

December 2018

Contextualizing the Corporate Rights Movement in Transactional Clinics

Alina Ball

University of California, Hastings College of Law, balla@uclawsf.edu

Follow this and additional works at: <https://ir.law.utk.edu/rgsj>



Part of the [Law Commons](#)

Recommended Citation

Ball, Alina (2018) "Contextualizing the Corporate Rights Movement in Transactional Clinics," *Tennessee Journal of Race, Gender, & Social Justice*: Vol. 7: Iss. 2, Article 10.

DOI: <https://doi.org/10.70658/2693-3225.1149>

Available at: <https://ir.law.utk.edu/rgsj/vol7/iss2/10>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Race, Gender, & Social Justice by an authorized editor. For more information, please visit <https://ir.law.utk.edu/rgsj>.

Contextualizing the Corporate Rights Movement in Transactional Clinics

Alina Ball
Associate Professor of Law
University of California, Hastings College of the Law

PRELUDE

This year is the 150th anniversary of the Fourteenth Amendment and provides an opportune moment to reflect on the role corporations have played in shaping not merely their own, but also individual constitutional rights. An examination of the “corporate rights movement” reveals the most successful legal battle in American jurisprudence, which was waged by corporations to obtain constitutional protection. From the right to sue in federal court to the right of contract through free speech rights, corporations have enlisted the best legal minds to advance their cause for expanded constitutional rights. As a result of their relentless litigation strategies, corporations have been at the forefront of shaping constitutional interpretation and, thus, have profoundly impacted American notions of democracy, equal protection, and due process. Although impactful, the corporate rights movement is not commonly studied in traditional corporate law, constitutional law, or economic justice courses.

This essay reflects on the corporate rights movement as a powerful tool for interrogating the enduring struggle for economic inclusion in this country. Additionally, this article offers thoughts on how transactional clinicians can use Professor Adam Winkler’s new research on the corporate rights movement in their clinic seminars to ground their students’ understanding of not only corporate common law, but also its impact on society.

INTRODUCTION

This year marks the 150th anniversary of the Fourteenth Amendment.¹ It is therefore a fitting moment to reflect on the impact of the amendment and more broadly America's commitment to economic justice. The Fourteenth Amendment is arguably the most important constitutional amendment protecting civil rights and economic justice.² The average person may not suspect that reflecting on the Fourteenth Amendment would require an examination of corporate rights. Public discourse on equal protection and due process of law does not take into consideration the outsized role of corporations in shaping our constitutional conception of justice.³

However, the history of the Fourteenth Amendment, which was adopted to shield formerly enslaved Black people from discrimination,⁴ illustrates how Confederate loyalists used corporations to systemically transform the amendment into a sword to overturn unwanted regulations on business and enterprise.⁵ In his recent book, *We the Corporations: How American Businesses Won Their Civil Rights*, Professor Adam Winkler meticulously documents how corporations persistently pursued their positions in federal court until they won constitutional protections such as the ones they have under the Fourteenth Amendment.⁶ It was only subsequent to landmark, constitutional cases brought by corporations that individuals would have the rights first obtained by corporations.

For most of American history, the Supreme Court refused to protect the marginalized and people of color,⁷ repeatedly claiming to be powerless or unwilling to

¹ AKHIL R. AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 320 (2005).

² William J. Brennan, Jr., *The Fourteenth Amendment*, 25 *Trial* 24 (1989) (suggesting more cases were litigated under the Fourteenth Amendment than under any other provision of the Constitution); *see also* *Lochner v. New York*, 198 U.S. 45 (1905) (establishing economic freedom as an unenumerated principle of the due process clause of the Fourteenth Amendment).

³ *See* Martin Luther King, Jr., *Letter From a Birmingham Jail [King, Jr.]*, THE KING CTR., <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0#> (last visited Sept. 28, 2018); *See generally* Garrett Epps, *The Struggle Over the Meaning of the 14th Amendment Continues*, THE ATLANTIC (July 10, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-struggle-over-the-meaning-of-the-14th-amendment-continues/564722/>.

⁴ *See generally* Epps, *supra* note 3. Shortly after the end of the Civil War, Black Codes continued to suppress the rights of African Americans; thus, Congress intervened to provide additional protections. *See generally* *The Southern "Black Codes" of 1855-66*, CONST. RTS. FOUND. (Oct. 13, 2018, 3:17 PM), <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

⁵ R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 247 (2001) ("For the remainder of the nineteenth century, the college decision was a potent legal and ideological weapon for corporations who sought to defeat regulation and establish the ideological primary of laissez-faire capitalism.").

⁶ *See generally* ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* xvi (2018).

