members representing shareholders or other constituents — and were also literally government agencies (pp. 35–36, 76–77). In *McCulloch v. Maryland*,⁵⁷ for example, the Supreme Court held that Maryland’s tax on the Bank’s officers was no different from a tax on the federal government.⁵⁸ And in the lead-up to *Dartmouth College v. Woodward*, the legislature of New Hampshire treated Dartmouth as if it were any other public school (pp. 77–79).

Over the course of *We the Corporations*, however, Winkler explains how the lawyers for the Bank, the university, and similar corporations convinced courts to award their clients legal protections from interference by the governments that created them. Winkler demonstrates that by the late nineteenth century, the Supreme Court had held consistently that the same constitutional provisions protecting individuals from government power also protected corporations from government power (pp. 157–58). In this respect, Winkler observes, more recent cases such as *Citizens United* have been “the culmination of a two-hundred-year struggle for constitutional rights for corporations” (p. 369). The corporation — an institution that began its history as a literal government — has grown up to assert rights against it.

B. Corporate Personhood v. Corporate Statehood

How did this happen? In contrast with other historians who’ve answered this question with reference to state courts, legislation, corruption, advertising, and commercial innovations,⁵⁹ Winkler’s book focuses

⁵⁷ 17 U.S. (4 Wheat.) 316.

⁵⁸ *Id.* at 436–37.

⁵⁹ See, e.g., CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS 332–429 (Boston, James R. Osgood & Co. 1871); ALFRED D. CHANDLER, JR., THE VISIBLE HAND 285–314, 455–500 (1977); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 129–39 (3d ed. 2005); HORWITZ, *supra* note 36, at 111–14; JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970, at 58–154 (1970); NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904, at 1–13, 159–94 (1985); RALPH L. NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956, at 5–7, 33–40 (1959); Alfred D. Chandler, Jr., *The Beginnings of “Big Business” in American Industry*, 33 BUS. HIST. REV. 1, 10–14 (1959); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1640–49 (1988). See generally RONALD SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855 (1982). Of course, not all corporations made this transition; municipal corporations became even more heavily regulated during this period. See GERALD E. FRUG, CITY MAKING 32–53 (1999); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at

exclusively on arguments before the Supreme Court (p. xviii). Although this focus may seem a little parochial to nonlawyers, it allows Winkler to correct a common misunderstanding — the one that has proliferated since the Year of the Corporate Person — about how lawyers have won constitutional rights for corporations.

As Winkler observes: “Many critics of *Citizens United* believe that corporations have the same rights as individuals because the Supreme Court defines them as *people*” (p. xx) — in other words, that corporate lawyers gained constitutional rights for their clients by taking advantage of a common law doctrine called *corporate personhood*.⁶⁰ This doctrine, which is centuries old, holds that corporations are “legal persons” who can sue or be sued, own property, or enter into contracts as if they were human beings (p. 50).⁶¹ During the nineteenth century, the popular story goes, corporate lawyers argued that corporations, as legal persons, should be allowed to invoke constitutional provisions such as the Fourteenth Amendment, which prohibits states from depriving “any person” of “the equal protection of the laws” or of “life, liberty, or property, without due process of law.”⁶²

But this belief does not tell the whole story: “While the Supreme Court has on occasion said that corporations are people, the justices have more often relied upon a very different conception of the corporation, one that views it as an *association* capable of asserting the rights of its members” (p. xx). Closely analyzing the arguments of the advocates who represented the Bank of the United States, Dartmouth College, and other corporations before the Supreme Court, Winkler persuasively and colorfully argues that these lawyers won rights for their

179–258 (1983). Even today, some for-profit corporations are so closely identified with their government of creation that constitutional limits apply to the corporation as well. *See, e.g.*, *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1228 (2015) (discussing Amtrak); *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 103 A.3d 249, 251 (N.J. 2014) (discussing the corporate owner of a high-rise apartment building).

⁶⁰ *See, e.g.*, Lyle Denniston, *A Constitutional Agenda for the “Occupy” Protesters*, CONST. DAILY (Oct. 27, 2011), <https://constitutioncenter.org/blog/a-constitutional-agenda-for-the-occupy-protesters> [<https://perma.cc/3Q7W-BB26>]; Stephen F. Diamond, *Occupy Santa Clara! Corporate Personhood Reconsidered*, DISSENT (Apr. 4, 2012), https://www.dissentmagazine.org/online_articles/occupy-santa-clara-corporate-personhood-reconsidered [<https://perma.cc/2MMF-6HKC>]; Ryan Grim & Mike Sacks, *Corporate Citizenship: How Public Dissent in Paris Sparked Creation of the Corporate Person*, HUFFINGTON POST (Oct. 12, 2011, 2:18 PM), https://www.huffingtonpost.com/2011/10/12/corporate-citizenship-corporate-personhood-paris-comune_n_1005244.html [<https://perma.cc/K4X2-BDP7>].

⁶¹ *See also* BLACKSTONE, *supra* note 11.

⁶² U.S. CONST. amend. XIV, § 1. Indeed, the Court’s nineteenth-century cases sometimes hinted at this theory. *See, e.g.*, *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26, 28 (1889); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888); *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886).

clients by embracing *corporate statehood*: calling their clients democratic institutions, like the Massachusetts Bay Company, in which elected executives represent shareholding, rights-bearing constituents.

In 1809, for example, lawyers for the Bank of the United States made this sort of argument to explain why the Supreme Court should protect their client from a passionate Georgia tax collector (p. 57). The tiff began shortly after Congress chartered the Bank both as a federal agency to regulate the country's money supply and as a modern financial corporation with publicly traded shares, an elected board of directors, and a secondary purpose of making money (pp. 35, 39). In keeping with both missions, the Bank's directors opened a branch in Savannah — sparking the immediate disapproval of Georgia lawmakers who didn't like either federal interference or out-of-state bankers (pp. 40–41). Although the Supremacy Clause of the U.S. Constitution⁶³ prohibited the state lawmakers from flat-out forbidding the federal agency from operating there, the lawmakers got around this problem by imposing a tax on the Bank — a tax that the Bank's directors refused to pay (pp. 40–41). Eventually, a Georgia tax collector named Peter Deveaux broke the impasse by storming the Bank's Savannah branch and carting off two boxes of silver coins (p. 41). The Bank's lawyers counterattacked by storming into federal court (pp. 41–42).

When *Bank of United States v. Deveaux*⁶⁴ reached the Supreme Court, the principal question wasn't whether the state had the power to tax the federally chartered bank — a question the Court wouldn't decide until *McCulloch v. Maryland* a decade later.⁶⁵ Rather, the question was whether the Court even had the power to hear the case.⁶⁶ Article III of the U.S. Constitution specifies what kinds of “Cases” and “Controversies” federal courts may decide,⁶⁷ and “controversies involving banks” wasn't listed there. Instead, the only language in Article III applicable to the Bank's case gave federal courts power to hear “Controversies . . . between a State and Citizens of another State” or “between Citizens of different States.”⁶⁸ Peter Deveaux was, indisputably, a proud citizen of Georgia. But his lawyers disputed whether the Bank of the United States — a corporation — was a “Citizen” of some other state (p. 53).

⁶³ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁶⁴ 9 U.S. (5 Cranch) 61 (1809).

⁶⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

⁶⁶ 9 U.S. (5 Cranch) at 63.

⁶⁷ U.S. CONST. art. III, § 2, cl. 1.

⁶⁸ *Id.*; see also An Act to Establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73, 78 (1789) (granting federal courts diversity jurisdiction but not federal question jurisdiction).

