BOOK REVIEW

A Review of *Corporations and American Democracy*

CORPORATIONS AND AMERICAN DEMOCRACY

by Naomi R. Lamoreaux & William J. Novak eds., 2017

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INTRODUCTION

Promised as the "first comprehensive history of the relationship between American democracy and the corporation," *Corporations and American Democracy* sets itself up with a lofty goal.[1] As the book's editors point out, recent U.S. Supreme Court decisions such as *Citizens United v. FEC*[2] and

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1 The Tobin Project, *Preface* to CORPORATIONS AND AMERICAN DEMOCRACY, at vii (Naomi R. Lamoreaux & William J. Novak eds., 2017).

2 558 U.S. 310 (2010). *Citizens United* held that the Federal Election Commission's limitation on political speech was unconstitutional, as promulgated by section 203 of the Bipartisan Campaign Reform Act of 2002, codified in 2 U.S.C. § 441b. *See Citizens United*, 558 U.S. at 310, 311–15.

Burwell v. Hobby Lobby Stores, Inc.[3] have fostered extensive debate concerning the appropriate role of corporations in American democracy.[4] The editors believe that this debate necessitates a deeper dive into the legal and economic history of corporations.[5] "[T]he level of discourse has remained primarily political if not polemical," they write, "[p]articipants have made bold assertions . . . without much empirical basis."[6] Inspired by this gap in discourse, the fourteen contributors to *Corporations and American Democracy* slipped away to conduct further research, ultimately contributing ten chapters on different topics concerning historical aspects of corporations in the United States.

With each chapter reminiscent of the law review article format, the contributors review corporate history from a detailed, scholarly perspective. Much of the focus is placed on the corporation and its historic role—or how it was historically and conceptually theorized and regulated—as opposed to focusing on the overarching history of campaign regulation, voting rights, or the democratic process—all topics of interest to those who followed *Citizens United* and *Hobby Lobby*. Concomitant with their scholarly achievement, we unfortunately found a lack of a principal narrative, voice, or discernable takeaway. Overall, because the book is presented in a series of discrete research topics related to the corporation, we feel that it would be a valuable reference text for professors with expertise or interest in the corporate form. We would not recommend it, however, to the casual reader hoping for predominant or long-term insights regarding the corporation in America.

Despite some of the book's shortcomings in that regard, the editors, to their credit, do synthesize the history of corporations' relationship to American democracy in what is perhaps the book's most valuable contribution—its introduction. There, Lamoreaux and Novak lay out three themes discerned from the book's self-admittedly "distinctive authorial voices."[7] First, they point to "Americans' long-standing love/hate relationship with the corporation."[8] They argue that the corporation has been seen in two distinct respects. On the one hand, they point out, Americans optimistically view corporations as powerful drivers of economic development and societal change, as an "engine of opportunity and

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3 134 S. Ct. 2751 (2014). *Hobby Lobby* held that corporations are granted exercise of religious freedoms under the Constitution. *See id.* at 2769.

4 Naomi R. Lamoreaux & William J. Novak, *Introduction* to CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 1.

5 The book's contributors consist of eight law professors, three historians, and three economists, with some contributors overlapping in areas of expertise. *See id.* at 495.

6 *Id.* at 1.

7 *Id.* at 2.

8 *Id.*

prosperity."[9] On the other hand, corporations are also viewed with deep skepticism as a corrupting influence, as "a site of coercion, monopoly, and the agglomeration of excessive social, economic, and political power."[10]

Second, the editors highlight what they see as a "basic fact" for their next theme: "American corporations were never granted the same legal and constitutional rights as natural persons or individual citizens."[11] Targeted at combating conclusions to the contrary expressed in cases such as *Hobby Lobby*, the editors note that it was "[o]nly in the second half of the twentieth century . . . [that] the Supreme Court move[d] to extend broader constitutional protections to corporations."[12] And even that move, they note, was only to protect the *individuals* associated in those corporations, not the corporation itself. They additionally outline an "important corollary that also threads through the volume"—the idea that corporations have been extensively regulated throughout history.[13] Although these points are framed as the editors' second discrete theme, it seems that they constitute the driving inquiry of the book as a whole.[14] Indeed, as articulated by other commentators before this, "[t]he problem is that corporations are not polities and shareholders are not citizens."[15] This point is discussed at greater length below.

Third, the editors emphasize that a diversity of organizations have taken the corporate form. They observe that "there is now about one business corporation for every seventy men, women, and children in the country."[16] Far from viewing corporations as solely large, big-money industrial entities, the editors note that there are now 1.5 million nonprofit corporations, even

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9 *Id.*

10 *Id.*

11 *Id.* at 3.

12 *Id.* at 4.

13 *Id*.

