

## Introduction

If you picked up this book, opened it to this page, and started reading this sentence, chances are you are a person.

My assumption in writing this book is that its readers would be persons, i.e., human beings, actual flesh and blood people. I figured you might be a student, a professor, a lawyer, a business executive, a policymaker, an activist, or any other person who is interested in the role of corporations in our society today. What I did not contemplate is that the reader of this book would be a corporation.

Yet corporations are people too, or so the law says. As legal persons, they can conduct activities in and out of the marketplace in much the same way human individuals do. Corporations can enter into contracts, buy and sell property, sue and be sued, and make claims to some of the most fundamental rights guaranteed to all persons under the Constitution. Why shouldn't I assume that a corporation as a person can pick up this book and absorb its contents? A corporation cannot *read*, you reply; it is not a real person, its personhood under the law is a metaphor. But the corporation can *speak*, according to the United States Supreme Court. Indeed, its speech is entitled to First Amendment protection. And herein lies one of the most perplexing dilemmas in American law. The corporation is not a flesh and blood person, but it nonetheless seeks to be regarded as a person with all the legal rights that pertain to personhood. Courts over time have allowed corporations to be treated in much the same manner as human persons, but the justifications for doing so have not always been consistent nor clearly articulated, revealing a deep ambiguity over the idea that corporations are fellow persons in the eyes of the law.

The personhood of corporations has always been a vexing puzzle for legal scholars, but in the last few years the dilemma over corporate personhood has moved well beyond academic circles and has become a controversial topic among wide swaths of the American public. Perhaps the surge of interest in the subject can be attributed to recent Supreme Court decisions that have extended corporate political speech and religious exercise rights in unprecedented directions. For example, in 2010, the Court in *Citizens United v. Federal Election Commission* upheld the First Amendment right of corporations to use unlimited corporate funds

to support or oppose candidates in political elections.<sup>1</sup> In 2014, the Court in *Burwell v. Hobby Lobby Stores, Inc.* held that it is a violation of a corporation's right to religious freedom to require the company to provide employees with access to contraceptive methods that the corporation finds morally objectionable based on its religious principles.<sup>2</sup> Most recently, in 2018, the Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* upheld on very narrow grounds the right of a bakery business owner to refuse to bake a wedding cake for a same-sex couple because of his religious objections to same-sex marriage.<sup>3</sup> The nation engaged in heated debate over these cases, questioning whether corporate entities can and should have the same status as human individuals to claim fundamental free speech and religious exercise rights.

The very notion that corporations can be persons under the Constitution has sparked outrage among a significant portion of the general public that believes corporations should not share the same constitutional rights of human beings. When former presidential candidate Mitt Romney famously stated, "Corporations are people," at the Iowa State Fair during his 2011 campaign, he found himself in the center of the corporate personhood controversy.<sup>4</sup> Someone in the audience immediately shouted back, "No, they're not!" Romney replied, "Of course they are. Everything corporations earn ultimately goes to people. Where do you think it goes?" Romney's point was not that corporations themselves are persons, but that corporations are essentially collections of human individuals whose financial interests are always at stake. Nonetheless, his statement drew widespread ridicule and scorn from opponents who accused him of equating corporations with real persons and presumably revealing his bias in favor of large corporations.

As the Romney incident demonstrated, the concept of corporate personhood has touched a nerve for many people who question the legitimacy of corporations' status as persons under the law. When the Occupy Wall Street movement began to pick up momentum in late 2011, angry protesters waved banners that read "End Corporate Personhood" and "Corporations Are Not People."<sup>5</sup> These slogans symbolized deep discontent over social and economic inequalities perceived to be the result of the

growing dominance of corporate power. Many people began to connect corporate personhood with the corrupting influence of money in politics and the widening gap between the "haves" and the "have nots." Several activist organizations launched a popular movement to amend the Constitution to establish that the expenditure of corporate money is not equivalent to political speech and that human beings, not corporations, are the only persons entitled to constitutional rights.<sup>6</sup> Numerous federal and state lawmakers, responding to pressures by their constituents, have openly expressed support for such a constitutional amendment to abolish the personhood of corporations. It is abundantly clear that corporate personhood is a significant issue that no longer occupies the attention of legal scholars alone, but has become a topic of considerable concern for many average Americans who decry "big business" and the overbearing influence of "corporate America."

My interest in the concept of corporate personhood began almost twenty years ago when I wrote a law review article on a federal rule of evidence called the character evidence rule. Under that rule, evidence of a person's character generally is not admissible in court to show that the person acted in conformity with that character on a particular occasion.<sup>7</sup> It is deemed unfair, for example, to present evidence of a person's prior misdeeds to prove that the person has a bad character and therefore must have committed the crime for which he is currently being tried. I wondered whether the character evidence rule applied to corporations in the same way it applies to individuals. I questioned first whether the corporation is even a "person" capable of having character for purposes of the character evidence rule, and second, even if the corporation could be regarded as a person, whether it could actually possess a "character" of its own, independent of the individual members of the corporation. After considerable research and thought, I answered both of those questions in the affirmative, but I ultimately concluded that the character evidence rule should not apply with equal force to corporations because they do not have the same moral status as human beings.<sup>8</sup> My ideas were tentative at the time. I recognized even then that corporate personhood is complicated and that clear-cut conclusions about its implications were elusive.

For me, the inquiry I entertained in that law review article was the start of a decades-long interest in understanding more broadly what it means to say that a corporation is a person and why it matters. Over the years, I have learned how intractable the debate over corporate personhood is, largely due to the multidimensional nature of the topic. In the past, the subject of corporate personhood was of interest mainly only to a small group of legal academics who argued about the essential nature of corporate bodies.

<sup>1</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>2</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>3</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

<sup>4</sup> Philip Rucker, *Mitt Romney Says 'Corporations Are People'*, WASH. POST (Aug. 11, 2011), [www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQA8wZ38L\\_story.html](http://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQA8wZ38L_story.html) [https://perma.cc/6LF6-BE5C].

<sup>5</sup> Joel Bakan, *Psychopaths, Inc.: On Corporate Personhood*, in *THE OCCUPY HANDBOOK* 353, 354 (Janet Byrne ed., 2012) (noting sign at an Occupy protest reading "We the People, Not We the Corporations"); Jim Hightower, *Organize in 2012, OTHER WORDS* (Jan. 9, 2012), [https://otherwords.org/organize\\_in\\_2012/](https://otherwords.org/organize_in_2012/) [https://perma.cc/W332-PL99] (displaying photo of Occupy Wall Street sign reading "Revoke Corporate Personhood"); Mark Trumbull, *Can 'Occupy Wall Street' Really Get Money out of Politics?*, CHRISTIAN SCI. MONITOR (Oct. 14, 2011), [www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics](http://www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics) [https://perma.cc/AzXT-D8UJ] (displaying photo of protester holding a sign reading "End Corporate Personhood").

<sup>6</sup> *Move to Amend's Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <https://movetoamend.org/wethepeopleamendment> [https://perma.cc/5AFB-5KVM]; *The Amendment*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/the-amendment/> [https://perma.cc/YC7H-YMLP].

<sup>7</sup> See FED. R. EVID. 404(a).

<sup>8</sup> See Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 804-08.

However, with corporations playing an increasingly more visible and influential role in our global society, I have watched as the corporate personhood topic has entered the public consciousness and become the source of dismay among growing numbers of people. Some of the most provocative issues today arise in cases involving the corporation and free speech rights, corporate religious freedoms, and corporate racial identity. To the extent a corporation can be considered a person, how far will we go to say that the corporation then has its own speech, religion, and race, all of which are entitled to some measure of respect? These are pressing issues that defy easy answers. From the United States Supreme Court's sharp 5-4 division in many of the most significant recent corporate constitutional rights cases, it is clear that the Court is as divided as the rest of us on these contentious topics surrounding the legal status of corporations.

Mainstream presentations of corporate personhood tend to be binary and fairly simplistic. People have a tendency to jump quickly into "for" or "against" camps. If you favor corporate personhood, you are regarded as pro-corporation: you accept and embrace the expansion of corporate rights and the exercise of corporate power in society. If you oppose corporate personhood, you are viewed as anti-corporation: you lament the dominating presence of corporations in society and you demand greater corporate accountability rather than broad corporate rights. These simplistic interpretations and binary positions do not take into account the nuances and complexity of corporate personhood. If pressed, most people would likely say they want corporations to be treated as persons in some situations, but not in all. Yet if we are willing to call someone or something a person in one context, on what grounds can we conclude that that person is suddenly no longer a person when the context changes? It would help to understand what corporate personhood means and why it can or should be relevant in certain circumstances.

One of the reasons it is so difficult to make sense of corporate personhood is because the concept combines two terms that themselves are extraordinarily complex: "corporation" and "personhood." The "corporation," or the "corporate-ness" of the object, refers to the collective nature of the firm. The root of the word "corporation" comes from the Latin word *corpus*, which means "body." The company represents the unified body of human individuals who together compose the collective association operating as one. This idea of many people coming together to form one person has always created tension and dichotomies in the law. We struggle to define exactly what a corporate body is. Is it simply the aggregate of individuals who contract with each other to utilize the firm for their mutual benefit? Or is it an entity, once created and thriving, that becomes something larger than the sum of its parts, taking on an identity and force of its own? If the corporation is merely the aggregation of its human participants, then the "rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it,"<sup>9</sup> and

<sup>9</sup> 1 Victor Morawetz, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* 3 (Boston, Little, Brown, & Co. 2d ed. 1886). Morawetz wrote that it is "self-evident that a corporation is not in reality a person or

the law should be structured to protect their individual rights and hold them directly accountable. If, however, the corporation is an independent entity, separate and apart from the individual shareholders and employees (who can come and go without changing the structure and identity of the corporation), then the rights and duties of the corporation may be fundamentally different in kind from those of its individual members.<sup>10</sup> In that case, the law should allow the entity itself to exercise certain rights in pursuing its own goals and likewise be held accountable for its actions.

This tension between the "aggregate-ness" and the "separate-ness" of the corporation exists in all situations involving collective groups, including nation states. When we refer to "America," do we mean the sum total of all individual Americans, or do we mean the national entity that has its own global identity? Can an America exist without individual Americans to act as its members?<sup>11</sup> By the same token, can there be individual Americans without an America existing a priori?<sup>12</sup> The corporate nature of any association of human beings poses a conundrum whenever we must decide whether the collective should possess rights or bear duties that go beyond those of the individuals who compose the collective.

At bottom, these two opposing positions represent the perennial clash between individualist and collectivist conceptions of human beings and their group associations. The individualist approach maintains that the individual is the only appropriate unit of social, political, legal, and economic analysis. The premise is that "society is constituted of autonomous, equal, units, namely separate individuals, and that such individuals are more important, ultimately, than any larger constituent group."<sup>13</sup> Individuals are always primary; ontologically they exist prior to any group or collective entity. Groups are secondary; their existence and significance arise out of the freely contracted arrangements of their human constituents. This reductionist viewpoint asserts that all group actions are reducible to and redescribable as individual actions. From this perspective, the corporation cannot exist or act without its human members. Those human beings alone are accountable for corporate actions, and they alone are entitled to claim any rights. The individualist approach extols

a thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose [it]." *Id.* at 2.

<sup>10</sup> OTTO GIERKE, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* 7 (George Heiman ed. & trans., 1977) ("The association, or group, is a living entity . . . Every group has a real and independent communal life, a conscious will, and an ability to act that are distinct from the lives and wills of its individual members.").

<sup>11</sup> Cf. Patricia H. Werhane, *PERSONS, RIGHTS, AND CORPORATIONS* 51 (1985) ("Corporations have no reality over and above their constituents, because they are created by and function only because of them.").

<sup>12</sup> Cf. Peter F. Drucker, *CONCEPT OF THE CORPORATION* 21 (rev. ed. 1972) ("The corporation is permanent, the shareholder is transitory. It might even be said without much exaggeration that the corporation is really socially and politically a priori whereas the shareholder's position is derivative.").

<sup>13</sup> Alan Macfarlane, *THE ORIGINS OF ENGLISH INDIVIDUALISM* 5 (1978); see also May Brodbeck, *Methodological Individualisms: Definition and Reduction*, in *READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES* 280 (May Brodbeck ed., 1968).

individual autonomy, self-realization, and responsibility. It suggests that corporations are nothing more than the aggregate of their individual participants, and corporations' status as independent entities is merely a convenient fiction.<sup>14</sup>

In contrast, the collectivist conception embraces a social model of human activity. It asserts that human beings are inherently social. Individuals from the moment they are born are first members of families and groups, and it is in these settings that they learn to identify themselves in terms of their positions and roles vis-à-vis others.<sup>15</sup> Individuals are always embedded in social contexts and derive their meaning from community. Groups are primary; they are an essential part of society. They are naturally occurring human institutions that arise out of the compelling human tendency to socialize and associate with others. People are continually absorbed into large and small groups of all kinds throughout their lifetime, and these groups are basic components of society that are themselves appropriate units of analysis. An organization as a whole can be greater than the sum of its parts; it can have an identity, a presence, and a life of its own. There are irreducible group level properties and processes that explain group phenomena in terms that cannot be redescribed solely as individual actions.<sup>16</sup> Under this view, corporations are real and separate entities in their own regard. They can have rights and duties that apply to them on an organizational basis. The collectivist viewpoint suggests that corporations' independence and autonomy demand a measure of respect and restraint from the state.

The tension between the individualist model and the collectivist model of human activity is one of many dichotomies or dualities that are inherent in the corporate form. The conflict reveals the problem with trying to define the corporation in unitary terms. When individuals join together in collective arrangements, the group can be described as both a cause and a result of individual intention and activity. The continual paradox of the corporation as both the aggregate of its individual members and a separate entity with its own identity reflects the multidimensional nature of the corporation as a person. Thus, the "corporate" component of corporate personhood is complex and resistant to simplistic interpretations of its meaning.

The "personhood" component of corporate personhood is equally complex. What exactly does it mean to be a person? The origin of the word "person" comes from the Latin word *persona*, which originally referred to the masks worn by actors on a theatrical stage. The one wearing the mask took on a *persona* and played an identifiable role. Anyone can don the mask. So long as the mask is in place, the wearer is deemed by others to be the character he is playing. *Persona* thus signified an outward disguise, or shell, an empty slot that anyone can fill. In legal terminology,

<sup>14</sup> See Christian List & Philip Pettit, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 3, 74 (2011) (also referring to this individualist paradigm as "eliminativism" or "singularism").

<sup>15</sup> See Robert C. Solomon, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 77–79 (1992).

<sup>16</sup> See Deborah Perron Tollefson, *GROUPS AS AGENTS* 4, 138 (2015); Andreas Georg Scherer, *Modes of Explanation in Organization Theory*, in *THE OXFORD HANDBOOK OF ORGANIZATION THEORY* 310, 326–27 (Haridimos Tsoukas & Christian Knudsen eds., 2003).

a legal person is anyone the law deems fit to act under the law and to play a particular role in the legal process. From this perspective, legal personhood is an empty slot into which the law can drop any object, including a corporation, in order to assign it various rights and duties.<sup>17</sup> Many statutes, including the federal Dictionary Act, define the term "person" to include corporations, partnerships, and other associations, as well as individuals.<sup>18</sup>

Determining who or what should fit within the legal definition of person has not always been a simple endeavor. It is often mired in controversy and conflict because deciding who counts as a person is inevitably influenced by considerations that go beyond legal expediency. Philosophers and psychologists consider personhood to be the exclusive privilege of those with essential traits such as the capacity for reason, rational thought, free will, self-awareness, or phenomenal consciousness. Religious and moral conceptions of personhood emphasize the importance of possessing an inner conscience and the capacity to discern between right and wrong. Persons are often described as ends in themselves,<sup>19</sup> having autonomy and moral rights that must be respected, as well as moral responsibilities for which persons must be held accountable. Political, social, and cultural assumptions and expectations also contribute to an understanding of persons as citizens who have a social and civic identity. They carry the capacities, rights, and duties that foster their meaningful participation in the political process and in the life of the community. All combined, our "notion of person, now bearing both a conscience and a civic identity, [has become] the foundation of modern political, social and legal institutions."<sup>20</sup>

Given the complexity of personhood, what sorts of living and non-living beings should qualify for personhood status? Debates over the personhood of fetuses, animals, artificial intelligence, and corporate bodies all raise strongly held beliefs and intuitions about the nature of personhood. In these situations, defining personhood is deeply controversial and is closely tied to legal, political, biological, and social conceptions of life, identity, autonomy, citizenship, and equality. To say that a corporation can be classified as a person arguably implies that it carries a certain

<sup>17</sup> Richard Tur, *The 'Person' in Law*, in *PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY* 116, 121 (Arthur Peacocke & Grant Gillett eds., 1987); see also John Finnis, *Corporate Persons II: Persons and Their Associations*, in 63 *PROC. ARISTOTELIAN SOC'Y, SUPP. VOL.* 267, 274 (1989) (noting that the concept of *persona* as mask corresponds to "the law's carefree attribution of legal personality to anything that figures as the subject of legal relations"); Andrew Vincent, *Can Groups Be Persons?*, 42 *REV. METAPHYSICS* 687, 700 (1989) (The term *persona* was "easily adaptable for use in the courts of law for those who were 'playing' particular roles (such as, plaintiff) in the legal process.").

<sup>18</sup> See 1 U.S.C. § 1 (2012). The American Law Institute defines "person" broadly to include an individual, a corporation, partnership, government agency, any form of association, or any other legal or commercial entity. See *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* § 1.28 (AM. LAW INST. 1994).

<sup>19</sup> Immanuel Kant, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 53 (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

<sup>20</sup> *THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY* at viii (Michael Carrithers et al. eds., 1985).

elevated status and is entitled to claim the legal and moral rights that belong to persons. This triggers difficult ethical and moral questions that the law alone does not satisfactorily resolve. Sophisticated philosophical theories of the meaning and value of persons provide insights into these issues but create yet another layer of complexity. Moral philosophers have puzzled over the extent to which a corporation can be considered a moral person such that it can be held ethically and morally responsible for its actions, apart from any legal liability under the law. If it is a moral person subject to duties to act morally and ethically, then by logical extension, would it not be entitled to the moral rights belonging to all persons, including the right to be treated as an end in itself?

Perhaps there is no reason to entertain any of these questions because the corporation should be viewed simply as a form of property, not a person. The corporation is owned by shareholders who are persons, but the corporation itself is merely a thing, a tool, an instrument through which real people pursue their financial interests. To view the corporation as a person is simply an exercise in anthropomorphism. Human beings have a natural tendency to anthropomorphize objects. We like to attribute human characteristics to pets, machines, moving shapes, and, of course, groups.<sup>21</sup> But we should take care not to press the personhood analogies too far.

All the same, the corporation does not quite fit neatly or exclusively in the category of property either. It may arguably be owned by shareholders as their property, but at the same time the corporation as an independent person owns its own property. Scholars who view corporations as social actors argue that corporations are persons with the ability to act intentionally in pursuit of corporate goals, and that corporations can form their own identity and character separate from that of their individual participants. The two competing conceptions of the corporation as person and as property present another dichotomy within the corporation.<sup>22</sup> The corporation plays dual roles, and as we shall see, this duality causes tension when trying to determine the appropriate scope of corporate rights and duties.

There is also a duality involving the public versus private orientation of the corporation. On the one hand, the corporation can be viewed as the product of the private initiative, private contracts, and private property arrangements of its human members. They are the ones who voluntarily come together to form the corporation and to utilize it to advance their personal interests. The purpose of the corporation is to further the goals of the individual members. They retain

<sup>21</sup> See Steven J. Sherman & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members*, 19 J. L. & POL'Y 137, 165 (2010).

<sup>22</sup> See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 592-93 (1999); Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346, 347 (2003); Jeffrey Nesterik & David T. Risser, *Conceptions of the Corporation and Ethical Decision Making in Business*, 12 BUS. & PROF. ETHICS J., no. 1, Spring 1993, at 73, 76-77.

the prerogative to decide whether to continue the activities of the corporation or terminate them at any time. This viewpoint invites a measure of deference to the preferences of the private actors who make up the corporation. Individuals should be free to choose their own values and enter into mutual exchanges without government intervention. The law should support the contract and property rights of these private parties and avoid interfering with their consensual actions. The private oriented approach eschews heavy government regulation of corporate activities and relations in favor of the free market and private ordering. Private businesses and associations are not government enterprises and should not be subject to state control in the pursuit of their lawful private objectives.

On the other hand, it is also possible to describe corporations in public oriented terms. Individuals who wish to incorporate their businesses can do so only through state incorporation statutes that authorize the legal formation of corporations. Thus, a corporation is a creature of statute. It is a concession of the government. The corporation cannot exist and function without the permission of the state. Private activity and free markets always operate within a framework of legal rules that are publicly enforced by the state. These legal rules are enacted because they are deemed to have some social and public utility. Private individuals must rely on state law to afford them the advantageous features that accompany the corporate form, including limited liability for shareholders. Historically, the government permitted these features and selectively granted corporate charters only because early corporations had a public purpose and served the public interest, such as constructing a public road or canal. The public dimension of corporations justifies greater regulation of their activity for the common good. Since the corporation exists by the good graces of the state, the corporation is subject to the state's supervision of its operations, and the state may define the rights and duties of the corporation in the public interest.

These dueling perspectives regarding the private and public aspects of the corporation assume that the world can be divided into two separate and mutually exclusive realms of activity, but that distinction is unrealistic. Corporations have both private and public attributes combined.<sup>23</sup> The two contrasting orientations are not necessarily irreconcilable. To exist and operate effectively, corporations require the contributions and arrangements of private individuals as well as the authorization and infrastructure of state law. In recent years, the line between the private and public character of corporations has become significantly blurred as many private and government institutions have become increasingly integrated. With greater frequency, the state has allowed private organizations to perform what were traditionally public functions, including running prisons, providing military services and

<sup>23</sup> For a thorough discussion of the "public/private distinction" constituting "two faces of the business enterprise," see Eric W. Orts, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 109-31 (2013).

security, collecting garbage, and supplying education.<sup>24</sup> Moreover, the operations of private corporations can have considerable social consequences that affect the public welfare. The public and private dimensions can never be completely separated in practice. Considerations of both are needed to make meaningful determinations regarding the permissible scope of corporate activity and the appropriate delineation of corporate rights and duties.

This leads to a related point about the role and purpose of the corporation, or to put it differently, the justification for its existence. A private oriented view emphasizes the primacy of those who are deemed to be the owners of the corporation, i.e., the shareholders. For them, the main purpose of the business corporation is to create wealth and maximize their returns. That is the reason why the corporation exists. Proponents of the shareholder primacy model argue that the predominant role of the corporation is to pursue profits for the benefit of the owners. In contrast, a public oriented approach envisions a broader role for the corporation. It is more than merely a vehicle for shareholders to further their self-interests. It is a social entity that serves many important public purposes as well.<sup>25</sup> It supplies goods and services to satisfy consumer needs, provides job opportunities to workers, fosters economic growth and development, offers avenues for entrepreneurship that give non-wealthy individuals opportunities for upward social mobility, and even contributes to a sense of community through philanthropic corporate actions. Under this view, the corporation exists to benefit the interests of a variety of stakeholders, all of whom have a stake in the prosperity of the corporation.<sup>26</sup> The purpose of the corporation should not be narrowly construed to advantage only its private owners, but to promote the welfare of the larger public community that contributes to and benefits from its success.<sup>27</sup>

One of the challenges with trying to isolate the main purpose of the corporation is that corporations can have multiple purposes simultaneously. They can further private interests and conduct activities that benefit the public as well. Moreover, there are many different types of entities that fit within the category of corporations,

<sup>24</sup> See *id.* at 116–17; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577, 659 (1990); Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 *U. PA. L. REV.* 1441, 1446–48 (1982).

<sup>25</sup> See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261, 265 (1992).

<sup>26</sup> See R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, in *ETHICAL THEORY AND BUSINESS* 56 (Tom L. Beauchamp & Norman E. Bowie eds., 6th ed. 2001).

<sup>27</sup> “Discourses of responsibility, citizenship, and commitments to serve public welfare . . . are the very ontological root of the corporation and its legal justifications for existence.” Joshua Barkan, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* 113 (2013). In reply, shareholder primacy proponents argue that maximizing profits for shareholders is not incompatible with these public welfare goals. By maximizing profits, which creates wealth for the entire economy and promotes efficient resource allocation, the corporation ultimately benefits all of its constituencies and society as a whole. See Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 *DEL. J. CORP. L.* 393, 416–19 (1993).

all of which have their own unique purposes and objectives. The large, multinational publicly held oil company is certainly a corporation. But so is the small, family-owned, local flower shop on the corner. When discussing corporations, we typically mean business entities that are formed for economic purposes, but the list of organizations that bear the corporate label is much more diverse. The earliest forms of corporations included guilds, townships, churches, and universities. Today, commercial businesses, nonprofit organizations, social clubs, trade unions, political parties, religious organizations, and media companies are all forms of corporations. Some organizations are large, some are small. Some are profit-oriented, some are not. Some are formed to promote specific values or pursue various educational, social, political, or religious objectives. Others exist mainly to advance the financial interests of their founders. Certain entities, such as “B corporations” or “benefit corporations,” have hybrid goals to pursue profits while simultaneously producing a material positive impact on society and the environment. Some corporations are highly structured, formalized, complex entities with thousands of employees and clearly defined group decision-making systems and procedures. They may be so large and have so much wealth that their power is likened to that of political states. Others are simply the alter ego of a single individual owner who performs all the work and calls all the shots, and whose firm is largely just an extension of himself. The wide range of entities that operate under the corporate form exist along a continuum with many different dimensions and purposes.<sup>28</sup> The extent to which some or all of these entities can be categorized as persons may depend in part on the type of corporations they are.

The plurality of organizations that can be classified as corporations is what often makes society’s debate over the appropriate status of corporations so difficult to resolve. People’s reactions to questions about the acceptable nature and role of corporations, as well as the appropriate scope of corporate rights and duties, differ considerably when speaking about large public corporations versus small mom and pop shops, or about for-profit companies versus nonprofit associations. Much of the controversy over corporate personhood, corporate rights, and corporate responsibilities tends to involve for-profit business enterprises, and this book will focus attention on that type of corporation the most. But at relevant points the book will also consider the range of various corporate entities in order to effectively explore the many aspects of the potential personhood of corporate bodies.

In the context of the business corporation, economic analysis of the nature and function of the corporation has often taken center stage. Theorists have long tried to develop a coherent theory of the corporate firm, and the discipline of economics has made some of the most significant contributions in this regard. In fact, for several decades economic theories of the firm, including the model of the corporation as a “nexus of contracts” rather than a separate person, have dominated legal academic

<sup>28</sup> See Orts, *supra* note 23, at 215–22.

thinking about the corporation.<sup>29</sup> Under this model, the corporate person is a fiction that serves as the center of a web of contracts between all the firm's constituents who gather together to gain the benefit of their bargains with each other. The primary objective of this corporate contractual arrangement is to maximize profits. From this perspective, no independent, real corporate entity exists. Scholars have utilized these economic theories both positively and normatively to explain the nature of the firm and its appropriate purposes and obligations.

The economic model is influential, having stood as the standard academic paradigm for analyzing the corporation for many years. But it is insufficient and incomplete. It offers too narrow a focus, too simplistic a response to the question, what is a corporation? By emphasizing the private contractual elements of corporate enterprises, the economic approach describes only one aspect of the corporate entity. It does not give significance to the many other legal, social, political, cultural, philosophical, and moral aspects of the corporation.

The corporation is not just an economic institution. It is also a legal actor and a participant in the political system; it is an artifact and product of our culture; it has a social presence and identity in our consumer world; it is a potential moral agent whose actions may be subject to moral praise or condemnation. We could try to restrict the corporation to being viewed solely as an economic tool for the mutually beneficial exchanges of its participants, but the complexity of the corporation defies such a narrow classification. There are many faces of the corporate person, and each is visible when viewed through the appropriate lens. The disciplines of law, economics, political science, anthropology, sociology, psychology, organizational theory, philosophy, moral theory, and even religious studies all have their own unique lenses through which they see the corporation. From their respective angles, they highlight different sides of the entity. Each has validity, but each in itself is incomplete and meaningful picture of the corporation and its role in society.<sup>30</sup>

A primary premise of this book is that corporate personhood is complicated because it is multidimensional. Discussions of corporate personhood are often impoverished because they focus on only a single or narrow aspect of the corporate person, and they fail to bring other important social science contributions into the conversation. This has often been the case in scholarly treatments of the economic model of the corporation or in analyses of the legal theories of the corporation.

<sup>29</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).  
<sup>30</sup> I have previously argued that an interdisciplinary analysis provides a more accurate and useful view of the multidimensional nature of the corporate person. See Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009). The "corporation has been reified as an economic actor. And it has not been given sufficient attention as a social, cultural, and political one." Kenneth Lipartito & David B. Sicilia, *Introduction: Crossing Corporate Boundaries*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 1, 3 (Kenneth Lipartito & David B. Sicilia eds., 2004).

While economic and legal theories are both important and necessary, they do not by themselves or in combination adequately account for the myriad other aspects of the nature and function of the corporation in the modern world. Corporate personhood is an intricate knot. Economic and legal theorists have been pulling on only one or two of the many threads of corporate personhood in their attempts to untangle it. The key is to loosen and engage more of the threads in order to unravel the cluster.

