

# HAVE YOUR CORPORATE VEIL AND PIERCE IT TOO: LESSONS LEARNED FROM *WE THE CORPORATIONS*

William Beasley\*

Thank you all for being here today and for allowing me to comment on Professor Padfield's article.<sup>1</sup> I greatly appreciate his detailed comments and the perspective he provides on Professor Winkler's comprehensive work, *We the Corporations*. Because I am one of the last speakers today, I will keep my comments brief, and then we will have some additional time for questions and commentary on these two pieces.

Throughout the book, Professor Winkler explores the story of how American corporations won their civil rights. This piece, structured as a pseudo-biography of the corporate person, relies on the historical contexts surrounding the decisions that have expanded corporations' civil rights.<sup>2</sup> This book also spends significant time discussing the advocates that argued many of the important cases like *Dartmouth College*<sup>3</sup> and *Citizens United*.<sup>4</sup> Professor Winkler pulls the curtain back to allow readers to understand these decisions and others that have shaped the rights of corporations in the United States. This approach allows us to read between the lines of the decisions in a way that I, as a student, miss when I am reading for class or preparing for a final exam.

---

\* William Beasley is a third-year law student at the University of Tennessee College of Law and the Editor-in-Chief of *Transactions: The Tennessee Journal of Business Law*. I would like to thank the University of Tennessee College of Law; Professors Kuney and Heminway for their mentorship, dedication to student scholarship, and leadership in hosting the Business Law: Connecting the Threads II CLE; Adelina Keenan for all of her hard work and the countless hours she spent hosting this wonderful event; and Sophia Brown and Micki Fox for their dedication to hosting CLE programs at the College of Law.

<sup>1</sup> The author was asked to comment on Professor Padfield's article, *Does Corporate Personhood Matter? A Review of, and Response to Adam Winkler's We the Corporations*, 20 TENN. J. BUS. L. 1009 (2019). This article consists of the author's edited comments presented at the conference on September 14, 2018.

<sup>2</sup> ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).

<sup>3</sup> *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

<sup>4</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

As I begin, I should preface my comments. I am far from a constitutional or business law scholar. In fact, I was an English major in undergrad and, regrettably, never took a business class until law school. Now, as a third-year law student currently enrolled in Business Associations, my contribution to the scholarly conversation surrounding business entities and corporate personhood will be minor. But I would be remiss if I did not point out that this book and Professor Padfield's thoughtful article changed the way I will advocate for my clients and provided an interesting perspective on the implications of the Court's recognition by omission in the *Masterpiece Cakeshop* decision.<sup>5</sup>

Additionally, I would argue that this book should inform all of us when we advocate for corporate clients. While practitioners may not cite this piece in briefs or pleadings, it must inform attorneys' advocacy because it provides a new perspective of these opinions from the other side of the bench and allows readers to more fully understand the reasoning of each opinion. This exploration of the historical context of corporate personhood equips attorneys to advocate for clients more effectively.

*We the Corporations* also reminds practitioners to pay special attention whenever the Court issues a decision involving the civil rights of a party and a corporation without specifically addressing the corporate form. This viewpoint provides a new context for analyzing civil rights cases where a court ignores the corporate form of a party. The question is: does the Court's failure to address the standing of a corporation grant corporations a new civil right?

As an example, consider the *Masterpiece Cakeshop* decision, which I must admit I read only after reading several of Professor Winkler's opinion pieces addressing whether the Court created a right of religious expression for corporations.<sup>6</sup> In *Masterpiece Cakeshop*, the Court reversed the Tenth Circuit Court of Appeals and ordered a new hearing before the Colorado Commission on Civil Rights (the Commission) after finding that the Commission did not afford the baker's religious beliefs fair consideration

---

<sup>5</sup> Stefan Padfield, *Does Corporate Personhood Matter*, 20 TENN. J. BUS. L. 1009, 1028–30 (2019).

<sup>6</sup> See Kent Greenfield & Adam Winkler, *Big Business Keeps Winning at the Supreme Court*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2018/07/big-business-keeps-winning-at-the-supreme-court/564260/> (last visited June 12, 2019).

in the previous hearing. Crucially, the Court only addressed the baker's religious beliefs and did not address the corporate form.<sup>7</sup>

Most recently, Winkler pointed out that despite an amicus brief signed by a group of business law professors, the Court ignored the fact that one of the parties was a corporation and that issues of corporate personhood prevent a corporation from exercising the religious belief of the owner.<sup>8</sup> In ignoring this important argument did the Court unintentionally extend the rights of corporations by allowing the defendant, a corporation, to refuse to serve individuals based on the owner's sincerely held religious beliefs?<sup>9</sup> Professor Winkler argues that this decision likely extends corporate personhood:

[T]he justices too gave scant attention to the fact that a corporation was involved in this case. Justice Anthony Kennedy's opinion for the court discusses the facts exclusively in terms of the baker—someone who clearly has religious liberty rights under the First Amendment—and never even mentions the most controversial question of the corporate entity's religious freedom. One possibility, then, is that future courts, when confronted with corporate assertions of religious liberty, will say that *Masterpiece Cakeshop* leaves the issue open and sets no definitive precedent.