14 As Naomi Lamoreaux stated about the issues addressed by the chapters in the book, "Americans have always, from the beginning, had an ambivalent love/hate relationship with the corporation. They have seen it as an engine of economic growth, of economic development, a vehicle of personal opportunity, but they have also viewed it as a tool for the accumulation of excessive and threatening economic and political power." Naomi Lamoreaux, Stanley B. Resor Professor of Econ. & History, Yale Univ., Moderator, The Brookings Institution, The Relationship Between Corporations and American Democracy (Nov. 15, 2017), https://www.brookings.edu/events/the-relationship-between-corporations-and-american-democracy [https://perma.cc/9GQX-TSGS].

15 Lucas E. Morel, *The Separation of Ownership and Control in Modern Corporations: Shareholder Democracy or Shareholder Republic? A Commentary on Dalia Tsuk Mitchell's* Shareholders as Proxies: The Contours of Shareholder Democracy, 63 WASH. & LEE L. REV. 1593, 1594 (2006).

16 Lamoreaux & Novak, *supra* note 4, at 5.

exclusive of churches.[17] These statistics lend merit to the view that the corporate form is inescapably worthy of attention.

The editors contend that the above three themes "come together to highlight the radical break with the past that the Supreme Court's recent decisions in *Citizens United* and *Hobby Lobby* represent."[18] This is the underlying goal of the book, regardless of the book's success in actually achieving a convincingly persuasive demonstration on that front. "Contrary to the claims of several of the justices in the majority," the editors write, "these decisions reflected neither the Framers' original position on corporations nor the vision of corporate rights articulated by [Justice] Marshall in his early nineteenth-century *Dartmouth College* opinion."[19] Instead, the editors hope to "recapture a sense of possibility," one that would, presumably, scale back present-day corporate rights and authority and reassert some level of public control and accountability.[20]

At this juncture, one may question the book's claim to be a work of "comprehensive history," untainted by any political whims or proclivities.[21] Contrary to the introduction's framing of the work, it does not appear that the work was initially, in fact, a response to both *Citizens United* and *Hobby Lobby*. Rather, because the work was a "five-year collaborative effort" ultimately published in 2017, the authors must have started their endeavor around 2012.[22] That year fell in the middle of the four-year gap between *Citizens United* and *Hobby Lobby*,[23] suggesting the book was actually the result of *Citizens United*, the holding of which was somewhat more limited than the *Hobby Lobby* ruling—at least with respect to corporations' ability to assert rights typically reserved for natural persons. The editors also note that many of the contributors worked with Jonathan Massey to merge the research into an amicus curiae brief for filing in *Hobby Lobby*.[24] In line with *Corporations and American Democracy*'s framing of the book as a work of history, their amicus brief as written for *Hobby Lobby* was titled "Brief of Amici Curiae Historians and Legal Scholars Supporting Neither Party."[25]

In filing this way, the scholars were actually aligning themselves with

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17 *Id.*

18 *Id.*

19 *Id.*; Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

20 Lamoreaux & Novak, *supra* note 4, at 5.

21 The Tobin Project, *supra* note 1, at vii.

22 CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 493.

23 Citizens United v. FEC, 558 U.S. 310 (2010); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

24 CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 493.

25 Brief of Amici Curiae Historians and Legal Scholars Supporting Neither Party, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

the historic role of an amicus curiae. One scholar has observed that the original amicus curiae "was . . . a neutral bystander, someone without a stake in the outcome of a case, who offered information to the court gratuitously, just to help the court avoid error."[26] As such, the amicus truly did serve as a "friend of the court."[27] Today, however, "[v]irtually every amicus hopes instead to advance its own interest by helping one party or the other win the case."[28] And one must wonder if the *Corporations and American Democracy* scholars truly did refrain from examining "the factual questions relating to the particular corporations at issue" in the case.[29] Overall, their conclusions strongly supported the arguments of the government.

Regardless of the true underpinning of the project leading to the writing of *Corporations and American Democracy*, the discrete chapters of the work do hold ground in their own right. In fact, many chapters were forceful, incisive pieces of scholarship which direct readers to important primary and historical sources concerning American corporations. We now turn to assessing and summarizing the specific contributions we found particularly worthwhile, or those that we found to otherwise merit discussion or further inquiry.

I. EARLY CORPORATE ORIGINS AND REGULATION

After a summary of the early corporate form in chapter one, Jessica L. Hennessey and John Joseph Wallis continue the historical discussion with a focus on the mid-19th century. They describe a corporate form and an incorporation process more familiar to today's readers than the one described by Hilt, who focuses on the early corporate charters as "special legislative acts." Hennessey and Wallis describe the historical rise of state law general incorporation statutes and challenge any standard account that liberalization in corporate charters was not part of a broader trend in state legislation. The rise of general incorporation statutes was contemporaneous with, and a fundamental part of, a move to general legislation, in which state laws that formerly granted a special privilege (e.g., a divorce) only upon request were opened up to more people.[30] They describe state legislative acts before the

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26 Stuart Banner, *The Myth of the Neutral Amicus: American Courts and their Friends, 1790–1890*, 20 CONST. COMMENT. 111, 111 (2003).

