

## Review Essay

### Corporations, Democracy, and the Historian

*Corporations and American Democracy. Edited by Naomi R. Lamoreaux and William J. Novak.* Cambridge, MA: Harvard University Press, 2017. viii + 517 pp. Maps, figures, tables, notes, index. Cloth, \$35.00. ISBN: 978-0-674-97228-5.

Reviewed by Richard R. John

What is the relationship between the corporation and American democracy? This provocative and timely question informs the ten essays that Naomi R. Lamoreaux and William J. Novak have assembled in a tightly edited volume that has attracted a good deal of attention from specialists in the history of U.S. public policy. In an age in which the political influence of big business has once again thrust itself onto the political agenda, this collection should also prove to be of great interest to the many historians, legal scholars, and jurists who are trying to understand the long and complex relationship between business, law, and the state.

For readers of this journal, this collection breaks new ground. For many decades, historians of the corporation rarely paid more than fleeting attention to its relationship to democracy. Like John F. Kennedy, who famously reminded critics of prodevelopmental economic policies that “a rising tide lifts all boats,” they were inclined to assume that if corporations guaranteed material abundance, there was small cause for concern. Their research agenda instead focused on the internal dynamics of the firm, a decision that owed much to their frustration with, and in some instances outright hostility toward, the intellectual orientation of an earlier generation of progressive historians, whose insistent critique of big business shaped much historical writing in the mid-twentieth century and remains very much alive—often, one might add, with good reason—in the academy today.

It would be a mistake to lump together business historians as opponents of the democratic impulse that galvanized Franklin D. Roosevelt’s New Deal. Even so, like the economist Joseph Schumpeter—or, for that matter, the raft of historians, social theorists, and jurists who witnessed firsthand the crisis of parliamentary democracy in 1930s Europe—business historians have been far more inclined than specialists in

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social, cultural, or political history to raise skeptical questions about the long-term significance of elections, presidential administrations, and social movements.<sup>1</sup> This was true even of Alfred D. Chandler Jr., despite his indebtedness to the conceptual framework that he inherited from the prodemocratic progressive historians Charles Beard and Frederick Jackson Turner.<sup>2</sup> Chandler's *Visible Hand*, for example, closed with the candid acknowledgment that the rise of the managerial enterprise posed a basic challenge to conventional ideas about democratic governance in the United States, without proposing how this challenge could be met.<sup>3</sup>

The neglect of democracy by business historians has not gone unnoticed. For many years, for example, Chandler's Harvard Business School colleague David A. Moss has taught classes on the history of American democracy both at Harvard and in the public schools. Moss is founder of the Tobin Project, a think tank based in Cambridge, Massachusetts, that is dedicated to generating policy-relevant scholarship on topics in the history of American democracy. Among the projects it has sponsored is the collaboration that led to this volume. Though Moss did not contribute an essay to *Corporations and American Democracy*, his long-standing commitment to the study of democracy has helped give this collection a coherence that is often lacking in projects of this kind.

The Tobin Project takes its inspiration from the conviction of Nobel Prize-winning economist James Tobin that "outstanding scholarship on important questions can make a profound difference in society" (p. vii). For the contributors to this volume, these questions include recent trends in jurisprudence—such as, in particular, their palpable outrage at the recent U.S. Supreme Court rulings in *Citizens United v. Federal Election Commission* (2010) and *Burwell v. Hobby Lobby Stores*

<sup>1</sup> For an unusually astute analysis of the problem of democratic governance in the 1930s that remains too little known among nonspecialists in legal history, see Edward A. Purcell Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington, KY, 1973).

<sup>2</sup> Richard R. John, "Turner, Beard, Chandler: Progressive Historians," *Business History Review* 82, no. 2 (2008): 227–40.

<sup>3</sup> The final sentences of Chandler's *Visible Hand* point toward the relevance of business history for democratic governance, while leaving it to others to figure out how this challenge might be met. "Such studies," Chandler observed—in referring to future scholarship on the comparative history of the business enterprise that focused, as in *The Visible Hand* he had not, on the influence on the business enterprise of cultural attitudes, values, ideologies, political systems, and the social structure—can help us answer "a critical issue of modern times," that is, how the "narrowly trained managers" who "must administer the processes of production and distribution in complex modern economies" could be "made responsible for their actions—actions that have far-reaching consequences." Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA, 1977), 500.

