Spring 2021

Corporations Are Persons, Too.

Harold Kent Greenfield

CORPORATIONS ARE PERSONS, TOO.

Written By Kent Greenfield

Introduction

Perhaps the greatest gift a writer can receive is a careful read and good faith consideration of one's work by intelligent and knowledgeable scholars. New England Law | Boston and the New England Law Review have honored me by facilitating the gift of such consideration of my book Corporations Are People Too (And They Should Act Like It)[1] by four scholars of immense intelligence and knowledge. I have benefitted from the critiques, suggestions, and perspectives of Daniel Greenwood, Aisha Saad, Natasha Varyani, and Adam Winkler.[2] Greenwood and Winkler have produced work over their distinguished careers that has influenced me and hundreds of other scholars; I have been fortunate to call them friends for upwards of two decades. Varyani was generous and insightful with her analysis and comments during the symposium on my book and in her essay published here; I look forward to watching her career flourish for decades to come. Saad is a scholar whose thoughtfulness and depth of knowledge indicate great promise. As her career unfolds, she will be a credit to the institutions fortunate enough to be associated with her.

This short response will be organized as follows. I will walk through each of the essays and offer some reactions, elaborations, and, where necessary, defenses to my work. I will then offer some more closing thoughts, in which I will attempt to place my book and these analyses into the context of a broader political and legal moment.

I. Natasha Varyani

Varyani's essay offers a perceptive and efficient summary of my book. She offers some reasons to be hopeful that we find ourselves in a historical moment in which there is greater openness to the notion that the obligations of corporations should be updated and expanded. As she relates, I argue in my book that three specific shocks occurred in the years 2008–2010 that opened the political conversation to requiring more from corporations: the global financial crisis of 2008–09, the 2010 Deepwater Oil spill, and the Citizens United ruling in 2010. As I describe in more length in my book, the promise of that moment was hindered in part by the political left's response to Citizens United. Instead of taking the perspective that the ruling offered a moment to expand corporations' obligations of "citizenship," the most prominent response was to attempt to cabin corporations' involvement in public life and to force corporations to focus even more on economic results and returns to shareholders. The world turned upside down for a bit; ideological conservatives argued that corporations should be about more than mere profit, and ideological progressives wanted corporations to be isolated politically, culturally, and legally.[3]

My sense of the current political moment is that we are returning to a more "normal" state, in which corporate law reform is welcomed and pushed by progressives. In the 2020 presidential campaign cycle, prominent Democratic candidates Elizabeth Warren and Bernie Sanders included corporate law reform among their policy centerpieces. These included proposals for national chartering as well as structural changes that would place employee representatives on

boards of directors.[4] In addition, scholars, activists, and thinkers have been crafting a set of policy proposals that can be put in place by a Democratic president and Congress in the coming years. These proposals include reforms of corporate law and structure.[5]

Varyani suggests two additional reasons to be optimistic. The first is that a "new generation of consumers have a completely novel relationship with information."[6] By "consumers," I understand her to mean both consumers of corporations' end products and services as well as consumers of corporate securities. Varyani argues that corporations will be made more accountable because of the availability and timeliness of information. "Advances in technology" make information "instantly available," which empowers the public to "demand accountability from corporations."[7] Rather than waiting days or even months for information, which in the past made for languid responses to any malfeasance or irresponsibility, modern day consumers and investors are the beneficiaries of greater availability of information, "resulting in more transparency in every aspect of our commercial lives."[8] Businesses are therefore held accountable "for each individual action." This "constant review of corporate activity" has, according to Varyani, "forced a change in behavior" on the part of the business community.[9]

Her second point is that the growth in the analytic and persuasive power of behavioral economics "upends" the conventional, narrow view of shareholder value.[10] Human beings' choices are more robust, sophisticated, and nuanced than the traditional view of economic rationality makes out. Corporate law's view of economic value has been expanded—"'value' may not always be measured in shareholder profits."[11]

Varyani raises two excellent points. Let me address the second one first. I agree that behavioral economics has matured into a valuable tool for those of us who argue for corporate law reform.[12] We should certainly expand our understanding of value to include more than mere short-term shareholder profit. What's more, the insights of behavioral economics can assist in responding to the counter-arguments often pressed against an expansive view of value. Believers in shareholder primacy push the notion that a solitary and narrow definition of value is essential in order to give corporate decision makers a clear decision matrix and to offer the clearest and most efficient way to monitor their decisions and behavior. In other words, shareholder primacists argue that a narrow view of value is important to constrain the agency costs of corporate hierarchical decision making.[13] But, behavioral insights help show the weakness of that argument. As I have written about before, a narrow set of obligations and a concomitant narrowness and homogeneity of decision making structures make "groupthink" and other defects in decision making more prevalent. More pluralistic decision making structures within corporations will help decision makers look more toward the long term and will improve the quality of decisions.[14]