27 *Id.*

28 *Id. But see* Montgomery v. Louisiana, 136 S. Ct. 718, 727 (2016) (noting that "[t]he parties agree that the Court has jurisdiction to decide this case," but appointing an amicus curiae "[t]o ensure this conclusion is correct").

29 Brief of Amici Curiae Historians and Legal Scholars Supporting Neither Party at 4, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (No. 13-354).

30 *See* Jessica L. Hennessey & John Joseph Wallis, *Corporations and Organizations in the United States After 1840*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 74, 86.

1840s as, in general, mechanisms for conferring privilege on those who were already members of dominant political and class groups.[31] The move to general incorporation, they claim, resulted from a "desire to prevent the politics of special privileges from influencing the legislative process, and thus the entire political system."[32] Hennessey and Wallis also challenge the narrative that liberalization of corporate chartering statutes spurred a "race to the bottom," in which states used deregulation to clear the way for "larger and more effective corporations to operate in national markets."[33]

Although the authors conduct a thorough survey of state incorporation statutes and describe certain trends, whether their data actually indicates legislative *intent* to provide liberal incorporation statutes for the purpose of serving the public's needs is questionable. The premise of a "race to the bottom" has historically supported essentially all federal involvement in corporate regulation—including bank chartering,[34] tax laws,[35] and antitrust statutes.[36] For example, antitrust laws originated because "[t]he trust was designed to bring about corporate consolidation while avoiding the prohibition under state corporation laws of one corporation holding the stock of another."[37] Federal intervention was necessary to prevent this consolidation that state law failed to cabin.

Hennessey and Wallis's chapter takes competing narrow and broad views concerning concepts such as special privilege, general statutes, and even democracy itself, showing that it is possible to historicize corporations without fully contextualizing them. The chapter begins with a description of the uniquely American corporate form, which undervalues other institutions over which the public had more control:

> The only comparably large organizations historically were governments, armies, or churches, but none of them reached the level of managerial sophistication and close coordination of capital,

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31 *Id.* at 80–83.

32 *Id.* at 83.

33 *Id.* at 76, 77.

34 *See* Daniel A. Crane, *The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 109, 111 (discussing corporate reform efforts in the late nineteenth century).

35 *See* Steven A. Bank & Ajay K. Mehrotra, *Corporate Taxation and the Regulation of Early Twentieth-Century American Business*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 177, 177 (describing tax laws implemented to address "the tension between using national tax policy to either control corporate power or facilitate its growth").

36 *See* Crane, *supra* note 34, at 131 (describing federal antitrust authority over corporations, which "have no reporting or regulatory relationship with the federal antitrust authorities").

37 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 80 (1992).

labor, products, and markets of late nineteenth-century firms.[38]

Indeed, this may be true, but at what cost to public institutions and to individuals do such institutions thrive? Notably absent are considerations of who was left behind by laws that Hennessey and Wallis claim "made it possible for anyone to obtain a corporate charter."[39] The "close coordination of capital, labor, products, and markets" would not have been possible without the low-cost, profit-making production that American chattel slavery allowed.[40] Even after slavery was abolished, industrialization and the consolidation of manufacturing in large corporations made many Americans dependent on wages set by the prerogative of the corporation and fearful of unemployment or retaliation when they challenged the corporation's "close coordination of capital, labor, products, and markets."[41]

The problem Hennessey and Wallis describe as created by the old chartering regime—i.e., legislative corruption that reserved the privileges granted to business organizations for a select few—cried out for a solution. It does not follow, however, that the liberalization of incorporation statutes had a positive effect on the functioning of democracy or participation in economic life at the state or federal levels. The opening of the corporate form to "anyone," a term Hennessey and Wallis fail to qualify, merely allowed for the proliferation of more concentrated wealth with less legislative control. Not only could legislatures "not explicitly create special privileges"[42] for corporations, but they also could not retain privileges for citizens wanting to curb the influence of increasingly large, wealthy corporations that were progressively performing essential functions, e.g., manufacturing necessities and building and maintaining infrastructure. Loosening the leash on the corporate form does not necessarily promote democracy. The ability of a small group of people to politically manipulate government may have shifted *away* from a small number of specially chartered corporations, but it did not necessarily shift *to* the people.

The best characterization of this theme comes later in Chapter Three, Daniel A. Crane's *The Dissociation of Incorporation and Regulation in the*

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38 Hennessey & Wallis, *supra* note 30, at 74.