⁷ *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) ("[T]here must necessarily be a large discretion on the part of the legislature."); *see also* Kim Phillips-Fein, *Company Men*, THE NEW REPUBLIC

apply concepts of justice.⁸ In contrast, when adjudicating the rights of corporations, the Supreme Court has consistently ignored broad public sentiment favoring business regulations to continuously expand the reach and protections of the Constitution to benefit corporations.⁹ Professor Winkler's book demonstrates not only how corporations have pushed with noteworthy success to obtain constitutional protections, but also that their relentless campaign for corporate rights is one of the longest and most successful constitutional legal battles.¹⁰ In his examination of corporate law history, Professor Winkler exposes how intimately the foundation of this country and the innovations of American constitutional rights are connected to the business corporation.¹¹

Throughout *We the Corporations*, Professor Winkler uses the term the "corporate rights movement" to describe the evolution of the corporation as an "artificial person"¹² to acquire legally enforceable rights similar to a natural person.¹³ With most expansions of constitutional rights there is an accompanying social movement that evolves the public opinion on the issue. Then, the civil rights for the marginalized group are gained through a painstaking litigation process. It was the opposite with corporations. Judicial decisions privileging corporations have been wildly unpopular.¹⁴ But wealthy corporations have consistently had judicial support.¹⁵ What they lacked in the courtroom they overcame with economic influence through the legislature. In this way, corporations moved from rights of property,¹⁶ to limited rights of liberty, to rights similar to those enjoyed by a natural person. An examination of the corporate rights movement also illustrates how the economic interests of the powerful have shaped our constitutional rights and affected the meaning of justice in our legal system. Transactional clinicians do our students a disservice by not explicitly interrogating how corporations have been used as an extension of the wealthy, obtaining constitutional rights often at the expense of marginalized populations. *We the Corporations* provides an accessible opportunity for transactional clinicians to bring critical issues of the corporate rights movement into our classrooms and students' consciousness. Transactional clinicians can advance student learning by connecting how the corporate rights movement continues to affect people's lives and our broader understanding of justice in this country.

(Mar. 29, 2018), [https://newrepublic.com/article/147374/company-men-legal-struggle-citizens-united-corporations-rights-people](https://newrepublic.com/article/147374/company-men-legal-struggle-citizens-<u>united-corporations-rights-people</u>).

⁸ *Plessy*, 163 U.S. at 548 (holding that "separate but equal" does not violate the 14th Amendment); *See also* *United States v. Reese*, 92 U.S. 214, 221 (1876) (striking down the Civil Rights Act of 1875); *see also* *United States v. Cruikshank*, 92 U.S. 542, 555–57 (1875).

⁹ WINKLER, *supra* note 6, at 64; *see also* Phillips-Fein, *supra* note 7.

¹⁰ *See generally* WINKLER, *supra* note 6.

¹¹ *Id.*

¹² *See* *Louisville, C. & C.R. Co. v. Letson*, 43 U.S. 497, 558 (1844) (discussing a corporation as "an artificial person . . . capable of being treated as a citizen of that state, as much as a natural person.").

¹³ *See* WINKLER, *supra* note 6 at xvi, 47.

¹⁴ *Majority of Americans Support Campaign Finance Reform*, IPSOS.COM, <https://www.ipsos.com/en-us/news-polls/center-for-public-integrity-2017-08-31> (last visited Sept. 28, 2018).

¹⁵ WINKLER, *supra* note 6, at xviii-xix.

¹⁶ *See* *Trs. of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

This essay proceeds by exploring the current state of transactional clinics and how they interact with contemporary economic justice efforts. The second section of this essay highlights lessons that *We the Corporations* illustrates that are essential for understanding the corporate rights movement and how it links to economic justice issues. This essay then offers ideas about how transactional clinicians can use the context of the corporate rights movement to ground our students' client work and develop their understanding of economic justice. As students work with clinic clients to form corporations and expand businesses in marginalized communities, the lenses and perspectives they have about the work will impact their client interactions, counseling, and final work product. Learning about the corporate rights movement invokes both the idealistic and exploitative power of corporations. It is essential that transactional clinicians carry an understanding of and respect for these tensions, so that the business work we conduct within marginalized communities has this critical lens.

I. TRANSACTIONAL CLINICS & ECONOMIC JUSTICE

The increase of transactional clinics has provided a new venue in legal education for conversations on economic justice.¹⁷ Economic justice generally refers to the efforts of lawyers to advance economic opportunity for low-income or marginalized populations.¹⁸ Litigation and policy advocates have historically dominated the economic justice space as a means to address a need for increased incomes in low-income communities. Lawyers have worked alongside community activists on campaigns to abolish poverty or other anti-poverty initiatives.¹⁹ Because poverty is never merely an issue of financial resources,²⁰ those initiatives have also included access to health care, education, and affordable housing, among other needs. However, a majority of economic justice lawyering has focused on increasing access to income. As Professor Susan Jones summarizes:

Antipoverty policy makers have traditionally focused on income, spending and consumption. A new vision is emerging that is focused on savings, investment and asset accumulation, but it works with, and not instead of, traditional antipoverty programs. Assets matter because they provide more than just an economic cushion. They provide a psychological orientation that income alone cannot provide.²¹

¹⁷ See Lynnise E. Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175 (2015).

¹⁸ See *Defining Economic Justice and Social Justice*, CTR. FOR ECON. & SOC. JUST., <http://www.cesj.org/learn/definitions/defining-economic-justice-and-social-justice/> (last visited Oct. 14, 2018).

¹⁹ See Stephen Loffredo, *Poverty Law and Community Activism: Notes From a Law School Clinic*, 150 U. PA. L. REV. 173 (2001).

²⁰ Bryan Stevenson, *We Need to Talk About An Injustice*, TED 16:15 (Mar. 2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en (“[T]he opposite of poverty is not wealth . . . the opposite of poverty is justice.”).