This point relates to my response to Varyani's first argument about the speed and transparency of information. There is no doubt that information flow is instantaneous now, and corporations and other businesses need to be ever aware of what information is circulating about them and be nimble in their responses. There is also no doubt that it is easier than ever to learn about the practices and policies of any particular company, and that activists, consumers, and investors can more quickly pressure companies to act responsibly toward their stakeholders.

I am less sanguine, however, about the net benefit of these effects. The speed of information leads to the growth of high-frequency trading, which fuels short-termism on the part of management.[15] Companies that engage in long-term strategies and are attentive to a range of stakeholders may suffer short-term drops in share price, for a variety of reasons. For example,

longterm investments may require capital in the present making it unavailable for dividends; investments in employees' human capital will have long-term benefits but will increase production costs in the short term. These shortterm costs will be evident to market watchers. The same transparency that enables community activists to protest a company that utilizes slave labor in its supply chain also enables capital market speculators to sell off securities of companies insufficiently attentive to shareholder gain in the short term. Even well-meaning, long-term oriented capital market investors may have a difficult time discerning when short-term dips in share price are an indicator of mismanagement (a reason to sell) or merely the embodiment of the short-term costs of management's long-term focus (a reason to buy).[16] The speed of information, I fear, makes life more difficult for companies that are managed for the long-term and in a way that is attentive to the interests of all stakeholders.

Of course, we are not going back to a reality in which information circulates slowly. I hope Varyani is correct to describe this as having net positive effects. But the jury is still out.

II. Aisha I. Saad

Saad uses her review of my book to map three competing views of the corporation: conservative, liberal, and progressive. The "conservative corporation" is one that is driven by traditional notions of shareholder primacy explained and analyzed in a contractarian framework. In this view, a corporation's social involvement and attentiveness to non-shareholder stakeholders must be merely a tactic to drive shareholder value. If not, it is "suspect."[17] Social involvement and philanthropy must be driven by "rational self-interest" aimed at "generating social legitimacy for the company."[18] "Corporate social responsibility" is cast as "part of a firm's long-term financial planning" and works best when it aligns with and bolsters the company's "competitive context."[19]

The liberal corporation "attempts to meet dual commitments" to shareholder value and the "public good."[20] Managers owe a fiduciary duty to shareholders but are also "conscious of the ways that [a corporation's] public legitimacy affords it a social license to operate." Liberal corporations may exhibit "enlightened shareholder primacy" that looks to maximize "the firm's long-term value" by being attentive to both shareholder returns and the long-term benefits to the company of being a good "citizen with a public inclination."[21]

Saad associates my work as helping to define the "progressive corporation," an "artificial creation of the state comprised of many participating stakeholders."[22] The progressive firm is measured by its ability to "maximize value for all of a company's stakeholders and not just its shareholders." Instead of a focus on the output of a corporation—measured by shareholder value in a conservative view or firm value in a liberal view— a progressive analysis "is concerned with questions of power, representation, and governance within the corporate entity and in corporate decision-making." Saad perceptively reveals that my view of corporate "personhood" is not that of the self-interested, rational actor assumed in the conservative view of the corporation. Rather, I advocate "for a particular type of personhood" that could be labeled "humanist."

In evaluating the current state of corporate governance law and practice, Saad argues that "increasing investor concern" with environmental, social, and governance factors (hereinafter "ESG") in decision-making has "perforated" the "hard lines separating a shareholder primacy model from stakeholder governance."[23] She identifies two "notable" trends in the investment markets that she says bring these markets into closer alignment with a progressive view of corporations. First, investors are demanding more ESG disclosures and using such information

as the basis for "engagement strategies and portfolio allocations."[24] Second, "socially responsible investors" have gained market share and are "undermining traditional assumptions about the 'reasonable investor.'" These trends have the effect of normalizing the attention of management on matters that would have been seen in earlier eras as immaterial or even inconsistent with a narrow view of shareholder primacy. Saad goes on to suggest that these trends will tend to collapse the difference between the "liberal" and "progressive" schools of thought within corporate scholarship. If so, the common ground between those two camps will "make available more evidence that can support shareholder and consumer litigation."[25]