39 *Id.* at 83.

40 *See* Dina Gerdeman, *The Clear Connection Between Slavery and American Capitalism*, FORBES (May 3, 2017), https://www.forbes.com/sites/hbsworkingknowledge/2017/05/03/the-clear-connection-between-slavery-and-american-capitalism/#5a0ff3937bd3 [https://perma.cc/S2KV-SZRY].

41 These issues could also have been addressed in more depth in Chapter Nine's discussion of the global corporate supply chain. *See* Nelson Lichtenstein, *Two Cheers for Vertical Integration: Corporate Governance in a World of Global Supply Chains*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 329, 329–58.

42 Hennessey & Wallis, *supra* note 30, at 83.

Progressive Era and the New Deal. Crane notes that Hennessey and Wallis challenge the race to the bottom narrative by characterizing liberalization of chartering as a socially beneficial "'race to the top' insofar as the institutional changes permitted by liberalization enabled more efficient deployment of capital on a national scale."[43] Efficient, yes, but democratic? Equitable? Hennessey and Wallis do not answer this question.

In Chapter Three, Crane brings the reader back down to earth from the liberalization high of the previous chapter. Crane describes, in more realistic terms, the results of liberalization of corporate chartering and other corporate rules. He instead states that the release of corporate governance and actions from states' control need not be characterized as either a race to the top or a race to the bottom.[44] This is a helpful clarification because the terms clearly mean different things to different people (even within the same book) and do not accurately capture the nuance of the effects of general incorporation statutes and their attendant deregulation. Crane does note that "in at least the limited sense that it gutted the states' ability to use corporate charter restrictions as antitrust regulatory devices," the granting of the privileges of incorporation to more and more entities without accompanying those grants with regulation was harmful.[45] This view challenges the idea that the common good is always promoted by the maximization of profit and production and the speedy deployment of capital. He notes that not all democracy confers equal benefit. The "democracy" of opening up corporate charters falls far short of a full participatory democracy in which citizens control state-created entities. "[E]ven as the corporate form became increasingly democratized and widely available, it became increasingly employed to aggregate economic power in the hands of a few powerful managers."[46] This result could easily have been anticipated, of course, because the corporate form was only "widely available" to those who could capitalize it.

Generally, Crane focuses on the failures of pro-regulation interests to marry regulation to a federal incorporation scheme and reign in runaway corporate power and dangerous concentrations of capital. Crane describes failed Progressive-Era proposals for a federal incorporation and registration regime that would provide comprehensive and uniform controls over large aggregations of capital in the wake of state deregulation and the rise of trusts. He presents early federal antitrust laws as ineffective.[47] Crane briefly notes

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43 Crane, *supra* note 34, at 114.

44 *See id.*

45 *Id.*

46 *Id.* at 112.

47 *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of

that the Sherman Act not only failed to break up large industrial trusts but also that "its axe most often fell on labor rather than capital."[48] Indeed, between a federal circuit court decision in *United States v. Workingmen's Amalgamated Council of New Orleans*,[49] and the passage of the Clayton Antitrust Act of 1914,[50] antitrust law was largely wielded not against corporations, but against workers who lacked bargaining power and sought to organize for better conditions.

Crane credits fear of nationalization and federal encroachment on state power for stalling any momentum toward federal involvement in incorporation;[51] not even harmful and undemocratic concentrations of wealth and corporate power could justify a departure from a blind commitment to American capitalism and faith in the corporate form in the early part of the 20th century. Crane describes the rise of a lesser substitute "in which a federal statute, enforced by a federal agency, the Justice Department, or private parties, prohibited enumerated types of conduct" and "antitrust remained a search for illegal behavior that could be prosecuted, penalized, and enjoined rather than an administrative-regulatory system in which large interstate trusts filed their contracts for approval with the Bureau of Corporations."[52] Crane also describes the model that emerged wherein corporate law as a field moved away from a focus on "the role of the corporation in society to one much more narrowly focused on the respective rights and obligations of managers and shareholders."[53]

Even the federal securities laws that Crane says "encouraged various New Deal factions to believe that a more comprehensive federal incorporation scheme was possible"[54] did nothing to make the corporate structure more responsive to the public. These laws only created disclosure obligations that concerned Americans who had an interest in trading in securities. These threads of hope for regulation had largely disintegrated with the arrival of World War II; the Roosevelt administration relied on large corporations in the early days of the military-industrial-congressional complex and the harnessing of large concentrations of capital and productive

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Carpenters, 459 U.S. 519, 539–40 (1983) ("At common law—as well as in the early days of administration of the federal antitrust laws—the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade.").