It wouldn't have been outrageous for the Bank's lawyers to argue that the Bank was a corporate person, Winkler writes (p. 53). Just as Americans today might speak of a Delaware corporation or a New York corporation, the Bank's lawyers "could possibly have argued that corporations were citizens because they enjoyed many of the characteristic features of citizenship" (p. 53). After all, the Bank's headquarters were in Philadelphia, so as a legal person the Bank presumably would have been a "Citizen" of Pennsylvania (p. 41). But instead, the Bank's lawyers framed the question before the Court as "[w]hether a body politic, composed exclusively of citizens of one state, can sue a citizen of another state" in a federal court.⁶⁹ Rather than argue that the corporation itself was a person, they argued that the corporation was nothing more than "a collection of many individuals united into one body, under a special name,"⁷⁰ and that these individuals didn't forfeit their *own* citizenship merely because they decided to join a corporation.⁷¹ Asking the Court to look past the corporate identity of their client, the lawyers argued that "[t]he spirit of the Constitution and laws of the United States, demands that the citizenship of the members of a corporation should be noticed in order to decide the question of jurisdiction, as well as for other purposes."⁷² In other words, Winkler writes, the Bank's lawyers argued that the people "who formed, ran, and financed the corporation were ordinary human beings entitled to all the rights provided in the Constitution. They undeniably were citizens, and Article III was written to protect their rights" (p. 54).

The lawyers for Georgia not only found this argument ridiculous, but also thought it contradicted the common law doctrine of corporate personhood. That doctrine was what gave the corporation the power to sue Deveaux in its own name, and it was the reason the case was called *Bank of the United States v. Deveaux* as opposed to *Every Single Shareholder, Director, and/or Employee of the Bank of the United States, Collectively v. Deveaux*.⁷³ "[T]he suit is brought in the corporate name," the Georgians complained.⁷⁴ "The corporation is the plaintiff, and it is absurd and impossible to say that a corporation aggregate is a citizen or citizens."⁷⁵ Just as Congress formed the corporation precisely because it had legal rights and powers that its shareholders individually lacked,⁷⁶

⁶⁹ 9 U.S. (5 Cranch) at 63.

⁷⁰ *Id.* at 64.

⁷¹ *Id.* at 64–65.

⁷² *Id.* at 67.

⁷³ *See id.* at 74–75.

⁷⁴ *Id.* at 74.

⁷⁵ *Id.* at 74–75.

⁷⁶ *Id.* at 73.

“the individuals who compose the society”⁷⁷ had allegiances different from those of the Bank (pp. 59–60).

These two competing arguments form the pattern that continues for the rest of Winkler’s book (pp. 61–62, 67). Corporate lawyers, seeing words like “person” and “Citizens” in the U.S. Constitution, argued that their corporate clients were *groups of persons*, *associations of citizens*, and *bodies politic of Americans*, and that they were entitled to the Constitution’s protections even as they cooperated in a corporate enterprise. State lawyers, baffled at how a corporation could claim to be its own person for purposes of debt and liability but claim to be lots of persons for purposes of constitutional rights, argued that corporations were *legal persons* whose rights and obligations were distinct from those of its human members. These two arguments aren’t inherently contradictory; the “United States” is both an assembly of millions of citizens as well as an international actor with its own legal obligations. But the arguments often led to contrasting results. Arguments rooted in *corporate statehood* emphasized the representative relationship between a corporation’s “members” and its elected directors to explain why the directors should be allowed to make decisions, spend money, and do all sorts of other things under the aegis of their members’ constitutional rights (pp. 67–68). Arguments rooted in *corporate personhood*, by contrast, emphasized the unitary nature of the corporation to highlight the absurdity of giving a legal fiction the same rights as a human being.

After listening to competing arguments in, “of all places, a pub” (p. 57), the Supreme Court embraced the statehood theory. Although Chief Justice Marshall agreed with the Georgians that the bank was “certainly not a citizen”⁷⁸ when considered as an “invisible, incorporeal creature of the law,”⁷⁹ he took this point to mean that in considering whether the bank had legal rights, he should look not to the corporation itself but “to the character of the individuals who compose the corporation” (p. 65).⁸⁰ If these individuals were all citizens of other states, Chief Justice Marshall wrote, then they shouldn’t lose their right to sue in federal court by a declaration “that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.”⁸¹ In this case, he concluded, “the corporate name represents persons who are members of the corporation,” and these members were “the real persons who come into court . . . under their corporate name.”⁸²

Summarizing the *Deveaux* case, Winkler writes that “allowing a corporation to claim the rights of its members[] would be the conceptual

⁷⁷ *Id.* at 75.

⁷⁸ *Id.* at 86.

⁷⁹ *Id.* at 89.

⁸⁰ *Id.* at 92; *see id.* at 86–92.

⁸¹ *Id.* at 91.

⁸² *Id.*

tool the Court would use to justify the extension of a wide variety of constitutional rights to corporations” (p. 68). In 1819’s *Trustees of Dartmouth College v. Woodward*, for example — a case about whether Dartmouth College was a state agency or a constitutionally protected “private” entity — the Supreme Court looked past the state action that created Dartmouth and concluded that the corporation really “represent[ed]” and “st[ood] in [the] place”⁸³ of the “private individuals”⁸⁴ whose donations first funded it (pp. 77–87).⁸⁵ Similarly, in a series of 1880s railroad cases beginning with *Santa Clara County v. Southern Pacific Railroad Co.*,⁸⁶ the Court held that the Fourteenth Amendment protected corporations because “corporations are merely associations of individuals united for a special purpose” — individuals whose rights would be infringed if the Court denied the corporations the amendment’s protections (p. 155).⁸⁷ In 1958’s *NAACP v. Alabama ex rel. Patterson*, the Warren Court applied the First Amendment to the NAACP because the civil rights corporation was “the medium through which its individual members seek to make more effective the expression of their own views” (pp. 258–59, 273–74).⁸⁸ And in 1978’s *First National Bank of Boston v. Bellotti*, the Court held that the First Amendment equally protected a business corporation, calling it a collection of shareholders who had determined for themselves that “their corporation should engage in debate on public issues” (pp. 319–20).⁸⁹

In sharp contrast, in those cases where the Supreme Court has embraced corporate *personhood*, the principle has traditionally “been used to justify limits on the rights of corporations” (p. xx). Take *Bank of Augusta v. Earle*,⁹⁰ a case that Winkler calls “the first time the Supreme Court ruled explicitly against extending a constitutional right to corporations” (p. 102). The case arose out of the Panic of 1837, which put many people, including Alabama businessman Joseph B. Earle, in severe debt (pp. 99–100). Earle tried to get out of an obligation he owed to the Bank of Augusta, a Georgia corporation, by arguing that Alabama law prohibited certain out-of-state banks from operating there (p. 100).

⁸³ *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 630 (1819).

⁸⁴ *Id.* at 632.

⁸⁵ *Id.* at 632–42 (“[The private donors] are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal.” *Id.* at 642.)

⁸⁶ See *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394 (1886); see also *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26 (1889); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

⁸⁷ The author quotes *Pembina*, 125 U.S. at 189.

⁸⁸ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

⁸⁹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978).

⁹⁰ 38 U.S. (13 Pet.) 519 (1839).