²¹ Susan R. Jones, *Dr. Martin Luther King, Jr.'s Legacy: An Economic Justice Imperative*, 19 WASH. U. J.L. & POL'Y 39, 57 (2005).

The relatively recent shift towards asset accumulation and management has encouraged more corporate and transactional attorneys and clinicians to be mindful of economic justice issues. Corporations are vehicles to accumulate wealth, organize capital, and structure collective enterprise. Thus, transactional lawyers are indispensable in economic justice efforts to make our society more inclusive. While the majority of transactional clinics may not have an explicit social justice mission, there are a growing number of transactional clinics that intentionally connect their representation of businesses to advancing economic justice efforts.²² Clinical education can have a transformative impact on the professional pursuits of students in those courses. Thus, the increased number of transactional clinics that address economic justice issues means that more corporate lawyers are also likely to intentionally move into the economic justice space. As transactional economic justice lawyers, we do not spend much, if any, time or attention on the constitutional rights of corporations. In distancing ourselves from these conversations, we prevent ourselves from seeing the relevance between the corporate rights movement and our contemporary work with small businesses. To understand the continued struggle for economic justice, transactional lawyers must also understand how it intersects with the corporate rights movement.

If more transactional lawyers are to join in economic justice lawyering, the responsibility falls on legal educators to contemplate what needs and resources these newcomers will need. As clinicians continue to develop and innovate the pedagogy of transactional clinics,²³ they should consider engaging the corporate rights movement in their seminars. Previously, there were few resources transactional clinicians could use as starting points for discussing the corporate rights movement. The remainder of this essay explores how transactional clinicians could use the recent book *We the Corporations* to expand student understanding of corporate constitutional law and the impact of corporations in this country. This background serves as a powerful foundation for thinking critically about corporations as an avenue to address economic marginalization and achieve economic justice. Because history serves as the foundation for understanding the present day, it is important that transactional economic justice lawyers recognize the connections between marginalized groups' search for economic justice and how expanded corporate rights have often opposed them.

II. LESSONS FROM THE CORPORATE RIGHTS MOVEMENT

Because much of corporate law is largely common law, studying corporate law provides a snapshot of the evolution of this country that goes deeper than a mere doctrinal investigation. In many ways, the American experience cannot be understood without the historical context of corporations and business rights.²⁴ From chartered

²² See Alina Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 CLINICAL L. REV. 27, 52–53 (2017).

²³ See Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413 (2015).

²⁴ HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM

colonies, to private institutions with public mission, to early nineteenth-century family owned businesses, to trans-continental railroad companies, to present-day transnational enterprises, the history of American corporations is the history of America. In his recent book, *We the Corporations*, Professor Adam Winkler succinctly describes the evolution of not only the corporate form, but also the corporate rights movement, documenting how corporations waged the legal battle to win constitutional rights and won.

The outsized role corporations have played in shaping constitutional rights is rarely examined in any doctrinal courses in law school. For this reason, reading Professor Winkler's book was an illuminating experience even for someone like me who has studied various aspects of corporate law for years. The corporate form is the genesis of American ideas of democracy, branches of government, and civic engagement. The first colonies in the Americas were corporations chartered under the British crown to earn profits for their shareholders.²⁵ As a result, numerous distinctive features of the American Constitution can trace their roots to the charter documents of those first colony corporations. In this way, the corporate form has exerted considerable influence on American ideas of government and continues to provide powerful metaphors for contemporary political candidates.²⁶

Moreover, corporations have the accumulated wealth to finance the best legal representation to relentlessly litigate the same issues until they have changed the Court's mind.²⁷ In other words, the legal mechanisms that allow corporations to accumulate wealth gives them multiple "bites at the apple" to change constitutional law, which in turn allows them to garnish more wealth, power, and influence. The first case to address the constitutional rights of corporations was in 1809;²⁸ that is fifty years before the first case to address the constitutional rights of African Americans²⁹ and sixty years before the constitutional rights of women reached the Supreme Court.³⁰ Unlike in the first constitutional cases of women and African Americans, the corporation won its

31 (1968) ("[This] argument is one of the landmarks in American constitutional history, an important turning point in our social and economic development.").

²⁵ WINKLER, *supra* note 6, at 6–7 (2018).

²⁶ See *Donald Trump Says He'll Run America Like His Business*, ASSOC. PRESS: FORTUNE (Oct. 27, 2016), <http://fortune.com/2016/10/27/donald-trump-hillary-clinton-business-management/>;

Catherine Rampell, *Trump is Running America Just Like His Businesses — Right Into the Ground*, WASH. POST: OPINION (Apr. 26, 2018),

[https://www.washingtonpost.com/opinions/trump-is-running-america-just-like-his-businesses--right-into-the-ground/2018/04/26/91235210-498d-11e8-8b5a-](https://www.washingtonpost.com/opinions/trump-is-running-america-just-like-his-businesses--right-into-the-ground/2018/04/26/91235210-498d-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.76715fb6ffb3)

[3b1697adcc2a_story.html?noredirect=on&utm_term=.76715fb6ffb3](https://www.washingtonpost.com/opinions/trump-is-running-america-just-like-his-businesses--right-into-the-ground/2018/04/26/91235210-498d-11e8-8b5a-3b1697adcc2a_story.html?noredirect=on&utm_term=.76715fb6ffb3) ("Throughout the 2016 campaign, Donald Trump repeatedly pledged that if elected, he'd run government like a business. 'If we could run our country the way I've run my company, we would have a country that you would be so proud of,' he promised during one debate.").