48 Crane, *supra* note 34, at 115.

49 54 F. 994, 996 (C.C.E.D. La.), *aff'd*, 57 F. 85 (5th Cir. 1893).

50 Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

51 *See* Crane, *supra* note 34, at 117–18.

52 *Id.* at 124–25.

53 *Id.*

54 *Id.* at 126.

capacity to promote manufacturing and transportation infrastructure for the war effort.[55]

If Crane's chapter describes the ultimate failure of Progressive-Era attempts to curb the antidemocratic power of concentrated corporate wealth, William J. Novak's chapter—*The Public Utility Idea and the Origins of Modern Business Regulation*—describes a relative success in the efforts at democratic control of corporations or, at the very least, a corporate scheme more beholden to the common good. Novak posits that even if the public utility model itself no longer sparks much interest as a concept, the early persistence of the idea behind it—that there is "a specific kind of business 'affected with the public interest'"—fueled a push toward a more expansive police power to regulate corporations in the public interest.[56] Novak believes in "the very real possibility that reports of the death of the public utility have been greatly exaggerated"[57] and that the "public utility idea essentially won"[58] because "public services fended off attempts to constitutionally limit or cabin state police power."[59] The question that predominates today, however, is whether states actually use that power to control corporations such that they operate in the public interest.

A "race to the bottom" can exist within or without a strong regulatory environment if states and the federal government fail to avail themselves of a regulatory regime. One only need to look to recent state and local attempts to woo corporations with promises of unbounded freedom from regulation to wonder if Novak's lauded regulatory expansion has made corporations any more sensitive to the public good or democratic control by citizens. For example, in mid-2017, Wisconsin Governor Scott Walker introduced a bill in a special legislative special session to incent Taiwanese technology manufacturing giant Foxconn to build a plant in the state by offering it more than $3 billion in tax incentives, including refundable credits, and exemptions from building taxes and key environmental regulations.[60] After the corporation announced it would seek a permit (required by a regional compact) to divert seven million gallons of water per day from Lake Michigan to meet the factory's water needs, the executive director of the Racine County Economic Development Corp. said, strikingly, "While

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55 *See id.* at 128.

56 William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 139, 143.

57 *Id.* at 142.

58 *Id.* at 143.

59 *Id.*

60 Shawn Johnson, *Wisconsin Foxconn Deal Waives Environmental Regulations*, WIS. PUB. RADIO (July 28, 2017, 4:20 PM), https://www.wpr.org/wisconsin-foxconn-deal-waives-environmental-regulations [https://perma.cc/WQD9-V3H5].

Foxconn will be a user of the water, this application will benefit the entire region."[61]

A similar recent example has been Amazon's invitation to localities around the country to bid for Amazon's second U.S. headquarters to be in their cities and towns.[62] Existing residents, who, under a strong regulatory regime, would in theory have democratic control over corporations, have complained that they felt left out of the bidding process and pushed out by Amazon and its concentration of wealth and power.[63] A Washington, D.C.-area hardware store owner asked, "Why should the richest man in the history of the world get money to open his business?"[64] Perhaps it is actually the death of the antidemocratic special charter described by Hennessey and Wallis, and not the death of the public utility idea, that has been greatly exaggerated.

II. THE CHANGING CORPORATE CLIMATE

Jonathan Levy's chapter, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, shifts the focus from the traditional view of corporations as simply large, profit-making industrial entities and describes the "fiscaliz[ing]" of corporations.[65] He also explains the move to "appropriat[ing] corporate profit as taxable income" while granting tax exemptions to nonprofit corporations organized for a public purpose under section 501(c) of the 1954 federal tax code revision.[66] In addition, he reminds the reader of the vast array of voluntary associations in the United States that are organized into the corporate form as nonprofit corporations.

This is the only chapter that engages in an in-depth discussion of

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61 Lee Bergquist, *Foxconn to Use up to 7 Million Gallons Daily from Lake Michigan*, USA TODAY (Jan. 29, 2018, 6:06 PM), https://www.usatoday.com/story/money/nation-now/2018/01/29/foxconn-use-up-7-million-gallons-daily-lake-michigan/1076692001 [https://perma.cc/QL9U-2BZU].

62 Amazon recently announced that its second headquarters will be in New York City and in Northern Virginia near Washington, D.C. *See* Alina Selyukh, *Amazon's Grand Search for 2nd Headquarters Ends with Split: NYC and D.C. Suburb*, NPR (Nov. 13, 2018), https://www.npr.org/2018/11/13/665646050/amazons-grand-search-for-2nd-headquarters-ends-with-split-nyc-and-d-c-suburb [https://perma.cc/ET8X-Z2QG].