After lower courts agreed with Earle's interpretation of state law, the Georgia bank's lawyers responded that the law violated the Privileges and Immunities Clause of the U.S. Constitution, which prohibits states from discriminating against "Citizens" of other states (p. 100).⁹¹

The bank's lawyers might have assumed that after *Deveaux* they had a surefire case; after all, the Court had already held that corporations were "Citizens" of the states in which their members were citizens (pp. 100–01). But *Deveaux*'s author, Chief Justice Marshall, died a year before the Panic of 1837 and was replaced by a fierce opponent of corporate power (pp. 89–90). Although Chief Justice Taney is most remembered for his racist opinion in *Dred Scott v. Sandford*,⁹² he began his legal career as a populist opponent of the Bank of the United States and the concentration of power it represented.⁹³ As Chief Justice, he refused to "look behind the act of incorporation, and see who are the members of it," but instead treated the Bank of Augusta as "a person[] for certain purposes in contemplation of law" (p. 101),⁹⁴ with rights and obligations distinct from those of its members.⁹⁵

In this way, Chief Justice Taney was able to conclude that the Alabama legislature would be justified in treating the Georgia bank differently from an Alabama corporation even if Alabama wouldn't be justified in treating an ordinary Georgian differently from an Alabamian.⁹⁶ Corporations exist "only in contemplation of law, and by force of the law," Chief Justice Taney wrote; and "where that law ceases to operate, and is no longer obligatory, the corporation can have no existence."⁹⁷ A Georgia corporation could operate in Alabama, therefore, only if Alabama public policy recognized the legitimacy of the Georgia law that created the corporation.⁹⁸ "When the policy of a state is thus manifest, the Courts of the United States would be bound to notice it as a part of its code of laws; and to declare all contracts in the state repugnant to it, to be illegal and void."⁹⁹ The Court ultimately concluded that Alabama public policy didn't clearly exclude the bank, but, as

⁹¹ U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

⁹² 60 U.S. (19 How.) 393 (1857).

⁹³ See HORWITZ, *supra* note 36, at 135–36; see also Roger B. Taney, Speech of Mr. Taney at Elkton, Md. (Sept. 4, 1834), in 47 NILES' WKLY. REG. 97, 106 (1834). Winkler persuasively reasons that one of the issues likely motivating Chief Justice Taney's opposition to corporate rights was his support of slavery: "A definition of 'Citizens' loose enough to include a purely legal person like a corporation might also be broad enough to include slaves, who were after all real, living human beings. And if slaves were citizens, they too would have constitutional rights" (p. 109).

⁹⁴ The author quotes *Earle*, 38 U.S. (13 Pet.) at 586, 588.

⁹⁵ *Earle*, 38 U.S. (13 Pet.) at 586–88.

⁹⁶ *Id.* at 588–91.

⁹⁷ *Id.* at 588.

⁹⁸ *Id.* at 589.

⁹⁹ *Id.* at 597.

Winkler writes, “Taney’s opinion articulated in decisive terms a principle [corporate-rights advocates] abhorred: states had the inherent power to exclude out-of-state corporations from their borders” (p. 103). Here, “personhood served as a limit on the rights of corporations and a basis for distinguishing corporations from ordinary people” (p. 102).

Winkler doesn’t explicitly draw any normative conclusions from these dynamics — even warning readers not to take his book “as an attack on corporate rights” (p. xxiv). But he strongly suggests that either the Supreme Court or a constitutional amendment should embrace corporate personhood (p. 394). Historically, he writes, the principle has led courts to “properly ask[] which rights corporations, as such, should have,” rather than “confound[ing] the rights of the corporation with the rights of the corporation’s members” (p. 388). And “for those today who wish to see the Supreme Court restrict the constitutional rights of corporations,” Winkler adds, the arguments and opinions of Chief Justice Taney offer a surprising model (p. 75).

II. CORPORATE STATEHOOD: AN ALTERNATIVE

Winkler’s proposal — that opponents of corporate power should adopt the metaphor of corporate personhood — makes a lot of sense when the universe of possibility is limited to influencing the Supreme Court. Although Winkler calls his narrative a history of the “corporate rights movement” (p. xviii), it’s a book about a movement that rarely steps outside of the appellate courtroom. As Winkler recognizes, most other civil rights movements have pursued claims of equality through a variety of means, including litigation, direct action, civil disobedience, lobbying, and mass mobilization (p. xvii). But Winkler argues that advocates for corporate rights almost exclusively “pursued and won constitutional protections through the courts, especially the Supreme Court” (p. xviii). “Ronald McDonald and the Pillsbury Doughboy never marched on Washington or protested down Main Street with signs demanding equal rights for corporations,” Winkler writes (pp. xvii–xviii). Rather, “[c]orporate rights were won in courts of law, by judicial rulings extending fundamental protections to business, even in the absence of any national consensus in favor of corporate rights” (p. xviii).

This focus on the Supreme Court is justifiable as a narrative matter. It is less compelling as a historical one. But lots of historians have written about how corporate executives have pursued legal protections

for their enterprises not only by litigating but also through advertising,¹⁰⁰ networking,¹⁰¹ lobbying,¹⁰² warmongering,¹⁰³ bribing,¹⁰⁴ discriminating,¹⁰⁵ suppressing their employees¹⁰⁶ and their political critics,¹⁰⁷ and exploiting the environment.¹⁰⁸ Winkler's choice to focus on litigation adds an important contribution to these histories — highlighting the role that doctrine and metaphor play in corporate executives' accumulation of power over time. But it may also divert readers away from the possibilities of restraining corporate power outside the courtroom. In this Part, I pursue one of these possibilities: that opponents of corporate power could embrace the metaphor of corporate statehood, think of corporations as representative institutions, and fight to make the metaphor true.

A. Corporate Statehood in the Supreme Court

As Winkler observes, corporate statehood, not corporate personhood, has been the dominant metaphor underlying the Supreme Court's corporate rights cases of the past two centuries. Decisions like *First National Bank of Boston v. Bellotti* and *Citizens United* are grounded in the assumption that corporations deserve the protections of their rights-bearing members because the corporations' leaders have been elected in some way to represent those members. But corporate lawyers have rarely described who, exactly, their constituents are — and the

¹⁰⁰ See, e.g., VICTORIA DE GRAZIA, *IRRESISTIBLE EMPIRE* 184–335 (2005) (surveying the roles of advertising and marketing in the accumulation of corporate power); ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA* (1982).

¹⁰¹ See, e.g., LIAQUAT AHMED, *LORDS OF FINANCE* (2009); PHILLIPS-FEIN, *supra* note 36, at 26–67, 185–213.

¹⁰² See generally BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* (1957); IRA KATZNELSON, *FEAR ITSELF* 367–403, 475–84 (2013) (describing the growing influence of lobbyists and private interests in the New Deal era).

¹⁰³ See, e.g., RON CHERNOW, *THE HOUSE OF MORGAN* 183–204 (1990) (documenting the Morgan bank's substantial accumulation of power during World War I); LISA MCGIRR, *SUBURBAN WARRIORS* (2001).

¹⁰⁴ See, e.g., ADAMS & ADAMS, *supra* note 59 (chronicling a long story of bribery in the battle for corporate control of the Erie Railroad); RICHARD WHITE, *RAILROADED* 91–130, 212–16 (2011) (discussing specific instances of bribery within U.S. railroad corporations).

¹⁰⁵ See, e.g., ALICE KESSLER-HARRIS, *OUT TO WORK* (1982) (tracing the history of women's entry into the workforce); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

¹⁰⁶ See generally THOMAS G. ANDREWS, *KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR* (2008); SVEN BECKERT, *EMPIRE OF COTTON* (2014).

¹⁰⁷ See, e.g., ANTHONY SAMPSON, *THE SOVEREIGN STATE OF ITT* 149–308 (1973) (describing the International Telephone and Telegraph Corporation's use of political pressure to outmaneuver its government opponents); STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT* 65–77 (1982) (detailing the political tactics of the powerful United Fruit Company).

¹⁰⁸ See, e.g., CRONON, *supra* note 54; THEODORE STEINBERG, *NATURE INCORPORATED* (1991) (canvassing the role of environmental exploitation and control over water in fueling corporate growth).

Supreme Court has rarely asked. The result, in Winkler's words, is that U.S. constitutional law has protected corporations for their members' sake "without ever seriously questioning who the members were or what the members wanted" (p. 67).