History, however, suggests another outcome. Over and over again, corporations have won rights through Supreme Court decisions that, like *Masterpiece Cakeshop*, provide little or no justification for why corporations as such should be able to claim those rights. In the 1880s, the Supreme Court held that business corporations have equal protection and due process rights with no explanation; the court simply dropped a sentence in an opinion saying they did. In the 1930s, the court ruled that corporations have First

---

<sup>7</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.*, 138 S. Ct. 1719 (2018).

<sup>8</sup> Adam Winkler, *Masterpiece Cakeshop's Surprising Breadth*, SLATE, <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html> (last visited June 12, 2019). See also Padfield, *supra* note 5, at 1029.

<sup>9</sup> *Id.*

Amendment press freedoms, again without offering any reasons for including corporations.<sup>10</sup>

Professor Padfield artfully addresses this discussion in his article as well:

[T]he Court completely ignored the argument that the plaintiff in the case was a corporation rather than an individual baker, and that at the very least the right of a corporation to claim religious freedom under the U.S. Constitution had not yet been decide, and that such a right should not be granted to corporations.<sup>11</sup>

My first instinct was that this decision could not expand corporate rights to the extent of allowing a corporation to exercise religious freedom. But the more I consider the historical context of past decisions and the expansion of other corporate rights, a pattern emerges that shows decisions like these will likely affect the rights of corporations. Throughout his book, Professor Winkler makes this point, demonstrating how decisions, which at first glance have very little to do with business law, unintentionally expand the rights of corporations. This could be the case in *Masterpiece Cakeshop* where both the owner and the corporation were parties to the case, but the court failed to address the corporation's standing to challenge the Commission's decision.

When I think of how I can contribute to this discussion with the time remaining in my presentation, I hope that I can offer you some assurance that no courts have seized upon this argument yet. Since the decision on June 4, 2018, *Masterpiece Cakeshop* has been cited in only 12 opinions and none of these decisions addressed corporate personhood, corporate form, or a corporation's right to religious freedom.<sup>12</sup> Though the sample size is small and additional time may prove that a court is willing to embrace this argument, for now the issue is left open.

In this lens, Professor Winkler's point is well taken. For centuries, corporations have won their civil rights through decisions that at times have very little to do with business law. As a law student preparing to enter the profession, this book and Professor Padfield's article have reminded me of the importance of each issue and the opportunity to more deeply

---

<sup>10</sup> Winkler, *supra* note 8. See also Padfield, *supra* note 5, at 1029.

<sup>11</sup> Padfield, *supra* note 5, at 1029.

<sup>12</sup> This assessment is current as of the date of the presentation, September 14, 2018.

understand the background and circumstances of each decision. While I am unable to predict how *Masterpiece Cakeshop* may affect the rights of corporations, we can see the pattern of decisions like these and the way that they have affected the rights of American corporations.

In preparing for this presentation I stumbled on a quote from the Tenth Circuit Court of Appeals in *Hobby Lobby v. Sebelius*.<sup>13</sup> In that case, the court held that corporations were persons for the purposes of the Religious Freedom Restoration Act.<sup>14</sup> There, Judge Matheson, concurring in part, stated the “structural barriers of corporate law give me pause about whether plaintiffs can have their corporate veil and pierce it too.”<sup>15</sup> I am not sure whether the Judge Matheson realized we would have a cake case so quickly. It is either supernatural foresight or an incredible coincidence, but either way we have a cake case now. And while the question is still open, it will be very interesting to see whether the Court will allow a corporation to have its corporate veil and its religious freedom too.

---

<sup>13</sup> *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1179 (10th Cir. App. 2013) (Matheson, J. *concurring in part*). See also Bill Corriher, Trump’s Supreme Court Nominee Puts the Rights of Corporations over Individuals, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/courts/reports/2017/03/13/427905/trump-supreme-court-nominee-puts-rights-corporations-individuals/> (last visited June 28, 2019).

<sup>14</sup> *Hobby Lobby*, *supra* note 13, at 1179.

<sup>15</sup> *Id.* at 1129.