This book offers a more comprehensive study of corporate personhood by utilizing multiple disciplines to analyze the corporation, including philosophy, moral theory, organizational behavior, sociology, psychology, and linguistics among others. The objective is to illuminate other dimensions of corporate personhood that are often overlooked. It is useful to examine other discipline's conceptualizations of organizations and personhood because no single approach can fully address all of the intersecting issues that surround the topic of corporate personhood. There is wisdom in approaching the topic in an integrative fashion, incorporating many different perspectives rather than privileging just a few. Part of the difficulty with analyzing corporate personhood is that it is not just a discrete concept, but the heart of a family of concepts that implicate identity, autonomy, citizenship, and moral standing. To fully understand these and other related concepts requires explication from disciplines outside of economics.<sup>31</sup> While the various theories may at times appear to be competing or in conflict, they are in fact complementary; they emphasize different facets of the corporation and represent different ways of understanding its personhood. They are all pieces in the corporate personhood puzzle. When joined, they display a more holistic image. We can expect to see and learn more about corporations than would be possible were we to employ a single theory or point of view.

A central theme of this book is that corporate personhood, much like individual personhood, is complex, textured, and dynamic, continually changing with changing societal views. Personhood need not be an all-or-nothing proposition. The wide spectrum of entities that can be categorized as corporations could possibly coincide with different degrees of personhood that lie along a continuum. An acknowledgment of the many facets of corporate personhood requires us to refrain from making categorical, inflexible conclusions about corporate personhood when confronted with difficult choices about the status, rights, and obligations of corporate entities.

The goal of this interdisciplinary anthology on corporate personhood is to stimulate deeper thinking about the topic by gathering in one place a variety of ideas about the nature of the corporation as a person and revealing the many ways it can be

<sup>31</sup> Even those who study individual human personhood maintain that "[p]ersonhood is a necessarily interdisciplinary subject." It is "an irreducibly holistic" concept that "applies across the physical sciences, social sciences, and humanities." Jack Martin & Mark H. Bickhard, *Introducing Persons and the Psychology of Personhood*, in *THE PSYCHOLOGY OF PERSONHOOD: PHILOSOPHICAL, HISTORICAL, SOCIAL-DEVELOPMENTAL, AND NARRATIVE PERSPECTIVES* 1, 2 (Jack Martin & Mark H. Bickhard eds., 2013).

analyzed from different vantage points. My aim is to provide a platform and pathway that allows all those who are interested in the role and status of corporations to gain a deeper understanding of the meaning of corporate personhood and to facilitate ongoing informed conversations about its implications. Thus, this book is intended for a broad audience. It is directed toward all readers, whether trained in the law or not, who are looking for a resource that unpacks the corporate personhood concept in a broad, informative, and accessible way.

My engagement with this topic is not tied to any favoritism toward or opposition to corporate interests. I endeavor to provide a fair and balanced account of the major theories and issues surrounding the personhood of corporations. I hope to show the importance of entertaining a range of ideas about what corporations are, how they operate, and why they can or cannot be regarded as persons. By thoroughly and objectively laying out the different sides of the debate over corporate personhood, the analysis in the book will attempt to equip readers to make their own decisions regarding the important controversies involving the status of corporations as persons. Where I hold certain opinions about the plausibility of various arguments, I point out their strengths and weaknesses in an effort to provide helpful critique. But in doing so, I seek to educate, not to preach or persuade. My objective is to highlight the complexity of corporate personhood, and to lay aside categorical, black and white, pro versus con statements about the corporation in favor of a more nuanced dialogue about the nature of the corporation and its role in society.

While I strive to be thoughtful and thorough in my analysis, a project of this size requires difficult choices as to its scope, lest it become so expansive and unwieldy that it loses its utility. Each of the chapters of this book easily merits its own book-length treatment. Space limitations prevent me from supplying an exhaustive review of the literature in any given chapter. Instead, I provide a focused discussion of the main themes and key resources related to the issues at hand. Tackling the multidimensional nature of corporate personhood within the confines of a single book is an ambitious undertaking that will invariably be subject to criticism for leaving out certain considerations or disciplinary contributions. I recognize that there are other disciplines as varied as cultural anthropology and theology that offer significant insights into the personhood of the corporation, but I cannot feasibly include an exploration of all of them. Instead, the book presents a detailed examination of what I regard as most of the relevant disciplinary theories and research to give the reader a good interdisciplinary overview of the contours of personhood as it relates to corporate entities.

Chapter 1 begins with the legal dimension of corporate personhood. The corporation is considered a person under the law with the capacity to act in ways that have legal significance. Historically, three different theories emerged to justify the corporation's personhood status: the artificial/fictional person theory, the aggregate theory, and the real/natural entity theory. Under the first theory, the corporation is viewed as an artificial or fictional person created by the state that grants its charter.

Depending entirely on state law for its existence, the corporation does not belong to the physical world of fact but the abstract world of intangible legal concepts. In contrast, the second theory focuses on the human individuals who make up the corporation. Viewing the corporation as the collection, or aggregate, of the natural persons who participate in the enterprise, the aggregate theory maintains that the corporate person has no existence or identity that is independent of these individuals. This viewpoint eventually served as the basis for the development of the highly influential economic contractual model of the corporation. The final theory makes the claim that the corporation is an undeniably real entity, not an abstraction. It exists as something much more than the aggregation of its individual participants and much more than an approved charter document from the state. The real entity theory recognizes the corporation as an independent collective body with the capacity for group intentions and actions that are qualitatively different in kind from those of its human members.

These traditional legal theories shaped and were shaped by the growth of corporations in America during the nineteenth and twentieth centuries. Each conception of the corporate person had its own normative implications for how corporate rights and duties should be assigned under the law. The legal theories will serve as important reference points throughout the book as other disciplinary perspectives are discussed. In subsequent chapters, the theories will provide a framework for analyzing corporations' status to claim certain fundamental constitutional rights.

The competing legal theories of corporate personhood have not always been determinative of the rights and duties that have been established for corporations. Courts have not consistently relied on any one theory to make determinations about corporate standing in legal cases. Well-known legal realist John Dewey cautioned against reliance on any particular legal or non-legal theories about personhood to make such determinations because he believed any theory could be invoked at any time to support any result one wanted. Dewey instead favored the use of pragmatic considerations to determine whether it is sensible to extend specific rights and duties to corporations based on the consequences of doing so.<sup>32</sup> While Dewey's indeterminacy thesis had merit, like all the other legal theories of the corporation, standing on its own, his view was also incomplete. In response to Dewey's position, Chapter 1 defends the idea that it is valuable to consider legal and non-legal conceptions of the corporation. A multidimensional approach to corporations provides a useful, richer understanding of the corporation. Theories of the corporate person may be indeterminate at times, but they are not irrelevant. The mental schemas we have regarding corporations, and the language we use to talk about them, can have effects on what corporations become. The legal language that is employed to describe corporations can have significant symbolic, expressive, and constitutive effects that can animate and reinforce the

<sup>32</sup> See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).



personhood of corporations. The importance of language is a theme that is introduced in Chapter 1 and revisited in subsequent chapters of the book.

Chapter 2 turns to philosophical conceptions of corporate personhood. Philosophers have long theorized over what it means to be a person and what traits are essential for one to be classified as a person. Philosophical theories emphasize a host of characteristics and capacities that range from rationality and intentionality to consciousness and emotional vulnerability. The point of identifying the essential properties of personhood is to justify differential treatment of persons and non-persons for both legal and moral purposes. Whether collective entities like corporations can be categorized as persons is a difficult philosophical question that has been the subject of intense debate. The topic raises thorny questions about individual and group ontology as well as the exclusive nature of personhood.

A related philosophical issue involves the moral personhood of individuals and groups. What is required for someone or something to be a moral person, i.e., the subject of moral rights and moral responsibilities that go beyond legal entitlements and legal accountability? Articulating the necessary and sufficient conditions for moral personhood is particularly challenging in the context of corporate bodies. If a corporation intentionally commits an act that wreaks devastating harm on a community or the environment, is the corporation subject to moral blame or condemnation? Does it make sense for people to be morally outraged by the corporation's faulty intentions and actions, or to say that the corporation itself bears moral responsibility above and beyond that borne by its individual human decision-makers? On the one hand, we might argue that the corporation is not a person with moral responsibilities because it has no real conscience or soul. On the other hand, it may be plausible to place moral blame on the corporation for some magnified collective acts and intentions that cannot sensibly be attributed to any particular human member.

If the corporation is a person capable of making moral choices and distinguishing between right and wrong, then we would be justified in expecting it to abide by its moral duties to other persons. If the corporation has moral duties, would it then also be entitled to claim moral rights? Some philosophers would prefer to draw a line at this point, acknowledging the personhood of corporations for purposes of owing moral responsibilities, but denying such status to corporations for claiming moral rights. As Chapter 2 explains, the variety of philosophical theories both for and against corporate personhood underscores the challenge of differentiating between individual versus collective activity for purposes of moral standing. The ideas that emerge from philosophical inquiry into the nature of persons reveal the complicated philosophical and moral dimensions of the corporation. Chapter 2 suggests that personhood may exist along a spectrum with corporations having a unique form of moral personhood. Our philosophical understanding of corporate personhood ultimately contributes to the way we shape the legal rules that apply to corporations.

Other dimensions of the corporation's personhood can be viewed through the lenses of additional social science disciplines that are discussed in Chapter 3, including organizational studies, psychology, sociology, linguistics, and political science. Each of these disciplines identifies the corporation as an organizational reality that itself is an object of study and evaluation. Organizational theory conceptualizes the corporation as an independent decision-making entity that is purposeful and intelligent, having the ability to learn and apply new knowledge to accomplish its goals. The corporation is viewed as a living, active entity that is capable of profoundly affecting and interacting with its environment, with the human individuals who are its members, and with the world of people who are external to its operations. The manifestations of personhood that are often associated with organizations mirror those of human persons, including such concepts as life cycles, identity, personality, character, image, reputation, citizenship, and social influence.

The corporate person has the capacity to form a corporate ethos, culture, and belief system that can significantly affect the individuals within it. Group level phenomena in corporations have significant psychological effects on those who are members of the group. Research findings highlight the power of a corporation's culture and climate to influence and direct individual behavior in the corporation. To the extent individuals' values and principles are shaped by their corporate environment, the individuals are in some sense creatures of the corporation, rather than the other way around.

As social institutions that cultivate a specific brand identity in society, corporations can have a recognizable persona. Corporations create social bonds with people through their products and advertising. They substantially influence people's attitudes and behavior. Our regular interactions with corporations and the way we personify them in our ordinary discourse reinforces our tendency to regard them as separate persons. In fact, careful analysis of the words and grammar we use in speaking about corporations reveals that their perceived personhood is woven into the fabric of our language. The vocabulary we utilize to characterize corporations affects the way we relate to them as persons in the community.

The social dimensions of the corporation's personhood raise important normative questions about the corporation's appropriate role as a functioning member of society. Should the corporation operate predominantly to maximize shareholder profits or should it carry broader social obligations to other sectors of society? How should the corporation balance or prioritize its many constituent interests? To whom should the corporation owe its greatest loyalty? The corporation's membership in society as a person is complicated and demanding because we expect it to fill multiple social functions simultaneously.

In addition, the corporation acts as a relevant participant in the political community. Theories of political pluralism emphasize the distinctiveness and significance of organizations in society. Certain political philosophies envision organizations as mediating institutions that act as important buffers between individuals and the

state. Under this view, the corporation as a powerful private institution can become a substantial countervailing force to protect individuals from potentially oppressive government power. At the same time, corporations with their vast resources and power can also resemble state authority and can pose a potential danger to individuals who are no match for corporate power. Corporations are prominent players in the political system. They insert themselves and their money in the political arena and consequently have influence over government officials, policies, and regulation. Whether the corporation's role in the polity is a good or bad thing depends on one's normative vision of the ideal political state, and there is sharp disagreement on that topic.

What apparently seems incontrovertible is that the corporation's role in society is not unidimensional, but rich and complex. It is a member of the larger community, but it is a community in itself as well. The corporation's presence in society carries considerable social, economic, political, and cultural significance. That so many social science disciplines each have distinct and substantive insights into the corporation not only confirms the many dimensions of the corporation as a person, but also underscores the deep interdependence of corporations and individuals in the modern world.

Building on the concepts discussed in the prior chapters, the next two chapters address the corporation's constitutional personhood, i.e., its standing as a person to claim fundamental constitutional rights. The United States Constitution contains no explicit reference to corporations, but the Supreme Court has held that corporations are persons entitled to claim an extensive array of constitutional rights. The support for these rights has developed implicitly from the many different and evolving conceptions of the corporation as a legal, moral, economic, social, and political actor. Chapter 4 provides an overview of the historical development of corporate constitutional rights. It explains how corporations came to be regarded as persons who are entitled to equal protection rights, due process rights, and many other constitutional protections. The analysis then focuses on three of the most controversial arenas today for legal battles on corporate constitutional personhood: (1) corporate free speech rights; (2) corporate religious exercise rights; and (3) corporate racial equality rights.

Chapter 4 examines the extent to which corporations can and should be considered persons whose speech is entitled to protection under the First Amendment. The chapter critically analyzes the cases and theories establishing that corporate persons, like natural persons, have the right to voice their opinions and contribute to the marketplace of ideas. The Supreme Court has held that the expenditure of corporate funds in the political sphere is itself a form of speech and worthy of protection. The Court's opinion in *Citizens United* confirming the speech rights of corporations to spend money in political elections intensified the debate over corporate First Amendment rights. The analysis in this chapter breaks down the conflicting arguments regarding corporate free speech rights in light of the diversity

of entities that utilize the corporate form, the wide range of goals pursued by these organizations, and the many disparate reasons for different corporations to engage in speech acts. The chapter suggests that different types of corporate persons could be eligible for different levels of speech protection.

The multidimensional nature of corporations complicates not only the debate over corporate free speech rights, but also, as Chapter 5 explains, the heated conflicts over other recent expansions of corporate rights, including the right of religious freedom. How plausible is it to think the corporation itself can possess and exercise religious beliefs? While it may be acceptable for a church or religious organization to possess certain religious rights, is it equally sensible for a large public company to claim a right to freely exercise its religion? In the Supreme Court's highly controversial *Hobby Lobby* case, the Court held that corporations are persons entitled to statutory protection for the exercise of their religious beliefs. As discussed in this chapter, the various arguments for and against corporate religious liberty rights reflect competing and complementary aspects of the corporate person.

If corporations are persons who can produce their own speech for purposes of free speech rights, and who can form their own religious identity for purposes of religious liberty rights, might they also be capable of possessing their own racial identity for purposes of racial equality rights? There has been significant public discussion about corporate free speech and corporate religion, but a lesser known emerging topic involves the issue of corporate race. The extent to which corporate persons may be described as having a race has become an important issue as society becomes increasingly more diverse and race relations grow more complex. Various courts have held that corporations may acquire a specific racial identity that would allow them to assert racial discrimination claims. Chapter 5 explains how corporate persons can be described as having a race that would entitle them to object to racially discriminatory treatment. The chapter discusses at least four different theories that can potentially be utilized to assign racial identities to corporations, or alternatively, to grant standing to corporations to assert discrimination claims even when the corporation is "racially neutral."

The debates over corporate race, religion, and speech all seek to determine the extent to which the corporate person can and should be treated like a natural person. As corporate rights have steadily expanded, many people have turned a critical eye toward the idea that the corporation is a person entitled to many of the same rights that are afforded to individuals. Concerns about the consolidation of corporate rights and corporate power have caused some people to argue that the concept of corporate personhood has gone too far. They believe that viewing the corporation as a person with claims to the same rights that belong to human individuals is fundamentally wrong and gives corporations an elevated status they do not deserve. The increasing dissatisfaction with the idea that corporations are persons for purposes of certain inalienable rights has galvanized a popular movement to revoke the personhood status of corporations under the law.

A book about corporate personhood would not be complete without some analysis of the popular effort to abolish it entirely. Chapter 6 addresses this important aspect of the corporate personhood debate. Recent years have seen dramatic growth among activist groups and community associations that want to amend the United States Constitution to establish that the only persons who have constitutional rights are human beings, not corporations. Hundreds of grassroots organizations have successfully worked to adopt resolutions at the state and local levels calling for such a constitutional amendment. Activists have made corporate personhood the main target of their reform efforts. They argue that corporate power will be significantly reduced if corporations are stripped of their standing to claim any constitutional rights.

Chapter 6 critically analyzes the objectives, arguments, and achievements of this anti-corporate personhood movement. It is unclear whether the movement will be successful in its drive for a constitutional amendment declaring that corporations are not persons under the Constitution. However, in the process of trying, movement organizers are starting and continuing a public conversation about corporate personhood that is relevant. By zeroing in on corporate personhood, they have brought into sharper focus a concept that was largely of interest only to legal scholars for many years. Some of those scholars dismissed the corporate personhood concept as being indeterminate and irrelevant. But corporate personhood is a concept that has tremendous significance, whether justified or not, for many people who worry about the scope and exercise of corporate power in the modern world. The movement to amend the Constitution has sparked important discussions about the meaning of corporate personhood and created a broader need for books like this one to explain and analyze its contours. In this regard, the movement has contributed to the important discourse surrounding corporate personhood and corporate power.

The book concludes with some closing observations regarding the complexity of the personhood of corporations. It identifies the need to balance various perspectives in deciding how we should view corporations, how they should be treated, and how they should treat us.

## 1

## Legal Theories of the Corporate Person

Perhaps the most powerful act of law is to make and define a legal person. A legal person is the subject of legal rights and duties.<sup>1</sup> Only those who are legally recognized as persons have the capacity to participate in legal relations. Legal personhood has never been a self-evident classification that applies only to living human beings. In fact, one's status as a human being is neither necessary nor sufficient to be a person in the eyes of the law. Non-human organizational entities are treated as legal persons for some purposes, while human beings like infants and mentally impaired individuals are not regarded as full-fledged legal persons for other purposes.

Corporations have long been viewed as persons under the law, capable of entering into legal relations, exercising legal rights, and bearing legal obligations. As a person, the corporation has the ability to enter into contracts, to sue and be sued, to own property in the corporate name, and to claim many fundamental constitutional rights. The theoretical and practical justifications for treating the corporation as a person are varied and have changed over time, reflecting historical changes in the form, purpose, and scale of corporate enterprise. This chapter describes the main legal theories of corporate personhood and explains how these theories shaped and have been shaped by the growing presence of corporations in society. As we will see, different legal theories of the corporation have cycled in and out of favor as political and economic climates for business have shifted.

The differing conceptions of the corporation are analytical but also ideological; they are simultaneously descriptive and prescriptive. To subscribe to a particular theory of the corporation – to say that the corporation is *x*, and not *y* – often reflects a particular political attitude about corporate activity and correspondingly implies that corporations should be treated in a certain way. Although the various depictions of the corporation often seem to contradict each other, each one plays a complementary role in highlighting essential aspects of the multidimensional corporate person.

<sup>1</sup> John Chipman Gray, *THE NATURE AND SOURCES OF THE LAW* 27 (Roland Gray ed., Macmillan Co. 2d ed. 1921) (1909).

## CORPORATION AS AN ARTIFICIAL AND DEPENDENT PERSON

One of the earliest theories of the corporate person, the artificial person theory, viewed the corporation as an artificial construct of the law.<sup>2</sup> According to this theory, the corporate person is simply an abstract legal fiction, created by law and human beings for the practical purpose of facilitating economic activity. It has no real, independent ontological existence of its own. It has no body, mind, or soul. The corporation's personhood is purely instrumental; it is a legal invention designed to enable human beings to engage usefully in commercial relationships. This conception of the corporation has two important components: (1) the fictional element, and (2) the dependence element.

The fictional element emphasizes that the corporate person exists in only an imaginary way, quite different from the way in which natural persons exist. As an invisible, intangible abstraction of law, "the corporate body is but a name, a thing of the intellect."<sup>3</sup> It has no substantive nature. It does not belong to the physical world of fact but the artificial world of legally created concepts. The "law calls forth the corporation out of nothing, that is, no extra-legal entity exists prior to the sovereign's act."<sup>4</sup> In this sense, anything can be deemed a legal person because legal personhood is simply assigned or defined into existence. It is an "empty slot" into which the law can drop any object, whether real or fictitious, in order to give it rights and duties.<sup>5</sup> The object need not have any measurable philosophical, moral, empirical, social, or political content, nor does it need to carry any resemblance to a natural person. The law can simply extend legal personhood to anything, including a corporation, when there are good reasons for doing so.<sup>6</sup> In the case of the corporation, its legal personhood serves the practical business purpose of allowing the corporation independently to enter into binding legal relations, to exercise rights and to incur obligations, without the continual involvement of every human member of the entity. "So it is that for one purpose and another, it becomes convenient, if not indeed necessary, to let the individual participants fade out of the picture and to look upon the organization as a unit."<sup>7</sup> The fictional nature of corporate personhood thus

<sup>2</sup> Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594, 600-01 (1924). This theory has been called by many different names, including the state grant theory, the fictitious personality theory, the artificial personality theory, the concession theory, and the hierarchical theory. Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1424 (2006).

<sup>3</sup> John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 667 (1926).

<sup>4</sup> Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1645 n.24 (1982).

<sup>5</sup> Richard Tur, *The 'Person' in Law*, in PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 116, 121 (Arthur Peacocke & Grant Gillett eds., 1987).

<sup>6</sup> See *id.* at 121 (referring to a case where an Indian idol was given legal personality); see also Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 347, 350 (1911) (noting that purely inanimate objects may be personified, e.g., the estate of a deceased person, a jury, or a community).

<sup>7</sup> Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 288-89 (1928).

serves as an abbreviation, a convenient shortcut, to apply the rules for natural persons by way of analogy to corporate organizations. It is clearly a fiction, but it is a valuable one that makes economic enterprise easier for the real persons who are involved.

The dependence element of the corporation focuses on the corporation's dependence on the law to create and sustain its personhood. The corporation cannot exist nor have any sort of power without the law's consent. Also known as the "concession theory," it emphasizes that corporations are formed when the government grants approval of their charters, and therefore, the personhood of corporations can be described as a grant or concession from government.<sup>8</sup> The classic statement of this view is found in Chief Justice Marshall's description of the corporation in 1819 in *Trustees of Dartmouth College v. Woodward*: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it."<sup>9</sup> From this perspective, the corporation is a creation of the state. It does not have an inherent essence. We cannot locate the source of its life and power by looking within the corporation. Rather, we must look to the law that exists outside the corporation as the originator of its personhood. The corporation is completely dependent on a force external to itself, i.e., the state, to create and recognize it.

The state also defines the scope of the corporation's rights and duties. The only powers the corporation possesses are those that are granted by the state. "A corporation has no inherent or natural rights like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted."<sup>10</sup> Of course, any rights the state can give to the corporation, the state can also take away. The same is true for duties. Any legal obligations the corporation possesses, it possesses by reason of the legal rules that create those duties. This means that every element of the corporation's collective being, including every right and duty, is continually dependent for its very existence on the law that constitutes it. In the final analysis, corporations are whatever the law says they are, and corporations have whichever rights and obligations the law says they have.

This theoretical view of the corporation was consistent with the dominating political role of the sovereign that existed at the time the earliest modern corporations were formed.<sup>11</sup> In seventeenth-century England, the corporate charter was used as a technique by the Crown not only to authorize and recognize corporate entities,

<sup>8</sup> The concession theory represents a "top-down" approach that sees the corporation as the subordinate subject of law and of the government that charters or otherwise recognizes it. Eric W. Orts, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 9-13 (2013).

<sup>9</sup> 17 U.S. (4 Wheat.) 518, 636 (1819).

<sup>10</sup> *Shaffer & Munn v. Union Mining Co.*, 55 Md. 74, 79 (1880).

<sup>11</sup> Historical antecedents to the corporate form can be traced back to the ancient Roman Republic. See Max Radin, *THE LEGISLATION OF THE GREEKS AND ROMANS ON CORPORATIONS* (Tuttle, Morehouse &

but also to utilize their power for the benefit of the sovereign. Granting incorporation was the principal device by which royal power was administered and expanded in the polity. Corporate charters were gifts of immunity from the sovereign to encourage corporations to organize and manage hospitals, universities, religious orders, towns, imperial trade, and colonies. Through these operations, corporations helped the state to maintain order in the community, to care for the population, and to foster the wealth, stability, welfare, and security of the state.<sup>12</sup> Corporate charters were granted by special grace of the sovereign, on an individual basis, and only upon a showing that the corporation's proposed project would serve a public purpose or further the interests of the sovereign state.

Obtaining a charter was deemed a significant gift because charters came with substantial privileges, including certain tax exemptions, monopoly rights, rights to land, and perpetual succession. England and other European countries chartered large trading companies, such as the East India Company, the Dutch East India Company, the Royal African Company, and the Hudson Bay Company, to develop foreign trade and colonize foreign lands. Corporations were granted territorial control over specific geographic regions and trade routes, all for the purpose of returning wealth, resources, and power back to the chartering country.<sup>13</sup> The status of these corporations resided in their dependence on the sovereign power that created them. Corporations were essentially an extension of the state. They were artificial instruments owing their existence to the will of the sovereign. It was one such corporation, the Virginia Company of London, that established the first English settlement in Jamestown, Virginia, thereby bringing the corporate form to America. Many of the original American colonies, including Massachusetts, Connecticut, and Georgia among others, were corporations chartered by the Crown.

In colonial America, corporations obtained charters by grants from colonial governors or legislatures, thereby continuing the tradition of viewing the corporation as an artificial person created by law as a concession of the government.<sup>14</sup> Once America gained its independence, corporate charters were granted by special acts of state legislatures.<sup>15</sup> States typically approved charters on a case-by-case basis for corporate enterprises that served a public function and met specific social needs, e.g., public utilities, banks, insurers, transportation services, and water works.

Taylor Press 1910); Ronald J. Colombo, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 30–32 (2015); Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1356–64 (2006). During the Middle Ages, forerunners of the corporation existed in the form of churches, guilds, municipalities, and educational institutions, all of which required charters that were granted by the sovereign. See Ron Harris, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844*, at 16–19 (2000).

<sup>12</sup> Joshua Barkan, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* 20–30 (2013).

<sup>13</sup> *Id.* at 31–35.

<sup>14</sup> James Willard Hurst, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970*, at 15–17 (1970).

<sup>15</sup> Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 188–201 (2d ed. 1985).

The “corporate privilege was granted sparingly; and only when the grant seemed necessary . . . to procure for the community some specific benefit otherwise unattainable.”<sup>16</sup> From the state's perspective, the corporation was a tool of the government to further the public welfare, and this was the only satisfactory justification for the corporation's existence. As Chief Justice Marshall emphasized in the *Dartmouth College* case: “The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant.”<sup>17</sup> With the charter, states often granted to corporations special privileges, monopolies, and exclusive rights in order to encourage and reward corporations that undertook large and costly public projects, such as building a bridge or a canal.<sup>18</sup>

At the same time, state legislatures imposed limits on corporate activity in order to protect the public. Early charters and state laws contained specific provisions designed to prevent corporations from engaging in potentially abusive corporate practices. For example, states strictly regulated banking activity through limited powers granted in bank charters and through strict construction of those charters by the courts.<sup>19</sup> Corporations were often limited in how large they could become, how much property they could hold, and how long they could exist. Sometimes legislatures required corporations to give equal voting power to smaller investors, provide favorable treatment to the poor, or ensure that investors and managers could be personally liable for corporate debts. Occasionally, states even regulated the prices that corporations could charge and the rate of return that investors could earn.<sup>20</sup> Courts developed the *ultra vires* doctrine, which prohibited corporations from acting beyond the specified powers given to them in their charters. State legislatures reserved the power to amend or repeal corporate charters in order to retain control over corporate activity.

This framework for corporate enterprise was consistent with the belief that incorporation was a unique privilege or concession awarded by the state. The corporation was viewed as a creature of law, possessing only the rights and duties that the law allowed it to have. This conception of the corporation was not incompatible with the expectation that investors would earn profits from the business. Organizers of early corporations were willing to engage in large and financially risky corporate projects precisely because investors sought to make money from the enterprise. However, the profit goal could not overshadow the idea that corporations

<sup>16</sup> *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

<sup>17</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 637 (1819).

<sup>18</sup> Barkan, *supra* note 12, at 51; Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1609–10 (1988).

<sup>19</sup> Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987).

<sup>20</sup> Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1476, 1478 (2006).

were given legal status to serve the ends of government. From a normative standpoint, the artificial person theory supported a public-oriented view of corporate activity. If the corporation is an artificial construction that derives its existence from the state, the logical result is that the corporation is subservient to the state and subject to state regulation in the public interest. The very laws that create corporations can and should also constrain them to act in ways that benefit, or at least do not harm, the public.