Nowhere was this more true than in 1978's *Bellotti*, the first case to hold that the First Amendment protects the political speech of business corporations. The case began when high-paid executives of the First National Bank, the largest financial corporation in New England, started spending the bank's money to successfully oppose constitutional amendments "that would raise their personal income taxes but lower the taxes of most of the bank's shareholders and employees."¹⁰⁹ In 1972, a frustrated Massachusetts legislature passed a law banning corporations from spending money on issues of personal taxation, reasoning that corporate executives "ought to be giving out of their own wallet, not out of corporate treasuries."¹¹⁰ When the bank challenged this law in court, Massachusetts's Attorney General argued that the law's purpose wasn't to silence the corporation but to protect shareholders who might not agree with the executives' politics.¹¹¹ "Corporations cannot have opinions," the Attorney General wrote. "In fact, because of the dispersion of stock ownership and shareholder apathy, opinions purportedly expressed on behalf of a corporation tend to be the personal opinions of its management."¹¹²

The Supreme Court disagreed. After holding that the First Amendment protects all political speech regardless of whether the speaker is a "corporation, association, union, or individual,"¹¹³ the Court emphasized that there was no reason to doubt that the bank's executives were expressing the political will of the bank's shareholders. "Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter," the Court wrote, "shareholders normally are presumed competent to protect their own interests."¹¹⁴ The Court treated the corporation as a meaningfully representative government in which "shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."¹¹⁵ The Court repeated this

¹⁰⁹ Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 948 (2018).

¹¹⁰ *Id.* at 957 (quoting Rachelle Patterson, *Supreme Court Redefines Law: 4 Companies Permitted to Finance Tax Campaigns*, BOS. GLOBE, Oct. 14, 1972, at 3); *see id.* at 957–58.

¹¹¹ *Id.* at 965–66.

¹¹² *Id.* at 966 (quoting Brief for the Appellee at 13–14, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172)).

¹¹³ *Bellotti*, 435 U.S. at 777.

¹¹⁴ *Id.* at 794–95.

¹¹⁵ *Id.* at 794.

analysis three decades later, commenting in *Citizens United* that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”¹¹⁶

As Winkler identifies, this assumption may have once been justified: when the seventeenth-century Massachusetts Bay Company allowed shareholding residents to elect colonial officers, the company was one of the most democratic governments then in existence (pp. 21–25).¹¹⁷ This assumption may also be true with corporations similar to the NAACP, “a voluntary, nonprofit membership corporation” whose members, as the Supreme Court pointed out in *Patterson*, join “specifically ‘to make more effective the expression of their own views’” (p. 274).¹¹⁸ But since at least the early twentieth century, the idea of “corporate democracy” has largely been panned as a myth.¹¹⁹ Around that time, business directors began choosing for themselves who would be nominated at annual elections, using the corporation’s resources “to post written communications to shareholders, solicit their votes, and otherwise finance their re-election[.]” campaigns.¹²⁰ Winkler quotes the Chief Justice of the Delaware Supreme Court, Leo Strine, who said in 2015 that the “reality is so-called stockholder democracy provides little restraint on management’s political spending” and also doesn’t permit dissatisfied stockholders to sell their shares (pp. 384–85). Moreover, even the most democratic American business corporations don’t allow shareholders, workers, and other engaged stakeholders to vote directly on

¹¹⁶ *Citizens United v. FEC*, 558 U.S. 310, 361–62 (2010) (quoting *Bellotti*, 435 U.S. at 794).

¹¹⁷ See generally Bowie, *supra* note 46 (manuscript at 15–22). Winkler credits the company’s democratic reforms to John Winthrop, writing that “Winthrop believed that all stakeholders, regardless of whether they owned shares, should be enfranchised” and that Winthrop “expanded the franchise” with “innovations” such as proxy voting (p. 22). But far from a democratic innovator, Winthrop was an antidemocratic, slaveowning elitist who feared being ruled by “a multitude of rude and misgoverned persons[;] the very scumme of the land.” JOHN WINTHROP, *General Observations for the Plantation of New England*, in 2 WINTHROP PAPERS 111, 114 (Mass. Historical Soc’y ed., 1931); see C.S. MANEGOLD, *TEN HILLS FARM: THE FORGOTTEN HISTORY OF SLAVERY IN THE NORTH* 45–47 (2010). He tolerated proxy voting only after an angry group of Massachusetts residents suggested that he was suppressing their right to vote on company decisions — a charge that was later substantiated and got him kicked out of office. See JOHN WINTHROP, *THE JOURNAL OF JOHN WINTHROP, 1630–1649*, at 64–68 (Richard S. Dunn & Laetitia Yeandle eds., 1996). See generally J.S. MALOY, *THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT* 114–39 (2008); ROGER THOMPSON, *DIVIDED WE STAND* 37–50 (2001).

¹¹⁸ The author quotes *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

¹¹⁹ See BERLE & MEANS, *supra* note 39, at 84, 89; Manning, *supra* note 41, at 1489; Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 833–36 (1961).

¹²⁰ Bowie, *supra* note 109, at 958; see *id.* at 957–58.

whether a corporation should exercise constitutional rights on their behalf.¹²¹ The result is that the Supreme Court currently assumes that all corporations are the Massachusetts Bay Company even though most business corporations are, in fact, antidemocratic.¹²²

With this in mind, an alternative to rejecting the Supreme Court's unfounded assumption that corporations operate democratically might be to embrace the Supreme Court's metaphor of corporate democracy but use means outside the courtroom to make corporations live up to it. That is, instead of attempting to change the Supreme Court's current doctrine, opponents of corporate power might instead attempt to bring all corporations — including banks, businesses, and other so-called corporate democracies — in line with American expectations about how twenty-first-century democracies should operate. Such an alternative might not only be more practical than changing doctrine given the existing Supreme Court, but might also be normatively preferable.

To see why, consider the general Occupy-style argument against corporate power — that corporations are unaccountable and operated for the benefit of the rich and powerful. This argument is significantly weaker when wielded against cooperative corporations, nonprofit corporations, municipal corporations, and other corporations that have broadly defined constituencies who have the realistic power to influence the sorts of arguments and political positions their corporations take. It is probably for this reason that opponents of corporate power like Senator Bernie Sanders have crafted their responses to *Citizens United* with exceptions that would preserve the free speech rights of nonprofit corporations like the NAACP. For example, the constitutional amendment Senator Sanders proposed in the Year of the Corporate Person didn't exclude all corporations from receiving constitutional protection; it stated that the "rights protected by the Constitution of the United States are the rights of natural persons and do not extend to *for-profit*

¹²¹ See Lucian A. Bebchuck & Robert J. Jackson, Jr., *The Supreme Court, 2009 Term — Comment: Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 83–84, 87–89 (2010) (arguing that existing corporate governance rules "are inappropriate for corporate political speech decisions," *id.* at 83–84).

¹²² See *id.* at 83–84. Notably, the Supreme Court doesn't share this assumption when it comes to labor unions. In contrast with its cases upholding corporate rights despite the possibility that dissenting workers or shareholders might be compelled to contribute to programs they disagree with, the Court has recently struck down arrangements in which dissenting workers were being compelled to contribute to union programs they disagreed with. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). See generally Nikolas Bowie, *The Government Could Not Work Doctrine*, 105 VA. L. REV. (forthcoming 2019) (examining the Supreme Court's shifting jurisprudence on religious and political exceptions to compulsory laws); Benjamin I. Sachs, *Unions, Corporations, and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012) (discussing the differing treatment of corporations and unions in campaign finance law).

corporations, limited liability companies, or other private entities established for business purposes or to promote business interests.”¹²³

But rather than attempt to draw new doctrinal lines to explain why a corporation like the NAACP should be protected by the First Amendment while a corporation like the First National Bank of Boston should not be, it might be better to make all corporations more like the NAACP. If business corporations expressed their First Amendment rights or made Fourteenth Amendment arguments only after consulting with a broad range of constituents and democratically ensuring that they were on board, then corporate power could be normatively indistinguishable from municipal power or political power. Indeed, a century ago, when constitutional amendments and Supreme Court reversals appeared similarly out of reach to opponents of corporate power, organizers mobilized to make business corporations more democratic. Their advocacy offers a model more appealing than that of Chief Justice Taney.