Saad's paper is a helpful reminder to those of us in the progressive camp to be open to political and scholarly alliances that can advance the cause of a more democratic, accountable, and responsible corporate governance framework. I have failed at times to recognize the potential of such alliances, allowing my worries about the narrowness of the "enlightened shareholder primacy" model to lead me toward skepticism and away from openness. I do believe that even enlightened shareholder primacy will diverge from the interest of other corporate stakeholders in the long term. [26] Shareholder interests and stakeholder interests are not the same, even with an extended time horizon. Disclosure is not a panacea, and markets (even fully informed ones) cannot do all the work that must be done. But if the goal is progress— and I am a progressive— Saad's reminder is a valuable one.

III. Adam Winkler

Winkler's book We the Corporations: How American Businesses Won Their Civil Rights is a brilliant contribution to our collective understanding of corporate constitutional rights.[27] We the Corporations was rightly recognized as one of the best nonfiction books of its publication year,[28] and Winkler's depths of research and narrative facility made the book an essential read for anyone interested in the history of corporate rights. His insight that we should understand the expansion of corporate rights as akin to a civil rights struggle (for better or for worse) is itself a significant scholarly advancement.

Winkler's essay in response to my book builds on accounts he began in We the Corporations. He describes the ways the Court has analyzed corporate rights through the decades, whether by analogizing corporations as associations of shareholders, the property of shareholders, or a placeholder for shareholder interests and rights.[29] While not uniformly so, the Court has often seen protecting corporate rights as necessary to protect shareholders.[30] As Winkler points out, the Court often assumes the unity of interest between shareholders and the corporation, failing even to notice the fact that this unity is highly contested within corporate law. Moreover, the Court fails to notice that this unity (or lack thereof) can be outcome determinative in constitutional law cases.

Take as an example the 2018 Masterpiece Cakeshop case.[31] A bakery in Colorado refused to sell a wedding cake to a same-sex couple, which was illegal under state anti-discrimination law. The bakery defended against the state's legal action by saying that it had a First Amendment right to refuse to sell the cake. The bakery said the cake was speech and to force it to sell to a couple celebrating a union with which the bakery disagreed was akin to coercing school children to recite the Pledge of Allegiance.[32] In addition, the bakery raised a religious claim, arguing that to force it to sell the cake was a violation of the bakery's freedom of religious exercise The case raised fascinating questions arising under both the free speech clause and the free exercise clause. Is making and selling a wedding cake speech? Is it unconstitutional coercion under

either speech or religious protections when anti-discrimination statutes require businesses to engage in transactions they would prefer to avoid? Can businesses raise association claims when they are required to interact with a subset of customers they would prefer to exclude?

Embedded in all of these questions is the preliminary one that the Court largely ignored.[33] As Winkler points out, and as colleagues and I argued in an amicus brief filed in that case on behalf of corporate law professors,[34] the entire case depends on the presumption that the bakery can assert the speech and religious claims of its principal shareholder. In Masterpiece, it was the main shareholder and principal baker, a man by the name of Jack Phillips, who had the constitutional speech and religious interests allegedly burdened by the operation of the state anti-discrimination statute. And for his interests to be projected onto the corporation required the Court to ignore the distinction between shareholder and corporation. Indeed, such a unity is the opposite of corporate personhood, not its embodiment. As we argued in our brief to the Court:

The constitutional claims of petitioner Masterpiece Cakeshop, Ltd., "a Colorado corporation," . . . depend on assumptions running contrary to longstanding and fundamental principles of corporate law, namely the separation of shareholders from the corporate entity. The constitutional interests asserted here by Petitioners are not the interests of the corporation, but rather the interests of one of the corporation's shareholders, Jack Phillips, who demands that the Court project his religious beliefs and political views onto the company.[35]

Jack Phillips chose to use the corporate form for the bakery to separate himself and his personal assets from the business. He wanted the business to be its own legal person, with its own legal rights and obligations. But when his constitutional interests were allegedly restricted by way of a state regulation not of him but of the business, he asserted that for purposes of the First Amendment the Court could ignore the corporate personality of the bakery and assume that he and the business were the same. But corporate law assumes—is indeed based on—the differences between the corporation and its shareholders. In the best line I have ever written in a brief, Phillips "cannot have [his] cake and eat it too."[36]

Winkler agrees with this assessment of Masterpiece and of other cases, arguing persuasively that a focus on corporate personhood—that is, corporate separateness from shareholders—will reduce the number of valid constitutional claims that can be brought by corporate claimants. "When the Court has embraced corporate personhood—saying that corporations are legal persons who stand separate and apart from their members—the result has often been to limit or restrict the rights of corporations."[37] The number will not be zero—like me, Winkler seems to believe corporations should be able to bring some constitutional claims some of the time. But Winkler's expertise in both corporate governance and constitutional law leads him to recognize that assumptions about corporations that are contested within corporate law should not be imported unquestioningly into constitutional law. On this he and I wholeheartedly agree.