The artificial person theory of the corporation dominated American thinking about corporate personhood until the mid-nineteenth century. At around that time, states began to eliminate the practice of chartering corporations on a case-by-case basis via special acts of the state legislature. The special chartering process fostered perceptions of political favoritism and corruption as certain businesses were granted charters while others were rejected. Many people believed the entire chartering structure favored wealthy, well-connected business people at the expense of new entrepreneurs. The system was regarded as inherently unfair, tainted by legislative bribery and monopolistic practices.<sup>21</sup> It was also inefficient and unwieldy, requiring the state legislature formally to act to approve each individual charter. In response, states adopted general incorporation statutes allowing entrepreneurs to incorporate their businesses freely without individualized grants from the legislature. This legislative change equalized the opportunity for any and all who wished to incorporate their business. "It was cheap and easy to incorporate under general laws – a few papers filed, a few forms and signatures; the privilege of incorporation lay open to whoever wanted it."<sup>22</sup> The act of incorporation became merely a formality of filing and played little role in the personhood of corporations. The notion that corporations existed only as a result of state concession and only for the purpose of benefiting the public gave way to the belief that the corporation actually owed its existence to the individuals who formed the corporation to further their own private financial interests.

The liberalization of the charter system was a factor in loosening the close tie that had previously existed between the corporation and the state. Corporate charters that had previously contained specific restrictions on corporate structure and activity were replaced with standard charters that authorized corporations to engage generally in any lawful acts. By making the charter freely available, states gave up their demand that the corporation directly provide for the public good. The charter was no longer the strict tool of regulation it had

<sup>21</sup> Harry C. Henn & John R. Alexander, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 25 (3d student ed. 1983); Hurst, *supra* note 14, at 120. "[L]egislative discretion over access to the corporate form enabled incumbent firms and their politically powerful owners to block entry by new firms." Eric Hilt, *Early American Corporations and the State*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 37, 72 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

<sup>22</sup> Friedman, *supra* note 15, at 512.

previously been. *Ultra vires* claims contending that corporations were acting beyond their specified powers virtually ceased by the late-nineteenth century because corporations were legally free to do anything an individual could do. With these changes, the artificial person theory of the corporation diminished in relevance since corporations no longer appeared to be mere fictions that were entirely dependent on the state to define the scope of their existence, purpose, and activities. The corporation looked less like an arm of the state and more like a vehicle for individuals to pursue economic ends. The law allowed for limited shareholder liability and perpetual duration of the business. This solidified the appeal of utilizing the corporate form for entrepreneurial endeavors that required large amounts of capital and risk.

While the artificial person theory of the corporation correctly describes important aspects of the legal basis for corporate personhood, some scholars believe it lacks viability today.<sup>23</sup> It was an idea that was good for its time, but it envisions a critical level of state involvement that is absent now that incorporation is essentially an administrative formality. "The difficulty with viewing the corporation simply as a creature of the state is that the state no longer functions as the dominant force in the development of a corporation's form and character."<sup>24</sup>

The artificial person theory may have fallen from dominance, but the normative and political implications of the theory continue to strike a chord with many who want to see the law regain greater control over the corporation. The idea that corporations should be more socially responsible and subject to stricter regulation resonates with those who believe corporations today have been permitted to gain too much financial and political power. The artificial person theory has never been formally renounced, and it is plausible that legislative and judicial authorities could invoke it today to justify limits on corporate activity.<sup>25</sup>

Opponents of corporate constitutional rights often revert to the artificial person theory to argue that corporations, as mere concessions of the state, should have no legitimate claim to constitutional rights such as freedom of speech or religion. Under this approach, the government "could easily reassert legal control over the structural make-up of corporations" and alter "one or more core attributes of

<sup>23</sup> See Henry N. Butler & Larry E. Ribstein, *THE CORPORATION AND THE CONSTITUTION*, at ix (1995) ("This theory had its origin in the early history of the corporation, when corporations were, in fact, created by special charter. The theory has no relevance today, when corporations are freely formed by making a simple filing under general corporation laws."); Colombo, *supra* note 11, at 99 ("[C]oncession theory has long been abandoned by the vast majority of corporate law scholars and commentators."); Michael J. Phillips, *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 *BUS. ETHICS Q.* 435, 442 (1992) ("[T]he theory ceased to reflect social reality over a century ago, and . . . few legal scholars who theorize about corporations take it seriously today.");

<sup>24</sup> Jeffrey Nesteruk, *Bellotti and the Question of Corporate Moral Agency*, 1988 *COLUM. BUS. L. REV.* 683, 687 n.23.

<sup>25</sup> See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 *SEATTLE U. L. REV.* 1135, 1148–49 (2012) (describing the potential viability of this argument).

corporate personhood” to limit corporate power and to increase corporate responsibilities.<sup>26</sup> The switch to general incorporation statutes may have made incorporation virtually automatic for anyone who wants it, but incorporation still requires a charter from the state, and states’ authority to grant a charter is concomitant with their authority to deny or revoke it. Indeed, efforts have been made to revive the artificial person theory by petitioning state attorney generals to revoke the charters of corporations accused of serious environmental crimes and human rights violations.<sup>27</sup> Although these petitions have not been successful, they represent an earnest attempt to reinvigorate the conception of the corporation as a fictional person or government concession that can be terminated just as easily as it can be created. Even so, revoking charters and dissolving corporations are perceived as such extreme measures that states are unlikely to utilize them even if the artificial person theory regains some persuasive force.

The conception of the corporation as an artificial legal fiction that is dependent on the state for recognition is not an erroneous depiction of the corporation, but it is an incomplete one. It is true that the corporation has no status as a legal person unless it has an effective charter approved by the state. In this sense, the corporation is a creature of the law, reliant on the state for legal recognition and permission to operate. The law endows the corporate form with special legal attributes such as limited shareholder liability and perpetual duration. The law is essential to defining the corporate person, as well as its rights, powers, and duties. Thus, the personhood of corporations is tied to the state. Yet that does not mean that corporations are extensions of the state. While the corporation may be a government-sanctioned entity, the corporation is not *only* that. Its identity as a creature of law is one aspect of its personhood, but as we shall see, there are many other aspects of its personhood that are equally elemental. The artificial person theory is helpful to a point, but “taken alone, is too authoritarian with respect to the business enterprise”<sup>28</sup> and fails to accommodate other important dimensions of the corporation, including social and moral dimensions. It is understandable that the artificial person model declined as theorists expanded their view to focus on additional facets of corporate personhood that went beyond merely its legal origins.

<sup>26</sup> *Id.* at 1151–52, 1158. Professor Lyman Johnson skillfully explains that the “existence of unexercised [state] power over corporations means the fully emergent corporate ‘person’ need not be in either rights or responsibilities legally identical to humans, and corporations likewise need not simplistically be equated to the institution of business more generally.” *Id.* at 1152.

<sup>27</sup> See Robert W. Benson, *How Many Strikes Do Big Corporations Get? The Petition to Revoke UNOCAL’s Corporate Charter*, 55 GUILD PRAC. 113 (1998); Thomas Linzey, *Petition to Attorney General of Delaware to Revoke Corporate Charters of WMX Technologies and Chemical Waste Management Inc.*, 52 GUILD PRAC. 116 (1995); Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219 (1995).

<sup>28</sup> Orts, *supra* note 8, at 21.

## CORPORATION AS AN AGGREGATE PERSON

By the end of the nineteenth century, it was clear that the artificial person theory offered too narrow a description of the corporation, and a shift in thinking about corporate personhood began to take place. At this time, general incorporation statutes had completely displaced the method of specialized legislative chartering. With the simplification of the incorporation process, the number of corporations increased dramatically. In 1800, there were 335 corporations in the United States.<sup>29</sup> By the time of the first federal income tax in 1916, there were more than 300,000 active corporations.<sup>30</sup> Many of these corporations were small- and medium-sized firms formed by individuals who sought the advantages associated with doing business in the corporate form. Because general incorporation laws allowed anyone easily to incorporate a business without the heavy state scrutiny that had previously existed, the focus shifted from the state as the authority and originator of the corporation to the human individuals who incorporated the business for profit. The corporation looked less like a concession of government designed to serve a public purpose, and more like an arrangement between private individuals to pursue their own personal gain. An alternative view of the corporation arose during this time that looked past the formality of creating a legal fiction and identified the real source of the business: profit-seeking entrepreneurs. From this point of view, the corporation was not so much a creature of the state but the product of individual initiative and enterprise.

This new approach formed the aggregate theory of the corporate person. While the artificial person theory holds that corporations cannot exist without the state, the aggregate theory emphasizes that the corporation cannot be formed without the action and agreement of the human persons behind the business. In fact, no corporate acts would ever occur if not for the individuals who make up the corporate entity. It is “owned, managed, and administered by *people*” and “[i]ts so-called actions are but manifestations of actions by real persons.”<sup>31</sup> The corporation is seen as a collection, or aggregate, of individuals who contract with each other to utilize the corporation for their mutual benefit. The corporate person has no existence or identity that is separate and apart from these natural persons. It is “self-evident that a corporation is not *in reality* a person or a thing distinct from its constituent parts. The word ‘corporation’ is but a collective name for the incorporators or members who compose [it].”<sup>32</sup> All of the actions and intentions of the corporation

<sup>29</sup> 2 Joseph Stancliffe Davis, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS*, no. IV, at 24 tbl.1 and surrounding text (Lawbook Exch. 2006) (1917).

<sup>30</sup> Naomi R. Lamoreaux, *Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 29, 34 (Kenneth Lipartito & David B. Sicilia eds., 2004).

<sup>31</sup> Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in 1 *ADVANCES IN CRIMINOLOGICAL THEORY* 31, 36 (William S. Laufer & Freda Adler eds., 1989).

<sup>32</sup> 1 Victor Morawetz, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* 2 (Boston, Little, Brown, & Co. 2d ed. 1886).

are always reducible to the actions and intentions of the individuals within the organization. This model of the corporate person is grounded in methodological individualism, the principle that the individual, not the group, is the appropriate starting point for any legal, political, or social theory. "Every complex social situation, institution, or event is the result of a particular configuration of individuals," and the only way to reach "rock-bottom explanations" of large-scale social phenomena is to boil them down to the "dispositions, beliefs, resources, and inter-relations of individuals."<sup>33</sup>

The aggregate theory retains the fictional element of the artificial person theory; the corporate person is seen as an artificial construct or fiction that is used as a convenient legal shortcut to facilitate economic enterprise. Neither theory suggests that the corporation has a real and distinct ontological existence of its own. Where the aggregate and artificial person theories differ is with regard to the dependence element of the corporation. The aggregate theory rejects the notion that corporations are entirely dependent on the state legislature for their creation; rather, the corporation relies on its human members for its organization and ongoing activity. The source and impetus for the corporation are the individuals who agree to aggregate their talent and resources within the corporate framework to pursue their joint ends. The corporation's origin is traced to these people and their private contractual arrangements with each other, not the state. A corporation cannot "be formed by law without the action of the incorporators; for the legislature has not the power to create the mutual consent, which is essential to every contractual relation."<sup>34</sup>

In this way, the aggregate theory reframes the role of the corporate charter. Rather than characterizing the charter as a government grant, the aggregate model sees the charter as a contract among the individuals who combine to form the business, much like a partnership agreement. When the charter is filed with the state, it is only an *ex post* registration with the state registrar, not an *ante* plea for a grant of sovereign approval. This new line of thinking made a lot of sense when the era of free incorporation began in the late-nineteenth century. With the adoption of general incorporation laws, chartering ceased to be a significant legislative affair and instead became a perfunctory procedural one. Incorporation was viewed more as a matter of individual entitlement than state privilege. Corporations appeared to be self-organized firms, created by and for their participants. The state's recognition of the corporate person was really just an affirmation of people's natural desire and right to come together to accomplish economic tasks in partnership with each other. From this view, the

<sup>33</sup> J. W. N. Watkins, *Methodological Individualism and Social Tendencies*, in *READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES* 269, 270-71 (May Brodbeck ed., 1968).

<sup>34</sup> Victor Morawetz, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE* 11 (Boston, Little, Brown, & Co. 1882).

corporation is "a creature of free contract among individual shareholders, no different, in effect, from a partnership."<sup>35</sup>

The aggregate theory, also called the contractual or associational theory, is rooted in the right of individuals to associate with one another, to form voluntary groups, to strike mutually beneficial bargains, and to otherwise freely relate to each other in ways that fulfill their own private interests. These concepts resonate with an "inherence theory" of corporations that suggests that "men have a natural right to form a corporation by contract for their own benefit, welfare, and mutual self-interest."<sup>36</sup> One aspect of this model involves the right to partner together contractually to form beneficial business structures that allow individuals to achieve joint economic goals and pursue pecuniary profits. Another branch of this model involves a more political core: the right of political and social association. There has always been a deep American belief in the sanctity of association. People have always formed voluntary groups and organizations with like-minded people to pursue shared interests. Corporations, as collections of individuals, can be analogized to other political and social groups in society that are created to enhance the lives, voices, and powers of individual members, such as churches, clubs, and political parties. These groups form naturally out of individuals' private social, political, and economic relationships. The collective entity consolidates and represents the interests and values of its constituents.

To determine any rights or duties of the organization, the aggregate theory requires us to look past the organizational form to the individual members themselves. Because the corporate person is really just the sum total of all those individuals, it is not possible to distinguish meaningfully between the interests of a corporation and those of its human constituents. The "rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being."<sup>37</sup>

The United States Supreme Court implicitly relied on this view in *Santa Clara County v. Southern Pacific Railroad* when it declared that a railroad corporation is a person for purposes of the Fourteenth Amendment, and thus its property cannot be taxed differently from the property of individuals.<sup>38</sup> The underlying reasoning was that the corporation's property was essentially the property of the individual shareholders who owned the corporation and therefore should be protected in the same manner. Morton Horwitz explained that the Court's decision relied on the aggregate theory arguments of the railroad company, and on Justice Stephen Field's reasoning

<sup>35</sup> Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 184 (1985).

<sup>36</sup> Robert Hessen, IN DEFENSE OF THE CORPORATION 22 (1979).

<sup>37</sup> 1 Morawetz, *supra* note 32, at 3; see also Henry O. Taylor, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK*, at iv (Philadelphia, Kay & Brother 1884) ("By dismissing this fiction [of the legal person] a clearer view may be had of the actual human beings interested, whose rights may then be determined without unnecessary mystification.")

<sup>38</sup> 118 U.S. 394 (1886).



in his circuit court opinion in a companion case.<sup>39</sup> Justice Field had questioned why individuals' interests in their property should suddenly terminate if they decide to join together and form a corporation. He wrote: "It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation."<sup>40</sup> To avoid this unfair result, the corporation must be entitled to the same constitutional protection that its human members would have if acting in their individual capacity. The property of the corporation ultimately belongs to the shareholders. "To deprive the corporation of its property . . . is, in fact, to deprive the corporators of their property . . . [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them."<sup>41</sup> From this perspective, the law must uphold corporate rights to protect the rights of the natural persons behind the corporation.

Certain normative implications flow from the aggregate paradigm of the corporation and its focus on individuals. It suggests not only that corporations should be regarded as the product of private initiative and natural market forces, but also that corporations reflect forms of private property and private contract, and that corporate law should be viewed as private law, not public law. The purpose of the corporation is to serve as a vehicle for investors to pursue their own interests, to maximize their wealth, and to accomplish their self-defined goals. Entrepreneurs do not form corporations to have them act as extensions of the state to promote generalized public or community purposes. Corporate "participants who invest their own wealth, time, labor, and knowledge in a business enterprise . . . see firms as representing, derivatively, their own interests and expectations, rather than those of a sponsoring government."<sup>42</sup> Unlike the artificial person theory, the aggregate model supports a hands-off, anti-regulatory approach to corporate activity. Rather than interfering with private parties' consensual corporate actions or restricting their property rights, the law should support the financial interests of corporate owners, and it should protect their rights to enter into beneficial contractual relations. This pro-business approach seeks to minimize regulation of business corporations because it encroaches on individuals' property rights and infringes on their freedom to contract in ways that best serve their own interests.

The aggregate theory remains a dominant paradigm in modern conceptions of the corporation. It serves as the foundation for the modern economic theory of the firm, the nexus of contracts model. As will be discussed later in the section of this chapter on the economic theory of the corporate person, this economic model has shaped

academic discourse about corporate law for decades. Moreover, as we will see in Chapters 4 and 5, the Supreme Court has often relied on the aggregate view to support the extension of constitutional rights to the corporation. The establishment of corporate constitutional rights is regarded as necessary to protect the constitutional rights of the individuals within the corporation.

While the aggregate theory has been extremely influential, it too offers only a partial picture of the corporate person. Not all actions of corporations can be redescribed as individual actions.<sup>43</sup> Organizations have certain properties that are truly products of the organization itself; they come about because of the way individuals behave *together*.<sup>44</sup> As the size of the corporation grows, the aggregate theory loses some of its practicability, and some perplexing questions arise. Which individuals are the relevant ones for purposes of the aggregation: the original individuals who started the corporation (perhaps a handful of people), or the individuals who currently own the corporation's stock (perhaps hundreds of people)? Would it be more sensible to include the corporation's employees, creditors, and suppliers in the aggregation of individuals who compose the corporate organization? If so, does this not begin to blur the line between the corporation and the rest of society as the aggregation necessarily expands with the growth of the corporation? If the corporation is merely the sum of its individual members, how can the corporation remain the same person when some or all of its individual members change or depart?

By the early-twentieth century, as corporations grew dramatically in size and scope, the difficulty with answering these questions became increasingly more apparent. At that time, dispersed shareholder ownership and immense growth in the size of corporations revealed a deep separation of ownership and control in large corporations.<sup>45</sup> Widely scattered shareholders of giant corporations were passive investors with small individual holdings who did not control the corporation in any meaningful sense. The board of directors and officers managed the business on the shareholders' behalf. The large corporation appeared to take on its own identity as a functioning organization, separate from the individual shareholders and employees who came and went without changing the fundamental nature of the organization's operations. The corporation had a longevity, a perpetual existence, that its individual members did not. Because the aggregate theory was not an entirely

<sup>39</sup> See *County of San Mateo v. S. Pac. R.R. Co.*, 13 F. 722 (C.C.D. Cal. 1882); Horwitz, *supra* note 35, at 177-78.

<sup>40</sup> *County of San Mateo*, 13 F. at 744.

<sup>41</sup> *Id.* at 747-48.

<sup>42</sup> Orts, *supra* note 8, at 10. The aggregate theory represents a "bottom-up" approach that prioritizes the interests of the human members of the corporation over those of the state. *Id.*

<sup>43</sup> Patricia H. Werhane, PERSONS, RIGHTS, AND CORPORATIONS 51-52 (1985).

<sup>44</sup> Michael Keeley, A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS 230 (1988).

<sup>45</sup> Adolf A. Berle, Jr. & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY 119-25 (1932). A shift from democratic voting rights (one vote per person) to plutocratic voting rights (one vote per share) may have been a key factor in this separation of ownership and control, turning the many smaller shareholders into passive investors and enabling the few larger shareholders to control and further empower the board. See Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, in CONSTRUCTING CORPORATE AMERICA, *supra* note 30, at 66, 72-87.

satisfactory description of the corporate person, a new theory, the real entity theory, emerged to explain the personhood of corporations.

#### CORPORATION AS A REAL AND INDEPENDENT PERSON

As corporations grew increasingly larger near the end of the nineteenth century, many of them were no longer owned and controlled by a small group of founding investors. Rather, the stock was held by numerous shareholders who allowed managers to run the company for the shareholders' benefit. Many small- and medium-sized businesses merged into very large corporate consolidations during the great merger movement that occurred at that time.<sup>46</sup> The massive growth of corporate organizations was at odds with the idea that corporations were simply associations, or aggregates, of the people who formed the corporation. The analogy to partnerships was no longer persuasive. "The reality of the corporation apart from its members was becoming clearer as the relationship of the shareholders to the operations of the business became increasingly distant."<sup>47</sup> Large corporations began taking on a character, reputation, personality, brand, and social identity of their own, distinct from the attributes of their human constituents.<sup>48</sup>

An outpouring of scholarly analysis on corporate personhood accompanied these changes in the structure and operations of corporations. Its origins were largely in the work of Otto Gierke, a German political theorist whose writings on the historical development of Germanic associations and communities were translated into English and promoted by legal scholars Frederic Maitland and Ernst Freund.<sup>49</sup> Gierke observed that human beings naturally form and function in groups, whether it be in families, clans, guilds, or nations. Groups are not created by the state; rather, they are natural, spontaneously formed, timeless entities that preexist the state. Gierke argued that associations were real entities with an autonomous existence stemming from the necessity of group life: "The association, or group, is a living entity . . . Every group has a real and independent communal life, a conscious will, and an ability to act that are distinct from the lives and wills of its individual members."<sup>50</sup> In the United States, Freund drew on some of Gierke's ideas to conceptualize the corporation as an autonomous entity with its own will. He argued: "The law does not create the corporate person, but finding it in existence invests it

<sup>46</sup> Naomi R. Lamoreaux, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904*, at 1-2 (1985).

<sup>47</sup> Mark, *supra* note 19, at 1472.

<sup>48</sup> Margaret M. Blair, *Corporate Personhood and the Corporate Person*, 2013 U. ILL. L. REV. 785, 810.

<sup>49</sup> Otto Gierke, *POLITICAL THEORIES OF THE MIDDLE AGE* (Frederic William Maitland trans., Lawbook Exch. 2002) (1900).

<sup>50</sup> OTTO GIERKE: *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* 7 (George Heiman ed. & trans., 1977). "In fact, the group and the individual human could be viewed as two species within the genus of real persons." Andrew Vincent, *Can Groups Be Persons?*, 42 REV. METAPHYSICS 687, 708 (1989) (discussing Gierke's view of groups).

with a certain legal capacity. The corporation . . . is not identical with [its human members], for out of the association of the individuals the new personality arises, having a distinct sphere of existence and a will of its own."<sup>51</sup>

Many scholars and jurists began to embrace the idea that corporations exist in their own distinct way. An alternative theory of the corporate person took shape. The real entity theory, also called the natural entity theory, arose to overshadow the aggregate model of the corporation. The real entity theory maintains that the corporation's existence is in many ways independent of the individuals who compose the corporation, as well as independent of the state that legally recognizes its form.

In contrast to the artificial person theory, the real entity theory views the corporation as an undeniably real and non-imaginary person. That which is said to be artificial can still be quite real. As one scholar argued, "an artificial lake is not an imaginary lake," it is something very real that we can see and touch.<sup>52</sup> Although corporate legal personality can be regarded as a fiction, the entity that is personified is certainly not fictional. It is a full-fledged, actual reality that exists as an objective fact and has a real presence in society.

The real entity theory rejects the artificial person theory's view of the corporation as a concession of the state. Rather than viewing the corporation as dependent on the state for its existence, the real entity theory contends that the corporation exists prior to the state. The state merely recognizes the corporation and gives it legal status once the corporation is already formed. Just as the state may record the birth of every baby, or the sale of every parcel of land, so the state records the formation of every corporation via a charter.<sup>53</sup> This corporate formation occurs by virtue of agreement of the private parties who constitute the business, not by virtue of any state action. The state merely adds "legal legitimacy" to the corporation by its public recognition of the entity, but it has nothing to do with the actual creation of the corporation.<sup>54</sup> "What really happens is that the state finding certain persons standing in a certain

<sup>51</sup> Ernst Freund, *THE LEGAL NATURE OF CORPORATIONS* 13 (Chicago, Univ. of Chi. Press 1897).

<sup>52</sup> Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257 (1911). Machen continued: "[A] corporation cannot possibly be imaginary or fictitious and also composed of natural persons. Neither in mathematics nor in philosophy nor in law can the sum of several actual, rational quantities produce an imaginary quantity." *Id.* He argued that the corporation's reality is evident in the tangible results of its operations in the world: "[corporations] bridge rivers, pierce mountains, unite cities, cross seas, control commerce, and accomplish all manner of other visible and tangible results." *Id.* at 267. Machen was also critical of the reductionism that marked the aggregate model of the corporation: "If a corporation is fictitious, the only reality being the individuals who compose it, then by the same token a river is fictitious, the only reality being the individual atoms of oxygen and hydrogen." *Id.* at 261.

<sup>53</sup> See Robert Hessen, Editorial, *Creatures of the State? The Case Against Federal Chartering of Corporations*, BARRON'S NAT'L BUS. & FIN. WKLY., May 24, 1976, at 7.

<sup>54</sup> Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1305 (1979). In fact, if the state suddenly ceased to recognize an existing corporation as a legally viable institution, the corporation would not cease to exist in an objective sense. "[I]t is not the law, with its fiction of juristic personality, that supplies the life blood and beating heart of these vast [corporations].

relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.”<sup>55</sup>

The real entity model views the corporation as distinct from the individuals who participate in the corporate enterprise. When several people come together to form an association for some shared purpose, the group entity is larger than and different in kind from the members themselves. Thus, an army, a university, and a church are all distinct units with an identity that is separate from the various individuals who are associated with them. New members may join and old ones may depart, but the entity retains its singularity. Likewise, a corporation is an independent entity whose existence and identity remain the same, even if its membership of individuals changes over time or is in a constant state of flux.<sup>56</sup> This is because one of the distinguishing features of large corporations is their continuity. “[O]rganizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones.”<sup>57</sup> The life of a firm can transcend the lives of the individuals engaged in it.

Under the real entity view, a corporation can have its own will and pursue its own goals in a manner that cannot be equated with the will and goals of its human members. The corporation has a collective consciousness, or collective will, that results from discussion and compromise among the individual members, and may not reflect the preferences of any one person. Actions of the corporation are qualitatively different from those of its individual constituents, who each may have contributed some part to the act, but no one person can be said to be responsible for the unified corporate action.<sup>58</sup> Corporations can initiate and be responsible for their

If the law . . . declared that they did not exist, the entities would be found to be not fictitious, but factual . . . The huge machine would keep right on rolling. This is of the essence of an institution, and not of a legalistic creation.” Adolf A. Berle, Jr., *THE 20TH CENTURY CAPITALIST REVOLUTION* 18–19 (1954).

<sup>55</sup> George F. Deiser, *The Juristic Person*, 57 U. PA. L. REV. 300, 304 (1909).

<sup>56</sup> See Peter A. French, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 19–30 (1984); W. Jethro Brown, *The Personality of the Corporation and the State*, 21 LAW Q. REV. 365, 366–67 (1905). Some scholars have argued that corporations can exist for periods of time, with all of their rights and duties, despite having no members whatsoever. Roger Scruton, *Corporate Persons*, in 63 PROC. ARISTOTELIAN SOC’Y, SUPP. VOL. 239, 246 (1989); see also Meir Dan-Cohen, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* 41–45 (2d ed. 2016) (telling an allegory of the “Personless Corporation” to show that one may “strip the corporation of all individuals and yet preserve, both conceptually and legally, the identity of [the corporation]”).

<sup>57</sup> Peter M. Blau & W. Richard Scott, *FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH* 1 (1962). In a complete reversal of the aggregate approach, it could be argued that the role of the shareholder is dependent on the corporation’s prior existence, rather than the other way around. See Peter F. Drucker, *CONCEPT OF THE CORPORATION* 21 (rev. ed. 1972) (“The corporation is permanent, the shareholder is transitory. It might even be said without much exaggeration that the corporation is really socially and politically a priori whereas the shareholder’s position is derivative.”).

<sup>58</sup> Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 790–91 (discussing ways in which the acts of the corporation sometimes may not sensibly be reduced to the actions of individuals within the organization).

own actions and intentions. Indeed, corporate criminal liability emerged at the turn of the twentieth century, about the time the real entity theory arose, to hold corporations independently responsible for their actions. Jurists began to perceive that a corporation itself could be convicted of a crime, due to its own organizational acts and culpable intent, independent of any criminal liability of specific individuals within the corporation.<sup>59</sup>

Support for the real entity theory grew out of the belief that the corporation was a natural outgrowth of people’s tendency to join together for shared economic purposes. Far from being an artificial construction of the state, the corporation was viewed as a naturally formed entity that obligates the law to respect and officially recognize it. The law does not create the corporation but instead acts simply as “a device for facilitating and registering the obvious and the inevitable.”<sup>60</sup> Real entity proponents argued that the theories of the corporation as artificial and fictional creatures were irrelevant because corporations are real, naturally occurring entities whose “bodies existed and were recognized before a theory was invented to explain their existence and recognition.”<sup>61</sup>

In its most extreme form, the real entity theory suggested that group organizations are real living organisms with a body and a will. There was a sense in which groups could take on an animating life force that gave them their own metaphysical ontological status. They were viewed as having a transcendent reality and organic permanence that went beyond the individuals engaged in it.<sup>62</sup> This organicist conception led to metaphysical speculations and anthropomorphist ideas about the corporate entity that were bizarre and unhelpful. The doctrine at times was carried to “grotesque lengths,” likening the corporation to a biological organism possessing “senses,” “organs,” and “gender.”<sup>63</sup> This anthropomorphism made little substantive sense when applied to corporate legal transactions. It was too incredulous to think that the creation of a wholly owned subsidiary would mean the creation of a “living being” to serve as an owned “slave,” and a contract for one company to merge into another would be “a promise to commit suicide.”<sup>64</sup> Critics subsequently argued that extreme notions of the real life of associations, including the state, served as the basis for political theories that became associated with totalitarianism. The more prudent use of the real entity theory was to avoid excessive organicist extensions and focus more specifically on the idea that the corporation was more

<sup>59</sup> See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909) (seminal case recognizing corporate criminal liability).