B. Corporate Statehood on the Streets

The “Continental Congress of the working class” convened for the first time on June 27, 1905, in Chicago, Illinois.¹²⁴ From the outset, its members recognized how different they looked from the Philadelphia Congress of over a century earlier. For one thing, the chairman of the Chicago Congress was a “huge, one-eyed man” from Utah whom friends called “Big Bill”¹²⁵ and whom reporters called “that big two-fisted thug.”¹²⁶ For another, this new Congress contained representatives from communities who had been excluded from both the Philadelphia Congress and its Washington, D.C., successor.¹²⁷ Women, black men, children, and recent immigrants had spent America’s first hundred years building the country into an industrial powerhouse while being formally and informally barred from voting on basic decisions about their living and working conditions. From the committee rooms of the U.S. Congress to the boardrooms of the U.S. Steel Corporation, the vast majority of Americans had no voice.

¹²³ S.J. Res. 33, 112th Cong. § 1 (2011) (emphasis added).

¹²⁴ PROCEEDINGS OF THE FIRST CONVENTION OF THE INDUSTRIAL WORKERS OF THE WORLD 1 (Wm. E. Trautman ed., 1905) [hereinafter FIRST IWW CONVENTION] (speech of Chairman William D. Haywood on June 27, 1905).

¹²⁵ MARY HEATON VORSE, A FOOTNOTE TO FOLLY 7–8 (1935).

¹²⁶ WILLIAM D. HAYWOOD, BILL HAYWOOD’S BOOK: THE AUTOBIOGRAPHY OF WILLIAM D. HAYWOOD 251 (1929); BRUCE WATSON, BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM 234 (2005).

¹²⁷ See FIRST IWW CONVENTION, *supra* note 124 (speech of Chairman William D. Haywood on June 27, 1905) (calling for all members of the “working class” to come together and establish a “labor organization that will open wide its doors”).

The Continental Congress of the working class sought to change that. From the perspective of its chairman, William “Big Bill” Haywood, American history demonstrated that if workers wanted power in political government, they first needed power in corporate government. “The first English settlements in North America were made by such corporations as the Virginia Company and the Plymouth Company,” Haywood recalled — corporations that had been controlled by the governments that granted to them rights through their charters.¹²⁸ But after 1800, as “corporations [became] engaged in the production of iron, of lumber and of many other commodities,” they “developed rapidly in both numbers and in size”¹²⁹ until they were their own “Governments of Industry.”¹³⁰ By 1911, trusts like the American Telephone & Telegraph Company and the American Woolen Company had become as important as “a state like New York, Missouri or California”; instead of “controlling a definite section of the Nation’s territory, [trusts] control[] a branch of the Nation’s industry.”¹³¹ Indeed, “the new industrial government, the corporations,”¹³² had begun to “use the government at Washington as a tool to serve their ends”: passing restrictive laws, issuing harsh injunctions, and mobilizing armed militias to crush all demands by the nation’s disenfranchised to improve their quality of life.¹³³ But unlike the government at Washington, Haywood argued, the chief rulers of these “industrial government[s] ma[de] the real laws of the land”¹³⁴ and didn’t even pretend to govern democratically:

The workers thus live under an awful tyranny. They are ruled without their consent. The government which oppresses them is the government of the shops, the mines and the railroads. This government declares when they shall work and when they shall be idle. . . . This they can now do without let or hindrance.¹³⁵

Haywood proposed that the Continental Congress democratize this industrial government. He demanded “the supervision of industry in the hands of those who do the work.”¹³⁶ Later, he argued that the participants could realize such a demand if they formed a democratic organization of workers that engaged in industrywide strikes, which in turn would force corporate executives to cede decisionmaking power to

¹²⁸ WILLIAM D. HAYWOOD & FRANK BOHN, *INDUSTRIAL SOCIALISM* 31 (1911).

¹²⁹ *Id.* at 32.

¹³⁰ *Id.* at 36.

¹³¹ *Id.* at 35.

¹³² *Id.* at 32.

¹³³ *Id.* at 38.

¹³⁴ *Id.* at 52.

¹³⁵ *Id.* at 37.

¹³⁶ FIRST IWW CONVENTION, *supra* note 124, at 2 (speech of Chairman William D. Haywood on June 27, 1905).

their employees.¹³⁷ Such a Continental Army of workers would be capable not only of shutting down entire industries to win concessions, Haywood maintained, but also of giving workers the ability to “vote for directors to operate the industries in which they are all employed.”¹³⁸ The result would be to enfranchise black men, women, and “every boy and girl employed in a shop . . . to legislate for themselves where they are most interested in changing conditions, namely, in the place where they work.”¹³⁹ The rest of the Chicago Congress agreed with Haywood’s message. After a two-week convention, they chartered an organization called the Industrial Workers of the World to “build up within itself the structure of an Industrial Democracy — a Workers’ Co-Operative Republic — which must finally burst the shell of capitalist government, and be the agency by which the working people will operate the industries, and appropriate the products to themselves.”¹⁴⁰

The Industrial Workers of the World was one of many turn-of-the-century labor organizations that responded to the Supreme Court’s *Lochner*-era decisions not with calls for corporate personhood, but with mass mobilization. Like the Knights of Labor and Western Federation of Miners before them, leaders of the Industrial Workers embraced the conception of corporations as governments — *industrial democracies* — but argued that workers needed to use strikes, boycotts, and other work stoppages to ensure that corporate leaders represented the interests of not only the shareholders but also the people who worked for them.¹⁴¹ In the organization’s first few years, the Industrial Workers terrified and puzzled a skeptical general public who didn’t believe that workers should have any role in managing industrial corporations. Even progressive reformers typically argued that corporations should be reined in not by enfranchising workers, but with legislative oversight, regulatory commissions, aggressive prosecutions, and new Supreme Court decisions.¹⁴² In the words of Frederick W. Hamilton, the president of Tufts University in 1912, Haywood was calling for a form of industrial

¹³⁷ William D. Haywood, Speech at Meeting Held for the Benefit of the Buccafiori Defense (Mar. 16, 1911), in WILLIAM D. HAYWOOD, *THE GENERAL STRIKE* 1, 2–3 (1911).

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* at 3.

¹⁴⁰ FIRST IWW CONVENTION, *supra* note 124, at 7; *see id.* at 509 (noting the final vote in favor of adopting the IWW’s constitution); *see also id.* at 247–48 (outlining the IWW’s Preamble).

¹⁴¹ *See* LEON FINK, *WORKINGMEN’S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS* 219–30 (1983); HAYWOOD, *supra* note 126, at 71–89 (describing the organizing tactics of the Western Federation of Miners); KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY* 72–89 (1993).

¹⁴² *See, e.g.,* *Petition to the President for a Federal Commission on Industrial Relations*, 27 *THE SURVEY* 1430, 1431 (1911); *see also* *Muller v. Oregon*, 208 U.S. 412, 423 (1908); *Federal Industrial Commission Urged*, 27 *THE SURVEY* 1407, 1407–08 (1911).

“Socialism . . . [,] a greater menace to individual liberty than ever King or Parliament of England were to the rights of American Colonists.”¹⁴³

C. Corporate Statehood in Action

These competing visions of how to regulate corporations came to a head in Lawrence, Massachusetts, in 1912. At the time, Lawrence was home to some of the wealthiest textile corporations in the world as well as some of the worst poverty in America: a frigid city in which the people who weaved coats couldn't afford to purchase them.¹⁴⁴ After the owners of the textile corporations cut average wages to an even more unacceptable level, workers affiliated with the Industrial Workers of the World organized a shutdown.¹⁴⁵ In contrast with most strikes at the time, in which only workers in certain crafts or occupations stopped working, the Industrial Workers organizers encouraged everyone in the textile mills to walk out.¹⁴⁶ As Haywood declared on the Lawrence Common, it was “the first time in the history of the labor movement in America that a strike ha[d] been conducted as [the workers] ha[d] carried on this one,”¹⁴⁷ with virtually all textile workers in the city joining an industrywide strike. The strike allowed the workers to “express themselves to the fullest as citizens of industry.”¹⁴⁸

The conduct of the strike was an example of what Haywood meant by “industrial democracy.”¹⁴⁹ Workers of all skills, genders, and nationalities elected a sort of industrial congress at which delegates voted on future working conditions for Lawrence's half-dozen different textile corporations.¹⁵⁰ As the strike dragged on for weeks and grew to include

¹⁴³ *Tyranny Like That of Kings*, BOS. DAILY GLOBE, Jan. 18, 1912, at 5.