(2014).<sup>4</sup> Indeed, in certain ways, *Corporations and American Democracy* reads like a professorial critique of the misuse of history by some of the nation's most prominent judges, an academic complement, as it were, to the widespread—and, it should be underscored, easily overstated—assumption among political progressives that these rulings have invested corporations with the same civil rights as the American people.<sup>5</sup> “Corporations are not people” is a seductive rallying cry for critics of the ideological orientation of today's Supreme Court. But it is a misleading gloss of corporate law—past or present—and the contributors to this collection try to explain why.

*Citizens United* and *Hobby Lobby* each expanded the prerogatives that corporations enjoy under the federal Constitution. *Citizens United* overruled a 2002 statutory limit on campaign spending by contending that this restriction violated the corporation's First Amendment free-speech rights, a holding that would henceforth permit any business or labor union to spend an unlimited sum of money on federal elections, so long as they did not earmark their contribution for a specific campaign. *Hobby Lobby* struck down a provision of a 1993 federal law that required the owners of a closely held corporation to provide their employees with certain health care benefits by contending that this provision violated the owners' First Amendment rights to the “free exercise” of religion.

These two rulings, warn Lamoreaux and Novak in a bracing introductory essay, mark a “radical break” in American jurisprudence (p. 5). Human beings, Lamoreaux elaborates later in the volume—in an essay coauthored with Ruth H. Bloch—have under the U.S. Constitution historically enjoyed rights to both liberty and property, while corporations have enjoyed only property rights. Yet as a result of the Supreme Court's recent “aggressive and unprecedented assertion of corporate rights and authority,” Lamoreaux and Novak contend in their introduction, this critical distinction has been blurred, overturning “two centuries of history” and sending the “relationship between corporation and American democracy reeling off in a new direction” (p. 5). This is dangerous, in their view, because corporations have historically been held to a “higher standard of public care, public responsibility, and public accountability” than human beings (p. 4). By investing corporations

<sup>4</sup>Twentieth-century state court rulings receive much less attention, even though they remain influential in corporate law, because in the United States, corporations are chartered by the states and not by the federal government.

<sup>5</sup>For a spirited, bracing, and morally engaged overview of the present-day debate over corporate civil rights, see Kim Phillips-Fein, “Company Men,” *New Republic*, Apr. 2018, 49–53. Phillips-Fein's article is a review of a recent book by Adam Winkler, one of the contributors to the Lamoreaux-Novak collection.

with rights, the Supreme Court has paradoxically *lowered* the threshold against which their conduct can be judged by lawmakers, jurists, and citizens.

Had this collection confined itself to providing a scholarly update on the use and misuse of history by the Supreme Court, this would itself have been a notable achievement. Yet *Corporations and American Democracy* also aspires to offer up a full-scale history of the relationship of the corporation to democracy in the American past. Central to this relationship is the premise, set forth most clearly in a preface written by the Tobin Project's (unnamed) sponsors, that from the eighteenth century to the present, corporations have been "created and regulated" to "address" the "recurring challenges of democracy" (p. vii). By framing the issue in this way, the Tobin Project sponsors identify corporations with democracy much more closely than is customary in U.S. history textbooks—let alone in the mass media. Whether the relationship between the corporation and democracy will emerge as the "next new thing" in American historiography remains to be seen. Yet the contributors are to be commended for putting this issue high on historians' agenda and, in so doing, offering up a progressive alternative to the steady stream of books and articles in the "history of capitalism" genre that risk confining the field's ambit to the (undeniably important) single topic of the exploitation of unfree labor.