<sup>60</sup> Edward S. Mason, *Introduction*, in *THE CORPORATION IN MODERN SOCIETY* 1, 1 (Edward S. Mason ed., 1959).

<sup>61</sup> W. M. Geldart, *Legal Personality*, 27 LAW Q. REV. 90, 96 (1911).

<sup>62</sup> See Christian List & Philip Pettit, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* 73–74 (2011); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068–69 (1994) (referring to the real entity theory’s organicist characteristics that analogized groups to biological organisms).

<sup>63</sup> Machen, *supra* note 52, at 256.

<sup>64</sup> Martin Wolff, *On the Nature of Legal Persons*, 54 LAW Q. REV. 494, 501 (1938).

than just a fictional entity and more than the mere sum of its parts. The corporation could be viewed as a real person, similar to a natural person, but not identical to a human being.

Two contrasting normative visions of the corporation proceed from the real entity theory. On the one hand, if the corporation is a real and natural being, much like an individual person, the corporation should be entitled to many of the same rights and privileges that are afforded to natural persons. Under the real entity approach, corporations are viewed as private institutions, not public entities, and therefore should be treated like private citizens. They should be free from government interference and overbearing regulation of their activities. They are no more in need of legal regulation than individuals are. If the corporation is a product of private entrepreneurial initiative and natural market tendencies toward economic consolidation, then the corporation should be left alone to do what it is naturally formed to do and what it is best at doing, i.e., furthering the shared interests of private individuals. It is not a creature of the state and thus should not be beholden to the state to foster specific public interests.

On the other hand, a slightly different interpretation of the real entity theory implies a more public-oriented normative view of corporations. If the corporation is a real person in society, it should have the same sorts of moral, ethical, and social responsibilities that individuals have. As a citizen of a larger community, it enjoys certain rights and privileges, but it should also bear the corresponding duties of a citizen to be sensitive to the impact of its activities on others. Its operations affect not only its investors, but also its employees, customers, creditors, and the larger community in which it exists. The corporation may be a private institution, but its business is not just a matter of private concern because everything it does is bound to affect the public in significant ways. From this perspective, the corporation has certain public-oriented obligations. The corporation should strive to be a contributing and responsible member of society, and at the very least, should avoid affirmatively harming others as it pursues its interests. The real entity theory embraces a stronger regulatory environment for corporations and supports greater tort and criminal liability for corporate persons who violate the law. The state should regulate corporations to use their powers not merely to maximize profits for their shareholders, but also to consider other participants in the corporation and to facilitate the greater good of society.

With these two very different normative visions of the corporation, the real entity theory represented a balance between the artificial person and aggregate theories. The aggregate view emphasized the role and rights of private shareholders so heavily that it gave the corporation too many rights vis-à-vis the state, while the artificial person theory focused so strongly on the role of the state as the creator of the corporation that it gave the state too much power to regulate corporations. The real entity view appeared to be “the most congruent with

business realities as well as the one most suited to some balance between corporations and the state.”<sup>65</sup>

Some scholars suggest that the real entity model retains its viability today because it seems to fit best with modern perceptions of corporations.<sup>66</sup> Large corporations are not commonly viewed as state-created entities or extensions of the government. Nor are they regarded as mere clusters of individuals, or as abstract fictional concepts. Corporations are perceived as being real entities that people can see and interact with, yet they are not individuals themselves. They are in a category of their own, different from human beings, and separate from the government. The real entity theory adopts a more holistic view of the corporate person than is described by the artificial person and aggregate theories alone.

#### INDETERMINACY OF THE LEGAL THEORIES OF THE CORPORATE PERSON

As a historical matter, the debate over which legal theory of the corporation was most accurate continued until the late 1920s when a pragmatic view of the legal treatment of corporations emerged. John Dewey, in his influential 1926 article, *The Historic Background of Corporate Legal Personality*, convincingly argued that the competing theories of the corporate person were indeterminate.<sup>67</sup> One could invoke any of the corporate personhood theories to support whatever result one wanted. Each model could be utilized to justify either limiting corporate power or enlarging it. Dewey observed that all of the theories were manipulable: “[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends.”<sup>68</sup> The outcomes of contested legal issues involving corporate rights and duties appeared to be dependent on political considerations, not on consistent application of the personhood theories. Dewey argued that the use of the word “person” when discussing the corporation was ultimately meaningless. It does not really matter what we call the corporation or which model we use to describe its essence. Instead of labeling it a person, we could just as easily refer to it as a “right-and-duty-bearing unit” and assign it whichever rights and obligations that we feel are prudent from a political standpoint.<sup>69</sup> It becomes merely “a verbal matter whether we call [corporations] all ‘persons,’ or whether we call some of them persons and not others – or

<sup>65</sup> Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 798 (2005).

<sup>66</sup> See *id.* at 812–13; Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1662; Thomas A. Smith, *The Use and Abuse of Corporate Personality*, 2 STAN. AGORA 69, 70–72 (2001) (arguing that some legal theories, as descriptions of the world, are “better and truer” than others, and the natural entity theory “comes closest in its broad overall outlines to the truth”).

<sup>67</sup> Dewey, *supra* note 3.

<sup>68</sup> *Id.* at 669. Dewey argued that the various theoretical corporate personhood concepts were simply being used after the fact as “rationalizations” for positions held by debating parties. *Id.* at 665.

<sup>69</sup> *Id.* at 656.

whether we abandon the use of the word entirely.”<sup>70</sup> In other words, the personhood designation is not determinative and is arguably irrelevant.

Dewey’s opinion about the indeterminacy of the corporate personhood theories had validity. This indeterminacy has been illustrated in the Supreme Court’s jurisprudence on the constitutional rights of corporate entities. The Court has sporadically used the artificial person, aggregate, and real entity theories to support its decisions, sometimes invoking multiple theories in a single case. In *Hale v. Henkel*, for example, the Court relied on the artificial person theory to hold that corporations are not entitled to the Fifth Amendment privilege against self-incrimination.<sup>71</sup> The Court stated that “the corporation is a creature of the State . . . presumed to be incorporated for the benefit of the public.”<sup>72</sup> In the same opinion, the Court used the aggregate theory to hold that corporations are protected by the Fourth Amendment from unreasonable searches. The rationale was that the “corporation is, after all, but an association of individuals under an assumed name,”<sup>73</sup> and their individual property rights were entitled to protection. Utilizing different theories, the same case both supported and rejected the personhood of the corporation at the same time for purposes of analyzing different rights under the Constitution.

Over the years, the corporate personhood designation and the underlying legal theories have been selectively applied in constitutional law cases, producing seemingly incoherent results. An example of this is found in the Supreme Court’s Fifth Amendment decisions. The Supreme Court has held that corporations, as creatures of the state, are not persons entitled to the Fifth Amendment privilege against self-incrimination, since that privilege “is essentially a personal one, applying only to natural individuals.”<sup>74</sup> However, the Court has also held that corporations are persons entitled to the Fifth Amendment protection against double jeopardy because the corporation, much like a natural person, has the same interests as an individual in avoiding “embarrassment, expense and ordeal,” not to mention “liv[ing] in a continuing state of anxiety and insecurity.”<sup>75</sup> The Court has never clearly explained why a corporation is a person for purposes of the double jeopardy clause of the Fifth Amendment, but not for purposes of the self-incrimination clause of the same amendment. The use of the term “person” in both clauses is analytically indistinguishable. The self-incrimination clause follows immediately after and is grammatically part of the double jeopardy clause. Yet the Court has used different conceptions of the corporate person to support the differing results, underscoring

<sup>70</sup> *Id.* at 662.

<sup>71</sup> *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

<sup>72</sup> *Id.* at 74.

<sup>73</sup> *Id.* at 76.

<sup>74</sup> *United States v. White*, 322 U.S. 694, 698 (1944).

<sup>75</sup> *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

Dewey’s argument that the paradigms are easily manipulable to rationalize conclusions that are politically determined.

Scholars have argued that the personhood of corporations under the Constitution has not been consistently controlled by personhood terminology or theories, but by an almost ad hoc approach to corporate rights. At times, the Supreme Court has utilized conflicting theories of corporate personhood to support particular results, rather than as guiding principles to help reach them.<sup>76</sup> From this standpoint, Dewey had a point in observing that the term “person” signifies whatever the “law makes it signify.”<sup>77</sup> Although Dewey downplayed the relevance of the legal theories of the corporation, his statement about the power of the law to determine the contours of the term “person” resonates with the artificial person theory. It suggests that the corporation is dependent on the state, through legislation and the courts, to define what the corporate person is and what rights and duties it should have. Dewey, however, ostensibly urged a pragmatic approach to dealing with issues of corporate rights and duties, i.e., dropping the theoretical debates about the source of the corporation’s personhood and focusing instead on the practical consequences of assigning certain rights and duties to the corporation. He rejected the idea that in order for the corporation to be called a person it must possess certain intrinsic properties that are characteristic of what we define metaphysically as a person. The relevant question was not what corporations are, but what corporations do, and whether treating them as legal persons and giving them particular rights or duties will produce beneficial or detrimental consequences.<sup>78</sup> The legal realists like Dewey who favored this approach believed that resolving these issues about the scope of corporate power must involve practical political judgments, not abstract theoretical or philosophical ones.

This legal realist view of the corporation dampened the debate over the various legal theories of corporate personhood. Dewey’s assertion about their indeterminacy became conventional wisdom, and the controversy over the nature of the corporate person lost its fervor. To theorize over the concept of corporate personhood was deemed an exercise in “transcendental nonsense.”<sup>79</sup> The goal was no longer to search for an inhering essence of the corporation but to analyze concrete facts to identify and evaluate the effects of calling the corporation a person. This was a shift toward a pragmatic instrumentalist approach to law under which legal rules can be justified by assessing the practical consequences of utilizing those rules as

<sup>76</sup> Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 318 (1990).

<sup>77</sup> Dewey, *supra* note 3, at 655. Dewey argued that the corporate personhood concept has constantly displayed “chameleon-like change,” and the effect on legal doctrine has been to “generate confusion and conflict.” *Id.* at 658.

<sup>78</sup> *Id.* at 660–61.

<sup>79</sup> See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen argued that abstract concepts that cannot be defined in terms of actual experience are meaningless. *Id.* at 826.

instruments to serve chosen ends.<sup>80</sup> From this perspective, whether a corporation should be treated as a person depends on the facts and circumstances and may vary from case to case, depending on the issues at stake. Dewey's pragmatic treatment of the corporation's legal status continues to find support among modern legal scholars who prefer to avoid analysis of what the corporation is, and instead focus on the effects of granting corporations certain rights and duties.<sup>81</sup>

Not everyone agrees with Dewey's indeterminacy thesis. Some scholars have argued that legal conceptions of the corporation are not perpetually manipulable but have in fact influenced the determination of certain legal outcomes. While the legal theories have not necessarily dictated results, they have had a role in "tilting" or shaping our views of the corporation and their treatment under the law.<sup>82</sup> In this regard, legal theories matter, ideas have consequences, and different conceptualizations of the corporation can and do influence the resolution of certain corporate legal issues. While Dewey's indeterminacy thesis had merit, like all the other legal theories of the corporation, standing on its own, his view of corporate personhood was also incomplete. As will be discussed later in the section of this chapter on the language of corporate personhood, Dewey rejected the value of integrating non-legal frameworks into our legal understanding of the corporation, and he did not account for the lasting power and influence of language to form our perceptions of corporate personhood.

### ECONOMIC THEORY OF THE CORPORATE PERSON

Although interest in the theoretical basis for calling the corporation a person languished for many decades after Dewey's work, the topic was revived in the 1980s when legal scholars began to draw upon ideas originating in the fields of economics and finance to form a new theory of the corporation. The theory focused on the contractual relations among the corporation's participants. Bolstered by the law and economics movement in legal scholarship, the contractual theory became extremely influential in the legal academy.<sup>83</sup> It has served as the dominant paradigm of the corporation for several decades.

This view of the corporate person relies on a contract model rooted in neoclassical economic theory. Under this paradigm, the corporation is merely a fiction that

<sup>80</sup> See Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

<sup>81</sup> See, e.g., Richard Schragger & Micah Schwartzman, *Some Realism About Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345, 347 (Micah Schwartzman et al. eds., 2016); Pollman, *supra* note 66, at 1631, 1675.

<sup>82</sup> See Horwitz, *supra* note 35, at 175–76.

<sup>83</sup> See Steven M. Teles, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 216 (2008) ("Simply measured in terms of the penetration of its adherents in the legal academy, law and economics is the most successful intellectual movement in the law of the past thirty years, having rapidly moved from insurgency to hegemony.")

serves as a "nexus of contracts" among the firm's various individual participants.<sup>84</sup> These contracts are not all formal contracts as defined by law, but the economist's notion of contracts as reciprocal arrangements involving mutual expectations between parties. The human parties are defined according to the economist's notion of rational self-interested actors who freely contract according to their own utility calculations. Market forces bring shareholders, managers, creditors, employees, suppliers, consumers, and others together to seek the benefit of their mutual bargains. Their web of interrelated contracts is what constitutes the corporation. From this perspective, no independent, real corporate entity exists. The idea of a separate corporate person is only a convenient fiction. The corporate entity itself has no precise boundaries, and "it makes little or no sense to try to distinguish between those things which are 'inside' the firm . . . from those things that are 'outside' of it."<sup>85</sup> In fact, some proponents of the model prefer the term "contractarian theory" over "nexus of contracts" because the latter might imply the corporation exists on its own as an entity apart from the contracts among its participants. There is no conceptual justification for reifying the mass of intertwined contracts that compose the corporate form. As a result, the concept of the distinct corporate person tends to disappear.<sup>86</sup>

Ownership of the firm also disappears as a meaningful concept.<sup>87</sup> Since the organization decomposes into a group of identifiable participants who negotiate an equilibrium position among themselves, no one class of participants, not even the shareholder class, has a right to regard itself as the owner of the corporation. The shareholders are just one group of inputs whose rights are determined by the many interrelated contracts making up the corporation. That said, the managers are considered the agents of the shareholder principals who agree to bear the residual risk if the firm is not successful. In return, the managers' role is to act to maximize shareholder interests. The managers are obliged to serve at the behest of the shareholders. The risk that managers will fail to do so generates agency costs that must be constrained by internal and external market forces if the corporation is to produce gains for all of its constituent parties and ultimately for the shareholders as residual claimants.

According to the contractarian model, the corporation springs up naturally as a product of private, voluntary actions by people who are free to contract in their own

<sup>84</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976). Jensen & Meckling's article was one of the key foundational works on this theory. Others include Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972) and Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301 (1983).

<sup>85</sup> Jensen & Meckling, *supra* note 84, at 311; see also Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1764 (1989).

<sup>86</sup> See William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 420 (1989).

<sup>87</sup> Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289–90 (1980).

self-interest. The corporation is not a metaphysical entity with its own ontological standing, nor is its existence a privilege bestowed by the state. It is a private undertaking by individual citizens. The contractarian model constitutes a modern variant of the aggregate theory of corporate personhood that, as previously discussed, says the corporation is nothing more than the collection of individuals who choose to join together to conduct their business in corporate form. The contractarian theory similarly holds that the corporation is merely the sum of its contractual parts.

The foundational concepts of the contractarian theory are not necessarily novel. Although the theory is regarded as a modern-day economics-based theory, early-twentieth century thinkers about the corporate form also made use of contractual concepts when discussing corporate personhood. For example, in 1911, W. M. Geldart's discussion of the legal personality of corporations utilized language that, in hindsight, resonates with the modern contractual model:

If we are going to get nearer to the facts, we must at least add the notion of contract to that of co-ownership, a contract made by every shareholder with every other, limiting his right of ownership to a right to share in profits and to vote at shareholders' meetings, contracts between each shareholder and the directors, between each shareholder and every person who supplies a ton of coals or steel rails; innumerable contracts to the making of which he has not given a moment's thought. To escape from the fictitious person we have fallen into the arms of the fictitious contract.<sup>88</sup>

The combination of all these explicit and implicit contracts is at the heart of the corporate enterprise. The contractarian theory is thus immensely reductionist, decomposing the firm into its many contractual pieces.

As a normative matter, the contractarian theory not only describes corporations as the center of interrelated contracts between freely contracting individuals, but also asserts that corporations should be allowed to function freely in that manner. The private individuals who voluntarily enter into these contracts should be given wide discretion to order their affairs in whatever way they choose. Corporate property is private property. Under this model, the most important laws are those that protect private property rights and enforce contracts. The law should provide only a set of non-mandatory default rules that the parties can change by voluntary agreement if they desire.<sup>89</sup> There should be no government policing of their relationships and contracts; rather, the state should yield to freedom of contract and freedom of association principles. The contractarian approach implies a preference for minimizing the regulation of business and eliminating restrictions on corporate activity.

<sup>88</sup> Geldart, *supra* note 61, at 97-98.

<sup>89</sup> See Frank H. Easterbrook & Daniel R. Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 15 (1991); Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1396-97 (1989); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV., no. 4, Summer 1989, at 99, 100.

From this standpoint, corporations should be afforded the latitude to do what they do best, generate profits for shareholders. Under the shareholder primacy and profit maximization principles, the interests of other constituencies must be subordinate to the corporation's primary concern for maximizing shareholder wealth.<sup>90</sup> Non-shareholder interests can all contract for their own protections. By maximizing profits, the corporation creates wealth for the broader economy, which ultimately benefits all of its constituents and society as a whole. According to this model, the more profits a company makes, the more those profits feed back into the system, providing jobs for workers, goods and services for consumers, prosperity for communities, and strong capital markets for the continuous economic growth of society.<sup>91</sup> This does not mean that corporations owe any legal, moral, or social responsibility to promote the public interest. Unlike the artificial person theory, the contractarian theory rejects the idea that the corporation possesses public-oriented duties toward the state or society. The mass of contracts that make up the corporation is a private endeavor among private citizens who each seek to benefit financially from the arrangement. Thus, the corporation's main purpose should be to increase the returns to its participants, and the law should be structured to avoid distracting corporations from that goal.

Because the firm is not regarded as a real or separate entity, it does not make sense to speak of such things as the entity's independent will, intent, or social or moral responsibilities, apart from those of its individual participants. Like the aggregate theory, the contractarian model reflects a strong adherence to methodological individualism wherein individuals are always the primary unit of analysis and groups can never be explained apart from their individual members. As a result, issues are analyzed from the vantage point of the individuals with an emphasis on their interests and obligations as the relevant contracting parties.

The economic contractarian theory of the corporation has had a commanding presence in legal academic thought for many decades. Yet it remains subject to considerable criticisms. Some argue that the theory assumes perfect, complete, and purposive contracting by rational economic actors, but in the real world, human beings' bounded rationality and limited problem-solving abilities make such perfect contracting an illusion.<sup>92</sup> The contractarian theory warns against the dangers of reification of the corporate enterprise, but "the equal and opposite sin to reification

<sup>90</sup> See David Millon, *The Single Constituency Argument in the Economic Analysis of Business Law*, in *LAW & ECONOMICS: TOWARD SOCIAL JUSTICE* 43, 45 (Dana L. Gold ed., 2009).

<sup>91</sup> See Easterbrook & Fischel, *supra* note 89, at 38; Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065-66 (2001) (describing the utilitarian basis for maximizing shareholder wealth).

<sup>92</sup> William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 183-84 (1992); Bratton, *supra* note 86, at 448-49. In response, contractarians may counter that the theory does not contemplate true contracts as used in the conventional legal sense, but only an "analogy to contract." Easterbrook & Fischel, *supra* note 89, at 15. But then this is like an "analogy to persons," which is what the other theories of corporate personhood arguably entail.

is reductionism."<sup>93</sup> The corporation might be reduced to a nexus of contracts, but those contracts can be reduced to a nexus of expectations, which in turn can be reduced to nexuses of perceptions, and so on. At some point, deconstructive measures blind us to the reality of the bigger picture.<sup>94</sup>

Critics also see a problem with the contractarian theory's emphasis on private contracting and economic markets. It fails to acknowledge that such private ordering operates against a backdrop of public law, and it is the law that provides the mechanism for creating and enforcing private contracts.<sup>95</sup> By focusing so intently on the private interests of shareholders to pursue profit maximization, the contractarian model loses sight of the public-oriented aspects of the firm that are integral to its successful functioning. While economic market forces are important, the contractarian theory does not account for other powerful forces, both political and social, that shape what corporations are and what they do.

The theory has made important contributions to our understanding of the firm by pointing out that the corporation has significant contractual aspects. Standing on its own, however, the theory is incomplete. The contractarian paradigm does not fully explain the empirical reality of the relations among members within the corporation as well as the relations between the corporation and the broader society. It does not give significance to the social, moral, political, and institutional aspects of the corporate person. The economic model ultimately provides a very narrow conception of a much more complicated reality.

This complaint, however, can be lodged against any one of the personhood theories of the corporation discussed in this chapter. By itself, no one theory of the corporate person can adequately and comprehensively explain the nature, role, and purpose of the corporation. The personhood of corporations is multidimensional. Each theory looks at the corporation from a different angle and highlights a different side of the entity. The economic contractarian theory of the corporation is an especially useful tool because it focuses our attention on critical contractual aspects of the corporation. But it is only one tool, and there are many others. Those who favor the economic theory believe no other theory of the firm presents a credible alternative to the unitary nexus of contracts model. However, that belief assumes we must have a single theory that can adequately define the corporation and justify policy decisions about the legal treatment of corporate activity. If we must choose

<sup>93</sup> Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369, 1371 (2006).

<sup>94</sup> The denial of the existence of a real and separate corporate entity does not necessarily have to follow from a reductionist approach. A related formulation of the contractual model asserts that the contractual arrangements combine to create an entity that is not reducible to the collective rights and duties of shareholders. Frederick Pollock & Frederic W. Maitland, *Corporation and Person, in ANTIROPOLOGY AND EARLY LAW* 300, 303 (Lawrence Krader ed., 1966) (corporation created through contract becomes indivisible unit comparable to human being).

<sup>95</sup> For an excellent discussion of the importance of law in the creation and maintenance of corporate persons, see generally Orts, *supra* note 8.

one or the other, the argument goes, the contractarian model is better than all others. But it is not clear why such a choice needs to be made at all. It is not necessary or even beneficial to settle on an agreement that, at bottom, the corporation is *essentially* a nexus of contracts, or *essentially* a legal fiction, or *essentially* an aggregate of individuals. The multidimensional nature of the corporate person defies unitary classification. The corporation is a complex reality, and to understand its nature and role in the world, we should be open to seeing it from many different vantage points.

#### THE LANGUAGE OF CORPORATE PERSONHOOD AND A RESPONSE TO DEWEY

To say that no one single theory of the corporation can capture the full picture of the corporate person does not mean that we should abandon theorizing about the corporation and simply adopt the exclusively pragmatic instrumentalist approach advocated by John Dewey in 1926. Because the corporate theories seem so indeterminate and manipulable, Dewey argued that the term "person" meant very little and the concept of corporate personhood was ultimately irrelevant. He disfavored the merging of popular and philosophical notions of personhood with the legal application of corporate personhood, and instead he preferred a practical, consequences-oriented conception of the corporation as the bearer of legal rights and duties. If Dewey's views maintain some of their sensibility today, one might wonder why we should continue to take corporate personhood seriously in light of Dewey's critique.

Although Dewey would like us to drop the whole matter, the reality is, even after all these years, the controversy over the personhood of corporations refuses to be swept away by the proof that corporate personhood theories are indeterminate. People still care deeply about it and want to talk about it. Indeed, the terminology of corporate personhood has become the center of a national debate over what the corporation is and how it should be treated in modern society. The battle has moved beyond theoretical arguments among scholars. The battle appears in sharply divided Supreme Court cases holding that a corporation is a person for purposes of exercising its statutory rights to religious freedom (*Hobby Lobby*) and its free speech rights to donate to political campaigns (*Citizens United*). The battle appears in the angry protests of anti-corporate activists waving banners that read "End Corporate Personhood" and "Corporations Are Not People." It appears in the growing popular movement to amend the Constitution to declare that only human beings, not corporations, are persons entitled to constitutional rights. In spite of Dewey's insistence that the terminology of personhood is meaningless, the act of calling the corporation a person today is loaded with meaning, and that meaning is rooted in significant moral, social, political, and legal values.

It is not enough to dismiss the controversy over the nature of the corporation as Dewey did by asserting that all conceptions of the corporation are indeterminate and



that personhood is an empty term. The problem is much more complicated. In the law, concepts have a force of their own because of their ability *ex ante* to influence our thinking and their use *ex post* to justify our conclusions about how things should be structured in our society. The fact that we talk about corporations in the language of personhood is not insignificant.<sup>96</sup> In an important sense, law is meaningful in the way that language is meaningful: "How we describe something [in our choice of words] is an important part of how we perceive it."<sup>97</sup> Language as a system of discourse conditions the way people think about things and interpret the world around them. Beyond merely *reflecting* societal views and values, legal language actually helps *form* prevailing judgments and understandings. When the law endorses and promotes certain theories of the corporate entity, the law affects our perceptions of the corporation and nudges us to view it in a particular light.<sup>98</sup> By calling the corporation a person, we tend to think of it as a being that has the attributes and the moral status of a natural person. This contributes to a propensity to treat the corporation with similar considerations that ground the rights of individual human beings. The personhood designation is more than an arbitrary, indeterminate label; it commands a measure of inviolability that is difficult to square with the idea that the entity is merely a tool to achieve an economic purpose. The vocabulary that we use to characterize corporations influences the manner in which we see and relate to them. The legal language of personhood has symbolic, expressive, and constitutive functions that animate and reinforce the personhood of corporations.

Language does more than merely describe a state of affairs. Through its ability to influence thought and discussion, it can help bring about that state of affairs. This is because "[i]nstitutions are very much dependent on language: what we cannot imagine and express in language has little chance of becoming a sociological reality."<sup>99</sup> This creative aspect of legal language is interesting. The law not only

<sup>96</sup> Contrary to Dewey's assertion that the term "person" has no substantive meaning and is used only for legal convenience, linguists have utilized linguistic evidence to demonstrate that our usage of the term "person" reflects and shapes our view of corporations as beings that are capable of intelligence, intention, and other qualities associated with human personhood. See Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 *TUL. L. REV.* 563 (1987) (utilizing linguistic analysis to refute Dewey's claim that the term "person" is arbitrary and indeterminate).

<sup>97</sup> Ellen A. Peters, *Reality and the Language of the Law*, 90 *YALE L.J.* 1193, 1195 (1981). Language has a labeling function that is an integral feature of law as language. *Id.*; see also Ian Hacking, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* 238 (1995) (discussing the concept of "semantic contagion," whereby the description of an action or behavior can shape its moral consequences).

<sup>98</sup> "It is vital not to discount the role that language plays in this context . . . The problems of law are problems of political language in the largest sense." The "verbal construct" of the image of the corporation "channels the thinking about corporations and in turn controls the material relations [of individuals and collectivities] themselves." Mark, *supra* note 19, at 1467 n.70; see also Tamara R. Piety, *Why Personhood Matters*, 30 *CONST. COMMENT.* 361, 385 (2015) (Calling the corporation a person matters a great deal because the "personhood language exploits our impulse to reject as discriminatory distinctions between *human* persons and extends it to distinctions between human beings and corporations.").

<sup>99</sup> Robert N. Bellah et al., *THE GOOD SOCIETY* 15 (1991).

reflects and incorporates pre-existing social conditions and relations. It also has the capacity to establish new ones.<sup>100</sup> It is an active discourse that creates the social world.<sup>101</sup> In this regard, the law creates truth, or makes things true in the eyes of the law.<sup>102</sup> Law is "constitutive" in the sense that it forms the mental frames, categories, and schema individuals use to comprehend and construct the social world.<sup>103</sup> Legal labeling can not only create cognitive categories but can also "produce behavior that confirms the law's cognitive categories . . ."<sup>104</sup> The ability to shape people's perceptions and understandings of the world around them, including their view of corporations, is one of the most important forms of power that legal language possesses. Although the utilization of the corporate personhood designation may seem indeterminate at times, it is not immaterial. Law does matter, and language matters too. "Each of us is partly made by our language, which gives us the categories in which we perceive the world . . . and in remaking our language we contribute to the remaking of our characters and lives."<sup>105</sup>

To focus so acutely on an analysis of language and its effects may strike some as engaging in needless semantics. This is a valid concern, and the intent of this discussion is not to engage in semantic arguments over the use of the personhood term. Rather, the goal is to highlight the critical role that language plays in how we evaluate corporate claims. Those who prefer Dewey's pragmatic approach to corporate personhood eschew extended discussions of the use of legal statements and terminology. Some scholars argue that ontological and semantic claims about legal statements are the wrong sorts of considerations for answering what they believe boil down to moral questions about corporate entitlements.<sup>106</sup> Instead, they contend that common sense morality, moral theories, and our moral beliefs are what tell us whether corporate entities should or should not have certain legal entitlements. While this analysis is instructive, the question still remains, how are those moral theories and moral beliefs formed? What contributes to the development of common sense

<sup>100</sup> Jeffrey Nesteruk, *Law and the Virtues: Developing a Legal Theory for Business Ethics*, 5 *BUS. ETHICS Q.* 361, 362 (1995) (book review).