¹⁴⁴ See BUREAU OF LABOR, DEP'T OF COMMERCE & LABOR, REPORT ON THE STRIKE OF TEXTILE WORKERS IN LAWRENCE, MASS. IN 1912, S. REP. NO. 62-870, at 9, 19 (1912); Robert E. Todd, *Housing Conditions*, in FRANCIS H. MCCLEAN ET AL., THE REPORT OF THE LAWRENCE SURVEY 31, 33-58 (1912); Walter E. Weyl, *The Strikers at Lawrence*, 100 THE OUTLOOK 309, 309 (1912).

¹⁴⁵ BUREAU OF LABOR, *supra* note 144, at 9, 13.

¹⁴⁶ Ray Stannard Baker, *The Revolutionary Strike: A New Form of Industrial Struggle as Exemplified at Lawrence, Massachusetts*, 74 AM. MAG. 19, 20, 30B (1912); see John D. Adams, Letter to the Editor, *Clod or Brother?*, 27 THE SURVEY 2014, 2014-15 (1912).

¹⁴⁷ Leslie H. Marcy & Frederick Sumner Boyd, *One Big Union Wins*, 12 INT'L SOCIALIST REV. 613, 628 (1912) (quoting Haywood's remarks to a crowd of Lawrence strikers on March 11, 1912).

¹⁴⁸ 11 COMM'N ON INDUS. RELATIONS, INDUSTRIAL RELATIONS: FINAL REPORT AND TESTIMONY, S. DOC. NO. 64-415, at 10,588 (1916) (testimony of William D. Haywood).

¹⁴⁹ See JUSTUS EBERT, THE TRIAL OF A NEW SOCIETY 33-34 (1913).

¹⁵⁰ William D. Haywood, Speech at Ettor-Giovannitti Protest Meeting, Cooper Union (May 21, 1912), in SPEECH OF WM. D. HAYWOOD ON THE CASE OF ETTOR AND GIOVANNITTI 1, 11 (Ettor-Giovannitti Def. Comm., Lawrence, Mass. 1912).

over 14,000 of Lawrence's 28,000 millworkers,¹⁵¹ it brought national attention to the Industrial Workers, spawning congressional hearings,¹⁵² think pieces in America's most read magazines,¹⁵³ and a federal Commission on Industrial Relations that interviewed 740 witnesses over 154 days of testimony.¹⁵⁴

Observers who compared the wealth of Lawrence's corporations with the poverty and disenfranchisement of its striking workers increasingly called for corporations to be more democratic. "We call our Government democratic; and so it is, substantially,"¹⁵⁵ wrote the editorial board of *The Outlook*, which in 1912 included former president Theodore Roosevelt.¹⁵⁶ "But when we turn to the processes of industry" and see "so many shivering men without overcoats as are to be seen in the cloth-producing town of Lawrence,"¹⁵⁷ the editors wrote, it had become clear that corporate "power [was] exerted by an oligarchy."¹⁵⁸ In its place, the editors argued, the country needed to "find some way of substituting for industrial oligarchy a prevailing industrial democracy."¹⁵⁹ Although they were borrowing a term from the Industrial Workers, the editors defined industrial democracy as a system of corporate governance "in which the workers shall participate, with the employers and with the consumers, in determining the conditions of their work and the share which shall be theirs of the products of their labor."¹⁶⁰ They concluded, "[t]he conditions under which workers in an industry are not allowed to have anything to say in regard to their conditions of work or their wages are undemocratic The Lawrence strike should call the attention of the country to those conditions."¹⁶¹

The editors of *The Outlook* were not alone in their call for industrial democracy. Two months into the Lawrence strike, two professors at Wellesley College courted controversy by calling for an end to corporate dividends until workers were allowed to participate in allocating

¹⁵¹ BUREAU OF LABOR, *supra* note 144, at 33.

¹⁵² See, e.g., *The Strike at Lawrence, Mass.: Hearings Before the Comm. on Rules of the H.R. on H. Res. 409 & 433*, 62d Cong. (1912).

¹⁵³ See, e.g., Harry Emerson Fosdick, *After the Strike — In Lawrence*, 101 THE OUTLOOK 340, 340 (1912); Lewis E. Palmer, *A Strike for Four Loaves of Bread*, 27 THE SURVEY 1690, 1695 (1912).

¹⁵⁴ 1 COMM'N ON INDUS. RELATIONS, *supra* note 148, at 19–20.

¹⁵⁵ Editorial, *Violence and Democracy*, 100 THE OUTLOOK 352, 352 (1912).

¹⁵⁶ William N. Tilchin, *Revealing Post-Presidential Snapshots: Theodore Roosevelt in the Outlook, March–July 1909*, 34 THEODORE ROOSEVELT ASS'N J. 31, 31 (2013).

¹⁵⁷ *Violence and Democracy*, *supra* note 155, at 352.

¹⁵⁸ *Id.* at 353.

¹⁵⁹ *Id.*

¹⁶⁰ *The Lawrence Strike: A Review*, *supra* note 43, at 536.

¹⁶¹ *Id.*

them.¹⁶² Although those professors faced an attempt to fire them, Wellesley's commencement speaker later argued that "Lawrence industrially . . . [is] speaking in no uncertain terms today. Unless we find the principle of application in democracy, darkening days will overcloud the republic."¹⁶³

Significantly, even some mill executives came to accept that if they didn't want workers to take over their industries by force, they needed to give workers a voice in corporate decisionmaking. In the *Bulletin of the National Association of Wool Manufacturers*, John Bruce McPherson blamed the Lawrence strike partly on "the manufacturers, who did not encourage, or by their subordinates opposed, the organization of regular trade unions, one of the organized conservative forces in the country at the present time."¹⁶⁴ He argued that "[t]he way to prevent the demagogue from getting control of the labor movement is not to attempt to thwart organization and refuse to confer with local or national officers, but to deal with these officers and encourage these regular organizations."¹⁶⁵ Other mill executives, meanwhile, emphasized that corporations already *were* industrial democracies because ordinary people owned shares and voted to elect corporate boards.¹⁶⁶ Like the corporate lawyers in Winkler's narrative, these corporate executives claimed that they were already representing the workers' interests.¹⁶⁷ "I am an employee of the company as you are," William Wood of the American Woolen Company said in a statement to the strikers.¹⁶⁸ "As its president I am bound . . . to take proper care of the interests of 13,000 stockholders. Quite a number of them are employees, and most . . . are not rich. Many of them necessarily depend on their dividends for their living just as you depend on your wages for yours."¹⁶⁹ The editors of *The Protectionist* magazine added that "[i]n the depressing agitation against our great industry, every side of it is painted in glaring colors against the corporation and its managers in favor of the help."¹⁷⁰ But "not a word is heard in favor of nearly as many shareholders as operatives, men and women who, in a great many cases, . . . deserve important

¹⁶² *Discipline at Wellesley*, BOS. DAILY GLOBE, Mar. 14, 1912, at 6; *Would Abolish Dividends — Prof. Ellen Hayes's Socialistic Views of Lawrence Strike*, N.Y. TIMES, Mar. 11, 1912, at 3.