²⁷ WINKLER, *supra* note 6, at 73–74. Railroad corporations used civil disobedience and test cases to strategically keep corporate rights in litigation. *Id.* at 120 (citing GRAHAM, *supra* note 24, 31).

²⁸ *Id.* at 36 (citing *Bank of the United States v. Deveaux*, 9 U.S. 61, 88 (1809)).

²⁹ *Id.* at 35 (citing *Scott v. Sandford*, 60 U.S. 393 (1857)).

³⁰ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

constitutional rights.³¹ In sum, the context for how we now understand the Constitution was profoundly shaped by the wealthiest corporations of their generation.³²

In these ways, Professor Winkler describes corporations as both “leveragers,” adapting previously decided cases to promote their business,³³ and as “first-movers,” trailblazing new legal concepts.³⁴ “As constitutional leveragers, corporations have successfully exploited constitutional reforms originally designed for progressive causes,” and usurped those reforms to increase their capital.³⁵ “Yet corporations are also constitutional first movers, and historically have often been innovators at the cutting edge of constitutional litigation.”³⁶ While courses covering the civil rights movements for women, racial minorities, LGBT, and other oppressed groups may be offered in law school, there are rarely any courses that expose students to the centuries-long push for constitutional rights that corporations have waged. In fact, most of the corporate rights movements have been invisible.³⁷ While individual cases might gain notoriety, the litany of constitutional corporate cases are rarely addressed and acknowledged as a distinct body of law. Professor Winkler’s book is both refreshing and provides long overdue recognition of the corporate rights movement.

Transactional clinicians could incorporate an examination of the corporate rights movement into their seminars not only to expand student understanding of doctrinal corporate law, but also to draw students’ attention to the role corporations have played in economic justice struggles. There are several key takeaways from Professor Winkler’s book about the corporate rights movement that would better contextualize the client representations of transactional clinics. The following sections highlight two such takeaways.

³¹ *Compare Deveaux*, 9 U.S. at 88 (holding that corporations have constitutional protections), *with Sandford*, 60 U.S. at 393 (holding that African Americans were not “‘citizens’ within the meaning of the Constitution”), *and Bradwell*, 83 U.S. at 130 (holding that the refusal to grant women professional licenses does not violate the Constitution).

³² See WINKLER, *supra* note 6, at 73 (“Litigation in other rights movements, however, has usually been coupled with broad-based, political mobilization of the masses . . . Corporate rights have largely been won in the courts, not in the streets, and have developed largely without much public scrutiny—even though many of the lawsuits leading to corporate rights were highly publicized in their time.”).

³³ *Id.* at 98.

³⁴ *Id.* at xxiii.

³⁵ *Id.* (“In the 1970s, Ralph Nader won a landmark case on behalf of consumers that established a First Amendment right to advertise—a right that corporations, including tobacco and gaming companies, used to overturn laws designed to help consumers.”).

³⁶ *Id.*

³⁷ Dave Davies, *How American Corporations Had a ‘Hidden’ Civil Rights Movement*, NPR (Mar. 26, 2018), <https://www.npr.org/2018/03/26/596989664/how-american-corporations-had-a-hidden-civil-rights-movement>.

A. CORPORATE LAW AS FUNDAMENTAL TO AMERICAN DEMOCRACY

Corporations existed in this country prior to the founding of the United States of America.³⁸ “[T]he Virginia Company of London was one of the earliest business corporations in England,” and was founded to make money for its stockholders in the new land of America.³⁹ The corporation “enjoyed exclusive trading rights for the area stretching roughly from modern-day North Carolina to Maine.”⁴⁰ When the Virginia Company was hemorrhaging money, it used its real property assets to attract more capital.⁴¹ “Every stockholder [of the company] was offered 100 acres of land” to cultivate.⁴² The overwhelming majority of stockholders chose to grow tobacco,⁴³ which would also have an enormous influence on the course of American history, eventually “fueling the demand for slave labor.”⁴⁴ In this way, the Virginia Company “recruited nearly 4,000 new colonists to come to the New World, including the Pilgrims.”⁴⁵

Reflecting on America’s roots as fledgling corporate colonies is fundamentally eye opening in an era where the President brags of running the country like one of his businesses.⁴⁶ Moreover, the exploitative beginnings of this country as several scrappy, struggling corporations puts into context why such a rich, first-world country refuses to end poverty and economic marginalization. Corporate greed is what birthed this country. Although not covered in *We the Corporations*, the reader can easily make the connections to see how the first corporations on United States soil succeeded because of their willingness to exploit white privilege by killing and stealing from Native Americans.⁴⁷ At the inception of this country, corporations were utilized as functions of wealth, masculinity, and whiteness to exploit and plunder.

Although the Virginia Company failed to turn a profit, it nevertheless provided a template for future English colonies and the construction of the present-day United States. The charter documents for those colony corporations would serve as a blueprint for what would become the U.S. Constitution.⁴⁸ The colony charters “heavily influenced [the Founders’] understanding of limited government, individual rights, and constitutionalism.”⁴⁹ The corporations that owned the first colonies also functioned as

³⁸ Marci Martin, *Founded When? America’s Oldest Companies*, BUS. NEWS DAILY (Sept. 28, 2018), <https://www.businessnewsdaily.com/8122-oldest-companies-in-america.html>.