<sup>101</sup> Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 814, 839 (1987); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 *HARV. L. REV.* 1, 7-8, 20 (1989) (describing the continually active and interactive role of law in recreating society).

<sup>102</sup> Jack M. Balkin, *The Proliferation of Legal Truth*, 26 *HARV. J.L. & PUB. POL'Y* 5, 6 (2003). Law helps to define reality by "selectively interpreting and therefore selectively reinforcing part of the status quo, thereby helping to reformulate or reconstruct reality." Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 113, 122 (Warren J. Samuels & Arthur S. Miller eds., 1987).

<sup>103</sup> Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 *U. ILL. L. REV.* 1043, 1045 n.4.

<sup>104</sup> Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 *WIS. L. REV.* 475, 492.

<sup>105</sup> James Boyd White, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 23 (1990).

<sup>106</sup> See, e.g., Steven Walt & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*, 11 *LAW & ETHICS HUM. RTS.* 1 (2017).

morality? I contend that language, both legal and cultural, plays a role in shaping moral beliefs and values. What we learn and believe, we acquire in part through language. To be sure, our common sense morality has a role in shaping the laws we create and the legal language that we use to govern society. At the same time, law influences the formation of prevailing values and understandings. There is a dynamic, reciprocal relationship between law and moral belief, with each informing and helping to create the other. It is important to think carefully about this connection and its application in the law and language of corporate personhood. We should acknowledge that “legal developments affect our moral judgments about corporations, including our conception of their moral status.”<sup>107</sup> In this respect, language and the expression of law do have significance beyond semantics. Dewey’s dismissal of the relevance of the legal terminology of personhood does not seem to do justice to the bigger picture.

Part of the reason why the personhood designation is so controversial is due to the power of language and law to send signals about society’s value judgments. When the law announces that a corporation is a person, with many of the same rights and duties of a human person, it sends a message about how society values corporations and how they should be treated. Law as language has an expressive function: it makes statements, and it expresses certain beliefs and attitudes about societal values.<sup>108</sup> For example, sentencing laws that punish criminal behavior express society’s moral condemnation of certain acts, making a statement about the kinds of conduct the community views as reprehensible.<sup>109</sup> Government policies that appear to endorse a particular religion violate the Establishment Clause, in part because they signal to non-adherents that they are outsiders and that their differing beliefs are unwelcome in the political community.<sup>110</sup> Laws that previously legalized racial segregation in schools were invalidated under the Fourteenth Amendment because, among other things, they communicated the

<sup>107</sup> Jeffrey Nesteruk, *The Moral Status of the Corporation: Comments on an Inquiry*, 2 BUS. ETHICS Q. 461, 463 (1992).

<sup>108</sup> Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 40 (2002); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). In asserting that the legal language of personhood matters, I do not seek to argue, as H. L. A. Hart did, that the meaning of expressions is performative, i.e., that the meaning of an expression is its use to perform particular types of acts within a set of rules. See H. L. A. Hart, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 3–4, 275–76 (1983); see also Walt & Schwartzman, *supra* note 106, at 8–9 (describing Hart’s views). Instead, I wish to draw upon the substantial body of scholarship dealing with the expressive function of legal language to make statements about our value judgments and to send signals about our underlying moral beliefs. See, e.g., Richard H. McAdams, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 136–37 (2015); Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHIL.-KENT L. REV. 669, 682–83 (2003).

<sup>109</sup> See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 498 (2006); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 362 (1997); Sunstein, *supra* note 108, at 2023.

<sup>110</sup> *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

harmful message that minority groups were inferior, disfavored members of society.<sup>111</sup> Law by its nature has expressive elements, and we are affected by the social and symbolic meaning of legal language, doctrines, and decisions.

Law makes important statements about the intrinsic and relative value of things. In the context of corporate personhood, for example, the law communicates who counts as a legal person and tells us whether corporations should hold the same place as individuals in our legal system. By upholding corporate rights under the First Amendment, the law arguably sends the message that corporate speech and individual speech have the same worth and are deserving of the same protections. Thus, legal language signals the value we as a society place on people, corporations, and certain actions such as speech. When law uses the term “person” to categorize an object, it “acts as a vehicle for expressing beliefs and values about persons, both legal and natural.”<sup>112</sup> When people perceive that law and legal language send the wrong message, there is backlash and resistance as evolving societal values conflict with the signals of the law. In the corporate personhood context, we have witnessed some of that backlash as some citizens believe the law of corporate personhood sends the dubious message that corporate activity and individual activity are of equal value and merit.

This is an indication of the intricate relationship between legal language and our system of beliefs. Law is a social product. As our social and cultural beliefs change over time, they affect and shape the development of law and legal doctrine. At the same time, as discussed above, the law plays a role in shaping our beliefs and our conception of reality. There is a reciprocal, dynamic quality to the formation of legal language and evolving societal beliefs. At times, legal language is the force that drives new thinking and perceptions; at other times, our beliefs and values force the development of new legal terminology and doctrine. It is a two-way street. Our language and our beliefs are dependent upon one another, continually affecting and being affected by each other.<sup>113</sup>

Dewey did not embrace this connection between our belief system and our legal system. In fact, he warned against entertaining ideas from other non-legal disciplines to inform our analysis of legal personhood because he believed they only confuse and complicate matters. He viewed the legal concept of corporate personhood as pure artifice, a tool for practical legal use. He criticized the tendency to look outside

<sup>111</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1542–44 (2000) (discussing the expressive dimensions of *Brown v. Bd. of Educ.*).

<sup>112</sup> Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1761 (2001).

<sup>113</sup> Margaret Radin has similarly observed that as concepts change and develop, they can cause social and cultural transformations; likewise, social and cultural developments can drive conceptual transformations. Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341 (1991); see also David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 241–47 (demonstrating how legal rules have shaped new thinking about corporations, and vice versa, how theoretical beliefs about corporations have shaped the formation of new legal doctrine).

the law for guidance on what it means to be a person worthy of recognition under the law. Dewey argued that “popular, historical, political, moral, philosophical, metaphysical and . . . theological” theories of personhood should not influence judgments about what the legal concept of personhood should entail.<sup>114</sup> To avoid confusion and conflict, Dewey urged us to keep the legal concept separate from any social and cultural notions of personhood. In his view, law is a self-enclosed system that does not and should not need to look elsewhere for its meaning.

The difficulty with this approach, however, is that legal concepts are inherently a reflection of and connected with our broader system of beliefs. Law cannot divorce itself from our culture, history, politics, moral beliefs, and social norms. These non-legal factors contribute to our vision of what makes a person, and the legal concept of personhood is unavoidably infused with this vision. Even when trying to determine the legal personhood of human beings, the analysis is necessarily a larger non-legal question involving metaphysical, cultural, social (and not just biological) understandings of what it is to be a whole and proper person.<sup>115</sup> Dewey strongly urged us not to clutter the practical determination of legal personhood with non-legal considerations because of the messy results, but as much as we might try, the law cannot be insulated from these broader aspects of our existence. Dewey preferred to ignore the constantly shifting popular and philosophical notions of personhood, but in some respects, we are “unable to avoid speculation about what it is to be a person [as] the legal term is constantly contaminated by non-legal moral meanings and may even be unintelligible without them.”<sup>116</sup>

Dewey was concerned that using these non-legal theories makes personhood an indeterminate and muddled concept because the theories are constantly changing with the times. But determinacy and precision are not necessarily superior values. In some situations, certain moral, ethical, and social concerns may emerge that call for a more adaptable, open-ended approach. There is value in acknowledging the many facets of the corporation, as viewed through different disciplinary lenses, even

<sup>114</sup> Dewey, *supra* note 3, at 655.

<sup>115</sup> Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 *MOD. L. REV.* 346, 359–61 (2003). This analysis is raised, for example, when determining the personhood of a fetus or a mentally impaired individual. In our predominantly liberal legal culture, we regard a person as an autonomous being who can stand alone, independently of others, individuated and separated from one's mother, and capable of exercising reason and intelligent thought. These considerations are a product of our cultural, philosophical, political, and social views of personhood. “[W]e see how being, who is therefore susceptible to personification, shapes what we as lawyers often take to be brute biology. There is a metaphysics here that is rarely addressed.” *Id.* at 361.

<sup>116</sup> *Id.* at 349. In certain respects, Dewey's views are consistent with my own thesis about the dynamic nature of personhood. He notes that “the history of western culture shows a chameleon-like change” in the various philosophical and popular notions of personhood. Dewey, *supra* note 3, at 658. While Dewey argues that these shifting notions should not affect the legal conception of the corporation, he does not dismiss them as entirely irrelevant. In fact, he acknowledges that these various non-legal considerations “express struggles and movements of immense social import, economic and political.” *Id.* at 664.

though we know the various disciplinary theories are bound to matter in different ways for different issues over time.

Dewey preferred to abandon theoretical discussions of personhood and instead focus pragmatically on hard facts and consequences in evaluating legal issues. From his point of view, it does not matter how we conceptualize corporations; all that matters is evaluating the facts and then resolving conflicts by weighing the practical consequences of competing resolutions.

While it is always critical to engage in comprehensive and honest assessments of facts and circumstances when faced with any legal controversy, it is also important not to jettison theory entirely from the analysis. It is error to assume that theory and practice are necessarily separate inquiries. Practice without theory lacks perspective and direction; it results in an admixture of intuitive reactions to specific factual situations. Theory without a connection to practice is hollow and lacks relevance in the face of real world problems; it results in “an intellectual game only vaguely connected to the very phenomena it is supposed to understand and explain.”<sup>117</sup> Theoretical and practical analyses go hand in hand and are deeply related. “When we think carefully about practical issues, we are impelled to theorize – although that does not mean that we merely ‘apply’ a theory.”<sup>118</sup> It means that we reflect on how specific cases are connected, how they fit into the big picture, and how they can be resolved to build a more just society. For this reason, it is important to engage in discussions of the various theoretical conceptions of the corporation. We cannot effectively evaluate corporate rights and responsibilities unless we also think about the moral status of corporations. We need analysis of theory as well as practice to decide how best to deal with complicated corporate issues.

#### MULTIDIMENSIONAL MODEL OF CORPORATE PERSONHOOD

All of the legal theories of corporate personhood offer a partial glimpse into the nature of the corporation. Each one correctly describes but one of the many aspects of the corporate totality. The corporation's existence and functionality depend on individuals, on contractual relationships, on state law and charters, and on social recognition of its identity and presence. The corporation is a legal fiction, but it is a real entity with which we engage daily in a very practical way. All of the legal theories of corporate personhood, and the various features of the corporation that they accentuate, cannot be fully appreciated without an understanding of their interrelationship, and their relationship to the entity as a whole. While the different theories each seek independently to explain the essence of the corporation, the theories in fact are dependent upon each other and upon their integrated roles to provide a comprehensive description of the corporate person.

<sup>117</sup> Hugh LaFollette, *Introduction*, in *THE OXFORD HANDBOOK OF PRACTICAL ETHICS* 1, 8 (Hugh LaFollette ed., 2003).

<sup>118</sup> *Id.* at 8.

This book favors a "multidimensional" analysis of the corporation that encompasses the many different conceptions of the corporation.<sup>119</sup> This approach recognizes that all the various legal and non-legal theories of the corporation play a part in describing the full essence of the corporate person. An adequate account of the corporation requires us to view the entity broadly, focusing on its varied roles and multiple purposes. The corporation is a constantly evolving entity that shapes and is shaped by society's shifting views of the nature of corporate life. A multidimensional approach recognizes that the personhood of corporations is dynamic, textured, and ever-evolving. It is an ongoing project that involves continual reflection and adaptation. Rather than embracing one particular theory of the corporate person, a multidimensional approach maintains a broader outlook and integrates the respective contributions made by the various interdisciplinary conceptions of the corporation.<sup>120</sup>

There is no single theory of the corporation that will permanently and neatly solve the legal, moral, philosophical, political, and social issues that surround corporate activity. Our circumstances, our economy, our political structures, our laws, our belief systems, our language, and our culture change over time, and with them, our view of corporations. If we are to resolve important questions about the acceptable role of corporations in our society, it would be helpful to have a richer understanding of the many facets of corporate personhood. A multidimensional approach acknowledges that the concept of the corporate person stems from a mass of legal and non-legal considerations, all of which contribute to our positive and normative view of corporate personhood.<sup>121</sup>

Legal rules and public policies should be sensitive to the multifaceted nature of the corporation. Recognizing both the public and private interests involved in corporate activity, we can acknowledge that both the government and individual business participants have valid claims and expectations that merit attention. Multidimensional analysis allows for the careful balancing of different interests and values to decide important issues involving corporate rights and responsibilities. This may mean continual case-by-case, issue-by-issue, substantive interdisciplinary discussions over significant corporate controversies, which is admittedly burdensome, but increasingly necessary as corporate persons coexist with human persons in the global community. At times, certain personhood concepts, theories, and values

<sup>119</sup> I first proposed and discussed this multidimensional approach to analyzing corporate personhood about a decade ago. See Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 167-74 (2009).

<sup>120</sup> See *id.* at 168. Eric Orts has similarly argued in favor of an "institutional theory" of the firm that skillfully combines elements from the main legal theories of the firm to provide a moderate "middle ground" between extremes. Orts, *supra* note 8, at 12-19. This approach is also consistent with non-legal views of the firm originating in "philosophical and sociological" discourses. *Id.* at 15.

<sup>121</sup> See Ripken, *supra* note 119, at 169. In the context of corporate power, Joshua Barkan has similarly observed that an understanding of corporate power "requires investigating the multiple modes of thought and practice that have attempted to define these institutions" and that "these forces are multiple and heterogeneous rather than linear and unified." Barkan, *supra* note 12, at 15.

will take precedence over others for resolving certain issues. A consideration of the practical realities and specific consequences of privileging any given conception over another is also important. In this way, a multidimensional approach encompasses an informed analysis of the various theoretical components that underlie corporate personhood while also being mindful of the practical effects of corporate personhood that were of main concern to Dewey.

Just as corporations evolve and our views of corporations change, the law develops in a continuously dynamic way.<sup>122</sup> The law is not fixed, nor should it be. As many jurists have noted, the genius of the law is that it "is not simply a deductive exercise" or "an inevitable working out of anything,"<sup>123</sup> but rather, it is "a living organism, ever growing and expanding to meet the problems and needs of changing social and economic conditions."<sup>124</sup> As we formulate laws that regulate corporate activity, we should remain flexible and adaptable as various theories of corporations bring different issues to light. The law should not cater to any static conception of the corporation. Instead, it should reflect the dynamic nature of the theories that describe the corporate person, and should avoid any narrow or fixed framework for analyzing corporate activity.

Broad consideration of the different disciplinary theories of corporate personhood will not be without contention and conflict. There will be, as there always has been, discord among the contrasting normative implications of the various theories. Nonetheless, it is worth the effort because it gives us a more in-depth view of a complicated reality. The more complete a picture we have of the subject of debate, the more informed the debate will be. An expansive view of the corporation that incorporates interdisciplinary input does not promise to end the enduring disputes over corporate rights and duties. As corporations change and societal ideas advance, each generation must struggle to find acceptable answers to the difficult questions regarding the legal and moral status of corporations. A multidimensional approach provides a starting point for tackling such questions with the understanding that the answers may be workable for only a period and then require reformulation at a later time. The corporate person is malleable, not fixed, and its role in our society is, in part, a product of our own continually changing moral, legal, philosophical, and political imagination.

#### BENEFITS OF INDETERMINACY

The indeterminacy of the various theories of the corporation is a perennial concern among scholars who echo Dewey's complaints about the inconsistent

<sup>122</sup> See Ripken, *supra* note 119, at 171-72.

<sup>123</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261, 278 (1992); see also Samuels, *supra* note 102, at 126 (arguing that law does not deduce or discover legal concepts, but rather, makes the rules that then help shape economic reality).

<sup>124</sup> *Russick v. Hicks*, 85 F. Supp. 281, 285 (W.D. Mich. 1949).

application of theoretical concepts to legal problems. They bemoan the fact that the body of law with respect to corporate legal personhood often seems incoherent and contradictory as different theories are selectively invoked to justify chosen outcomes. There is a sense that judicial use of the personhood theories results in post-hoc rationalizations and in legal reasoning that is purely results-oriented. That the competing theories contribute to the indeterminacy of the law is considered a problem that warrants correction.

The objection to indeterminacy reflects an underlying dissatisfaction with inconsistency in general. Legal scholars naturally seek paradigms that are systematically coherent and produce consistent results. The problem with this preference, however, is that legal issues involving people and groups are complex, and sometimes the preoccupation with consistency can detract from considering the full picture. The fact that various legal theories may not be consistently applied in practice does not mean they should be discarded altogether. Indeterminacy is not a damning charge against legal theories and principles. A general claim of legal indeterminacy simply means that the social construction of law refers to other values and goals that are external to the legal system.<sup>125</sup> These other values and norms may derive from pertinent social, ethical, political, and philosophical considerations, all of which are constantly evolving. Indeterminacy is then "a simple recognition of the inevitable reality of social change and evolution in the law."<sup>126</sup>

From this standpoint, indeterminacy should not be regarded as a bad thing. In fact, we should appreciate the value of indeterminacy in the law and the advantage of having diverse views of corporate personhood. The law retains efficacy and legitimacy precisely because it does not emphatically state that the corporation is *x*. The conflicting themes that underlie the theories of the corporations – aggregate *v.* real entity, contract *v.* concession, individualism *v.* collectivism, person *v.* property, public *v.* private, shareholder primacy *v.* common good – all exist in constant tension. They produce contradictory and complementary visions of corporate life. However, the contradictions should be acknowledged and accommodated, not avoided and spurned. The inconsistencies and conflicts are constructive. They reflect the richness of society's diverse values and norms. Appreciating their interplay in the law enhances our positive and normative view of corporations and their role in society.<sup>127</sup> As a complex entity in which all of these contradictory concepts coalesce, the corporation should not be reduced to a single simple theoretical framework that would necessarily be incomplete. Complex entities require complex rules. Although a multidimensional approach to corporations may result in inconsistent outcomes, it recognizes the reality of the multifaceted

nature of the corporate person. The "flaws of inconsistency are far less serious than those of unreality."<sup>128</sup>

Indeterminacy in the law allows for selective application of different theories of the corporate person, depending on the situation and the issues to be decided. Because the corporation is a bundle of contrasting and coinciding concepts, the law must mediate between the various conceptual viewpoints. When a problem occurs that raises two valid but inconsistent normative demands, mediation is required, and choosing between the two is ultimately a matter of judgment.<sup>129</sup> By considering the descriptive and normative components of different theories of the corporate person, the law adopts a thicker, more informed conception of the corporation. Equipped with this broader perspective, the legal decision-maker can make a judgment of better quality, rather than a judgment that reflects only a narrow set of concerns. This may lead to favoring different concepts at different times, but this is the nature of mediation. To aim to adopt a clear-cut, unitary theory of the corporation is to close off the advantage of drawing on the insights of different theories even as they compete. The indeterminacy of the law should not be regarded as theoretical failure, but as the beneficial application of a more nuanced approach to corporate personhood.<sup>130</sup> An expansive, more complete view of the corporation can help us determine how best to resolve corporate issues as they arise. To that end, the following chapters explore other dimensions of the corporation and provide a wide-angle view of its personhood.

<sup>128</sup> Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673, 1676 (1993).

<sup>129</sup> See Bratton, *supra* note 92, at 214.

<sup>130</sup> See Ripken, *supra* note 119, at 173–74.

<sup>125</sup> Orts, *supra* note 8, at 118.

<sup>126</sup> *Id.*

<sup>127</sup> See Bratton, *supra* note 86, at 465.

because the range of corporate organizations is vast. The nonprofit religious organization, the closely held minority business owned by a single shareholder, and the large publicly held corporation with thousands of shareholders are very different entities, but they are all incorporated organizations. They have different purposes, different needs, and different ways of interacting with their members and the public at large. They each have their own unique place in our cultural, political, and economic systems. Yet they share the same legal origin. The same law and social structure that facilitate the formation of Apple, Inc. also authorizes and fosters the formation of the local church on the corner and the small family restaurant owned by a husband and wife. The corporate form is flexible and enabling, affording its members broad opportunity to operate it in the manner they want, for the purposes they want.

As a result, we encounter a proliferation of different types of corporations lying along a spectrum of personhood. When legislatures and courts are confronted with the task of expanding or limiting the rights of these corporate persons, “[w]hat we see time and again is not the law’s deference to some overarching conceptualization of the corporation and whatever logical consequences would flow therefrom, but rather a tailoring of rules and regulations to the particular business entity before it.”<sup>210</sup> Absolutist positions arguing that corporations should always or should never be treated like natural persons, or that corporations of all types should be treated identically, do not account for the complexity of corporations. The multidimensional nature of the corporation and its continually evolving role in society require us to analyze corporate structure and function when determining whether and how our basic legal rights might apply to the many different types of corporations that exist along the continuum of corporate persons. These determinations are difficult, and the implications of treating certain corporations as persons whose speech, religion, and race are deserving of respect and protection are serious. The difficult issues of corporate rights and obligations will warrant careful analysis as our social, political, and legal systems evolve, and the types and purposes of corporations grow increasingly more diverse.

<sup>210</sup> Colombo, *supra* note 53, at 191.

## 6

### Abolishing Corporate Personhood

The topic of corporate personhood has generated disagreement and even dismay among a growing segment of the general public. Many people resist the notion that corporations can be considered persons for purposes of claiming constitutional rights. There is increasing concern about the expansion of corporate rights and corporate power in society. As discussed previously in Chapters 4 and 5, many people were outraged by the Supreme Court’s decisions in *Citizens United* and *Hobby Lobby* to uphold corporate political speech rights and corporate religious exercise rights. The outrage stems from the belief that the rulings go too far in treating corporate persons with the same deference that is owed to natural persons. To say that the corporation is capable of engaging in speech and exercising religious beliefs, and is entitled to protection when it does so, appears to equate corporate entities with human beings. Viewing the corporation as a person with an entitlement to the same fundamental rights that belong to human individuals is regarded as a dangerous trend that gives corporations an elevated status they do not deserve. The mounting dissatisfaction with the idea that corporations can be considered persons for purposes of certain inalienable rights has galvanized some people to take action to roll back the status of corporations as persons under the law.

The last decade has seen dramatic growth among activist groups and community organizations that want to amend the United States Constitution to establish that the only persons who have constitutional rights are human beings, not corporations. Hundreds of grassroots organizations have worked to adopt local ordinances that reduce the political and economic power of corporations in their communities. In several states, officials at the state and municipal levels have supported these measures and are working to eliminate the doctrine of corporate personhood altogether. Members of Congress have introduced bills proposing amendments to the Constitution to reverse the *Citizens United* result and to abolish the personhood of corporations for purposes of all constitutional rights.

A social movement to address and attack corporate personhood has ebbed and flowed for many years, but it began to gain greater momentum after the *Citizens United* ruling. Participants in the movement believe that eliminating corporate

personhood is the first step in abating what they regard as the increasingly coercive power wielded by corporations in the economic and political spheres of society. The overriding mission of these activist groups is to overthrow “corporate rule.” I call them corporate abolitionists because they see their work as similar to that of the early abolitionists who demanded an end to slavery. One of their widely used slogans resonates with this theme: “Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.”<sup>1</sup> The corporate abolitionists do not argue that large corporations must be more socially responsible or that we should adopt stricter laws to regulate corporate behavior and rein in corporate power. Instead, they believe the abolition of corporate personhood is an issue of human rights, like the abolition of slavery. They maintain that the whole institution is fundamentally wrong and must be eradicated if we are to have true democratic self-governance. In mobilizing their campaign to amend the constitution, these activists hope to follow in the model of other social justice movements, like the suffragists and the civil rights activists, that successfully organized to demand reform.

The mission and methods of the corporate abolitionists are serious, and they have become very strategic in their efforts to move toward the complete revocation of the status of corporations as persons under the law. A book about corporate personhood would not be complete without some analysis of the impassioned effort to eliminate its legal effects altogether. This chapter looks carefully and objectively at this popular movement with an eye toward examining its goals, the organizations involved, the framing of their arguments, what their work has accomplished, and where their efforts are leading. It is important to understand what is at stake in the attempt to abolish corporate personhood from legal discourse entirely.

### DISDAIN FOR CORPORATE PERSONHOOD AND POWER

Corporate abolitionists revile the dominance of corporations in modern society. They believe large corporations, with their vast concentrations of wealth and their enormous size, possess economic and political power comparable to government power.<sup>2</sup> Activists view multinational corporations as governing institutions whose presence permeates every aspect of “our lives, our government, our work, our health

and our food supply.”<sup>3</sup> The economic power of these corporate entities unquestionably is significant. The largest corporations generate revenues that exceed the economies of many nation states.<sup>4</sup> They have the resources to drive out or acquire smaller businesses and eliminate competitive economic threats. They have access to tremendous amounts of cash, and they maintain control over substantial portions of earth’s productive capacity.

Having control over such wealth produces unmatched political power. As discussed in Chapter 3, corporations are important players in the political system. Their role in lobbying government officials, in contributing to election campaigns, in exerting industry pressures on lawmakers and administrative agencies, and in heavily lawyering the rulemaking and enforcement processes, all allow corporations to “make changes to the political system itself that lock in lasting advantages for them and protect their dominance.”<sup>5</sup> According to one member of Congress, “[t]oday there is virtually no element of the political landscape into which corporate influence has not intruded, and it is usually the strongest political force arrayed in any part of that landscape.”<sup>6</sup> Anti-corporate activists believe that corporations’ immense political influence threatens the integrity of our system of governance and renders it impossible for average citizens to have a meaningful voice in government.

Beyond their economic and political power, corporations also exert social and cultural power that has an impact on the desires, priorities, and behavior of consumers. Activists argue that corporate messaging plays a manipulative role in influencing our preferences, what we believe will make us happy, and how we view ourselves and others. This is a power that shapes our mindset and culture. So many aspects of our lives are governed by what corporations choose to do or not to do. Corporate decisions on what foods to produce, what products to manufacture, what services to offer, what research to fund, what drugs to market, what natural resources to use, what news to transmit, what forms of entertainment to make available, along with countless other fundamental corporate choices, directly impact our health, our work, our judgments, our activities, and the overall pace and quality of our lives. In these and other ways, corporations have profound effects on the basic structure and development of society.

In the view of corporate abolitionists, the prevalence and power of large corporations are a cause for deep concern because they serve only to corrupt our government

<sup>1</sup> Molly Morgan & Jan Edwards, *Abolish Corporate Personhood*, 59 GUILD PRAC. 209, 214 (2002). In earlier works, I have examined the corporate abolitionist movement in the context of understanding the relationship between social movements and constitutional legal reform, as well as the legal source and maintenance of corporate power. See Susanna Kim Ripken, *Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209, 224–44 (2011); Susanna Kim Ripken, Citizens United, *Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J. L. & PUB. POL’Y 285, 291–99 (2012). This chapter incorporates some of the analysis contained in those articles.

<sup>2</sup> Many scholars agree with this assessment of corporate power. See, e.g., Kent Greenfield, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 4–5 (2006) (noting that

corporations are among the “largest and most powerful institutions in the world,” wielding “the economic power of nations”).

<sup>3</sup> *About Us*, ALLIANCE FOR DEMOCRACY, <http://alliancefordemocracy.weebly.com/about-us.html> [https://perma.cc/31QS-UUW].

<sup>4</sup> See Joe Myers, *How Do the World’s Biggest Companies Compare to the Biggest Economies?*, WORLD ECON. F. (Oct. 19, 2016), [www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/](http://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/) [https://perma.cc/G3QD-C31Q].

<sup>5</sup> Sheldon Whitehouse, *CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY*, at xx (2017).

<sup>6</sup> *Id.*

and endanger our future. Activists contend that corporations “control the course and set the limits of public discussion, commercialize and debase our national consciousness, and manipulate mainstream public opinion. Everywhere the natural world is threatened. Yet people worldwide are exhorted to consume more and buy more in the name of ‘progress’ so big corporations can get bigger.”<sup>7</sup> Activists believe the relentless pursuit of corporate profit is the greatest cause of political, economic, social, and ecological injury around the world. Although the corporation is subject to government regulation, the mighty grip that corporations have on the political system limits the government’s ability to restrain the coercive power of corporations.

It was not always this way. The corporate abolitionists note that during the earliest years of corporations in America, states strictly limited corporations from gaining the kind of power they have today. As explained in Chapter 1, state legislatures historically granted special corporate charters to businesses on a case-by-case basis, and these charters typically went only to corporations serving a public function. Because a corporation derived its existence from the state, the state could restrict the powers of a corporation for the public interest. Laws kept corporate power in check out of fear that corporations, if left unbridled, would grow so large and amass such power that they would become oppressive and coercive.<sup>8</sup> When the Constitution was adopted, the Framers “took it as a given that corporations could be comprehensively regulated in the service of the public welfare.”<sup>9</sup>

According to the corporate abolitionists, everything changed when the Supreme Court announced for the first time that corporations are persons under the Fourteenth Amendment. That was the tool corporations used to shift themselves “from the duty side of the line, where they’re accountable to the people, to the rights side, where they get protection from government.”<sup>10</sup> At that point, corporations were transformed into persons who could claim constitutional rights and compel the government to justify its regulations affecting corporate business activities. With this interpretation of the Fourteenth Amendment, corporations that had been subject to strict regulation of their operations became the bearer of rights to oppose legislation burdening their interests.