IV. Daniel J.H. Greenwood

Greenwood has long been one of the most penetrating critics of the conventional view of corporations and their governance. Our views are aligned in many ways, and he has persuaded me of a number of his arguments through the years. I cite him persistently and assign his work to my students. Because of the alignment of much of our views and the similarity of names, our work is sometimes confused as that of the other. (I am certainly less offended than he has a right to be when that occurs.) In his current essay Corporations Are Organizations and Footnote 4,

Too, Greenwood is powerful in his critique of the current state of corporate governance and influence in the United States.[38] I agree with much of that critique.

Because of the level of our agreement, our disagreements are illuminating. And we disagree about a central issue in my book: the best metaphor for the corporate entity, and the implications for whether corporations can be claimants of constitutional rights. Greenwood takes issue with my title and my defense of some constitutional rights for corporations, instead arguing that the most instructive metaphor for the corporation is a public organization such as a city or town. Instead of holders of rights, Greenwood argues, corporations should be holders of constitutional obligations. They are much more akin to public actors than private ones, and they should have no greater rights to assert, for example, constitutional free speech interests than a local government can assert those same interests against a government hierarchically superior to it. Because of the nature of corporate governance in the United States, to bestow constitutional rights on corporations is to empower those corporations to oppress and marginalize their employees, the communities where they operate, and other stakeholders. This is the opposite of what constitutional rights should be used for, he argues. When corporations assert constitutional protections for their "lobbying, politicking, campaign contributions," and other activities they are not "protecting freedom but restraining it, eliminating tools for ensuring that corporations, and democracy itself, work for us rather than against us."[39]

The intellectual history of corporate law in the United States is a triptych of a journey through various metaphors.[40] Corporations are property, owned by shareholders. They are trusts. Or they are associations, teams, contracts, persons, or government entities.

I think it is fair to say that most scholars who use metaphors to make arguments about corporations do so with the metaphor as the conclusion rather than the premise. Those of us who study the corporation understand it as a unique legal tool used: (1) to gather capital, labor, and other inputs; (2) to marshal them to create goods or services for a profit; while (3) insulating its various investors from personal liability for the activities and decisions of the corporation. Like the ancient Buddhist parable of the elephant being described by the blind men, different aspects of the corporation appear like other things depending on what you focus on. But few of us use the metaphors as the crucible of the argument. In my book, for example, I do not argue that corporations are best seen as people (or persons) and therefore they should have rights. Instead, I make the argument that corporations should have (some) rights (some of the time), and thus can be thought of as legal persons (some of the time).

Greenwood's preferred metaphor of corporation as government is also a conclusion rather than a premise. Corporations should not be claimants of rights but holders of obligations. The rights they receive should come by way of legislative grace; the obligations they hold should come by way of structural, rules-of-the-game mandates. They are thus not persons who can assert rights claims but government entities that must respect claims of rights.

It does not really matter, then, whether my book uses the term "people" or "persons" to describe corporations.[41] The terms are rhetorical tools used to describe my conclusion that it is proper for corporations to be able to assert some constitutional rights. Nor does it matter in responding to Greenwood's argument that descriptively corporations are not in fact government entities. What matters is whether these entities should be able to claim constitutional rights.

And notice here that I do not need to answer Greenwood by arguing that corporate constitutional rights are coextensive to the rights held by natural person citizens. I understand

Greenwood to argue that corporations should not be able to claim any constitutional right at all, in any context. He might retreat to an argument that corporations do indeed depend on some rights, but that those rights should be the product of legislative grace. But that is not what a right is; rights are prior and superior to legislative grace or lack thereof. This is an honest and real disagreement.

To answer Greenwood, I do not have to argue that the current constitutional framework vis-à-vis corporations is the best. My book does not defend the status quo, and I do not wish to do so. I merely have to argue that the best constitutional understanding is not one that gives zero rights to corporate entities.