³⁹ WINKLER, *supra* note 6, at 6.

⁴⁰ *Id.*

⁴¹ *Id.* at 14.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (“Tobacco, we will see, would also play a starring role in the history of corporate rights, as tobacco companies and their allies would prove to be among the most ardent proponents of constitutional protections for corporations.”).

⁴⁵ *Id.* at 16.

⁴⁶ *See supra* text accompanying note 20.

⁴⁷ Rebecca Onion, *America’s Other Original Sin*, SLATE (Jan. 18, 2016), http://www.slate.com/articles/news_and_politics/cover_story/2016/01/native_american_slavery_historians_uncover_a_chilling_chapter_in_u_s_history.html.

⁴⁸ WINKLER, *supra* note 6, at 5.

⁴⁹ *Id.*

governments responsible for overseeing the people who lived there and exerted a considerable influence on American attitudes and understanding about governance.⁵⁰ Self-government was a corporate necessity for those early corporations and those corporate charters were regarded as mini constitutions. In the years leading up to the American Revolution, the colonists came to believe that the rights guaranteed to them by their charters were under attack by England. The U.S. Constitution was designed to do what corporate charters had long done in the colonies: establish government offices, outline the procedures for lawmaking, and impose limits on government action. “The similarities between the Constitution and the original 1629 charter of the Massachusetts Bay Company . . . are striking.”⁵¹ The Constitution was America’s charter and founding document, and the Constitution’s shape and scope reflected the Framers’ experience with corporate governance.

Democracy and constitutionalism have, thus, been intimately tied up with the corporate form from the establishment of this country. “[J]udicial review is another of the distinctive features of American constitutionalism that can be traced back to the corporation.”⁵² The principle that corporate bylaws must not be “contrary to the laws of the land” or not be “repugnant to the Laws of the Nation” developed as a restriction on the colonial charters.⁵³ The colonies could legislate to the extent that their laws were not contrary to the laws adopted by Parliament. This view of legislative limits was incorporated when Marshall explained that a “law repugnant to the Constitution is void” thereby expanding the role of the judiciary to review and invalidate laws contrary to the Constitution.⁵⁴

This history not only makes us reflect on the origins of this country, but also the realities of starting a business. For example, I often remind my students that starting a business for one purpose can lead to an unintended positive outcome. While the majority of new businesses may fail,⁵⁵ as the Virginia Company demonstrates, a failed business does not mean the business endeavor was not worthwhile. Corporate leadership and business ownership have a long history of serving as a training ground for civic engagement.⁵⁶ For better or worse, the electorate in this country has regularly chosen to select its leadership from the business sector pipeline. The history of the United States as a lean start-up desperate for another round of venture capital financing reiterates the lesson transactional clinicians often want their students to learn about connecting corporate leadership to other successful endeavors.

⁵⁰ *Id.* at 19.

⁵¹ *Id.* “[F]undamental liberties functioned similarly to constitutional rights in that they were understood to be limits on the power of those holding office under the charter . . . The legislative power vested in the assembly was just the ordinary power of a corporation to enact bylaws, and the popular assembly was a meeting of the stockholders.” *Id.* at 21.

⁵² *Id.* at 63.

⁵³ *Id.*

⁵⁴ *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

⁵⁵ See SBA Office Advocacy, *Frequently Asked Questions*, SMALL BUS. ASS’N 1, 3 (Sept. 2012), https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf (“About half of all new establishments survive five years or more and about one-third survive 10 years or more.”).

⁵⁶ See Charles M. Tolbert, II, *Minding Our Own Business: Local Retail Establishments and the Future of Southern Civic Community*, 83 SOC. FORCES 1309 (2005).

The power of democratic participation also resonates in Winkler's retelling of the Virginia Company and other corporate colonies.⁵⁷ Transactional clinicians addressing economic justice issues may anecdotally discuss why it is important for marginalized individuals to participate in corporate enterprise. The history of the corporate colonies provides a tactile illustration of how the corporate form engenders democratic participation. The American iteration of democracy originates from stockholder votes.⁵⁸ A transactional clinic may represent, for example, a corporate client that is an employee-owned worker cooperative that allows otherwise disenfranchised individuals to vote on the direction of the corporation. The clinician's objective in deciding to represent this cooperative client may be to expose their students to the importance and meaningfulness of these employee votes. The history of the corporate colonies in the U.S. illustrates how participation in a corporate entity can facilitate other forms of democratic participation.