Activists call this the corporate “hijacking” of the Fourteenth Amendment, and they trace the roots and consolidation of corporate power directly to the concept of constitutional corporate personhood.<sup>11</sup> They blame corporate

<sup>7</sup> ALLIANCE FOR DEMOCRACY, *supra* note 3.

<sup>8</sup> There was “[f]ear of encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly . . . There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.” *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548–49 (1933) (Brandeis, J., dissenting).

<sup>9</sup> *Citizens United v. FEC*, 558 U.S. 310, 428 (2010) (Stevens, J., dissenting).

<sup>10</sup> Jan Edwards & Molly Morgan, *Abolish Corporate Personhood*, RECLAIM DEMOCRACY (May 20, 2004), <http://reclaimdemocracy.org/abolish-corporate-personhood/> [https://perma.cc/7K4V-NDQY].

<sup>11</sup> See Doug Hammerstrom, *The Hijacking of the Fourteenth Amendment*, RECLAIM DEMOCRACY (2002), [http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/fourteenth\\_amendment\\_ham](http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/fourteenth_amendment_ham)

personhood for allowing corporations over the last 130 years to gain one by one almost all the inalienable rights of human beings guaranteed by the Bill of Rights. In their view, *Citizens United* and *Hobby Lobby* continue the pattern of placing corporations in the same position as human beings for purposes of important constitutional and statutory rights. Although the majority opinions in *Citizens United* and *Hobby Lobby* did not explicitly rely on corporate personhood theories to justify their outcomes, corporate abolitionists contend that the unstated but key premise of those cases is that corporations are persons entitled to enjoy the same free speech and religious exercise rights as human individuals. Activists argue that these basic rights, combined with corporations’ immense wealth and power, allow corporations to overpower individual citizens who consequently become second-class persons with little ability to oppose or resist corporate actions.<sup>12</sup> Many people fear that the corporate creation has now become more powerful than its human creators. This concern finds support in the work of some legal scholars who believe corporate rights threaten to undermine individual rights.<sup>13</sup>

Corporate abolitionists blame the Supreme Court for creating and entrenching corporate personhood in the law. They call the doctrine “illegitimate,” a “fabrication,” “fake constitutional law,” and “unconstitutional folly.”<sup>14</sup> They argue that the Court, an “unelected” body, “gave us corporate personhood,” and “intentionally created this problem.”<sup>15</sup> They maintain that the economic and political power of corporations is derived from corporations’ status as legal persons, and corporate personhood is identified as the true “threat to authentic democratic self-

merstrom.pdf [https://perma.cc/TSL5-W5VE]. In line with this sentiment, one scholar calls the extension of the Fourteenth Amendment to corporations “one of the great perverse tragedies in legal history.” William Quigley, *Catholic Social Thought and the Amoralism of Large Corporations: Time to Abolish Corporate Personhood*, 5 *LOY. J. PUB. INT. L.* 109, 116 (2004).

<sup>12</sup> See William Meyers, *THE SANTA CLARA BLUES: CORPORATE PERSONHOOD VERSUS DEMOCRACY* 17–18 (2000), [http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/santa\\_clara\\_blues.pdf](http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/santa_clara_blues.pdf) [https://perma.cc/RZ78-XHY9].

<sup>13</sup> See Tamara R. Piety, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* 231 (2012) (“[Corporations’] power is already so great that they do not need the protection of the First Amendment. To the contrary, it is we who need protection from them.”); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 *HASTINGS L.J.* 577, 658 (1990) (The “extension of corporate constitutional rights is a zero-sum game that diminishes the rights and powers of real individuals.”).

<sup>14</sup> Jeffrey D. Clements, *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* 56 (2012); Greg Coleridge, *Gorsuch’s Gory Expansion of Corporate Personhood*, BY WHAT AUTHORITY (Program on Corps., Law & Democracy, South Yarmouth, MA), Mar./Apr. 2017, [www.poclad.org/BWA/files/2017/BWAMarchApril2017.pdf](http://www.poclad.org/BWA/files/2017/BWAMarchApril2017.pdf) [https://perma.cc/N423-MQVW]; *Our Mission*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/our-mission/> [https://perma.cc/P5SX-ANF7].

<sup>15</sup> Derek D. Cressman, *WHEN MONEY TALKS: THE HIGH PRICE OF “FREE” SPEECH AND THE SELLING OF DEMOCRACY* 149–50 (2016); Thom Hartmann, *UNEQUAL PROTECTION: HOW CORPORATIONS BECAME “PEOPLE” – AND YOU CAN FIGHT BACK* 322 (2d ed. 2010); Thom Hartmann, *THE CRASH OF 2016: THE PLOT TO DESTROY AMERICA – AND WHAT WE CAN DO TO STOP IT* 207 (2013).



governance.”<sup>16</sup> Indeed, activists portray corporations as being more than merely persons: “Corporations are now a sort of super-being: They can live forever, they cannot be jailed, they have no conscience — yet they also enjoy virtually all the rights that humans have.”<sup>17</sup> “As long as superhuman ‘corporate persons’ have rights under the law, the vast majority of people have little or no effective voice in our political arena, which is why we see abolishing corporate personhood as so important to ending corporate rule and building a more democratic society.”<sup>18</sup>

Corporate abolitionists say they are tired of trying to work within the existing legal structure to rein in corporate power with regulatory reform. Their sentiment is that it is futile to spend any more “strength, time, and hope” on pursuing “dead ends” such as “corporate responsibility, corporate accountability, corporate ethics, corporate codes of conduct, good corporate ‘citizenship,’ corporate crime, corporate reform, consumer protection, fixing regulatory agencies, or [helping] stakeholders.”<sup>19</sup> These fixes do not address the real root of the problem. It is not corporate *behavior* that must be restricted, but corporate *status*. What the corporate abolitionists seek with their campaign to strip corporations of their status as persons is a transformation in the way corporations are viewed and treated in society so that corporations will always be regarded as subordinate institutions with no claim to inalienable rights. Activists believe the only way to accomplish this result is to take personhood away from corporations through a constitutional amendment.

In their call to action, corporate abolitionists view their work as similar to that of the historical abolitionists who successfully labored to end slavery, the suffragists who championed women’s rights, the civil rights activists who opposed racial discrimination, and the American Revolutionaries who resisted political oppression in the name of democratic rule.<sup>20</sup> Corporate abolitionists believe that, like the abolition of slavery, the abolition of corporate personhood is supported by a moral imperative. They argue that the early abolitionists of the nineteenth century did not go to Congress to seek a Slavery Protection Act, or a Slavery Regulatory Agency, or a voluntary code of conduct for slave owners. The abolitionists viewed the institution of slavery as fundamentally and morally wrong, and therefore, “the whole thing had

<sup>16</sup> *Why Abolish All Corporate Constitutional Rights*, BY WHAT AUTHORITY (Program on Corps., Law & Democracy, South Yarmouth, MA), Nov. 2010, [www.poclad.org/BWA/files/2010-11/BWANov2010.pdf](http://www.poclad.org/BWA/files/2010-11/BWANov2010.pdf) [<https://perma.cc/F3LD-UJXK>].

<sup>17</sup> Doug Pibel, *Real People v. Corporate “People”: The Fight Is On*, YES! MAG. (May 27, 2010), [www.yesmagazine.org/issues/water-solutions/real-people-v.-corporate-people-the-fight-is-on](http://www.yesmagazine.org/issues/water-solutions/real-people-v.-corporate-people-the-fight-is-on) [<https://perma.cc/4B52-A787>].

<sup>18</sup> Edwards & Morgan, *supra* note 10.

<sup>19</sup> Richard L. Grossman & Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation*, NEW SOLUTIONS, Spring 1993, at 7, 16; Cmty. Envtl. Legal Def. Fund et al., *Model Brief of Amici Curiae*, Preface (2003), [www.ratical.org/corporations/demoBrief.pdf](http://www.ratical.org/corporations/demoBrief.pdf) [<https://perma.cc/8YWK-H6WZ>].

<sup>20</sup> Kaitlin Sopoci-Belknap, *Citizens United v. FEC: Supreme Court Sides with Large Corporations*, DEMOCRACY UNLIMITED OF HUMBOLDT COUNTY (Feb. 28, 2010), [www.dulc.org/profiles/blogs/citizens-united-v-fec-supreme](http://www.dulc.org/profiles/blogs/citizens-united-v-fec-supreme) [<https://perma.cc/7CNE-F6DY>].

to go.”<sup>21</sup> In the same vein, corporate abolitionists insist constitutional corporate personhood must be dismantled in order to achieve democracy and equal rights. It is an all-or-nothing proposition. Through their push to amend the Constitution, the corporate abolitionists hope to “slay the dragon of corporate personhood once and for all.”<sup>22</sup> Like other historical social movements that changed the culture to support a strategy to change the law, these activists stress the need for a grassroots effort to create a cultural shift in society favoring an amendment to the Constitution to limit constitutional rights to natural persons alone.

According to corporate abolitionists, the consequences of successfully abolishing the status of corporations as persons would be dramatic. They are confident that once corporate personhood is revoked, corporations will no longer be able to independently assert any constitutional rights. New laws and stricter regulation of corporate activity will be possible, and corporations will have no standing to challenge these laws. For example, without First Amendment rights, corporations could be prohibited from engaging in campaign spending and other forms of political activity. Without Fourth Amendment rights, government inspectors could more freely search corporate premises and seize corporate records to ensure compliance with various laws. Corporations could be prohibited from owning stock in other companies and prevented from becoming giant corporate conglomerates. Communities could ban corporations that exceed a certain size from operating in their towns and rely instead on local businesses and commerce. Corporations would once again be viewed as concessions of the government, subject to strict regulation and privileged to have only the limited rights the state chooses to bestow. The entire structure of society would be changed if corporations no longer dominated the political, social, and economic landscape. We could resume self-governance and “define our culture as we want to see it.”<sup>23</sup> According to this viewpoint, the result of abolishing corporate personhood would be “a new flowering of freedom, democracy, and economic opportunity in America and around the world.”<sup>24</sup>

#### PERSONHOOD THEORIES OF THE CORPORATION

It is clear from their rhetoric that the activists’ preferred view of the corporation is in line with the artificial person or concession theory of the corporation. They insist that the corporation be regarded as simply a device created by the state, a concession of the government. The state defines the corporation’s existence, the scope of its

<sup>21</sup> Morgan & Edwards, *supra* note 1, at 213; *Why Abolish All Corporate Constitutional Rights*, *supra* note 16; see also Meyers, *supra* note 12, at 24 (“The abolition of corporate personhood is part of the abolition of slavery . . . This is not an optional campaign.”).

<sup>22</sup> Matthew Rothschild, *Corporations Aren’t Persons: Amend the Constitution*, PROGRESSIVE, Apr. 2010, at 16, 20.

<sup>23</sup> Doug Hammerstrom, *Why Bother with Corporate Personhood*, [www.nancho.net/corperson/cpbother.html](http://www.nancho.net/corperson/cpbother.html) [<https://perma.cc/K4XK-B7CQ>].

<sup>24</sup> Hartmann, *UNEQUAL PROTECTION*, *supra* note 15, at 296.

powers, and the limits of its activities. It is granted a charter by the state to operate for the lawful purposes permitted by the government and ultimately for the greater public interest. From this perspective, the corporation is merely a creature of law, an artificial, legal fiction. It is not, nor should it be analogized to, a real person. The corporation is an economic tool and nothing more.<sup>25</sup>

Corporate abolitionists reject the real entity theory of the corporate person, and they vehemently oppose language that anthropomorphizes corporations. They emphasize that corporations do not eat, sleep, dance, raise children, fight in wars, get sick, or lose loved ones. They argue that corporations have none of the truly essential elements that define the human condition. Corporate abolitionists commonly assert that corporations have no soul or conscience, no mental or emotional capacities, no internal moral compass or values. Corporations have no capacity for virtue or loyalty, nor are they designed for it. The corporation's sole objective is to pursue profit and externalize the costs of doing so on others.

Although corporate abolitionists resist any descriptions of corporations in human like terms, they interestingly and perhaps unwittingly have similar tendencies to speak of corporations in real person terms. They characterize corporations as "single-minded," and "determined." Corporations are "relentless pursuers of profit," with "appetites that are never satisfied." Corporations shrewdly plot to overpower citizens and undermine regulation. They seek to subvert the social order, corrupt our democratic system, promote irresponsible consumption, and brainwash society. Corporations are commonly referred to as self-interested "psychopaths" or "homicidal serial killers" holding little regard for others.<sup>26</sup> While activists maintain corporations have no virtues, feelings, desires, and beliefs, they routinely speak of "corporate greed," "corporate evil," and "corporate barbarity." Words such as "dominant," "diabolical," "tyrannical," and "pathological" appear often in the speeches and literature of the corporate abolitionists.

On some level, these descriptions draw on a view of corporations as more than merely an artificial legal fiction or inanimate tool. Rather, the corporation is portrayed as a driven, unrelenting person or being that makes deliberate choices to fulfill its desires in its own self-interest. Many people are comfortable making moral judgments about corporations because they believe corporations have obligations to act morally, honestly, and ethically. When corporations violate those expectations,

<sup>25</sup> See Clements, *supra* note 14, at 60–61, 67; Coleridge, *supra* note 14 ("Corporations are legal, subordinate creations of *We the People*. These artificial entities should receive only privileges, not rights, as authorized by the public.").

<sup>26</sup> See Joel Bakan, *Psychopaths, Inc.: On Corporate Personhood*, in *THE OCCUPY HANDBOOK* 353 (Janet Byrne ed., 2012); Bruce A. Dixon, *Time for a Corporate Death Penalty*, BLACK AGENDA REP. (June 9, 2010), <https://blackagenda.com/content/time-corporate-death-penalty> [<https://perma.cc/4GX9-H3KZ>]. At times, corporations have even been described as living, albeit non-human, organisms: "Corporations function like retroviruses, taking over the rights and protections that we created for ourselves, and then using them against us, their human hosts." Greg Coleridge, *The System Isn't Broken, It's Fixed: Ending Big Money and Corporations in Our Elections*, 44 U. TOLEDO L. REV. 541, 553 (2013).

they become targets of blame and condemnation. Such feelings of moral blame would not be appropriate if directed to a merely inanimate object. Thus, invoking elements of the real entity aspects of the corporate person seems unavoidable even in the discourse of anti-corporate activists.

What is conspicuously missing from this activist discourse is any reference to the aggregate concept of the corporate person. Under the aggregate view, the corporation is more than a creature of law. Its existence depends on the aggregate of the actual human beings who underlie the corporate form. The justification for many of the Supreme Court's most controversial decisions regarding corporate constitutional rights has relied on the aggregate conception of the corporation as an association of the human individuals who make up the corporation. Those individuals are the ones whose rights are at stake. Under this view, the corporation is really the people who, by private contract, decide to participate together in an incorporated business. They do not lose their rights when they opt to operate their enterprise as a corporation. The Supreme Court has often looked through the corporation to the real people within and upheld the corporation's right as a means of upholding theirs.

Corporate abolitionists rarely mention or acknowledge the aggregate aspects of the corporation. Indeed, they often discount the aggregate view, if not reject it altogether. Holding steadfastly to the artificial person theory of the corporation, they argue that corporations "cannot exist by private arrangement."<sup>27</sup> They must be chartered by the state, and no amount of private contracting can form a legally recognized corporation. Corporate abolitionists disagree with the Supreme Court's view of the corporation as an aggregate of the human individuals who make up the corporation. Instead, they insist that a "corporation is not a person, nor is it an association or a group of people. A corporation is a creation of law, a *public* tool of economic policy."<sup>28</sup> Thus, corporate abolitionists have a very narrow theoretical vision of the corporation, one that focuses solely on the artificial person aspects of the corporation. This allows activists to argue that corporations are only what We the People say they are, nothing more and nothing less. Whatever privileges the legislature elects to extend to corporations are the prerogative of the state, and corporations have no independent basis for asserting any other rights. That the Supreme Court has treated corporations as independent persons or as representatives of their human members for purposes of constitutional rights is viewed by corporate abolitionists as deeply flawed and unsupportable. They believe now is the time for a popular uprising to undo this result. Their preferred method for doing so is to amend the Constitution to clarify that only human beings, not corporate entities, are persons entitled to constitutional rights. The movement, called "Move to Amend," seeks to abolish corporate personhood and invalidate all the fundamental constitutional rights that are currently afforded to corporations.

<sup>27</sup> Clements, *supra* note 14, at 60.

<sup>28</sup> *Id.* at 56.

## MOVE TO AMEND

people reacted negatively when the Supreme Court in *Citizens United* upheld strict campaign finance laws and upheld the First Amendment free rights of corporations to spend their money to support or oppose candidates in elections. Polls showed that a large majority of the public disfavored the *Citizens United* decision. The Move to Amend campaign was launched to push for the adoption of a twenty-eighth amendment to the Constitution to declare that corporations are not entitled to any constitutional rights and that the spending of money is not entitled to First Amendment protection.

Move to Amend is an outgrowth of several activist organizations that have been in existence for some time and have expressed a commitment to “ending corporate personhood and building a vibrant democracy that is genuinely accountable to the people, not to corporate interests.”<sup>30</sup> Nationwide, several hundred grassroots community-based organizations have endorsed or joined the Move to Amend coalition. Many of these organizations are themselves extensive coalitions of other progressive groups that have created a national network of activists that support the campaign. Organizations include, for example, the Alliance for Democracy, the National Labor Council, the Program on Corporations, Law & Democracy, Reclaim Our Democracy, and the Liberty Tree Foundation.<sup>31</sup>

Move to Amend activists have adopted the following petition as a centerpiece of their campaign: “We, the People of the United States of America, reject the U.S. Supreme Court’s *Citizens United* ruling and other related cases, and move to amend the Constitution to firmly establish that money is not speech, and that human beings, not corporations, are persons entitled to constitutional rights.”<sup>32</sup> Citizens United petitioners signed the petition and endorse the effort to retract all constitutional rights from corporations. As of the time of this writing, approximately 460,000 signatures had been collected.<sup>33</sup>

The Move to Amend campaign engages in grassroots efforts to encourage cities and counties to pass local resolutions in support of amending the Constitution to abolish corporate personhood. Activists work with local organizations to draft resolutions for city

and Dan Eggen, *Poll: Large Majority Opposes Supreme Court’s Decision on Campaign Financing*, WASHINGTON POST (Feb. 17, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/02/17/2010021701151.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/2010021701151.html) [https://perma.cc/7RQD-ZEDQ]. A recent survey indicated that most respondents support a constitutional amendment to effectively overturn *Citizens United*. See Robert C. Calcerzak, *Study: Most Americans Want to Kill ‘Citizens United’ with Constitutional Amendment*, CTR. PUB. INTEGRITY (May 10, 2018), [www.publicintegrity.org/2018/05/10/21739/study-most-americans-want-kill-citizens-united-constitutional-amendment](http://www.publicintegrity.org/2018/05/10/21739/study-most-americans-want-kill-citizens-united-constitutional-amendment) [https://perma.cc/4SKF-2PGJ].

30 *Coalition*, MOVE TO AMEND, <https://movetoamend.org/about-us> [https://perma.cc/NGE7-7W3L].

31 *Supporting Organizations*, MOVE TO AMEND, <https://movetoamend.org/organizations> [https://perma.cc/WR-EWNP].

32 *Move to Amend ~ Sign the Petition*, MOVE TO AMEND, <https://movetoamend.org/motion> [https://perma.cc/HFF4-695M].

councils to adopt, as well as ballot initiatives for voting citizens to approve.<sup>34</sup> Move to Amend’s goal is to create a groundswell of support at the municipal level in favor of amending the Constitution so that state legislatures and Congress will then be prompted to act. “When enough local communities have passed ordinances that directly challenge corporate personhood, state legislatures will begin to notice . . . [E]ventually the federal government will get on board.”<sup>35</sup> Activists believe that the “[p]assage of a critical mass of [constitutional amendment] resolutions throughout the country will bring decisive pressure on Congress to finish the job.”<sup>36</sup>

Move to Amend works alongside several other progressive groups with the goal of amending the Constitution and nullifying the *Citizens United* result. Organizations such as Free Speech For People, Common Cause, Public Citizen, People for the American Way, and American Promise, all support the adoption of a twenty-eighth amendment to the Constitution to curb the impact of corporate power on the political system. But tensions arise among these and other activist groups over the best strategies for accomplishing their common goal. Move to Amend is highly critical of other groups that promote a constitutional amendment that focuses primarily on campaign finance reform by forbidding corporations from spending money in political elections. While this strategy addresses the *Citizens United* result, Move to Amend and other corporate abolitionist groups believe it is weak and insufficient. In their view, revoking First Amendment corporate political speech rights to reverse *Citizens United* is a start, but not nearly enough to cut off the source of corporate power. Rather, they argue corporate personhood itself must be abolished, and any new constitutional amendment must explicitly affirm that corporations have no entitlement to *any* constitutional rights because they possess no standing as persons to claim them.<sup>37</sup>

Moreover, some activists believe that unions and nonprofit entities should be permitted to maintain their personhood status and that only for-profit corporations should be denied constitutional rights. However, other activist groups like Move to Amend contend that all corporate entities, whether nonprofit or for-profit, are strictly artificial persons created by the state, and none should be regarded as persons for constitutional rights.<sup>38</sup>

Consequently, there is considerable disagreement over the language and scope of the proposed constitutional amendment, with some groups advocating a much more

<sup>34</sup> *Pass a Local Resolution*, MOVE TO AMEND, <https://movetoamend.org/pass-local-resolution> [https://perma.cc/6ZLN-6MBR].

<sup>35</sup> Hartmann, *UNEQUAL PROTECTION*, *supra* note 15, at 295–96.

<sup>36</sup> Clements, *supra* note 14, at 153.

<sup>37</sup> MOVE TO AMEND, *THE PATH TO THE 28TH AMENDMENT: STRATEGIC PLAN TO PASS THE “WE THE PEOPLE AMENDMENT” TO THE UNITED STATES CONSTITUTION 8–10* (2016), [https://movetoamend.org/default/files/move\\_to\\_amend\\_strategic\\_plan.pdf](https://movetoamend.org/default/files/move_to_amend_strategic_plan.pdf) [https://perma.cc/24K3-V8WM].

<sup>38</sup> See Move to Amend, *Why Non Profit Corporations Do Not Need (or Have) Constitutional Rights*, [https://movetoamend.org/sites/default/files/non\\_profits\\_dont\\_need\\_constitutional\\_rights.pdf](https://movetoamend.org/sites/default/files/non_profits_dont_need_constitutional_rights.pdf) [https://perma.cc/QE4B-3K3F].

radical and progressive agenda, and others adopting a more mainstream and diplomatic approach.<sup>39</sup> In an effort to facilitate cooperation and consolidation, the American Promise group has recently begun a “Writing the 28th Amendment” program with the intent to build national consensus on effective language for a constitutional amendment.<sup>40</sup>

#### STATE AND LOCAL SUPPORT FOR ABOLISHING CORPORATE PERSONHOOD

The requirements for amending the Constitution are stringent. A proposed amendment requires approval from two thirds of Congress, and then three quarters of the states must ratify it. Alternatively, two thirds of the states can call a constitutional convention to consider the amendment and then three quarters of the states must ratify it.<sup>41</sup> Requiring such a supermajority of Congress and the states to agree on any issue poses a formidable challenge. Roughly 12,000 proposals to amend the Constitution have been introduced in Congress since the Constitution’s ratification, but only twenty-seven have been adopted as constitutional amendments, ten of which comprised the Bill of Rights. In addition, although various states have filed hundreds of different petitions with Congress to call a constitutional convention to propose amendments, a convention has never occurred because the requisite supermajority of the states has never been met.<sup>42</sup>

The movement to end corporate personhood through a constitutional amendment has made inroads in various states and met with some degree of success. Move to Amend and other activist groups have aggressively engaged in grassroots efforts to prompt city councils and state legislatures to adopt resolutions urging Congress to propose a constitutional amendment eliminating the status of corporations as persons for purposes of constitutional rights.

Movement organizers claim that to date nineteen states have made some type of formal declaration in support of a constitutional amendment, whether through

<sup>39</sup> See Joel Bleifuss, *Corporations Are Not People*, IN THESE TIMES (Sept. 19, 2011), [http://inthesetimes.com/article/11937/corporations\\_are\\_not\\_people](http://inthesetimes.com/article/11937/corporations_are_not_people) [<https://perma.cc/7XVZ-ZYRK>] (discussing contrasting strategies of different activist groups). Some anti-corporate activist groups believe the corporate abolitionist movement is not radical enough. They argue that attempting to eliminate corporate personhood through the constitutional amendment procedure is futile because it requires dependence on federal and state lawmakers who are members of a corrupt corporate political power system. Instead, some activists encourage civil disobedience and defiance of corporate rights, emphasizing the need to “become revolutionaries, not reformers.” Cmty. Envtl. Legal Def. Fund, *Statement on Efforts to Amend the U.S. Constitution Following Citizens United* (Jan. 2012), <https://celdf.org/wp-content/uploads/2015/08/CELDf-CITIZENS-UNITED-STATEMENT-JANUARY-17-2012.pdf> [<https://perma.cc/7AK8-F4UW>].

<sup>40</sup> *Vision/Mission*, AM. PROMISE, [www.americanpromise.net/who\\_we\\_are/vision\\_mission](http://www.americanpromise.net/who_we_are/vision_mission) [<https://perma.cc/GR3R-zLNG>].

<sup>41</sup> U.S. CONST. art. V.

<sup>42</sup> Roger C. Hartley, *HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE* 2–3 (2017).

official resolutions in the state legislature, ballot initiatives approved by voters in statewide elections, or formal letters to Congress signed by a majority of state lawmakers. Considering they will need thirty-eight states (i.e., three fourths of the states) to ratify the amendment, movement organizers claim that they are already half-way there.<sup>43</sup>

However, not all the nineteen states supporting a constitutional amendment have explicitly demanded an end to corporate personhood per se. Rather, many states merely advocate a constitutional amendment that would allow for stricter regulation of corporate spending in elections, thereby reversing the effect of *Citizens United*, but not suggesting that corporations should be stripped of standing as persons for purposes of all constitutional rights. For example, the Nevada legislature passed a joint resolution in 2017 that urges Congress to propose a constitutional amendment allowing the federal government and the states to regulate political contributions and expenditures. Although the recitals of the resolution describe *Citizens United* as a precedent that “harm[s] our democratic system of government,” the text of the resolution contains no language condemning corporate personhood or calling for its abolition.<sup>44</sup> Similarly, the Maine legislature in 2013 approved a joint resolution declaring support for a constitutional amendment “regarding campaign finance that would reaffirm the power of citizens through their government to regulate the raising and spending of money in elections;” the language of the resolution does not refer to the personhood of corporations.<sup>45</sup> These and other states favor a constitutional amendment, but their focus is more generally on defining the scope of political speech rights, reforming campaign finance restrictions, and regulating corporate spending in elections, rather than targeting corporate personhood.

There are several states, however, that have explicitly raised concerns about corporate personhood and have expressed support for a constitutional amendment allowing only natural persons, not corporate entities, to claim constitutional rights. For example, the Illinois state legislature in 2013 passed a joint resolution calling on Congress “to propose and send to the states for ratification a constitutional amendment to overturn *Citizens United*” and “make clear that the rights of persons protected by the Constitution are the rights of natural persons and not those of corporations or other artificial entities.”<sup>46</sup> Other states have utilized a direct written communication to Congress, rather than a state resolution, to express the same sentiment. For instance,

<sup>43</sup> The nineteen states that appear to have indicated support for a constitutional amendment are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and West Virginia. See *State and Local Support*, UNITED FOR THE PEOPLE, <http://united4thepeople.org/state-and-local-support-2/> [<https://perma.cc/M3AW-WYXN>]; FREE SPEECH FOR PEOPLE, 2017 END OF YEAR UPDATE 4, <https://freespeechforpeople.org/wp-content/uploads/2018/02/2017-Annual-Report-.pdf> [<https://perma.cc/KYB8-Z45E>].

<sup>44</sup> S.J. Res. 4, 79th Leg. (Nev. 2017).

<sup>45</sup> S.P. 548, 126th Leg., 1st Reg. Sess. (Me. 2013).

<sup>46</sup> S.J. Res. 27, 98th Gen. Assemb. (Ill. 2013).

radical and progressive agenda, and others adopting a more mainstream and diplomatic approach.<sup>39</sup> In an effort to facilitate cooperation and consolidation, the American Promise group has recently begun a “Writing the 28th Amendment” program with the intent to build national consensus on effective language for a constitutional amendment.<sup>40</sup>

#### STATE AND LOCAL SUPPORT FOR ABOLISHING CORPORATE PERSONHOOD

The requirements for amending the Constitution are stringent. A proposed amendment requires approval from two thirds of Congress, and then three quarters of the states must ratify it. Alternatively, two thirds of the states can call a constitutional convention to consider the amendment and then three quarters of the states must ratify it.<sup>41</sup> Requiring such a supermajority of Congress and the states to agree on any issue poses a formidable challenge. Roughly 12,000 proposals to amend the Constitution have been introduced in Congress since the Constitution’s ratification, but only twenty-seven have been adopted as constitutional amendments, ten of which comprised the Bill of Rights. In addition, although various states have filed hundreds of different petitions with Congress to call a constitutional convention to propose amendments, a convention has never occurred because the requisite supermajority of the states has never been met.<sup>42</sup>

The movement to end corporate personhood through a constitutional amendment has made inroads in various states and met with some degree of success. Move to Amend and other activist groups have aggressively engaged in grassroots efforts to prompt city councils and state legislatures to adopt resolutions urging Congress to propose a constitutional amendment eliminating the status of corporations as persons for purposes of constitutional rights.