63 *See* Marco della Cava, *Amazon Headquarters Finalists: Some Say Winning Would Come at Too High a Price*, USA TODAY (Jan. 25, 2018, 9:41 AM), https://www.usatoday.com/story/tech/news/2018/01/25/your-city-made-amazons-headquarters-finalist-round-do-you-really-want/1059909001 [https://perma.cc/B6ZV-TERZ].

64 Ben Casselman, *Promising Billions to Amazon: Is It a Good Deal for Cities?*, N.Y. TIMES (Jan. 26, 2018), https://mobile.nytimes.com/2018/01/26/business/economy/amazon-finalists-incentives.html [https://perma.cc/DX5P-8NL8].

65 Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 213, 220.

66 *Id.*

different corporate forms. Although Professor Levy's chapter bifurcates corporations into nonprofit and for-profit, such a distinction is likely too binary if the reader is to assess the role of corporations, as a whole, throughout the 21st century. *Citizens United*'s holding addressed corporations as a whole without reference to the profit-making structure of any corporation.[67] Because nonprofit corporations are considered within the realm of *Corporations and American Democracy*, other incorporation forms could have been included as well. For example, Professor Levy's chapter and the book's other contributors ignored "unincorporated business organizations."[68]

An assessment of various forms of partnerships and limited liability companies, which often escape public control, would have added depth to the discussion of the impact of various corporate forms on issues of "anticorruption" and "shareholder-protection interest."[69]

Levy addresses fiscalization of the corporate form in what he calls a "fiscal triangle"—consisting of nonprofit corporations, for-profit corporations, and the federal government—which began to emerge in the first half of the 20th century as the federal government batted around various taxation schemes for for-profit entities.[70] He describes the implications of a shift in thinking after 1980 in which corporations came to be seen not as industrial but financial entitles: "No longer were the interests of individual shareholders subdominant in theories of the corporation. Increasingly, they were definitional."[71] Levy's argument builds on a thread that runs through much of the book—that the ease with which individuals can organize into voluntary public and private associations is a cornerstone of the ideal of American democratic practice. He posits that any scholarship that describes the relationship between corporations and American democracy must take into account nonprofit organizations in general and, more specifically, the reasons for creating a taxonomy of corporations that, at its highest level,

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67 Again, although the case's holding seems broad, the appellant was specifically a nonprofit corporation. *See* Citizens United v. FEC, 558 U.S. 310, 319 (2010).

68 This term denotes noncorporate forms, although such entities are all subject to many of the same principles of incorporation with the state, with the exception of general partnerships. *See* Robert R. Keatinge, *Universal Business Organization Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29, 36–39 (1998) (laying out the unifying characteristics of business organizations, including both "corporations" and unincorporated business organizations such as partnerships and limited partnerships).

69 *See Citizens United*, 558 U.S. at 357–62 (addressing the government's arguments that corporate expenditure restrictions should be permitted due to "an anticorruption interest" and "a shareholder-protection interest").

70 Levy, *supra* note 65, at 220–21.

71 *Id.* at 240.

divides those that exist solely to make profit from those that do not.[72]

Although the profit/nonprofit distinction may seem natural and logical now, Levy explains that corporations, in the early years of the Republic, were "defined with respect to sovereignty" because corporate charters were "'concessions' of popular sovereignty"[73] and not today's association of individuals organizing for a "lawful [profit-making] purpose."[74] Levy attributes the development of the Supreme Court's corporate rights jurisprudence, beginning with *Santa Clara County v. Southern Pacific Railroad Co.*,[75] to the rise of the latter understanding. The parallel definition for nonprofit corporations was that their charters recognized their incorporation not for profit but for a "general purpose," including "the well-being of mankind throughout the world."[76]

Mentioned in Levy's chapter are the consequences to democracy and overall well-being that come with reliance on voluntary nonprofit associations to promote "the well-being of mankind." Levy notes the sharp turn from Franklin D. Roosevelt's 1933 executive order "mandat[ing] that federal welfare must be delivered by state agencies,"[77] to his request in 1935 that "nonprofit corporations . . . complement public welfare."[78] Levy believes this ushered in a "golden age of mass philanthropy."[79]

A reliance on private institutions may have seemed an innocuous way to support New Deal programs as they got off the ground, but it cannot be forgotten that the New Deal was not for all.[80] As the United States dug in its heels over economic ideology after World War II, as Keeanga-Yamahtta Taylor has observed, "American boosters sustained the fiction of the 'culture of poverty' as the pretext for the persisting inequality between Blacks [denied many of the most robust benefits of the New Deal] and the rest of

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72 *Id.* at 213, 216–17.

73 *Id.* at 217.

74 *Id.* at 219.

75 118 U.S. 394 (1886).

76 Levy, *supra* note 65, at 219.

77 *Id.* at 228.