B. CORPORATE AND JUDICIARY SCHEME TO CLAIM THE FOURTEENTH AMENDMENT

Despite the fact that corporations have never been subjected to systemic oppression, like groups such as women and racial minorities, they too have pushed to gain constitutional protections since America's earliest days. No legal fight details that better than the corporate rights movement to transform the Fourteenth Amendment. The Amendment had been adopted after the Civil War to guarantee the rights of the newly freed enslaved persons; however, corporations litigated tirelessly to expand their access to such due process and equal protection rights.⁵⁹ Professor Winkler tells the story behind this legal strategy and its beginning in former U.S. Senator Roscoe Conkling, the only person living at that time who had been on the committee that wrote the Amendment.⁶⁰ During his oral arguments in *Santa Clara County v. Southern Pacific Railroad Co.*, Conkling claimed to the Supreme Court that the drafting committee members specifically selected the word "person" in the amendment because they were concerned about the undue burdens that recent laws were placing on enterprises.⁶¹ Although evidence exists that the Supreme Court may have suspected Conkling's portrayal of events to be a lie, the justices nonetheless embraced Conkling's argument that corporations had rights protected by the Fourteenth Amendment.⁶²

This was not a unique circumstance. The Court previously found protections for corporations, where they refused to find them for African Americans.⁶³ For example, although "there was no evidence the Framers understood Article III to include corporations," the Court had already extended to the corporations the benefit of their legal imagination in a way they would not extend it to African Americans.⁶⁴

⁵⁷ WINKLER, *supra* note 6, at 19.

⁵⁸ *See id.* at 14.

⁵⁹ *Id.* at 113.

⁶⁰ *Id.* at 114.

⁶¹ *Id.* at 115.

⁶² *Id.*

⁶³ *Id.* at 117.

⁶⁴ *Id.* at 110.

“[T]he Supreme Court would invoke those corporate rights [under the Fourteenth Amendment] to invalidate numerous laws governing how businesses were to be run, supervised, and taxed.”⁶⁵ A study conducted in 1912 found that the court “had heard 604 Fourteenth Amendment cases between 1868 and 1912.”⁶⁶ “[T]wenty-eight of those cases (less than 5 percent) involved [the constitutional rights of] African Americans . . . and in nearly all of those cases the racial minorities lost.”⁶⁷ Corporations were involved in 312 of those cases and “succeeded in striking down numerous laws regulating business, including minimum wage laws, zoning laws, and child labor laws.”⁶⁸ “At the same time the court was upholding Jim Crow laws in infamous cases like *Plessy v. Ferguson* . . . the justices were invalidating minimum-wage laws, curtailing collective bargaining efforts, voiding manufacturing restrictions, and even overturning a law regulating the weight of commercial loaves of bread.”⁶⁹ Wealthy corporations, with the endorsement of the Supreme Court, intentionally transformed the Fourteenth Amendment, originally adopted to shield formerly enslaved Black people from discrimination, into a sword to strike at unwanted business regulations.⁷⁰

Converting the Fourteenth Amendment was part of a larger plan to reclaim power after the Reconstruction Era.⁷¹ “Instead of trying to overturn the amendment, [former Confederate leadership] would seek to exploit it in an attempt to defang Reconstruction.”⁷² The *Slaughter-House Cases* of 1873 set the persistence of the Confederacy to fight Reconstruction by systematically undermining it.⁷³ Although the Supreme Court ultimately ruled against corporate interests in the *Slaughter-House Cases*, the cases raised the questions of whether “the Fourteenth Amendment create[d] a barrier to laws regulating economic activity.”⁷⁴ In Justice Field’s dissent in the *Slaughter-House Cases*, he advocated for a “liberty of contract” that “protected an individual’s right to practice the trade or profession of one’s choice without undue state interference.”⁷⁵ By the time Reconstruction ended in 1877, the Supreme Court had minimized the ability of racial minorities to use the Fourteenth Amendment, opening the door to corporations to continue the pursuit to expand their Constitutional rights under this provision.⁷⁶

Within the next twenty years, the Supreme Court had embraced Justice Field’s reading of the amendment to include his “unenumerated principle of laissez-faire into the due process clause.”⁷⁷ Justice Field would go onto take advantage of Chief Justice Waite’s illness “to insert into a Supreme Court majority opinion an affirmation that

⁶⁵ *Id.* at xv.

⁶⁶ *Id.* at 157.

⁶⁷ *Id.*

⁶⁸ *Id.* at 158.

⁶⁹ *Id.* at xv.

⁷⁰ *Id.* at 117.

⁷¹ *Id.* at 125.

⁷² *Id.*

⁷³ *Id.* at 127.

⁷⁴ *Id.* at 128.

⁷⁵ *Id.* at 154.

⁷⁶ *Id.*

⁷⁷ *Id.*

corporations had Fourteenth Amendment rights.”⁷⁸ Constitutional protections for corporations meant that the Court would invalidate regulations that interfered with a pro-business agenda.⁷⁹ The landmark case *Lochner v. New York* became a symbol of this new doctrine.⁸⁰ The economic liberty read into the transformed Fourteenth Amendment provided much for corporations to celebrate.⁸¹ Although there were plenty of cases litigating business regulations that corporations lost during this *Lochner* era, the drawn-out cases that corporations now had standing to bring could at least delayed implementation of those regulations.⁸²

Often, we take for granted the amount of control corporations yield, without putting in context the amount of time and effort that has been contributed to creating this status quo.⁸³ Corporate constitutional rights, such as those gained under the Fourteenth Amendment, were strategically crafted and plotted through a series of cases.⁸⁴ Corporations had to accumulate legal victories with incremental success to acquire their current slate of constitutional rights.⁸⁵ “Although there was never a broad-based popular movement for corporate rights, throughout American history the nation’s most powerful corporations have persistently mobilized to use the Constitution to fight off unwanted government regulations.”⁸⁶ Professor Winkler goes on to summarize that “what has often united justices across the [ideological] spectrum is a tendency to side with business.”⁸⁷ The corporate rights gained in the past have only continued to propel the movement forward today. “In recent years, scholars have increasingly noticed that even in the ideologically divided Roberts court, the justices regularly find common ground in business cases.”⁸⁸

The legacy of the *Lochner* era and the Court identifying unenumerated rights under the Fourteenth Amendment would go onto influence individual rights.⁸⁹ Over the years, the due process clause was construed to protect “the right to privacy, the right to

⁷⁸ *Id.*

⁷⁹ *Id.* at 155 (citing *Pembina Consol. Silver Mining Co. v. Pa.*, 125 U.S. 181 (1888)).