The central project of my book is to describe why I believe corporations should indeed receive some rights. Remember that rights are limits on government power.[42] As I say in the book, "A right is simply a way to describe a limitation on government behavior."[43] Those who oppose rights—whether for natural persons, associations of persons, or corporate entities—are in effect arguing for an increase in government power. To argue that corporations should have no rights is to argue that government power over corporations should have no constitutional check. "If corporations have no rights, then governmental power in connection with corporations is at its maximum. That power can be abused, and corporate personhood is a necessary bulwark."[44]

As I argue in the book, the notion that corporate entities have no constitutional protections is extremely difficult to maintain. Corporate assets can be seized arbitrarily by local sheriffs? Let's hope not. President Trump could have ordered the New York Times to cease and desist from publishing an editorial about his Russian ties? Let's hope not. A state can regulate companies whose shareholders are Black differently from companies whose shareholders are White? Let's hope not. Corporations can be denied a jury trial or other procedural due process protections? Let's hope not.

It does not seem that Greenwood would deny corporate rights to nonprofit corporate entities. The non-profit corporation I helped create almost twenty years ago, the Forum for Academic and Institutional Rights, sued the Pentagon over issues of LGBTQ rights. We lost in the Supreme Court, but on the merits and not because the corporation had no standing to bring a constitutional claim.[45] The Boy Scouts are a corporate entity,[46] as are Planned Parenthood[47] and the NAACP.[48] So is Boston College, my employer. Some of these are traditional associations; some are not. But I do not hear Greenwood saying that the Constitution does not protect those entities.

So for Greenwood's argument to work, he cannot depend on the notion that no corporations have rights. Instead he has to persuade us that nonprofit corporations can have rights but for-profit corporations should not. That is, he has to persuade us that government power should be constrained vis-à-vis Boston College but not against the Boston Globe. That is a very difficult argument to make. There may be reasons why the nature of a specific corporation should affect the constitutional calculus; as I say in the book, one key question in determining which rights attach and which rights do not is what the purpose of the entity is. But the putative lack of constitutional rights cannot be based on the corporate nature of the entity, that it is not a natural human being, that it is not a true association, or that it is a creature of the state. All of those characteristics can be true of Planned Parenthood, Boston College, or the Southern Poverty Law Center.

Instead, Greenwood must argue that those corporations organized to pursue profit do not deserve constitutional protection because of one of three reasons. First, he could say that for-profit corporations do not need such rights, even if non-profits do. Second, he could say it is inconsistent with the purpose and text of the constitution to give profit-making corporations constitutional standing. Or third, he could say that giving them rights gives them too much power.

Notice that these are the three main themes of my book's analysis. I propose that "the answer to that question [of which constitutional rights corporations can claim] turns on both the purpose of the corporate form and the nature of the right claimed."[49] I say that "[a] first cut on the constitutional analysis should begin with the presumption that corporations should receive the rights necessarily incidental to serving [their] economic purpose."[50] And "we need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations."[51] And as to the theme of corporate power, I propose that the best way to address the anti-democratic nature of corporations is to change corporate governance law to make corporations themselves more democratic.

As for the constitutional analysis, I do not believe that either the nature of for-profit entities or the purpose of the Constitution itself requires that the bundle of corporate constitutional rights be a null set. I think it is quite easy, in fact, to argue that the nature of corporations requires them to receive rights that are necessary for them to fulfill their role as economic engines—rights such as procedural due process protections or rights to be free of uncompensated takings. I also believe it is straightforward and persuasive to say that some rights should apply to corporations because of the nature of the right. For example, the Fourth Amendment's limits on warrantless and unreasonable searches constrain the arbitrary power of police departments. It is important that police officers are so constrained whether it is a house or a business they seek to enter and search.

There is a set of rights that are more difficult to analyze, including substantive due process rights, equal protection rights, religious freedom rights, and free speech rights. In the book, I step through these rights and propose a way to think about them in the corporate context. My analysis leads to different outcomes and a narrower set of protections than those that flow from current doctrine. For example, I believe that restrictions on campaign expenditures should be upheld under First Amendment doctrine, and I think the arguments in favor of upholding restrictions on corporate money are even more persuasive than those in favor of upholding restrictions on individual spending.[52]