¹⁶³ *Duty of Man is More Than Law*, BOS. DAILY GLOBE, June 17, 1912, at 9.

¹⁶⁴ John Bruce McPherson, *The Lawrence Strike of 1912*, 42 BULL. NAT'L ASS'N WOOL MANUFACTURERS 219, 250 (1912); see *id.* at 263–65.

¹⁶⁵ *Id.* at 264.

¹⁶⁶ See, e.g., BUREAU OF LABOR, *supra* note 144, at 40 (statement of William M. Wood, President of the American Woolen Co.).

¹⁶⁷ See, e.g., *id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Rights of Shareholders*, 23 THE PROTECTIONIST 711, 711 (1912).

consideration, as what they get in dividends supplies bread and butter as much as the wage of the operative supplies the necessities of life.”¹⁷¹

D. Corporate Statehood Applied

To the surprise of many observers, after three months of striking, the Industrial Workers managed to convince the Lawrence mill owners to agree to across-the-board wage increases, significant worker benefits, and reinstatement of all the workers who had gone on strike.¹⁷² It was a major victory for the labor movement: an example of how workers could use their “labor power” to give themselves a voice in corporate decisionmaking.¹⁷³ But that victory in Lawrence didn’t last long. Over the next few years, state and federal officials violently suppressed the Industrial Workers, sending Haywood and other leaders into hiding, prison, or exile.¹⁷⁴

Despite the suppression of their members, the Industrial Workers’ message of industrial democracy thrived — in large part, ironically, thanks to the federal government. In February 1912, while the Lawrence strike was ongoing, President William Howard Taft delivered a message to the U.S. Congress calling for the creation of a commission to conduct a “reexamination of our laws bearing upon the relations of employer and employee.”¹⁷⁵ The President’s message was a victory for a group of progressive reformers, including Louis D. Brandeis, who had petitioned the President to cast a “light along a more crucial boundary line — the borderland between industry and democracy.”¹⁷⁶ The reformers’ petition channeled the Civil War in explaining the proposed commission’s purpose: “Today, as fifty years ago, a house divided

¹⁷¹ *Id.* at 711–12.

¹⁷² Frank P. Sibley, *Lawrence Strikers to Vote on Raise in Mass Meeting Today*, BOS. DAILY GLOBE, Mar. 14, 1912, at 1, 6.

¹⁷³ Haywood, *supra* note 150, at 9–12.

¹⁷⁴ See ELIZABETH GURLEY FLYNN, *I SPEAK MY OWN PIECE: AUTOBIOGRAPHY OF “THE REBEL GIRL”* 245–47 (1955); HAYWOOD, *supra* note 126, at 360–62; Interview by Donald Shaughnessy with Mary Heaton Vorse (Apr. 13, 1957), at 4 (on file at the Lawrence History Center, Lawrence, Mass., box 3, folder 10); see also Seditious Act of 1918, Pub. L. No. 65-150, 40 Stat. 553; Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217; Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874. See generally PETER CARLSON, *ROUGHNECK: THE LIFE AND TIMES OF BIG BILL HAYWOOD* 255–330 (1983); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES* 23–71 (1990).

¹⁷⁵ WILLIAM H. TAFT, *MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING DATA OF THE WORK OF THE INTERIOR DEPARTMENT AND OTHER MATTERS WITH ACCOMPANYING PAPERS*, H.R. DOC. NO. 62-504, at 10–11 (1912).

¹⁷⁶ *Petition to the President for a Federal Commission on Industrial Relations*, *supra* note 142, at 1431.

against itself cannot stand," it read.¹⁷⁷ "We have yet to solve the problems of democracy in its industrial relationships and to solve them along democratic lines."¹⁷⁸

This petition was evocative of Brandeis's imprecise, pre-1912 understanding of what the Industrial Workers were calling "industrial democracy." Raised Jewish in antebellum Kentucky, Brandeis moved to Massachusetts in 1875 to study at Harvard Law School.¹⁷⁹ When he graduated, he remained in Boston, whose Puritan values, he wrote, "came nearer my ideal than anything I had ever found anywhere else."¹⁸⁰ In the 1890s, Brandeis became interested in labor issues after reading about a local shoemakers' strike in Haverhill.¹⁸¹ By 1912, Brandeis had developed what the *Harvard Crimson* called "a national reputation as counsel for progressive causes, having been largely responsible for the [Supreme Court's] recognition of the Oregon ten hour law" that set maximum hours for women.¹⁸² Brandeis was also well known for his fierce but unsuccessful opposition to an attempt by the nation's wealthiest banker, J.P. Morgan, to merge Massachusetts's last remaining independent railroad with Morgan's New York, New Haven & Hartford Railroad.¹⁸³ When the New Haven Railroad later collapsed into bankruptcy, Brandeis's opposition to the monopoly appeared prophetic.¹⁸⁴

Although Brandeis was passionate about using the law to protect working people, he rarely expressed that passion using the term "industrial democracy." His agenda was not to increase workers' participation in corporate decisions, but to give workers a better minimum standard of living so that they would have more faith in America's democratic institutions. For example, in December 1911, weeks before the Lawrence strike, Brandeis testified before the Senate about a proposed

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; see also *Federal Industrial Commission Urged*, 27 *THE SURVEY* 1407, 1407 (1911).

¹⁷⁹ Peter Scott Campbell, *Notes for a Lost Memoir of Louis D. Brandeis*, 43 *J. SUP. CT. HIST.* 27, 29, 33 (2018).

¹⁸⁰ *Id.* at 40.

¹⁸¹ See *id.* at 42. See generally THOMAS K. MCCRAW, *PROPHETS OF REGULATION 82-142* (1984) (describing Brandeis's extensive involvement in labor issues and reform).

¹⁸² *Mr. Brandeis to Lecture*, *HARV. CRIMSON*, Jan. 19, 1912, at 1; see also *Muller v. Oregon*, 208 U.S. 412, 415 (1908) (listing Brandeis as counsel for the State of Oregon).

¹⁸³ See Campbell, *supra* note 179, at 46 n.85; see also An Act to Incorporate the Boston Railroad Holding Company, ch. 519, 1909 Mass. Acts 776; COMM'N ON COMMERCE & INDUS., *REPORT OF THE COMMISSION ON COMMERCE AND INDUSTRY 7-22* (1908).

¹⁸⁴ See generally HENRY LEE STAPLES & ALPHEUS THOMAS MASON, *THE FALL OF A RAILROAD EMPIRE: BRANDEIS AND THE NEW HAVEN MERGER BATTLE* (1947); Richard M. Abrams, *Brandeis and the New Haven-Boston & Maine Merger Battle Revisited*, 36 *BUS. HIST. REV.* 408 (1962).

bill to create a Federal Trade Commission.¹⁸⁵ In his testimony, Brandeis argued that large corporations like the International Mercantile Marine tended to be unsuccessful, inefficient, and unfair.¹⁸⁶ Brandeis's proposed solution was not to give workers in these companies a role to play in corporate decisionmaking, however, but to redirect the companies' profits toward improving workers' standard of life.¹⁸⁷ Brandeis argued that paternalistic profit-sharing arrangements would instill in workers American values.¹⁸⁸

Brandeis's understanding of the problems of corporations changed during the Lawrence strike. Two years after the strike, in his popular 1914 book, *Other People's Money and How the Bankers Use It*, Brandeis cast his experience fighting the New Haven Railroad as a fight against a "financial oligarchy" in which ordinary people — even shareholders — had no ability to "participate in the management."¹⁸⁹ He argued that the problem with large corporations wasn't just that they were unfair, but also that they were undemocratically run by unelected managers and financiers.¹⁹⁰ "The American people have as little need of oligarchy in business as in politics," Brandeis wrote.¹⁹¹ He argued that "industrial democracy — true cooperation — should be substituted for industrial absolutism."¹⁹²

Brandeis testified to this effect before the Commission on Industrial Relations, the federal commission President Taft had assembled to study the Lawrence strike and similar labor disputes.¹⁹³ At the core of his testimony was a belief that all American institutions, including corporations, operated best when they were democratic: or in Brandeis's words, "we need democracy at all times no matter what the system is under which we work."¹⁹⁴ "I can not see any real solution, ultimate solution, or an approximation of a solution of unrest as long as there exists in this country any juxtaposition of political democracy and industrial absolutism," Brandeis said.¹⁹⁵ "To my mind, before we can really solve the

¹⁸⁵ *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings Before S. Comm. on Interstate Commerce*, 62d Cong. 1146–67 (1913) (testimony of Louis D. Brandeis on Dec. 14, 1911).