How can one generalize about the corporation in the abstract? Business historians often restrict themselves to giant organizations such as the Bank of the United States, Standard Oil, or General Motors. Yet these behemoths are hardly representative. Some 4.5 million corporations exist in the United States today. Of these, some are large, the vast majority small, and the majority nonprofits. Given this variety, it can be perilous to generalize about their structure, conduct, and performance. Sensitive to this objection, economic historians respond by generalizing about the formal attributes of corporate charters, while law professors trace legal norms. Of the ten substantive essays here, only Nelson Lichtenstein's analysis of Walmart's business strategy takes as its defining problematique the social consequences of the managerial strategy of a single firm. Building directly on the time-honored internalism of Chandlerian business history, Lichtenstein demonstrates its radical potential—a potential that is largely absent from the other essays in the collection, which rarely stray far from the unquestionably consequential, yet ultimately more narrowly defined, realms of institutional forms and legal norms.

Democracy poses an even greater interpretative challenge. Democracy is notoriously hard to define and the contributors are mostly content to sidestep the issue. For some, democracy is a principled

aversion to special privilege; for others, it is the public declaration by lawmakers, jurists, and the writers of legal tracts that corporations have a social responsibility to promote the public good. For still others, it is the promulgation of legal norms that empower journalists to report on public affairs and voluntary associations to champion the weak and the powerless. Only by implication is democracy understood—as it had been, for example, by the twentieth-century philosopher John Dewey—as a mode of self-rule that is open ended, future oriented, and participatory.

It is of course unfair to fault a project for a lack of clarity on such a notoriously vexed issue. Even so, would-be readers should be aware that there remain other ways to relate the corporation to democracy. None of the contributors, for example, has honed in specifically on the character and significance of corporate environmental regulation, the mid-twentieth-century “industrial democracy” movement to increase labor participation on the factory floor, or the ongoing campaign inside and outside of the boardroom to overcome the long legacy of workplace discrimination against women and minorities. And only Lichtenstein speculates directly about the antidemocratic implications of corporate speech, contending that it is likely to be less consequential than the erosion of direct managerial control over supply chain management. If you are looking for a book on the legacy of Occupy Wall Street or the machinations of the Koch brothers, you have plenty of options. But you will not find these topics discussed here.

*Corporations and American Democracy* is, instead, a well-researched and forcefully argued history of the institutional forms and legal norms that have shaped the corporation in the United States from the colonial era to the present, an indispensable perspective that is particularly well suited to the collaborative research agenda that is the centerpiece of the Tobin Project’s mission and that has created an impressive body of knowledge that should help to orient future research on the relationship of political structure, business strategy, and the public good.

### Corporations and the Law

In the first substantive essay, Eric Hilt challenges the contention of Supreme Court Justice Antonin Scalia that the only corporations that concerned the eighteenth-century founders were the tiny number that lawmakers had granted legally sanctioned monopolies, rather than the much larger number that had been granted special privileges of various kinds. Every corporation in this period received a special charter, typically from a state legislature. For this reason, the founders found *all* corporations troubling. This was because *every* corporation,

by virtue of its special charter, had been granted certain special privileges. In *Modern Corporation and Private Property* (1932), Adolf H. Berle and Gardiner C. Means wrote approvingly of special-charter corporations, on the grounds that their special charters demonstrated that state legislators were effectively regulating them to promote the public good; for Hilt, in contrast, special charters were almost always a pernicious legal device that entrenched incumbents, blocked new entrants, and fostered political corruption.

The mid-nineteenth-century shift from special charters to general incorporation is the theme of the essay by Jessica L. Hennessey and John Joseph Wallis. General incorporation—that is, the granting of a corporate charter to any promoters who met a very basic set of requirements—was in their view an epochal innovation that would, as Lamoreaux and Novak put it in their introduction, hasten a “fundamental restructuring” of the “workings of American democracy” (p. 13). By making it easier to incorporate, these laws lifted barriers to entry that had limited economic opportunity in the special-charter era. By limiting lawmakers, democracy prevailed: “General incorporation laws were not designed to tie the hands of the corporations, they were designed to tie the hands of the legislators” (p. 85). Just as the movement for general incorporation was democratic, so too was its legacy. In fact, the “whole ecology of organizations” that general incorporation created and sustained was “structured” to “support a viable and vibrant democracy,” making general incorporation—or what an earlier generation of historians called “laissez faire”—a “fundamental support for American democracy” (pp. 77, 97).<sup>6</sup>