Movement organizers claim that to date nineteen states have made some type of formal declaration in support of a constitutional amendment, whether through

<sup>39</sup> See Joel Bleifuss, *Corporations Are Not People*, IN THESE TIMES (Sept. 19, 2011), [http://inthesetimes.com/article/11937/corporations\\_are\\_not\\_people](http://inthesetimes.com/article/11937/corporations_are_not_people) [<https://perma.cc/7XVZ-ZYRK>] (discussing contrasting strategies of different activist groups). Some anti-corporate activist groups believe the corporate abolitionist movement is not radical enough. They argue that attempting to eliminate corporate personhood through the constitutional amendment procedure is futile because it requires dependence on federal and state lawmakers who are members of a corrupt corporate political power system. Instead, some activists encourage civil disobedience and defiance of corporate rights, emphasizing the need to “become revolutionaries, not reformers.” Cmty. Envtl. Legal Def. Fund, *Statement on Efforts to Amend the U.S. Constitution Following Citizens United* (Jan. 2012), <https://celdf.org/wp-content/uploads/2015/08/CELDf-CITIZENS-UNITED-STATEMENT-JANUARY-17-2012.pdf> [<https://perma.cc/7AK8-F4UW>].

<sup>40</sup> *Vision/Mission*, AM. PROMISE, [www.americanpromise.net/who\\_we\\_are/vision\\_mission](http://www.americanpromise.net/who_we_are/vision_mission) [<https://perma.cc/GR3R-2LNG>].

<sup>41</sup> U.S. CONST. art. V.

<sup>42</sup> Roger C. Hartley, *HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE* 2–3 (2017).

official resolutions in the state legislature, ballot initiatives approved by voters in statewide elections, or formal letters to Congress signed by a majority of state lawmakers. Considering they will need thirty-eight states (i.e., three fourths of the states) to ratify the amendment, movement organizers claim that they are already half-way there.<sup>43</sup>

However, not all the nineteen states supporting a constitutional amendment have explicitly demanded an end to corporate personhood per se. Rather, many states merely advocate a constitutional amendment that would allow for stricter regulation of corporate spending in elections, thereby reversing the effect of *Citizens United*, but not suggesting that corporations should be stripped of standing as persons for purposes of all constitutional rights. For example, the Nevada legislature passed a joint resolution in 2017 that urges Congress to propose a constitutional amendment allowing the federal government and the states to regulate political contributions and expenditures. Although the recitals of the resolution describe *Citizens United* as a precedent that “harm[s] our democratic system of government,” the text of the resolution contains no language condemning corporate personhood or calling for its abolition.<sup>44</sup> Similarly, the Maine legislature in 2013 approved a joint resolution declaring support for a constitutional amendment “regarding campaign finance that would reaffirm the power of citizens through their government to regulate the raising and spending of money in elections;” the language of the resolution does not refer to the personhood of corporations.<sup>45</sup> These and other states favor a constitutional amendment, but their focus is more generally on defining the scope of political speech rights, reforming campaign finance restrictions, and regulating corporate spending in elections, rather than targeting corporate personhood.

There are several states, however, that have explicitly raised concerns about corporate personhood and have expressed support for a constitutional amendment allowing only natural persons, not corporate entities, to claim constitutional rights. For example, the Illinois state legislature in 2013 passed a joint resolution calling on Congress “to propose and send to the states for ratification a constitutional amendment to overturn *Citizens United*” and “make clear that the rights of persons protected by the Constitution are the rights of natural persons and not those of corporations or other artificial entities.”<sup>46</sup> Other states have utilized a direct written communication to Congress, rather than a state resolution, to express the same sentiment. For instance,

<sup>43</sup> The nineteen states that appear to have indicated support for a constitutional amendment are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and West Virginia. See *State and Local Support, UNITED FOR THE PEOPLE*, <http://united4thepeople.org/state-and-local-support-2/> [<https://perma.cc/M3AW-WYXN>]; *FREE SPEECH FOR PEOPLE, 2017 END OF YEAR UPDATE 4*, <https://freespeechforpeople.org/wp-content/uploads/2018/03/2017-Annual-Report.pdf> [<https://perma.cc/KYB8-Z45E>].

<sup>44</sup> S.J. Res. 4, 79th Leg. (Nev. 2017).

<sup>45</sup> S.P. 548, 126th Leg., 1st Reg. Sess. (Me. 2013).

<sup>46</sup> S.J. Res. 27, 98th Gen. Assemb. (Ill. 2013).

2012, a majority of state legislators in Connecticut signed and sent a letter to congressional representatives in support of a constitutional amendment to overturn *Citizens United* and to “firmly establish that money is not speech and that human beings, not corporations, are persons entitled to constitutional rights.”<sup>47</sup> These types of calls for a constitutional amendment contain personhood language highlighting the difference between corporations and human individuals.

At the local level, activists assert that approximately 800 cities and counties have approved resolutions and ballot measures calling for a constitutional amendment to revoke corporate personhood and/or authorize the regulation of corporate political spending. Chicago, Kansas City, Santa Fe, and Tucson are among the hundreds of cities that have formally expressed support for the constitutional amendment campaign in the last several years.<sup>48</sup>

One activist group called Wolf-PAC has focused on the alternative route to amending the Constitution: having two thirds of the states formally petition Congress to call a constitutional convention to amend the Constitution. To date, five states have officially adopted resolutions calling for a constitutional convention to propose an amendment to address corporate political spending and to overturn *Citizens United*.<sup>49</sup>

It is not entirely clear how long these various state and municipal resolutions, orders, and referenda remain in effect to express the sentiment of their respective decision-making bodies. Some may last indefinitely while others over time may no longer represent the state or locality’s position and therefore require a renewed resolution by the state or city. For example, Illinois’s joint resolution favoring a constitutional amendment was adopted in 2013. If it takes another ten years for the Move to Amend campaign to get a total of thirty-eight states to indicate support for the amendment, Move to Amend may not be able to still count Illinois as

Letter from Conn. Gen. Assembly to Conn. U.S. Representatives (May 1, 2012), <https://org2.salsalabs.com/o/7003/images/CTStateRepstoFeds.pdf> [<https://perma.cc/A8C7-VI44>]; *Connecticut Calls for Constitutional Amendment to Overturn Citizens United*, PUB. CITIZEN (Sep. 12, 2012), [www.citizen.org/media/press-releases/connecticut-calls-constitutional-amendment-overturn-citizens-united](http://www.citizen.org/media/press-releases/connecticut-calls-constitutional-amendment-overturn-citizens-united) [<https://perma.cc/NY6S-JCT9>].

See *Resolutions & Ordinances*, MOVE TO AMEND, <https://movetoamend.org/resolutions-map> [<https://perma.cc/PC32-Y732>]; *State and Local Support*, *supra* note 43; 2017 in Review, AM. PROMISE, [www.americanpromise.net/who\\_we\\_are/2017\\_year\\_end\\_report](http://www.americanpromise.net/who_we_are/2017_year_end_report) [<https://perma.cc/RGF8-VQV7>] (“800 cities and towns hav[e] passed local 28th Amendment resolutions.”).

The five states are California, Illinois, New Jersey, Rhode Island, and Vermont. See David Guldenschuh, *Article V Progress Report*, ARTICLE V CAUCUS, <http://articlevcaucus.com/news/article-v-progress-report-4/> [<https://perma.cc/z5QX-N4SC>]. Some activist groups strongly oppose this approach because a constitutional convention has never been used before to propose amendments, and there are no settled rules or procedures to govern the convention once it is convened. They argue that the convention could potentially be unlimited in scope, might result in the elimination of other established constitutional rights, and runs the dangerous risk of producing a wholesale rewrite of the Constitution. See Common Cause, *U.S. Constitution Threatened as Article V Convention Movement Nears Success* (Feb. 2018), [www.commoncause.org/wp-content/uploads/2018/03/Article-V-Memo-Feb-2018.pdf](http://www.commoncause.org/wp-content/uploads/2018/03/Article-V-Memo-Feb-2018.pdf) [<https://perma.cc/41I43-2Q8Z>].

a supporter state in the year 2029 if its resolution was passed in 2013.<sup>50</sup> In any case, corporate abolitionists claim there is currently significant popular interest nationwide to envision an amendment that would limit or eliminate constitutional rights for corporations, either specifically in the context of First Amendment political speech, or altogether for all rights enumerated in the Constitution.

## FEDERAL SUPPORT FOR ABOLISHING CORPORATE PERSONHOOD

At the federal level, members of Congress have introduced various resolutions proposing a constitutional amendment. These resolutions address the status of corporations as holders of constitutional rights. One resolution, the “We the People Amendment,” is the version endorsed by the Move to Amend campaign.<sup>51</sup> The resolution proposes a constitutional amendment providing that the “rights protected by the Constitution . . . are the rights of natural persons only. Artificial entities, such as corporations, limited liability companies, and other entities . . . shall have no rights under this Constitution” and the “privileges of artificial entities . . . shall not be construed to be inherent or inalienable.”<sup>52</sup> The intent of the resolution is to forbid *all* entities, whether for-profit corporations, nonprofit corporations, or unions, from claiming *any* constitutional rights. While some activists suggest that an exemption should be made for nonprofit organizations and unions, Move to Amend maintains that all corporate entities are created by state charter, and it “is not intellectually honest to attempt to create a constitutional exemption for the types of artificial entities that one likes but not for the ones one doesn’t like . . . Because only people have rights, and only people are people.”<sup>53</sup> This proposed amendment seeks to eliminate more than merely the First Amendment political speech (i.e., political spending) rights of corporate entities. It targets all the rights corporations have ever gained under the Constitution and revokes the standing of corporations to claim any of them.

<sup>50</sup> The Illinois Legislative Glossary’s definition of “resolution” states that a “resolution is merely to express the opinion of one or both houses . . . [and] is typically temporary in character.” *Illinois Legislative Glossary*, ILL. GEN. ASSEMBLY, [www.ilga.gov/legislation/glossary.asp#R](http://www.ilga.gov/legislation/glossary.asp#R) [<https://perma.cc/CW5K-TSFZ>].

<sup>51</sup> H.R.J. Res. 48, 115th Cong. (2017); *Move to Amend’s Proposed 28th Amendment to the Constitution*, MOVE TO AMEND, <https://movetoamend.org/wethepeopleamendment> [<https://perma.cc/5AFB-5KVM>]. The resolution was introduced by Rep. Richard Nolan on Jan. 30, 2017. He has proposed the same resolution in the last two Congresses, but it did not gain approval. See H.R.J. Res. 48, 114th Cong. (2015); H.R.J. Res. 29, 113th Cong. (2013).

<sup>52</sup> H.R.J. Res. 48, 115th Cong. § 1 (2017). The proposed constitutional amendment would also require the government to regulate political spending in elections, and it would forbid the judiciary from equating the spending of money in elections with political speech protected by the First Amendment. See *id.* at § 2.

<sup>53</sup> Move to Amend, *Why Non Profit Corporations Do Not Need (or Have) Constitutional Rights*, *supra* note 38.

Another Congressional resolution is the “Democracy for All Amendment,” which is endorsed by Free Speech For People.<sup>54</sup> The resolution proposes a constitutional amendment declaring that Congress and the states “may distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.”<sup>55</sup> The language of the proposed amendment is permissive, not mandatory. It does not call for the abolition of corporate personhood for all constitutional rights. Rather, it allows the government in its discretion to treat natural persons and corporate entities differently for purposes of regulating political spending. Move to Amend organizers and other corporate abolitionists are highly critical of this proposed amendment, calling it “a half-measure that – at best – takes us back to the pre-*Citizens United* era [where] corporations and the wealthy still dominated the political process.”<sup>56</sup> They argue that merely overturning *Citizens United* or taking away corporate political speech rights is not enough. Instead, they believe that a complete revocation of corporate personhood under the Constitution is necessary to effectively address the problems associated with the power of corporations to influence not only politics and elections, but also the overall direction and well-being of society.

An alternative resolution addresses the meaning of personhood directly. The “People’s Rights Amendment” proposes a constitutional amendment declaring that the rights protected by the Constitution are the rights of natural persons only, and the word “person” in the Constitution does “not include corporations, limited liability companies or other corporate entities.”<sup>57</sup> The intent of the resolution is to establish that corporations are not persons entitled to claim any constitutional rights whatsoever. This is a broader approach that seeks to ensure only human individuals,

<sup>54</sup> H.R.J. Res. 31, 115th Cong. (2017); S.J. Res. 8, 115th Cong. (2017). *The Democracy for all Amendment*, FREE SPEECH FOR PEOPLE, <https://freespeechforpeople.org/the-amendment/democracy-for-all-amendment/> [https://perma.cc/58QC-ET5J]. The resolution was introduced by Rep. Theodore Deutch in the House on January 24, 2017, with an identical resolution introduced by Sen. Tom Udall in the Senate. The same resolution was introduced in the last two Congresses, but it failed to gain approval. See H.R.J. Res. 22, 114th Cong. (2015); S.J. Res. 5, 114th Cong. (2015); H.R.J. Res. 119, 113th Cong. (2014); S.J. Res. 19, 113th Cong. (2013). The resolution was debated in the Senate in 2014 and resulted in a Senate majority vote (fifty-four Senators) in favor of the resolution, falling short of the two-thirds majority (sixty-seven Senators) needed to pass. John Nichols, *The Senate Tried to Overturn ‘Citizens United’ Today. Guess What Stopped Them?*, NATION (Sep. 11, 2014), [www.thenation.com/article/senate-tried-to-overturn-citizens-united-today-guess-what-stopped-them/](http://www.thenation.com/article/senate-tried-to-overturn-citizens-united-today-guess-what-stopped-them/) [https://perma.cc/19PG-6JZW].

<sup>55</sup> H.R.J. Res. 31, 115th Cong. § 2 (2017). The proposed constitutional amendment would also allow the government to regulate political spending in elections. See *id.* at § 1.

<sup>56</sup> MOVE TO AMEND, THE PATH TO THE 28TH AMENDMENT, *supra* note 37, at 9.

<sup>57</sup> H.R.J. Res. 88, 115th Cong. § 2 (2017). The resolution was introduced by Rep. James McGovern in the House on March 10, 2017. A similar resolution was introduced by Sen. Jon Tester in the Senate. See S.J. Res. 20, 115th Cong. (2017). The same resolutions were introduced in the last two Congresses but failed to gain approval. See H.R.J. Res. 23, 114th Cong. (2015); S.J. Res. 7, 114th Cong. (2015); H.R.J. Res. 21, 113th Cong. (2013); S.J. Res. 18, 113th Cong. (2013).

not corporate entities, are the holders of the rights guaranteed under the Constitution.

While all these resolutions have gained multiple co-sponsors in Congress, to date Congress has not passed any of these or other resolutions in favor of a proposed constitutional amendment limiting corporate constitutional rights. The corporate abolitionists are well aware of the uphill battle they face in Congress, but they continue to emphasize their grassroots efforts at the state and local levels to drive a nationwide popular movement that they believe Congress will eventually have to acknowledge. Drawing inspiration from social movements of the past that have effectuated transformational changes in society and the law, corporate abolitionists assert, “History shows that when the public is sufficiently aroused, actions that once seemed impossible can, in hindsight, seem inevitable.”<sup>58</sup>

#### THE LANGUAGE OF CORPORATE PERSONHOOD

Critics of the corporate abolitionist movement suggest that activists are making too much ado about corporate personhood and blowing its significance out of proportion. Defenders of corporate rights often dismiss activists’ attacks on corporate personhood with the reply, “Of course, corporations are not actually people. Everyone knows that.” The statement implies that the clamor over the personhood status of corporations is unwarranted and exaggerates the significance of calling the corporation a person under the law. Courts have never said that corporations have rights because they are literally persons. Corporate personhood is a useful concept that allows corporations to enter into contracts, own property, and conduct business in the corporate name. Supporters of corporate personhood argue that activists’ continual indictment of corporate personhood as the source of coercive corporate power and political dominance is misguided and unhelpful. While corporate abolitionists perceive corporate personhood as a treacherous weapon that threatens democracy and self-governance, those who disagree believe that corporate personhood is a red herring and that activists should stop fussing over it.<sup>59</sup>

Corporate abolitionists find it ironic that those who dismiss corporate personhood as “no big deal” also simultaneously argue that it is important not to abolish it because it is essential for the proper functioning of the legal system and the flow of commerce.

<sup>58</sup> Fran Korten, *10 Ways to Stop Corporate Dominance of Politics*, YES! MAG. (Jan. 25, 2010), [www.yesmagazine.org/people-power/10-ways-to-stop-corporate-dominance-of-politics](http://www.yesmagazine.org/people-power/10-ways-to-stop-corporate-dominance-of-politics) [https://perma.cc/KZT6-FXWV].

<sup>59</sup> See Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309 (2015); Eric Posner, *Stop Fussing over Personhood*, SLATE (Dec. 11, 2013), [www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html) [https://perma.cc/3AR2-DHFT]; see also Kent Greenfield, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* 27–28 (2018) (arguing that “we should stop fighting corporate personhood” and instead adopt more pluralistic corporate governance structures that allow corporations to “behave more like people”).

Activists contend that the practice of calling the corporation a person under the law has become more than a convenient fiction that facilitates commerce. They believe that attributing personhood to corporations suggests a moral equality and political commensurability between living persons and corporate entities that results in uniquely empowering corporations and disempowering human individuals.

Some legal scholars agree with this point. They reject the suggestion that personhood is not important. On the contrary, in their view, personhood matters, and it matters a lot.<sup>60</sup> Calling the corporation a person has substantial rhetorical power because of our deeply held belief that all persons are entitled to be treated equally, with dignity and respect. Our legal system is strongly committed to affording all people equal rights, and we generally condemn instances of discrimination among persons. When the corporation is viewed as a person, we are all the more inclined to afford it the same rights that are typically afforded only to human beings under the Constitution. Many believe that the personhood concept becomes misleading and dangerous at this point because it portrays the corporation as an embattled victim in need of protection from overbearing and discriminatory government power. Referring to corporations as persons invokes the cherished notions of autonomy, freedom, and fairness that are intrinsically associated with personhood. If the corporation is a person, then it is deserving of the rights that we as a civilized society extend to all those with that status. The idea that corporations are persons makes the establishment of corporate rights seem natural and self-evident.<sup>61</sup>

It is true that the Supreme Court did not explicitly rely on theories of corporate personhood as the justification for its holdings in *Citizens United* and *Hobby Lobby*. But a good chunk of the general public certainly seemed to perceive that personhood was the reason behind those decisions. The idea that corporations as persons must be afforded the same free speech rights and the same religious freedom rights as human beings is what prompted some of the strongest public opposition to those rulings.<sup>62</sup> Activists' attacks on corporate personhood arise from their belief that the personification of corporations is what gives corporations power in society. Reformers argue that "[w]hen we begin to insist that corporate money is not 'speech' and that corporations are not people, we begin to take back power."<sup>63</sup>

Much of this debate relates to the ability of language to reflect and to influence our beliefs and our perceptions of the world and reality. As discussed in Chapter 1,

<sup>60</sup> See, e.g., Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015).

<sup>61</sup> See *id.* at 363, 384–85.

<sup>62</sup> Shortly after the *Citizens United* decision, several members of Congress proposed a resolution to express disapproval of the case, specifically criticizing the Court for "treating corporations and living persons equally with respect to free speech rights under the First Amendment [and] effectively bestow[ing] on corporations aspects of personhood, which . . . ensures that . . . individual citizens . . . must now compete against . . . the vast resources of multibillion dollar, multinational corporations, thus diminishing the [free speech rights of] individual citizen[s]." H.R. Res. 1275, 111th Cong. (2010).

<sup>63</sup> Clements, *supra* note 14, at 56.

the fact that we talk about corporations in the language of personhood is not insignificant. Language as a system of discourse conditions the way people think about things and interpret the world around them. Beyond merely reflecting societal views and values, language helps form them. The way we speak about corporations has a role in shaping our understanding of them and our judgments about them. Continually referring to corporations as persons may reveal certain perceptions of what corporations are or how they should be treated. But the practice of labelling a corporation a person may also nudge us toward viewing the corporation in a certain light and treating it in a certain way. We should not underestimate the power of words and language to influence thought and judgments. The vocabulary we use to characterize corporations affects the manner in which we perceive and relate to them. In this sense, labels matter.<sup>64</sup>

As mentioned in Chapter 3, postmodern philosophies view language as the medium through which our social world is constructed. Things around us become what they are and have their meaning as a result of the way we talk about them. To give something a name or a label, to speak about it in a particular way, and to verbalize a set of ideas around it, have powerful constitutive effects on what it becomes, how it is regarded, and why we treat it one way as opposed to another. "Language doesn't just describe; it creates, and partly constitutes, what it both describes and creates."<sup>65</sup>

If this is true, then centers of power within society have the profound ability to decide how our social reality is constructed because "anyone who controls discourse can make something exist, or disappear."<sup>66</sup> If you can control the direction of the discourse, you can shape the social world. Those who exercise power may allow some things to be said, but not others. Certain terminologies and communications may be endorsed, while other expressive forms are discouraged. "[T]hese controlled practices [give] rise to the discourse that guides meaning making within its boundaries."<sup>67</sup> This command over discourse can be particularly dangerous because "imbalances of power . . . allow some to define the reality in which others must live, creating the potential for exploitation and abuse."<sup>68</sup>

<sup>64</sup> See Wm. Dennis Huber, *Law, Language and Corporatehood: Corporations and the U.S. Constitution*, 1 INT'L J. FOR RULE LAW, no. 2, Dec. 2017, at 78, 79, 87. Some commentators have suggested that there may be benefits to discarding the corporate person terminology and replacing it with terms that do not invoke human personhood, such as "corporatehood" or "entity." See *id.* at 98; Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Māori Corporation Walk into a Bar . . .*, 39 SEATTLE U. L. REV. 353, 393 (2016).

<sup>65</sup> John R. Searle, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 85 (2010) (describing language's role in constructing social reality). "[I]n human languages we have the capacity not only to represent reality, both how it is and how we want to make it be, but we also have the capacity to create a new reality by representing that reality as existing." *Id.* at 86.

<sup>66</sup> Mary Jo Hatch with Ann L. Cunliffe, ORGANIZATION THEORY: MODERN, SYMBOLIC, AND POSTMODERN PERSPECTIVES 13 (3d ed. 2013).

<sup>67</sup> *Id.* at 43.

<sup>68</sup> *Id.* at 14.



this is in part why the corporate abolitionists so strongly condemn the use of corporate personhood. In their view, when the Supreme Court and other power refer to the corporation as a person, they are attempting to control the discourse about corporations and their role in society. Judicial and legislative pronouncements that have the effect of categorizing corporations as persons contribute to the process of transforming and socially constructing corporate entities into legal beings with rights that, according to the corporate abolitionists, are intended only for natural human beings. Activists argue that this defines a reality in which corporations can use their rights to dominate and oppress individuals; activists want to change the legal and political discourse about corporations to create a different reality.

Those who are dismayed by corporate personhood also share a concern about the expressive function of legal language. As discussed in Chapter 1, expressive theories of law suggest that law does more than merely control or limit behavior. Law communicates certain beliefs and attitudes about societal values; it sends underlying messages and makes important statements that are understood by citizens.<sup>69</sup> Laws that send the wrong message or express the wrong values cannot be tolerated. For example, laws that are racially discriminatory are invalid under the Fourteenth Amendment because they tacitly communicate the abhorrent message that certain racial groups are inferior, disfavored members of society. Government policies that discriminate on the basis of a particular religion are invalid under the First Amendment's Establishment Clause because they impliedly signal to non-adherents that they are unwelcome and that their religious beliefs are unwelcome in the community. Legal language is understood as expressing and endorsing particular values. In a pluralistic civilized society, our goal is to ensure that our laws, as enacted and interpreted by courts, send messages that are constructive, consistent, and ever reflective of our democratic ideals. The expressive function of legal language is said to be important because individuals can internalize a law's message and allow it to influence their judgments. Commentators argue that laws can change people's beliefs and values, and consequently shape their preferred

In the context of corporate personhood, laws can signal certain judgments about the value of corporations and then influence people's beliefs about them. Legal language that references the personhood and rights of corporations, whether through statutes or court decisions, may have expressive effects that send messages about the value we place on corporations. When the law announces that a corporation is a person, or is entitled to the same rights as a human person, it makes

<sup>69</sup> Cass R. Sunstein, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 40 (2002); Mark A. Rothstein, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 681 (2003); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996); Robert Cooter, *Expressive Law and Economics*, 28 J. LEGAL STUD. 585, 586 (1998); Alexander S. Scalet & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 CALIF. L. REV. 1061, 1062-66 (2016) (reviewing Richard H. McAdams, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015)).

a statement regarding the equality in status of corporations and human beings as holders of fundamental rights.

Although corporate abolitionists may not articulate their position in precisely these terms, it is these expressive and constitutive functions of law and language that seem to concern them so deeply. They worry that the legal doctrine of corporate personhood sends the message that corporations count fully as persons in our society and that they possess the worth of a person under the law, and that they deserve the same rights and respect that are accorded to natural persons. Corporate abolitionists worry that this is the wrong message to send. They believe the language of corporate personhood reflects an inappropriate valuation of corporations vis-à-vis human beings. When the Supreme Court announces in cases such as *Citizens United* that corporations should not be distinguished from individuals while engaging in certain activities like speech, corporate abolitionists contend such legal pronouncements disvalue human beings by improperly placing too much value on corporations.

There is often backlash and resistance when people perceive that law and language transmit signals that conflict with other evolving societal values. This backlash manifested in the popular movement to propose a constitutional amendment to abolish corporate personhood. Activists seek to stop the Supreme Court from continuing to send what they believe is the harmful message that corporate activity and individual activity are equally deserving of constitutional protection. They worry that such legal endorsements of corporate personhood cause people to internalize the notion that corporations are persons with the same constitutional status and entitlements. Corporate abolitionists want to reform the law to change the way people talk and think about corporations with the goal that corporations can ultimately be removed from the category of persons altogether.

## THE NEED FOR CORPORATE PERSONHOOD

While many people believe that corporations have too much economic and political power, and that something more should be done to regulate or limit the scope of corporate activity, not everyone agrees that taking all constitutional protections away from corporations is the answer. Some who sympathize with activists' concerns about disproportionate corporate power in politics nonetheless believe that the alternative of passing a constitutional amendment abolishing corporate personhood is unlikely to cause more harm than good.

On one level, activists may be ignoring or minimizing the potential negative consequences associated with eliminating the status of corporations as persons under the law. The Constitution was written to protect the people from overbearing government power. A person's ability to invoke fundamental rights under the Constitution provides an essential check on government power. In the absence of constitutional rights, the government has the potential to exercise control in oppressive ways. A constitutional amendment that term

constitutional rights for corporate entities could tip the scales in favor of government overreaching.

For example, if the corporation could claim no Fifth Amendment rights, the government might be able to freely take property from the corporation at any time without paying just compensation. The assets of the corporation would always be at risk of being confiscated. Knowing that corporate resources could be taken by the government whenever it wanted, investors would be far less likely to invest in corporate businesses. Drying up the capital markets that help to drive a healthy national economy could be an unfortunate consequence of revoking the constitutional rights of corporations.

Excluding corporations from the First Amendment's protection for freedom of the press could possibly have the unwelcome effect of undermining the free speech rights of media corporations. If freedom of press is a right enjoyed only by natural persons, not corporations, then the government could prevent the publication of newspapers or the broadcasting of news reports by media companies.

Without Fourth Amendment rights, corporations potentially could be subject to unreasonable searches and seizures of their property. The government could enter the corporation's premises to search and take corporate records without a warrant and without consideration for interference with its business activities or relationships. Records involving the corporation's business relationships with customers, suppliers, creditors, and employees would be subject to the government's unrestricted search and seizure power.

Taking away all corporate rights under the Constitution would mean that corporations charged with crimes would not be entitled to due process of law or a jury trial. If a corporation was acquitted of a crime, it could be tried again and again because it would have no claim to a constitutional right against double jeopardy.

If constitutional rights were stripped from all corporate entities, whether for-profit or nonprofit, then many organizations such as unions, churches, charities, universities, and small family businesses would lose their constitutional protections as well. The "We the People Amendment" advocated by the Move to Amend campaign would produce this result.