But my arguments do not result in a null set of rights claims even among central areas of constitutional law such as free speech, due process, religion, and equal protection. I need not rehash my analysis here. I will hasten to point out again, however, that to argue that for-profit corporations cannot claim any such rights is exceedingly difficult to maintain. For example, under the three most prominent theories of free speech protection, good arguments exist as to why corporate entities should be able to claim at least some free speech protections. That is, whether you believe the First Amendment is best explained by a marketplace of ideas theory, the public discourse theory, or the autonomy theory, there are reasons to protect corporate speech at least some of the time. The first two theories prioritize and protect the content of ideas, regardless of source. The last theory focuses on the primacy of the autonomy of human speakers, and under that theory corporations are not valued as speakers because they are not actual humans. But the autonomy theory also protects human hearers, since humans self-define not

only by speaking but by experiencing the communication of others, including corporate speakers. So even in the autonomy theory, there is reason to offer some protections to corporate speakers because of the value of that speech to human hearers. Thus, a carve-out of corporate speakers as completely beyond the reach of free speech protections does not work easily with any of the theories. I spent an entire chapter of my book on this.[53]

In practice, too, the rights of for-profit corporations are important. The New York Times is a for-profit corporate entity. Americans owe the New York Times and other journalistic outlets a gigantic debt of gratitude for being sentinels and truth-tellers during the four years of incompetence, corruption, lawlessness, cruelty, and bigotry of the Trump administration. It is not an overstatement to say that democracy itself depended on the constitutional rights of for-profit entities over those four years. [54] The promise and project of the First Amendment is, at least in part, to protect against government tyranny by allowing for dissent and resistance. Corporate voices were an essential part of dissent and resistance during the Trump years. I am not claiming that all such corporate voices were positive forces, nor am I claiming that all corporate voices among the resistance participated for altruistic rather than selfish purposes. But to answer Greenwood, my claim can be more modest: that some corporate voices, some of the time, have in fact created the very kind of public good that the First Amendment facilitates, protects, and nurtures.

It is not an answer to the New York Times example to say, as some have, [55] that newspapers are protected by the First Amendment's press clause rather than the speech clause. The Supreme Court has not made distinctions between the protections arising from the two clauses, and the line-drawing necessary to make such distinctions would be exceedingly difficult. (When General Electric was the parent of NBC, or when Westinghouse was the parent of CBS, were they protected by the press clause? Is a blogger protected? Someone who posts on Facebook?)

But more fundamentally for our purposes, Greenwood's arguments against corporate rights do not pick and choose among the rights corporations can claim and which they cannot. That is my project. Greenwood's is to deny all corporate rights, whether they arise under the speech clause, the press clause, the takings clause, or the due process clause. And in my view, a denial of all rights to corporate entities is inconsistent with the purpose of corporations—to provide an engine for economic creation—and the purpose of constitutional rights—to limit the arbitrary power of government.

I agree with Greenwood that the dangers of corporate power and influence are real. I also agree that current constitutional doctrine around corporate speech generally, and corporate political spending more specifically, is significantly flawed. But these doctrinal defects do not require that we denude corporations of any and all rights. We just need a Supreme Court that is knowledgeable of the ways corporations really work and aware of the dangers corporate powers pose to our democracy. And we need corporate governance reform to structure and regulate corporations to act as if they have multiple obligations to a variety of stakeholders. "The best way to constrain corporations is to require them to sign onto a more robust social contract and govern themselves more pluralistically—mechanisms designed to mimic the traits of human personhood within the corporate form."[56]

CONCLUSION

One cannot discuss corporate law and corporate rights removed from the historical and political context. For example, as I write in my book, it is no surprise that the Lochner era in

constitutional law coincided with the Dodge v. Ford era in corporate law. 57 In an era of social darwinism, libertarianism, and robber barons, it was natural to see corporations and businesses as private entities, organized for the benefit of their shareholderowners. They could not be conscripted to provide the public good of safe and dignified employment (Lochner) nor could their resources be marshaled to benefit employees and communities at the expense of the wealthy (Dodge). Similarly, when the Great Depression revealed the dangers of unbridled and unregulated markets, constitutional law expanded the ability of government to regulate business58 and corporate law increasingly showed deference to more magnanimous corporate policies and practices.59

We are now in a moment of historical turmoil, and it is impossible to discuss the rights and obligations of corporations without reference to that. As Americans, we have suffered through four years of a lawless, corrupt, cruel, and bigoted presidency. Even though Trump lost the presidency, it remains unclear whether the nation has truly repudiated that presidency. If not, corporate law and policy will be the least of our worries. If so, there is reason to be hopeful that reforms of corporate governance and an expansion of the social contract of corporations will be important parts of coming political and legal changes. In such an era, the Trump presidency will be seen as the last gasp of an outdated political framework that prioritized existing hierarchies of privilege and domination. A new era can take hold that empowers working-class people, dismantles racist and sexist systems of oppression, protects public health, nurtures democracy, and builds an economy that works for all Americans and not just the richest of the rich.