The Hennessey-Wallis essay illustrates the possibilities, and the limitations, of the contributors’ understanding of democracy. General incorporation is democratic not only because it was enacted, but also because it substituted market competition for political fiat. Nowhere discussed, however, is the failure of general incorporation laws to fulfill the lofty expectations with which they had been invested. In the case of the nineteenth-century telegraph business, for example—a case study well known to contemporaries, yet one that none of the contributors consider in any detail—general incorporation would backfire in the most spectacular way, leading in just over three decades to the takeover of the country’s dominant telegraph network provider by the nineteenth century’s most notorious financier.<sup>7</sup>

<sup>6</sup> Ronald E. Seavoy, “Laissez-Faire: Business Policy, Corporations, and Capital Investment in the Early National Period,” in *Encyclopedia of American Political History*, vol. 2, ed. Jack P. Greene (New York, 1984), 728–37.

<sup>7</sup>The notorious propensity of the self-professed antimonopolist telegraph promoter Jay Gould to manipulate the political process to buttress his prerogatives raises serious questions about the sweeping contention by Hennessey and Wallis that general incorporation regimes

The corporate merger movement of 1895 to 1904 exacerbated the long-standing mismatch between the legal domicile of the corporation, which with a few exceptions remained an individual state, and the geographical scale on which the corporation operated, which was increasingly nationwide and even global. As the organizational capabilities of the corporation increasingly burst the boundaries of the states, state legislatures found it increasingly difficult to hold them accountable to the public good.

One proposed solution, nicely documented by Daniel A. Crane, was the proposed enactment of federal legislation requiring corporations to obtain some kind of a federal license. Two quite different proposals for incorporation were seriously debated. The first debate occurred in the 1900s during the presidency of Theodore Roosevelt (1901–1909), the second in the 1930s during the New Deal. Though neither of these proposals succeeded, the fact that they had been seriously debated reveals a continuing democratic distrust of the corporation by influential lawmakers from both of the two major political parties.

While federal licensing failed, the related “public utility idea” proved to be a spectacular success. Championed in the early twentieth century by legal treatise writer Bruce Wyman and law professor Felix Frankfurter, this legal norm would help structure economic activity in several sectors, including communications, transportation, and energy. In his chapter, Novak traces the origins of the public utility concept back to the early nineteenth century, with a special focus on the jurisprudence spawned by *Munn v. Illinois* (1877). Public utility presupposed the social control of economic activity by government officials, an outcome that for Novak is the quintessence of the public good, making it “one of the most important Progressive innovations in the democratic control of the American corporation” (p. 176).

Somewhat puzzlingly, since, if anything, it would reinforce his emphasis on the importance of the “public utility idea,” Novak devotes little attention to the municipal franchise corporation—the very organizations that would help to popularize “public utility” as a stand-alone noun in the wake of the Panic of 1893 and that in the opening years of the twentieth century were the quintessential public utilities.<sup>8</sup> The

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are less prone to corruption than special charter regimes. Richard R. John, *Network Nation: Inventing American Telecommunications* (Cambridge, MA, 2010), chap. 5. Indeed, their claim has a discernible affinity with the avowedly antidemocratic critique of government regulation of the “public choice” economist James M. Buchanan that is the subject of Nancy MacLean’s *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* (New York, 2017).

<sup>8</sup> On the evolution of the municipal franchise corporation, a theme neglected in this collection, see John, *Network Nation*, chap. 7, esp. 216–18, 267.

laws regulating municipal franchise corporations had *never* presupposed open access, making them an important exception to the corporations chartered under general incorporation laws—a legal innovation that not only Novak but also Hilt and Hennessey and Wallis regard as so critical to the democratization of the American corporation. For this reason, the history of these laws complicates Novak’s “Road from *Munn*” narrative by emphasizing an alternative genealogy of the “public utility idea” that foregrounded a category of special-charter corporations in which open access had never been presumed and that had been subject from the outset to more or less continuous regulatory oversight.<sup>9</sup>

Progressive taxation was another expedient that lawmakers relied on to reign in corporate power. In the immediate aftermath of the great merger movement, as Steven A. Bank and Ajay K. Mehrotra demonstrate in their chapter, even sober-minded promoters took it for granted that the speculative manipulation of corporate securities had reached a fever pitch. By enacting tax legislation penalizing speculation, lawmakers strove to institutionalize the widespread egalitarian hostility toward corporate power.