⁸⁰ *Id.* at 154. *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); GRAHAM, *supra* note 24, at 137; E.S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 653 (1909).

⁸¹ WINKLER, *supra* note 6, at 158.

⁸² *Id.*

⁸³ *Id.* at 159; see Ruth H. Bloch and Naomi Lamoreaux, *Corporations and the Fourteenth Amendment*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 286 (Naomi R. Lamoreaux & William J. Novak eds. 2017).

⁸⁴ WINKLER, *supra* note 6, at 159.

⁸⁵ *Id.*

⁸⁶ *Id.* at xxi.

⁸⁷ *Id.* at xviii-xix.

⁸⁸ *Id.* at xix.

⁸⁹ *Id.* at 182; see MELVIN UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 351 (2015); See also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 110 (2011).

choose abortion, and the right to same-sex marriage.”⁹⁰ As a result, corporations as first-movers have “fundamentally reshaped American constitutional law.”⁹¹

III. ADVOCACY WITH HISTORICAL CONTEXT

As the previous Section recounted, corporations’ efforts in shaping constitutional law have not only benefited them financially, but also impacted how individual’s rights have developed under the Constitution.⁹² Thus, understanding corporate constitutional law not only reveals much about doctrinal corporate law, but also our current concepts of justice in this country. Understanding this context is meaningful. As Martin Luther King Jr. once warned, economic justice in this country is elusive because we have “power without compassion, might without morality, and strength without sight.”⁹³ I would add to the list, advocacy without historical context. The corporate rights movement provides context that all economic justice advocates should understand, but especially transactional lawyers working in this space because so much of what we do is attempting to use the corporate form to address economic marginalization. In that effort towards economic justice, transactional lawyers cannot be advocates without historical context.

A. CORPORATE LAW AS AN EXTENSION OF POWER

We often discuss the significance of local context in our economic justice advocacy because the efforts that have proven successful in one geographic location may not be effective in another for political, cultural, or structural reasons. Similarly, the historical context of our work is also salient. A deeper understanding of the corporate rights movement may also temper rhetoric about empowerment when working in low-income communities. While the corporate form itself may be helpful to achieve a specific client goal, we should also understand how the wealthy and powerful are contemporaneously using the form to fortify and preserve their own interest.⁹⁴ Transactional lawyers working towards economic justice need not only be aware, but also vigilant of how the corporate form is used to marginalize through its acquisition and consolidation of power.

On the other hand, by studying the history of corporate rights, we also see the social purpose origin of the corporate form that can add substance to our claims about how corporations should be engaging in business. Historically, U.S. corporations had a stated public purpose and were not merely mechanisms to drive private profits. In other words, the origin for the corporate form had both private and public functions. For example, Alexander Hamilton noted when writing about the Bank of North America, “public utility is more truly the object of public banks than private profit.”⁹⁵ The origin

⁹⁰ WINKLER, *supra* note 6, at 182.

⁹¹ *Id.*

⁹² *Id.*

⁹³ DONALD T. PHILLIPS, *Preface to MARTIN LUTHER KING, JR., ON LEADERSHIP: INSPIRATION & WISDOM FOR CHALLENGING TIMES* 1 (1998).

⁹⁴ WINKLER, *supra* note 6, at 5.

⁹⁵ *Id.* at 39; see James O. Wettereau, *New Light on the First Bank of the United States*, 61 PA. MAG. HIST. & BIOGRAPHY 272, 284 (1937).

for the corporate form had both private and public functions. Corporations were financed and managed by private parties, but were also inherently public, as the government would not grant a formation charter unless the corporation had a stated public purpose.⁹⁶ “Individual investors took home profits, but the ultimate mission of the corporations had to be in the service of the public.”⁹⁷ This historical context is an important lens for contemporary, socially conscious entrepreneurs. The current trend of social enterprise laws can be better understood not as a new innovation of law,⁹⁸ but rather a return to the origin of corporate law.⁹⁹

Understanding and acknowledging the duality of corporations can give more meaning to our work as transactional clinicians as well. Transactional economic justice clinicians can take a normative stance on the way corporations have used their power to perverse constitutional rights and still use the corporate form to help clients acquire access and justice. This is a familiar paradox other social justice advocates have grappled with, as the law generally has been consistently used to benefit the powerful, wealthy, male, and white.

Transactional clinicians cannot go into low-income communities advancing the corporate form as ways to empower small businesses and community groups, without also recognizing from where the corporate form derives its power. Professor Winkler noted the importance of corporations’ property rights in that “corporations were designed to pull together the property interests of a diverse group of people for consolidated control.”¹⁰⁰ In this manner, corporations have always been used as a legal extension of the wealthy property rights. Though nuanced with ups and downs, twists and turns, reviewing the litany of corporate rights cases illustrates that over the course of our history the law sides with corporate power.

