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# FROM COLONIES TO CORPORATIONS: A COMMENT ON ADAM WINKLER'S *WE THE CORPORATIONS*

George Kuney\*

Good afternoon, I am thankfully your last speaker of the day. It is always nice to come last. I say that tongue and cheek. This is a great book. My name is George Kuney and I head up the Center for Entrepreneurial Law that got Joan to put this all together along with the students from *Transactions*, who have done a great job at this. I only have a few comments about this and I'm not going to really talk about the thesis of the book or personhood. By the way, this is a very readable book. This is the kind of thing you can put on your nightstand and read a chapter a night and it doesn't put you to sleep. It keeps you away from the little glowing screen, it keeps you entertained, and you move right through it. I think I got through it in about 20 days. It's a very interesting read.

The interesting thing to me—what it makes me think of—is where we got all this from. We really got it from a period of mercantilism and the original formation of sovereign chartered companies, for a lack of a better word—the British East India company, the Dutch India company, and the like. These all get chartered because these are massive enterprises that no single group of merchants can actually finance. You could argue that it goes back even further than that when you have merchants who are banding together to buy and charter a vessel and buy goods and then sail them from Venice over to Istanbul and back and then split the proceeds. But really it is the introduction of limited liability that the joint stock companies brought to us. There can be no loss to investors other than what was put into the company. From those you got a certain number—in fact, thirteen little colonies over here, which were all separately chartered and were corporate entities. The British colonialization of America wasn't any kind of a humanitarian development, the colonies were businesses. As one of our president's would later say, *the business from America from the very beginning has been business*. These businesses got to the

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\* Lindsey Young Distinguished Professor of Law, Director of the Clayton Center for Entrepreneurial Law, and Director of the LL.M. in United States Business Law, The University of Tennessee College of Law. University of San Diego, M.B.A. 1997; University of California Hastings College of the Law, J.D. 1989; University of California Santa Cruz, B.A. 1986.

point where they had corporate governance problems with the majority shareholder—England—and they decided they were going to break off from that corporate group. They entered into the Articles of Confederation, which proved to be a disaster. The Articles didn't provide enough strength or enough power to the federal government, so they had to be dissolved. Speaking in my own terms, it was time for a corporate reorganization. And then we end up with the Constitution of the United States and it's really a government's charter. The result was the basic Constitution, different from all that sexy stuff in the Bill of Rights that was tacked on later. The Bill of Rights was added later in order to get the votes necessary to get the Constitution ratified by the states. It was not at the core of what was going on, which was the core Constitution—a corporate governance document that provides for the three branches of government, and delineates a series of checks and balances between them, and lists a series of enumerated powers. The landed property owners, who were the delegates at the Constitutional convention, were trying to agree on governance matters. We did fairly well after we ratified the Constitution, after giving the little people some rights they thought they could count on with the Bill of Rights. Then we have our own little problem. We have something that looks like a hostile spinoff, or an attempted hostile spinoff, that we call the Confederacy and the Civil War.

It's kind of interesting to look at a redlined version of the Confederate Constitution as compared to the original Constitution there are some things that jump out at you. First of all, Noah Webster had done his work between the original draft of the Constitution and the Confederate Constitution so all the spellings in the later document were in standardized modern English. Secondly, every single U.S. Supreme Court case that had been decided against the South was modified—written over—in the Confederate Constitution. So, matters dealing with federal governance of streams, rivers, navigation, banking, etc. was all addressed in their constitution.

The Confederacy and the Civil War didn't go well—for the North or for the South—and it was an unsuccessful reorganization.

Today and in the previous few decades, we are at a point where we are litigating over whether or not the Constitution and its Bill of Rights applies to the corporations that mirror the entity created by the Constitution itself. We have created, therefore, a bunch of little mirror images of the original colonies that are now seeking to be included fully in the Bill of Rights. I fully expect that attempt to go on as long as

possible. The one advantage that the corporations have over you and I is that they can keep on grinding through the legislative and litigation process longer than we can. They are potentially perpetual fighters.

Those are my closing thoughts. I don't think there is much you can do with them except to ponder it. I hope that leaves you in a good mood at the end of this conference. Thank you all very much for coming, we have enjoyed these presentations and the ensuing discussions very much.



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