Historians often posit a fundamental distinction between business and philanthropy. In recent decades, however, as Jonathan Levy contends in his chapter on the “fiscal triangle” between for-profit corporations, nonprofit corporations, and the government, this distinction has been stripped of much of its meaning. No longer do legal scholars—or, even more significantly, jurists—blithely assume that government corporate regulation promotes the public good. On the contrary, both for-profit and nonprofit corporations have been re-envisioned as a nexus of contracts to promote the interests of shareholders, a shift that helps to explain the sensitivity toward shareholder rights in *Hobby Lobby* and the blurring of the distinction between for-profit and nonprofit corporations in *Citizens United*.

The legal evolution of corporate rights over the entire course of American history furnishes the theme for the chapter by Margaret M. Blair and Elizabeth Pollman. Taking the long view, and building on a large body of scholarship in legal history that deserves to be better known outside of this field, Blair and Pollman contend that the rights that jurists had historically invested in corporations—such as, for example, the rights of personhood that the Supreme Court granted the Southern Pacific railroad in *Santa Clara County v. Southern Pacific Railroad* (1888)—rested not in the corporation as a person but instead in the identity, or person, of the corporation’s shareholders, who were,

<sup>9</sup> John, chap. 7, esp. 267–68.



at the time, almost always a relatively small number of people.<sup>10</sup> The *Hobby Lobby* ruling for this reason marks in their view a dramatic break with legal precedent, since—though its defendant was also a closely held corporation—it “dismantled” the “basic framework laid down more than a century ago of recognizing corporate rights only when it is necessary to protect the rights of human persons represented by the corporation” (p. 285).

To underscore the novelty of *Hobby Lobby* and *Citizens United*, Bloch and Lamoreaux chart in their chapter the evolution of two very different kinds of corporate rights: property rights and liberty rights. Building on several generations of legal scholarship, they underscore that the “conventional wisdom” among nonspecialists regarding *Santa Clara*—that is, the ruling that granted corporations the same civil rights under the Fourteenth Amendment as individuals—was mistaken: “Liberty rights, as distinct from property rights, belonged only to humans” (p. 287). *Santa Clara* safeguarded the property rights of the Southern Pacific railroad, but declined to grant the railroad First Amendment (“liberty”) rights. In contrast, *Hobby Lobby* and *Citizens United* collapsed this distinction: “The idea that corporations have First Amendment rights is a recent invention” (p. 289).

Lichtenstein shifts the focus in his chapter from corporate law to corporate practice. In April 2013, a fire at a garment factory complex near Dhaka, Bangladesh, killed 1,124 people. How, he asks, can catastrophes like this be explained? Who should be held accountable? Much of the answer can be found in the rise of an international corporate legal regime to facilitate global supply chain management—a business technique that has permitted corporations like Walmart to rely increasingly on intermediaries to match supply and demand. In so doing, legal norms made it harder for workers to collectively bargain to boost their working conditions and living standards. The Chandlerian vertically integrated corporation was, in short, more supportive of proworker regulation than the “distended sourcing strategies and fissured employment regimes” that have supplanted it (p. 357). By facilitating the vertical disintegration of supply chain management, present-day corporate legal norms have undermined an organizational mechanism that had promoted the empowerment of some of the world’s most vulnerable workers.

<sup>10</sup> For a related discussion that puts the issue of corporate personhood in its late nineteenth-century intellectual milieu, see Gregory A. Mark, “The Personification of the Business Corporation in American Law,” *University of Chicago Law Review* 54 (1987): 1441–83. For Mark’s critique of the *Hobby Lobby* ruling, see Mark, “*Hobby Lobby* and Corporate Personhood: Taking the U.S. Supreme Court’s Reasoning at Face Value,” *DePaul Law Review* 65 (Winter 2016): 535–58.