In such an era, the perspectives, intelligence, and wisdom of scholars such as Daniel Greenwood, Aisha Saad, Natasha Varyani, and Adam Winkler will be invaluable. I will be honored to join them in an effort to build a better, fairer, and more vibrant America.

---

*Professor of Law and Dean's Distinguished Scholar, Boston College Law School. The author thanks the editors and staff of the New England Law Review for their interest in my work and their professionalism during the conference and the production of these essays. I would like to thank particularly Gabrielle Mainiero and Kileigh Stranahan for their leadership, patience, and guidance.

[1]Kent Greenfield, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018) [hereinafter Greenfield, People].

[2]See Daniel J. H. Greenwood, Corporations Are Organizations and Footnote 4, Too, 54 New Eng. L. Rev. 49 (2019); Aisha Saad, Pitching the Big Tent of Corporate Citizenship: Reconciling Kent Greenfield's Humanist Corporate Personhood with an Enlightened Shareholder Primacy, 54 New Eng. L. Rev. 9 (2019); Natasha Varyani, A New Purpose: Shifting Foundations That May Reprioritize the Needs of Corporate Stakeholders and Social Movements, 54 New Eng. L. Rev. 1 (2019); Adam Winkler, Corporate Personhood and Constitutional Rights for Corporations, 54 New Eng. L. Rev. 23 (2019).

[3]See Greenfield, People, supra note 1, at 54–58.

[4]See Empowering Workers Through Accountable Capitalism, Warren Democrats, https://perma.cc/3JA7-PN4U (last visited Apr. 3, 2021) (proposing that employees elect 40% of the board of large companies); Corporate Accountability and Democracy, BERNIE

SANDERS, https://perma.cc/4H8Q-S56Y (last visited Apr. 3, 2021) (proposing that employees elect 45% of the board of large companies).

[5]See, e.g., Our Recommendations, CLEAN SLATE FOR WORKER POWER, https://perma.cc/9QWS-JPV7 (last visited Apr. 3, 2021) ("We recommend that workers choose representatives to serve on corporate boards and that corporations have a legal duty to consider how corporate decisions will affect workers, not just executives and shareholders.").

[6]Varyani, supra note 2, at 6.

[7]Varyani, supra note 2, at 6.

[8]Varyani, supra note 2, at 6.

[9]Varyani, supra note 2, at 6.

[10]Varyani, supra note 2, at 6.

[11]Varyani, supra note 2, at 6.

[12]See, e.g., Kent Greenfield, THE END OF CONTRACTARIANISM? BEHAVIORAL ECONOMICS AND THE LAW OF CORPORATIONS, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 520–25, (Eyal Zamir & Doron Teichman, eds., 2014); Kent Greenfield & Peter Kostant, An Experimental Test of Fairness Under Agency and Profit Maximization Constraints (with Notes on Implications for Corporate Governance), 71 GEO. WASH. L. REV. 983 (2003); Kent Greenfield, Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool, 35 U.C. DAVIS L. REV. 581 (2002).

[13]See George W. Dent, Jr., Stakeholder Governance: A Bad Idea Getting Worse, 58 CASE W. RES. L. REV. 1107, 1129 (2008) ("Creating a new duty to stakeholders would cut off the possibility of curbing CEO autocracy."); Stephen M. Bainbridge, The Case for Limited Shareholder Voting Rights, 53 UCLA L. REV. 601, 610 (2006) (stating that instructing directors to serve multiple constituencies would produce mixed and possibly unstable signals, thus undermining their monitoring role); Robert B. Thompson & Paul H. Edelman, Corporate Voting, 62 VAND. L. REV. 129, 149 (2009) ("Shareholders are the appropriate group to monitor the board and correct errors because they are uniquely sensitive to the principal signal indicating a deviation of the board from its duty to the corporation: the market price of the corporation's stock.").

[14]See GREENFIELD, PEOPLE, supra note 1, at 214–23.

[15]See GREENFIELD, PEOPLE, supra note 1, at 218–22 (discussing high frequency trading and short-termism).

[16]See generally Kent Greenfield, The Puzzle of Short-Termism, 46 WAKE FOREST L. REV. 635–36 (2011).

[17]Saad, supra note 2, at 12.