78 *Id.*

79 *Id.*

80 *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987) ("To enact the social and economic reforms of the New Deal, President Roosevelt and his allies were forced to compromise with southern congressmen. Those congressmen negotiated with Roosevelt to obtain modifications of New Deal legislation that preserved the social and racial plantation system in the South—a system resting on the subjugation of blacks and other minorities. As a result, New Deal legislation, including the FLSA, became infected with unconstitutional racial motivation.").

the country."[81] Taylor notes that "[e]lected officials in both parties continued to demonize social welfare as socialism or communism and an affront to free enterprise, as did private-sector actors who had a financial interest in seeing the American government shift its functions to private institutions."[82] The rise of the nonprofit corporation and its shift from a voluntary and sometimes charitable association of individuals to the very mechanism by which public welfare is administered in the United States had striking impacts on democratic governance of people's rights to food, shelter, and healthcare.

Margaret M. Blair and Elizabeth Pollman's chapter is probably the most useful chapter for anyone who picks up *Corporations and American Democracy* hoping to understand the Supreme Court's treatment of corporations over time, how that culminated in the *Citizens United* and *Hobby Lobby* decisions, and whether—at least with respect to the Supreme Court's precedent and historical understanding of corporations—those cases were correctly decided. Understanding the shift Jonathan Levy describes in his essay, from a corporation as a group of individuals organized for (usually) an industrial purpose to a corporation as a financial entity with an identity of its own, is important to understanding how the jurisprudence of corporate rights became what it is today. In characterizing 19th-century Supreme Court cases, Blair and Pollman note that "in each case in which the Court recognized a corporation as having a right, the Court derived such right from the human persons that the corporation was seen as representing."[83]

Blair and Pollman argue that, over time, the Court's understanding of the corporate structure failed to keep pace with the general trends in corporate law and the corporate role in society.[84] This failure of the Court to adjust corporate rights doctrine to account for changes resulted in the controversies that persist today over whether corporations, as financial entities divorced from their component individual members, should have similar rights to natural persons.[85] The chapter is heavy on doctrine and context and serves its purpose well, juxtaposing the Supreme Court's relatively static corporate rights doctrine within a changing corporate statutory and relational structure.

Indeed, when it comes to corporate structure, many foundational cases in corporate law do not make the distinction between various corporate

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81 KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 34 (2016).

82 *Id.*

83 Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 245, 247.

84 *Id.*

85 *See id.*

forms. Perhaps it has been a long time coming that such distinctions are made as a premise to the greater moral discussion of whether the current concentration of wealth and power held by entities is interfering with American democracy. As the authors highlight, *Trustees of Dartmouth College v. Woodward*[86] addressed a nonprofit charitable institution that only was viewed as representative of private individuals in order to obtain a contracting right to incorporate with the state,[87] and *Santa Clara* viewed corporations as partnerships.[88] However, despite the conflation of nonprofit and pass-through entity associations versus corporations as distinct legal entities, it is important to understand the distinction between associations as corporations, versus corporations themselves, which developed under separate corporate law jurisprudence. While associations informed the early view of corporations,[89] corporations as a distinct and separate legal entity—which is the prominent view of corporations today—exist without owners effectively exerting control over the entity itself.[90] This change, Blair and Pollman point out, should have a place in the Court's corporate rights jurisprudence.[91]

III. THE MODERN CORPORATE ENVIRONMENT

Coming at the end of so many chapters tracking the history of the corporation, Adam Winkler's chapter, Citizens United*, Personhood, and the Corporation in Politics*, is a welcome relief. The reader feels as though they have finally made it to the point where an author has license to discuss *Citizens United* head on, rather than mentioning its relation to some historic era of corporate history. Winkler valuably summarizes the theories embedded in *Citizens United*, as well as how lower federal courts have interpreted the case to come to conclusions regarding other barriers to corporate money in politics. In *SpeechNow.org v. FEC*,[92] for example, "the [D.C. Circuit] held that the logic of [*Citizens United*] meant that corporations, unions, and individuals could give unlimited amounts to PACs

86 17 U.S. 518 (1819).

87 *See* Blair & Pollman, *supra* note 83, at 260.

88 *See* Santa Clara Cty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886); Blair & Pollman, *supra* note 83, at 254.

89 *See* Blair & Pollman, *supra* note 83, at 246–47.

90 *See, e.g.*, *"Empty Voting" and Other Fault Lines Undermining Shareholder Democracy: The New Hunting Ground for Hedge Funds*, LATHAM & WATKINS: M&A DEAL COMMENT. (Apr. 2007), https://www.lw.com/upload/pubContent/_pdf/pub1878_1.Commentary.Empty.Voting.pdf [https://perma.cc/V6PC-UXN2] (describing the relationship between corporation owners and the distribution of voting rights).