Several of the contributors to *Corporations and American Democracy* emphasize the novelty of the Supreme Court rulings in *Hobby Lobby* and *Citizens United*. For Adam Winkler, however, this contention is not only highly misleading but also potentially reactionary. By reconstructing the precedents on which the Supreme Court relied in rendering its verdicts—a topic he explores in more detail in his recent book, *We the Corporations: How American Businesses Won Their Civil Rights* (2018)—Winkler concludes that these rulings rest on a string of precedents, making them far less anomalous than several of the other contributors to this collection assert. *Hobby Lobby* hinged on a particular reading of statutory law, *Citizens United* on a concept of corporate personhood that valorized the rights not of the creator of controversial content but of its audience. To contend otherwise—by, say, enacting a constitutional amendment that would strip corporations of rights, as certain present-day progressives have proposed—might well leave media outlets like, for example, the *New York Times* unable to defend their First Amendment free-expression rights should a hostile party such as, for example, a government official try to assail their prerogatives in the courts.

### Conclusions

While the contributors to *Corporations and American Democracy* do not speak with a single voice, several conclusions emerge. First, the “birth or origin” of government corporate regulation in the United States long antedated the enactment of the Interstate Commerce Act in 1887 and the Federal Antitrust Act in 1890 (p. 15). By 1887, the regulation of the corporation on the basis of the public interest had already become a “dominant feature of American economic and political history” (p. 16). Second, corporations have historically been enormously varied, raising questions about the wisdom of designing legal norms that treat them as if they were all alike. Third, the social control of corporations is a democratic imperative that has promoted, and can promote, the public good. To be sure, neither Hilt nor Hennessey and Wallis nor even Novak provides corporation-specific case studies to buttress this eminently plausible claim, and Crane documents a regulatory project that failed. Even so, most of the contributors equate government regulation with democracy and lament the recent challenges to government regulation hastened by the broadening of corporate rights. There is little in this collection, in short, to warm the hearts of libertarians; indeed, large portions read like a paean to the still-unfulfilled promise of the Democratic Party’s midcentury New Deal.

Here lies a certain tension in the collection. In the period between 1790 and 1840, some Americans criticized the government regulation

of corporations as corrupt and praised general incorporation as democratic. In the early twentieth century, other Americans hailed the government regulation of corporations as a salutary constraint upon a rapacious plutocracy. Were either or both of these movements democratic? If so, how would we know?

Even more basic questions are raised by the enormous significance with which the contributors have invested recent Supreme Court rulings. Will future generations share the conviction that *Hobby Lobby* and *Citizens United* should be treated with the kind of moral disdain that historians today reserve for *Dred Scott v. Sanford* (1857) and *Plessy v. Ferguson* (1892)? Or, alternatively, might not future generations fault today's historians for exaggerating their novelty—and, in the process, inadvertently weakening democratic constraints on corporate power—just as a prior generation had popularized a misleading view of corporate personhood by overstating the novelty of *Santa Clara*. It has taken generations for legal historians to debunk the mistaken idea that early twentieth-century U.S. jurisprudence was defined by the antiregulatory animus of *Lochner v. New York* (1905). It would be an unfortunate irony if *Corporations and American Democracy* contributed to an equally misleading reading of present-day jurisprudence by unintentionally inflating the significance of *Hobby Lobby* and *Citizens United*.<sup>11</sup>

None of these questions is meant to detract from the merits of this volume. Carefully planned, intelligently edited, and forcefully argued, *Corporations and American Democracy* is a valuable addition to an emerging revisionist literature in business history, political history, and legal studies and is a testament to a successful interdisciplinary collaboration that showcases the intellectual rewards of tapping specialists from different fields to tackle big questions about issues of contemporary concern.

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<sup>11</sup> In their introduction, Lamoreaux and Novak rightly deplore the “persistent myths” about the “so-called ‘Gilded Age’” and the *Lochner* era—catchphrases that have distracted historians from exploring the continued *expansion* in the period from 1877 to 1920 of the “regulatory impulse to assert democratic control over newly expansive forms of corporate power and concentration” (p. 17). It is to be hoped that the journalistic hyping of *Hobby Lobby* and *Citizens United* will not lead to a similar misreading of the present moment in U.S. political history.