[18]Saad, supra note 2, at 13.

[19]Saad, supra note 2, at 13 (quoting Michael E. Porter & Mark R. Kramer, The Competitive Advantage of Corporate Philanthropy, HARV. BUS. REV. (Dec 2002)).

[20]Saad, supra note 2, at 13.

[21]Saad, supra note 2, at 13.

[22]Saad, supra note 2, at 14.

[23]Saad, supra note 2, at 14–18.

[24]Saad, supra note 2, at 18.

[25]Saad, supra note 2, at 20.

[26]See GREENFIELD, PEOPLE, supra note 1, at 194–99 (discussing differences between shareholder interests and stakeholder interests).

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

[28]Winkler's book was a finalist for both the National Book Award, The 2018 National Book Awards Finalists Announced, NAT'L BOOK FOUND. (Oct. 2018), https://perma.cc/LZ4E-EM7B, and the National Book Critics Circle Award for Nonfiction, 2018 National Book Critics Circle Award, NAT'L BOOK CRITICS CIRCLE, https://perma.cc/VA8T-CNVY (last visited Apr. 3, 2021).

[29]Winkler, supra note 2, at 101–03, 108, 110, 116, 118, 126.

[30]The first corporate rights case, Bank of the United States v. Deveaux, 9 U.S. 61 (1809), allowed corporations to invoke diversity jurisdiction under Article III, § 2, which grants such jurisdiction to "citizens." The Court ruled that corporations deserved such rights because the shareholders were "essentially, the parties in such a case." Deveaux, 9 U.S. at 87–88; see Winkler, supra note 2, at 108 (discussing Deveaux).

[31]Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

[32]See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[33]The exception being a line of questioning by Justice Sonia Sotomayor, on rebuttal. See Tr. of Oral Arg. at 96, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, https://perma.cc/3YV3-XAW9 (U.S. Dec. 5, 2017) (No. 16-111) (Sotomayor: "Here the seller of the cakes is not Mr. Phillips, it's Masterpiece Corporation. Does it -- in your arguments, who controls the expression here, the corporation or its shareholders?").

[34]Brief of Amici Curiae Corporate Law Professors at 1, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, https://perma.cc/A93A-CCB5 (Oct. 30, 2017) (No. 16-111).

[35]Id.

[36]Id. at 11.

[37]Winkler, supra note 2, at 42.

[38]Greenwood, supra note 2, at 51-52.

[39]Greenwood, supra note 2, at 89.

[40]See, e.g., Margaret Blair & Elizabeth Pollman, The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy, in CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak, eds., 2017); Thomas W. Joo, Contract, Property, and the Role of Metaphor in Corporations Law, 35 U.C. DAVIS L. REV. 779, 779 (2002); Adam Winkler, The Corporation in Election Law, 32 LOY. L.A. L. REV. 1243, 1243 (1999).

[41]See Greenwood, supra note 2, at 52 (distinguishing "persons" from "people").

[42]See Varyani, supra note 2, at 3 (noting my argument that "if there exists an opposite of a constitutional right . . . it is governmental power").

[43]GREENFIELD, PEOPLE, supra note 1, at 65.

[44]GREENFIELD, PEOPLE, supra note 1, at 66.

[45]Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006); GREENFIELD, PEOPLE, supra note 1, at 70.

[46]See Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

[47]See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845 (1992).

[48]See NAACP v. Alabama, 357 U.S. 449, 451 (1958).

[49]GREENFIELD, PEOPLE, supra note 1, at 19.

[50]GREENFIELD, PEOPLE, supra note 1, at 62.

[51]GREENFIELD, PEOPLE, supra note 1, at 103.

[52]See GREENFIELD, PEOPLE, supra note 1, at 168–70.

[53]See generally GREENFIELD, PEOPLE, supra note 1, at ch. 5.

[54]See Varyani, supra note 2, at 4 (stating if newspapers "had not been allowed to assert the constitutional rights related to personhood, then government intervention would have led to a result . . . that set the entire democratic framework of the United States on a different course").

[55]See, e.g., The People's Rights Amendment Protects Freedom of the Press, FREE SPEECH FOR PEOPLE, https://perma.cc/L4EQ-638L (last visited Apr. 3, 2021).

[56]GREENFIELD, PEOPLE supra note 1, at 27.

[57]GREENFIELD, PEOPLE, supra note 1, at 31–38.

[58]See W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 390–94 (1937).

[59]See, e.g., A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 584–85, 589–90 (N.J. 1953).

Kent Greenfield