91 *See id.* at 245–47.

92 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010).

to finance independent expenditures, such as election ads."[93] *SpeechNow* currently stands as the authorization for the independent-expenditure-only committee, commonly known as the "Super PAC"—an organization to which individuals can give limitless amounts of money in order to finance independent ads in support of or in opposition to political candidates.[94] Winkler observes that, according to available data, "it was estimated that *Citizens United* accounted for approximately $1 billion in new election spending."[95]

Intriguingly, Winkler's work serves as a foil to the optimistic, reformative mindset with which Lamoreaux and Novak so hopefully introduce their book. Against the editors' charge that "[t]he future direction of corporate power, possibility, and responsibility still remains in our hands,"[96] Winkler retorts that the "reform movement to overturn *Citizens United* [is] not promising."[97] "[O]nly a constitutional amendment . . . could reverse it" and "[a]mending the Constitution is always challenging," Winkler writes, "all the more so when it involves carving out an exception to the much-revered First Amendment."[98] He also outlines the potential for "[l]egislative and regulatory options to respond to *Citizens United*," a potential he views as "limited."[99] This dose of skeptical realism is much appreciated for its honesty, but we reflect on how it renders *Corporations and American Democracy* a largely theoretical undertaking.

CONCLUSION

In the end, although the book was conceived as a response to *Citizens United*, perhaps greater analysis of the nuances of that decision, to begin with, would have better informed the readers of the book's different essays. *Citizens United* was unique in that it was not corporate speech itself that was entirely the subject of challenge. The Supreme Court decided it was unconstitutional under the First Amendment to chill political expression seeking campaign funds in favor of a *nonprofit* corporation.[100] However, the court's holding was applied to corporations in general, albeit with an emphasis on "small and nonprofit corporations."[101] Nonetheless, most of the

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93 Adam Winkler, Citizens United*, Personhood, and the Corporation in Politics*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 359, 384.

94 *Id.*

95 *Id.* at 385.

96 Lamoreaux & Novak, *supra* note 4, at 33.

97 Winkler, *supra* note 93, at 386.

98 *Id.*

99 *Id.*

100 *See* Citizens United v. FEC, 558 U.S. 310, 319–22, 354–55 (2010).

101 *See id.* at 355.

book's contributors address problems created by *for-profit* corporations since, surely, the unique problems created by a profit motive are not so inherent in corporations owned by the public.[102] Unlike for-profit corporations, nonprofits are already owned by the public and must operate in a way that serves the public.[103] Furthermore, if any type of corporate speech was being protected in *Citizens United*, it was that of media corporations, which themselves serve a unique public function not served by other types of corporations.[104]

As mentioned in the book's introduction, the Supreme Court's grant of rights to corporations in recent years "extend[ed] broader constitutional protections to corporations."[105]

The Supreme Court has certainly moved the needle in favor of corporations in comparison to older cases.[106] At the same time, the Supreme Court has not fully considered the distinctions present in corporate-law jurisprudence regarding limited liability and separate entity analysis in informing their decisions of corporate constitutional rights.[107] This gap reflects how corporations have developed in America, as within the purview of state corporate law, while federal courts have been limited to interpreting constitutional issues, which are separate from corporate law itself. In light of this, distinctions of corporate law should not be ignored if the moral and social implications of corporate benefits are to be assessed into the future. *Corporations and American Democracy* certainly provides an important first step in establishing a detailed empirical basis for understanding the history of the American corporation.

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102 *See* Greg McRay, *Who Really Owns a Nonprofit?*, FOUND. GROUP: CEO'S BLOG (Sept. 1, 2015), https://www.501c3.org/who-really-owns-a-nonprofit/ [https://perma.cc/PP6S-G9RN].

103 *See id.*

104 *See Citizens United*, 558 U.S. at 353 ("There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by *media corporations*.") (emphasis added).

105 Lamoreaux & Novak, *supra* note 4, at 4.

106 In *NAACP v. Alabama ex rel. Patterson*, the Court addressed the rights of an association, which is a different legal form than that of a for-profit industrial or financial corporation. *See* 357 U.S. 449, 458–59 (1958). Such an association is not a distinct legal entity under common law. *See, e.g.*, Reconstruction Fin. Corp. v. Goldberg, 143 F.2d 752, 758 (7th Cir. 1944) ("A trust is no entity at all, while a corporation is an artificial person."). Perhaps the reason for the lack of clarity regarding corporate forms is the Supreme Court's own conflation of the terms "association" and "corporation." *Compare* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768–73 (2014) (involving an association's standing to sue for infringements of religious rights under the Constitution) *with Citizens United*, 558 U.S. at 336–66 (involving a corporation's political speech rights under the Constitution).

107 *See generally* Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 1, at 286, 286–325.