B. CONTEXTUALIZING TRANSACTIONAL CLINICAL PEDAGOGY

There is real tension for the transactional clinician to cover as much doctrine, theory, and skills training as possible in the confines of an academic semester or even quarter. Thus, while many may agree that exploring the evolution of the corporate rights movement would make an interesting and enlightening conversation, previously there has not been a resource that would make this possible within the confines of the realities of a clinical course. Professor Winkler’s book, *We the Corporations*, now makes that possible because it covers the corporate rights movements within one book.¹⁰¹ A clinical professor could easily assign one chapter of the book during the course of the semester for class discussion or assign the entire book to be read and revisited during the semester to connect with other themes and topics the clinician is addressing.

⁹⁶ WINKLER, *supra* note 6, at 78; see David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013).

⁹⁷ WINKLER, *supra* note 6, at 48.

⁹⁸ See J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541 (2016).

⁹⁹ See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 Del. J. Corp. L. 767 (2005).

¹⁰⁰ WINKLER, *supra* note 6, at 49.

¹⁰¹ *Id.* at 73–74.

The transactional clinician could also consider assigning a reflective essay to accompany any selected readings from this book. Reflective essays are a powerful tool in developing students' higher learning and documenting their metacognitive development.¹⁰² Clinical pedagogy incorporates reflective essays to help students process the complex information they learn in the clinic and to provide them a space to document their developing understandings of not only substantive law, but also their professional identity. It can be difficult to compose reflective essay prompts that are significantly connected to the corporate law, but also allow students to use creativity and critical analysis in their written responses. Providing a prompt on *We the Corporations* could fill this gap for transactional clinicians.

For instance, the transactional clinician could assign their class to read the first chapter of the book, *In the Beginning, America Was a Corporation*, for in-class discussion.¹⁰³ This is a relatively short chapter in the book that explores the colonial charter history of the establishment of the country.¹⁰⁴ The chapter also covers the development of corporate governance,¹⁰⁵ which is a common doctrinal topic addressed in transactional clinic seminars. In class, the clinician can facilitate a conversation that leads the students not only to summarize the genesis of the country from chartered corporations, but also to identify what structural elements of our present-day government are derived from corporate governance.

Subsequent to the in-class discussion, the clinician could assign the students to complete a reflective essay. The prompt for the reflective essay could be something to the effect of: "Reflecting on the themes of this chapter and our discussions on corporate governance, what are your thoughts on America's past as corporate colonies? How does the country's past as corporate colonies influence present-day conceptions of corporations?" This prompt is broad enough to encourage a variety of responses, but narrow enough for students to begin to internalize how the history of corporations in our society has relevance to their present work. Depending on the other themes of the course and whether or not the course explicitly addresses economic justice topics, the clinician could also include in the prompt: "Why has economic justice been elusive in a country that was established originally for economic gain?"

Surely, there are other exercises and discussions in the seminar that would provide students opportunities to reflect on and implement their understanding of the corporate rights movement into their work. The reflective essay offers one specific example of how the transactional clinician might achieve this.

¹⁰² See Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1, 29 (2015).

¹⁰³ WINKLER, *supra* note 6, at 7.

¹⁰⁴ *Id.* at 7–13.

¹⁰⁵ *Id.*

CONCLUSION

The legal innovation of the corporate form has allowed for unprecedented concentrations of power and wealth. As transactional clinicians continue to participate in economic justice efforts, part of our goal is to help clients accumulate and leverage power that has been denied to their communities for too long. As proven by over 400 years of corporate constitutional law, the corporate form is an effective vehicle to accomplish this task. However, the study of corporate constitutional jurisprudence also reveals the problematic ways corporations have influenced and altered the concepts of justice. The corporate rights movement demonstrates how corporate law was used throughout the development of this country as a tool to protect and expand the rights and privileges of the wealthy and powerful. Corporations continue to use constitutional litigation to manipulate and distort public policy to increase their own profits. This historical lens provides context for present-day constitutional law cases as well as economic justice efforts in low-income communities.

Today, corporations have practically the same constitutional rights as individuals: freedom of speech, freedom of press, religious liberty, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, the right against double jeopardy, and the right to trial by jury, among others. These are not rights that were won because of public support or even knowledge. In fact, many of these corporate rights were gained in spite of vocal public opposition. The public outcry after *Citizens United*¹⁰⁶ did not prevent the Supreme Court's decision in *Hobby Lobby*¹⁰⁷ four years later. Similarly, although public opinion favors same-sex marriage, the Supreme Court still issued its pro-corporate rights ruling in *Masterpiece Cakeshop*.¹⁰⁸

Given this, transactional clinicians should consider directly addressing the corporate rights movement in their courses because legal education currently lacks a dedicated course that exposes students to the subject. As transactional clinicians expand their place in economic justice scholarship, the historical context of corporate rights is one that we need to continue to grapple with. Transactional clinicians would do their students and clients a benefit to include coverage of the corporate rights movement in their courses. Professor Winkler's book is an excellent resource to effectively address the corporate rights movement in a seminar course, as the book invites transactional clinicians to speak more explicitly about corporate actors' intersections with historical and present-day economic justice efforts.

¹⁰⁶ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁰⁷ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

¹⁰⁸ See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).