¹⁸⁶ *See id.* at 1148.

¹⁸⁷ *See id.* at 1151–52.

¹⁸⁸ *See id.* at 1154–56.

¹⁸⁹ BRANDEIS, *supra* note 39, at 6, 10; *see id.* at 6–7, 207–08.

¹⁹⁰ *See id.* at 2–6.

¹⁹¹ *Id.* at 207–08.

¹⁹² *Id.* at 208; *see also* JOSEPH A. MCCARTIN, *LABOR'S GREAT WAR* 51–52 (1997).

¹⁹³ *See* 1 COMM'N ON INDUS. RELATIONS, *supra* note 148, at 998–99 (testimony of Louis D. Brandeis).

¹⁹⁴ *Id.* at 999.

¹⁹⁵ *Id.* at 1005.

problem of industrial unrest, the worker must have a part in the responsibility and management of the business, and . . . unrest will not be removed as long as we have that inconsistency.”¹⁹⁶ Brandeis testified again before the Commission in January 1915, similarly attributing the “fundamental” cause of labor unrest to the “necessary conflict — the contrast between our political liberty and our industrial absolutism.”¹⁹⁷

Brandeis’s solution to this economic problem was the same solution Americans had applied to politics: democratize the corporation. “[T]he end to which we must move is a recognition of industrial democracy as the end to which we are to work,” Brandeis told the Commission.¹⁹⁸ He continued:

[A]nd that means this: It means that the problems are not any longer, or to be any longer, the problems of the employer [T]hey are the problems of the employer and the employee There must be a division not only of the profits, but a division of the responsibilities; and the men must have the opportunity of deciding, in part, what shall be their condition and how the business shall be run.¹⁹⁹

Brandeis believed that when corporations were so powerful that labor unions could not force them to bargain, then the state had a responsibility to assist the unions: “Industrial democracy will not come by gift. It has got to be won by those who desire it . . . and the State must in some way come to the aid of the workingmen if democratization is to be secured.”²⁰⁰ Brandeis’s ideal was different from Haywood’s; he did not envision that workers would replace executives or shareholders atop the corporate ladder. But he did see workers as a relevant constituency that executives could no longer ignore: he dreamed of a world in which the worker had “not only a voice but a vote; not merely a right to be heard, but a position through which labor may participate in management . . . the power contributing to action — of participating in action.”²⁰¹

When the Commission presented its findings in August 1915, its principal report included an extended quotation from Brandeis. Its opening lines even parroted his recommendation: “The only hope for the solution of the tremendous problems created by industrial relationship[s] lies in the effective use of our democratic institutions and in the rapid extension of the principles of democracy to industry.”²⁰² The Commission’s conclusion was even more blunt: “Political freedom can exist only where

¹⁹⁶ *Id.*

¹⁹⁷ 8 *id.* at 7659.

¹⁹⁸ 1 *id.* at 63.

¹⁹⁹ *Id.* at 63–64.

²⁰⁰ 8 *id.* at 7662.

²⁰¹ *Id.* at 7664.

²⁰² 1 *id.* at 17.

there is industrial freedom; political democracy only where there is industrial democracy.”²⁰³

This call for industrial democracy soon became federal policy. In January 1916, President Woodrow Wilson nominated Brandeis to become a member of the Supreme Court, where he served for over two decades.²⁰⁴ While on the Court, Justice Brandeis consistently voted in favor of efforts by states and the federal government to institute “industrial democracy” in the workplace.²⁰⁵ Members of the Commission on Industrial Relations went on to serve on President Wilson’s National War Labor Board, which inaugurated one of the first attempts by the federal government to support labor unions instead of inhibiting them.²⁰⁶ Two decades later, Congress passed the National Labor Relations Act of 1935 with the goal of “project[ing] into economic affairs the essence of true democracy, by outlining a system of checks and balances between industry and labor, crowned by governmental supervision and advice.”²⁰⁷

CONCLUSION

As the examples of the Industrial Workers, the Lawrence strike, and the aftermath of that strike show, the Supreme Court isn’t the only place where corporate rights have been protected or taken away. Before the Lawrence strike, many observers assumed that corporate executives should have a constitutionally protected right to make decisions concerning the terms and conditions on which the corporation would hire workers.²⁰⁸ But afterward, progressive reformers, federal investigators, legislators, and even the President recognized that this right couldn’t be unlimited or else corporations would function as oligarchies. The idea of “industrial democracy” moved from the radical margins to the mainstream because of mass mobilization, cultural transformations, and a movement among intellectuals to embrace economic change. Although this idea eventually reached the Court, it did so not just through doctrinal arguments but also through decades-long changes in norms.

The examples also suggest that even today, the metaphor of corporate statehood might have as much purchase outside the Supreme Court as it has among the current Justices. Eight years after Mitt Romney’s

²⁰³ *Id.* at 18.

²⁰⁴ See Campbell, *supra* note 179, at 27.

²⁰⁵ See, e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 564–67 (1933) (Brandeis, J., dissenting).

²⁰⁶ See MCCARTIN, *supra* note 192, at 64–68.

²⁰⁷ *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. 8 (1934) (statement of Sen. Robert Wagner).

²⁰⁸ See *Lochner v. New York*, 198 U.S. 45, 56 (1905).

“corporations are people” remarks, Senator Elizabeth Warren inaugurated her own presidential campaign in Lawrence, at the same textile mill where the strike once began.²⁰⁹ Just as Romney could identify one group of “people” who make up a corporation — those whose pockets fund it — Senator Warren could identify other stakeholders, including consumers, workers, creditors, neighbors, and students.²¹⁰ Before announcing her campaign, she even introduced legislation that would empower corporate employees to elect at least forty percent of the directors on their corporation’s board.²¹¹ Like Brandeis before her, Senator Warren explained that corporate directors should “consider the interests of all major corporate stakeholders — not only shareholders — in company decisions.”²¹²

But requiring corporations to expand their constituencies needn’t take place in Washington or depend on a particular presidential candidate. It could also start in states that charter corporations, like Delaware, or states in which out-of-state corporations operate, like the Alabama of *Earle* (pp. 97–103). In short, the universe of possible reforms to a case like *Citizens United* is significantly broader than a book about the Supreme Court would let on. Although Winkler’s book describes corporations’ acquisition of power in the Supreme Court as a “movement,” it will likely take an actual movement with real people to ensure that corporations remain democratically accountable.

²⁰⁹ Kate Taylor, *Elizabeth Warren Formally Announces 2020 Presidential Bid in Lawrence, Mass.*, N.Y. TIMES (Feb. 9, 2019), <https://nyti.ms/2E1ErKD> [<https://perma.cc/QE36-46RS>].

²¹⁰ Shannon Young, *Read: Elizabeth Warren’s 2020 Announcement Speech*, MASS. LIVE (Feb. 9, 2019), <https://www.masslive.com/politics/2019/02/read-elizabeth-warrens-2020-announcement-speech.html> [<https://perma.cc/N6XG-VAEV>].

²¹¹ Elizabeth Warren, Opinion, *Companies Shouldn’t Be Accountable Only to Shareholders*, WALL ST. J., Aug. 15, 2018, at A17.

²¹² *Id.*