Corporate abolitionists argue that the loss of all corporate constitutional rights will not produce negative results because the human members of the corporate entity will retain their constitutional rights, and those individuals can always invoke their rights when necessary to protect their interests. So, even if "Apple is not a 'person' under the Constitution's due process clause," Apple's shareholders are real people who "do have due process rights not to have the value of their Apple shares turned over to the government without due process. Nothing . . . would prevent those real people from protecting their rights."<sup>71</sup> But how would those shareholders assert their due process rights if the government decided to take some of Apple's property

<sup>71</sup> Clements, *supra* note 14, at 171.

without due process? The activists' response is that the claim could "be brought by the corporation, if it is deemed to have standing by the Court to raise the rights of its shareholders."<sup>72</sup>

It is not entirely clear how this result would change or remedy the current framework that allows corporations to bring claims to assert constitutional rights. Requiring the corporation to prove that it has standing to raise the rights of its shareholders adds an extra layer of litigation to assert a due process claim the corporation would otherwise possess to make the very same substantive arguments. Constitutional rights have been extended to corporations in so many areas precisely because upholding the corporation's status to bring the claim ultimately protects the property or liberty interests of the underlying shareholders. Under the aggregate approach to corporate personhood, the rights of the corporation really boil down to the rights of its human members. In the Apple scenario, it seems likely that Apple would have standing to raise the rights of its shareholders if the government were to unreasonably search and seize Apple records, or take Apple's property without due process, or tax Apple in a discriminatory way. If so, then whether we say Apple can bring the claim directly or as a representative of its shareholders seems to make little substantive difference since the factual and legal arguments that would be made to prove the merits of the claims would be the same.

It appears that corporate abolitionists recognize that abolishing corporate constitutional rights can have detrimental effects on the interests of shareholders and others who participate in the corporate enterprise. This is why corporate abolitionists offer the possibility that, once corporate personhood is abolished, corporations would still be permitted to bring claims on behalf of shareholders to protect their interests. However, this road seems to lead to the same end result, i.e., corporations coming into court to complain of violations of constitutional rights. Therefore, it is plausible that abolishing the constitutional rights of corporations will not have as large an effect as activists presume since corporations will be able to simply assert the same constitutional challenges so long as corporations do so ostensibly as the representatives of their shareholders.

#### THE CONNECTION BETWEEN CORPORATE PERSONHOOD AND CORPORATE POWER

Activists have made corporate personhood the main target of their reform efforts, and their reasons for doing so are understandable. But there are also reasons to think that the popular movement to abolish corporate personhood may be somewhat misguided because it overstates the significance of corporate personhood as the origin of corporate power.

<sup>72</sup> Alternatively, the "claim could be brought by the shareholders as a class." *Id.*

Corporate abolitionists believe that the political and social power of corporations stems from their status as legal persons to claim constitutional rights. They blame the Supreme Court for giving corporations their personhood status when the Court in the late-nineteenth century held that corporations were persons entitled to claim equal protection rights under the Fourteenth Amendment. From that point on, corporations have steadily gained greater rights and correspondingly greater capacity to challenge laws that burden corporate interests. This is why activists believe the Supreme Court is ultimately responsible for the power and influence that corporations have today. They trace corporate power to the Court's 130 years of constitutional law jurisprudence establishing rights for corporations as persons under the Constitution.

The reality, however, is that constitutional analysis played only a partial role. "[C]orporations were already powerful institutional arrangements for governing [society and] the complex of individuals and things before they were given constitutional protections as persons."<sup>73</sup> The large railroad companies with their wealth and resources wielded enormous power long before the Supreme Court extended Fourteenth Amendment rights to them. It is a mistake to believe that the Court and constitutional law are entirely responsible for the rise of corporate power and influence in society. The legal personhood of corporations under the Constitution is not solely what created and consolidated corporate power. There were many other dimensions of the corporation's identity – its wealth, its longevity, its ability to absorb numerous individual participants into one body with a single-minded goal – that contributed to its empowerment.

A substantial part of what makes large corporations such a dominating force in the world today is their ability to accumulate such vast amounts of capital. The political, economic, and social power that comes from having money is undeniable. The capacity to make, keep, and spend that much money is not so much a function of constitutional law and one's legal standing as a person. It is a function of an economic system that embraces entrepreneurial enterprise, free markets, and capitalist values, and of a legal system and public policy framework that seeks to facilitate the implementation of those values.<sup>74</sup> The underlying economic and legal structures we have developed over time have the effect of promoting the formation and perpetuation of powerful corporate entities.

Our system of corporate law in particular makes this corporate empowerment possible. Corporate law doctrines allow corporations to be structured and operated in ways that enable exponential growth and unlimited life spans. Corporations can

grow to an enormous size and exist perpetually. They are not generally constrained by legal restrictions on their wealth, size, or geographic reach. Nor are they held back by time limits on how long they can exist. They are given considerable freedom to operate for any lawful purpose, to make as much money as they can or want, and to spend it in whatever ways their duly elected managers deem best. Long-standing norms involving profit maximization, shareholder primacy, separation of ownership and control, and deference for the business judgment of corporate managers, have shaped the role that corporations play in our society.<sup>75</sup> The combination of these deeply entrenched corporate law doctrines and norms work together to cultivate an environment where corporations can achieve exactly what activists do not want corporations to have – enormous drive and power to accumulate and spend tremendous amounts of money – and thereby significantly influence our political and social systems.

What makes corporations so powerful then is not merely their personhood under the Constitution, but the features of our legal, economic, and cultural systems that facilitate the growth and proliferation of corporations and their large accumulations of capital. While judicial development and interpretation of constitutional law has played a role in elevating the legal status of corporations, our economic and business law frameworks have permitted and promoted corporate advantage and authority as well.

In some measure, this is a choice we have made. We have allowed these systems to flourish because we depend on the material goods only large corporations can provide. We live in a consumer world that wants, needs, and demands a wide selection of complex products and services at our disposal, for our convenience, at a good price, on a timely basis. These demands require the ingenuity, organization, and performance of countless corporations, without whose large-scale operations the unremitting desires of modern society would go unmet. Corporations provide goods and services that we would find it difficult to live without in our technological day and age. "Many of the things we buy are much more complicated to manufacture and bring to the marketplace than the products of an earlier generation . . . Individual producers, whether farmers, craftsmen, or professionals, can rarely satisfy the needs of the community."<sup>76</sup> The corporation enables human beings to accomplish, through concerted action, many things that no individual could achieve alone, free of many of the inefficiencies that plague bureaucratic government agencies. Because we need and want what corporations can provide, we have provided legal frameworks to foster their widespread existence and growth.

<sup>73</sup> Joshua Barkan, *CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* 68 (2013).

<sup>74</sup> As one scholar stated almost a century ago, the "real danger that lies in the corporate organization is the fact that great accumulations of capital are by their very mass, tremendously powerful—and consequently capable of much mischief. Obviously, however, that is an incident of our economic structure and not a consequence of the [personhood of the] corporate entity." Max Radin, *The Endless Problem of Corporate Personality*, 32 *COLUM. L. REV.* 643, 658 (1932).

<sup>75</sup> See Ripken, *Citizens United, Corporate Personhood, and Corporate Power*, *supra* note 1, at 302–13 (discussing the direct connection between corporate power and corporate law doctrines and norms such as shareholder primacy, profit maximization, separation of ownership and control, business judgment rule, perpetual existence, and unlimited growth).

<sup>76</sup> Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 *AVE MARIA L. REV.* 1, 27 (2006).

As a consequence, corporations proliferate, and they accumulate vast resources. With those resources comes power. With that power, corporations have a dominating presence in society. Their personhood stretches beyond a legal status on paper and becomes a real force that is akin to government power.

Thus, any efforts to curb corporate power or to address it in a meaningful way will have to involve more than terminating corporations' status as persons in the constitutional realm. Corporate personhood and power do not find their origin exclusively in constitutional law, but in the core fundamentals of the corporate law regime, and in the social and economic systems that animate corporate entities. The demands of our consumer culture facilitate the presence and power of corporations, and even our cultural perceptions of corporations give them a distinct social identity. In a complex way, the elements required to consolidate corporate power are embedded in the very structure of law, culture, and society itself. This suggests that a constitutional amendment to revoke the constitutional rights of corporations and reverse the effects of Supreme Court cases like *Citizens United* will not accomplish all that activists hope it will. Indeed, some of the corporation's most vocal critics acknowledge that "corporate power and malfeasance are not rooted in the Constitution, which is why excluding corporations from the benefits it confers can have only limited effects."<sup>77</sup> It is possible that "[e]ven were the [constitutional] amendment to pass, the Court could easily read its precedents to require little or no change in its doctrine."<sup>78</sup>

From this perspective, a constitutional amendment is not likely to dramatically diminish the power and influence of corporations because there will always still be the problem of corporate money. Money, like water, will always flow around obstacles and have its way. So long as corporations are authorized to accumulate immense stores of capital, that money will continue to have its influence. And so long as consumers want what corporations can provide, corporate presence will continue to endure.

Perhaps corporate abolitionists recognize all of this but feel they need to start somewhere. They know that passing a constitutional amendment to abolish the personhood of corporations under the Constitution faces long odds, but it presents a much more straightforward and clearly defined route than attempting to take on all of corporate law and our capitalist economic system as a governing structure. To otherwise address corporate power in the comprehensive manner that corporate abolitionists wish, they would need to challenge core corporate law doctrines and norms, as well as society's fundamental economic values and

consumer preferences, and that is an entirely different battle that is much more difficult to wage. Focusing instead on corporate personhood gives activists a narrower target. Working to eliminate corporate constitutional rights seems to offer people a concrete, practical solution, a clear objective, and a method for fixing a political system they feel is broken. A message like "Stop Corporate Greed" is so general and amorphous that it is impractical. The call to amend the Constitution to "End Corporate Personhood," however, has appeal because it gives activists a precise and definitive goal, a specific path to take. It is something people believe they can take affirmative steps to try to accomplish. They view the abolition of corporate personhood as a viable and practicable solution to limit corporate power.

The shortcoming with this approach is that it focuses entirely on removing the legal personhood of corporations under the Constitution without addressing the other dimensions of the corporation's identity that continue to exist. The perceived personhood of the corporation is much more complex than just its legal status to claim rights under the Constitution. As the prior chapters of this book have explained, corporate personhood is a multidimensional phenomenon that can be analyzed from many different angles. It has legal, philosophical, moral, social, political, economic, and cultural implications. Revoking the corporation's legal personhood for constitutional rights will not make the other dimensions disappear. Personhood is more than a legal concept. Activists believe that the "dragon" of corporate personhood must be slain, but saying the corporation is no longer a person for purposes of constitutional rights will not by itself obliterate the many other non-legal reasons why corporations are regarded as persons in society. "Some may be tempted to jettison the idea of corporate personality entirely, but this is not a viable position. Ignoring the organizational persons that law, government, and society create will not make them go away."<sup>79</sup> Corporations are complex, multifaceted entities, and their perceived personhood arises from more than their legal status. Addressing the corporation's personhood and power requires us to ask tough questions about the economic, social, and political systems we have created for ourselves and how we want to order our priorities and values. Finding satisfactory answers to these questions, and deciding what changes, if any, we should make to the underlying structures that empower corporations is beyond the scope of this book, but it will likely require a much larger endeavor than seeking only to terminate the rights of corporations under the Constitution.

<sup>77</sup> Bakan, *supra* note 26, at 356.

<sup>78</sup> Daniel J. H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 166; see also Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 872 (2007) ("Even if the courts were to permit the banning of corporate political speech entirely, corporate influence and power would not be substantially reduced . . . The problem, in a nutshell, is corporate law.").

<sup>79</sup> Eric W. Orts, *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* 243 n.72 (2013); see also Greenfield, *CORPORATIONS ARE PEOPLE TOO*, *supra* note 59, at 211 ("Instead of responding to cases such as *Citizens United* and *Hobby Lobby* with cries of 'Corporations Are Not People,' we should be chanting 'Let's Make Corporations Human Again' or 'If Corporations Are People, They Should Act Like It.' More corporate personhood should be our goal, not our fear.").

### THE ROLE OF SOCIAL MOVEMENTS IN INFLUENCING DISCOURSE AND LAW

Perhaps the movement to abolish corporate personhood can draw the nation into a broader conversation about those deeper questions. The drive to amend the Constitution may not be successful, but that does not mean it cannot be an effective instigator of an important dialogue about what role corporations can and should play in society. In this regard, the corporate abolitionist movement may be hoping to find the same success that other historic social movements have had in moving the needle of public opinion toward stricter regulation, despite a failure to obtain a constitutional amendment.

The organized women's movement of the 1970s accomplished this task. Although the movement failed in its effort to add the Equal Rights Amendment (ERA) to the Constitution to prohibit sex discrimination, the law today effectively operates as if the ERA had been adopted. Legislatures have enacted laws and the Supreme Court has interpreted the Constitution to forbid discrimination based on gender, leading many legal scholars commonly to describe the "failed constitutional amendment as a successful one."<sup>80</sup> Similarly, environmental activists never triumphed in securing constitutional protection for environmental sustainability. But they did succeed in motivating widespread concern for the environment and prompted the enactment of the substantial environmental regulatory system we now have in place, signifying "a transformation in American law that could be described as quasi-constitutional in scope."<sup>81</sup>

A social movement's failure to amend the Constitution does not necessarily spell failure to change societal values and, ultimately, to change how the Constitution is interpreted.<sup>82</sup> The amendment proposal process can be used as a political forum for expressing views and making arguments about what the Constitution does or should mean. Debate over whether to amend the Constitution can create a climate for

<sup>80</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1332 (2006); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 502 (2001) ("[T]he women's movement . . . was able to do through the Equal Protection Clause virtually everything the ERA would have accomplished had it been ratified and added to the Constitution."); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001) ("Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted. For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender.")

<sup>81</sup> Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 98 (2001); see also Jeannie Oakes et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J.C.R. & C.L. 339, 353-58 (2008) (explaining how several social movements have had a dramatic impact on altering social practices, laws, and the interpretation of constitutional provisions).

<sup>82</sup> See generally Hartley, *supra* note 42 (showing how failed attempts to amend the Constitution have successfully mobilized political change).

citizens to wrestle with important constitutional issues. Popular movements that oppose the status quo help to shape the way the Constitution is applied over time.<sup>83</sup> Although the Supreme Court, through controversial decisions like *Citizens United* and *Hobby Lobby*, plays a large role in generating and advancing debate over important social and political issues, popular movements that arise to dispute those decisions can play a significant role in doing so as well. Social movements, such as the women's rights movement, the environmental movement, the civil rights movement, or the labor movement, all help to apprehend and ignite social change. They provide input and anger, opinions and outrage, and in the process of contesting established constitutional understandings, they can have a voice in reforming the law.

Corporate abolitionists may find that achieving their ultimate objective to amend the Constitution is beyond their reach, but, in the process of trying, they can start and continue a public conversation about corporate personhood that is relevant. They have utilized the Move to Amend campaign to inform and educate people about the concept of corporate personhood, its history, and its implications. By targeting corporate personhood, activists have raised awareness about a concept that was largely of interest only to legal scholars for many years. Some of those scholars dismissed the concept as being indeterminate and irrelevant, recommending that we all stop ruminating over corporate personhood altogether. However, the disquietude over corporate personhood persists. It is a concept that is heavily laden with meaning, whether justified or not, for many people who worry about the scope and exercise of corporate power across the globe.

Recent Supreme Court cases like *Citizens United* and *Hobby Lobby*, which solidify corporate rights, have heightened public concern over the idea of treating corporations like persons with claims to fundamental rights of their own. Corporate personhood has become a topic of mainstream attention and a target of activists' ire. The movement to amend the Constitution has spawned important discussions about the meaning of corporate personhood and created a broader need for books like this one to explain and analyze its contours. In this regard, the corporate abolitionist movement has contributed to the discourse surrounding corporate personhood and power, and by affecting the discourse, may ultimately influence the direction of the law regarding corporate rights. Many social movements of the past have tried and failed to amend the Constitution, but they have nonetheless effectively altered how society and ultimately the courts interpret important constitutional issues. It remains to be seen whether the ongoing movement to change the way we currently view, treat, and protect corporations will accomplish its objective.

<sup>83</sup> See Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928-29 (2006).

## Conclusion

The place of corporations in our society and in our legal system has always been deeply ambiguous. Americans have a “long-standing love/hate relationship with the corporation” characterized by an “enthusiastic embrace of the corporation as an engine of opportunity and prosperity, and [a] simultaneous skeptical distrust of it as a source of corruption and driver of inequality.”<sup>1</sup> The corporation is an extraordinarily useful instrument that can channel the collective energies of individuals to accomplish tasks that would be impossible for an individual to undertake alone. Corporations permeate almost every part of our lives, contributing to so many integral aspects of our existence, including our food, housing, healthcare, security, transportation, amusement, and communication needs. Through the production and distribution of innumerable goods and services, the corporation has revolutionized the way we live and offers every likelihood of further extending human possibility. Even so, the benefits produced by the corporation have come at a very high cost. Corporations have exposed us to unprecedented environmental hazards, worker alienation and exploitation, manipulative marketing, unsafe products, and financial scandals leading to market collapses that have had devastating rippling effects on people and communities worldwide. While the corporation would like to be viewed as “an engine of economic growth and a bulwark of democratic prosperity,” it might also be legitimately described as “a potentially dangerous threat to that same democracy – a site of coercion, monopoly, and the agglomeration of excessive social, economic, and political power.”<sup>2</sup> These concerns about corporate power are a factor driving the current popular movement to eliminate the status of corporations as persons under the Constitution.

We typically have ambivalent feelings about corporations because we desire all the material benefits they can provide, but we fear their power and their capacity to harm. This has led to competing public policies that seek to support and facilitate corporate activity while also trying to restrain and regulate it in the public interest.

<sup>1</sup> Naomi R. Lamoreaux & William J. Novak, *Corporations and American Democracy: An Introduction*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 1, 2 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

<sup>2</sup> *Id.*

Due to this ambivalence toward corporations, it has never been easy to decide how best to construct laws governing corporate actions.

In trying to determine which rights and duties are appropriate for corporate entities, we have often found ourselves implicitly addressing deeper questions about the nature, role, and purpose of the corporation. What exactly is the corporation and what is its reason for being? Is it a person, or something like a person, and is it prudent to treat it as other persons are treated under the law? Does the corporation exist for the benefit of a few or for the good of all in society? Although legal realists insist that we should not be wasting our time with such questions about the essential nature of corporations, the questions have an uncanny way of persisting, of seeping into our minds and refusing to be discarded. Perhaps this is due to our enduring preoccupation with the concept of personhood and our continual search for what it means to be a person, not just for groups, but for ourselves as individuals. Our judgments about personhood ineluctably have a way of affecting how we weigh the good and bad consequences of the legal rules we adopt to delineate individual and corporate rights and duties.

As this book has endeavored to demonstrate, the personhood of corporations is not a simple concept. It would be easy to call it a metaphor or a fiction and leave it at that. But that would fail to meaningfully address the very visible presence and identity of corporations in the world and the real social consequences that they have. It does not seem entirely fair to say that the corporation’s personhood exists only in our imagination, that it serves only as an analogy, or that it occurs through a linguistic sleight of hand. It is true that the personhood of corporations is constructed and manufactured, but in some ways, it is also natural and unavoidable. We have engineered legal corporate personhood as a matter of expediency to serve certain legal purposes. However, we must also acknowledge that on some level it is inevitable that corporate bodies begin naturally to take on certain other personhood dimensions. Corporations have a palpable force and presence that have real and significant impacts on people and society. It may behoove us to acknowledge that corporations are the product of man and our culture, but we and our culture have also become products of the corporate world.

Certainly, it would not be wrong to say that the corporation is a collective of human beings without whom the corporation would arguably be an unanimated empty shell. Yet the corporation sometimes can have features and systems in place that produce independent corporate decisions and actions that are qualitatively different in kind from individual inputs. And so it appears the corporation, like so many other examples of human collectives, can become something larger than the sum of its individual parts. Nonetheless, corporations are not the equivalent of individuals, and this is an important distinction that should be respected.

Just as there is no single settled definition of individual personhood, there is no singular description of the character of the corporation that can capture the many dimensions of its perceived personhood. The corporation can be conceptualized in

different ways depending on one's point of view. All of the various disciplinary perspectives shed light on different facets of the corporation as a person. Focusing on one aspect to the exclusion of the others risks oversimplification of complex social, economic, and political realities. The conflicting and coinciding conceptions of the corporation are not necessarily right or wrong, "neither true nor false but are only more or less helpful in calling attention to certain aspects of the phenomenon under study."<sup>3</sup> Each theory of the corporate person "has some validity and contributes to a better understanding of the full dimensions of a 'remarkably fluctuating reality.'"<sup>4</sup>

Personhood does not fit into a neat and tidy box. It is complicated, textured, and dynamic. People and societies change over time. Corporations change as well. As human collectives, corporations continually adapt and evolve to meet the demands and preferences of each generation. Our understandings of corporations and personhood are fluid and subject to adjustments as we experience changes in our circumstances, political structures, economic conditions, legal systems, beliefs, language, and culture. Our interactions with corporations bring about changes in them and us. How we perceive the personhood of corporations is affected by our engagement with them: "shifts in the nature of some of the most powerful institutions in our society have caused shifts in the way that persons relate to those institutions, and consequently shifts in the cultural meaning of personhood itself."<sup>5</sup> What a person is at any one point in time is an unfinished project, and so it is with the corporation. Conceptions of corporate personhood are bound to change over time, and matter in different ways for different issues. As the law both shapes and is shaped by the fluctuating factual realities of the corporate enterprise, the "law, like ourselves, is always in flux, always 'becoming.'"<sup>6</sup> The "ever-emergent quality of law" suggests that any attempted resolution of the controversy over corporate personhood will never be a final answer to the question: What is a corporation?<sup>7</sup>

Corporate personhood is not a unitary concept, and it raises issues that defy unitary treatment. Determining the legal rules by which corporate persons should be governed will necessarily involve a consideration of competing values and

a balancing of varying interests. "Human [and corporate] life is all about choices, and we cannot have it all. When important values come into conflict, the sensible approach is not to resolve ahead of time to pick one over the other."<sup>8</sup> Instead of dogmatically adhering to a particular theory of the corporate person that preferences one set of values over others in all circumstances, we should remain flexible and open to the many different conceptions of the corporation that highlight the corporation's diverse roles and multiple purposes. Corporations are multidimensional, and the law we construct to deal with them will need to be sensitive to their multifaceted nature as well. Understanding and accounting for the various dimensions of the corporation can help to shape public policies and legal rules that can effectively accommodate the complexity and the diversity of corporate organizations. A broad, multidimensional analysis allows for selective application of different conceptions of the corporate person, depending on the situation and the issues to be decided.<sup>9</sup>

At times, the process of legal decision-making will require difficult choices as different values and interests will be more pressing in some circumstances than others. The inevitable clash of values and theories can make construction of law difficult and can lead to inconsistent results. But corporations are complex, and they need complex rules. "[W]e must have law and that law must cover corporations. What more could we do, under such circumstances, than to construct a legal system that is as multifaceted—or, if one prefers, contradictory—as the reality it would presumably regulate?"<sup>10</sup>

The decisions we make today regarding corporate personhood, corporate rights, and corporate duties will necessarily be a function of our moment in history. The determinations represent our current understandings of corporations in their contemporary context. However, corporations, and our conceptions of them, are not static. It is to be expected that the compromises we reach in formulating rules to govern corporations may not last forever. Certain decisions that seem suitable for our society today may turn out to be less acceptable at a later time. Those who favor the status of corporations to claim all the rights of individual persons, and those who seek to abolish that status altogether, hold strong positions that will call for a certain amount of softening on both sides. In trying to reach consensus, the best that we can do is work toward "promoting and preserving an uneasy equilibrium, which is constantly threatened and in constant need of repair."<sup>11</sup> There will be much occasion for exercising sound judgment. As we strive to identify important values, balance competing interests, craft appropriate legal rules, and decide controversial

<sup>8</sup> Steven H. Shiffrin, *WHAT'S WRONG WITH THE FIRST AMENDMENT?* 7 (2016).

<sup>9</sup> Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 *FORDHAM J. CORP. & FIN. L.* 97, 173 (2009).

<sup>10</sup> Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 *WASH. & LEE L. REV.* 1673, 1695 (1993).

<sup>11</sup> Isaiah Berlin, *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 16 (Henry Hardy & Roger Hausheer eds., 1998).

<sup>3</sup> W. Richard Scott, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* 30 (5th ed. 2003). "[P]aradigms are not right or wrong, but they are predicated on the notion that certain questions are 'more important' and certain approaches to answering those questions are 'more useful.'" Pamela S. Tolbert & Richard H. Hall, *ORGANIZATIONS: STRUCTURES, PROCESSES, AND OUTCOMES* 162 (10th ed. 2009) (referring to Thomas Kuhn's views of paradigms).

<sup>4</sup> Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 *DEL. J. CORP. L.* 283, 295 (1990).

<sup>5</sup> Eric Guthy, *New Economy Romanticism, Narratives of Corporate Personhood, and the Antimanagement Impulse*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 321, 325 (Kenneth Lipartito & David B. Sicilia eds., 2004).

<sup>6</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261, 279 (1992).

<sup>7</sup> See *id.*

corporate rights cases, we will have to use our best judgment in light of all that we know and understand about corporate persons and their reason for being.

The resulting resolutions may not always be consistent or logical. But, as Oliver Wendell Holmes observed, the life of the law really is not always about logic, but about experience. It is about making reasonable decisions based on the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious,"<sup>12</sup> as well as the implicit beliefs we hold for the makings of a good society. The ideas that come from different disciplinary perspectives influence our beliefs and intuitions. Having a broad understanding of the multidimensional nature of corporations as persons from various disciplinary angles will help us to make important judgments about corporate matters on a more informed basis. In an effort to facilitate that broader understanding, this book has explored the unique contributions of different disciplines to illuminate the multifaceted nature of the corporation.

What is corporate personhood, and why does it matter? As the analysis in the preceding chapters has attempted to show, the answer to both of those questions is: It's complicated. The corporation is as complex as the human persons who animate it. Whether the corporation is, can, or should be considered a person is deeply contested. There are many different types of corporations and many different dimensions of personhood. The extent to which corporations and personhood can be sensibly combined for legal, economic, political, and moral purposes is not a settled matter. Perhaps it is simply a story in progress. It is a story about the unique relationship we have with corporations – organizations that fulfill both individualist and collectivist functions, that serve both private and public purposes, and that act both as property and person. Time will tell how the story will unfold. Our task will be to do our best to move the storyline ever toward an ideal balance between individuals and the vast array of corporate organizations that have become so central to our larger human narrative.

<sup>12</sup> O. W. Holmes, Jr., *THE COMMON LAW* 1 (Lawbook Exch. 2005) (1881).

## Bibliography

- Ahdar, Rex, *Companies as Religious Liberty Claimants*, 5 *OXFORD J. L. & RELIGION* 1 (2016).
- Albert, Stuart & David A. Whetten, *Organizational Identity*, in 7 *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 263 (L. L. Cummings & Barry M. Staw eds., 1985).
- Organizational Identity*, in *REVEALING THE CORPORATION: PERSPECTIVES ON IDENTITY, IMAGE, REPUTATION, CORPORATE BRANDING, AND CORPORATE-LEVEL MARKETING* 77 (John M. T. Balmer & Stephen A. Greyser eds., 2003).
- Alchian, Armen A. & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972).
- Allen, William T., *Our Schizophrenic Conception of the Business Corporation*, 14 *CARDOZO L. REV.* 261 (1992).
- Alschuler, Albert W., *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 *B.U. L. REV.* 307 (1991).
- Alvesson, Mats, *Organizational Culture: Meaning, Discourse, and Identity*, in *THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 11 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* (1994).
- Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354 & 13-356), 2014 WL 333889.
- Anderson, Elizabeth S. & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. PA. L. REV.* 1503 (2000).
- Andrews, Kristin, *Beyond Anthropomorphism: Attributing Psychological Properties to Animals*, in *THE OXFORD HANDBOOK OF ANIMAL ETHICS* 469 (Tom L. Beauchamp & R. G. Frey eds., 2011).
- Ashforth, Blake E., *Organizational, Subunit, and Individual Identities*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY* 79 (Michael G. Pratt et al. eds., 2016).
- Ashkanasy, Neal M. & Charmine E. J. Härtel, *Positive and Negative Affective Climate and Culture*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL CLIMATE AND CULTURE* 136 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- Avi-Yonah, Reuven S., *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 *DELA. J. CORP. L.* 767 (2005).
- Baddorf, Matthew, *Phenomenal Consciousness, Collective Mentality, and Collective Moral Responsibility*, *PHIL. STUD.*, doi:10.1007/s11098-016-0809-x (2016).
- Bailyn, Jonathan, *A Critical Race Theorist Account of Corporate Racial Standing*, 16 *SCHOLAR* 725 (2014).



- Bridge, Stephen M., *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997) (book review).
- Brinkmann, Joel, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2005).
- Brody, David, *Psychopaths, Inc.: On Corporate Personhood*, in *THE OCCUPY HANDBOOK* 353 (Janet Byrnes ed., 2012).
- Brudner, C. Edwin, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976).
- Brudner, C. Edwin, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).
- Brudner, C. Edwin, *Erzak, Ashley, Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, CTR. PUB. INTEGRITY (May 10, 2018), www.publicintegrity.org/2018/05/10/21739/study-most-americans-want-kill-citizens-united-constitutional-amendment [https://perma.cc/4SKF-2PCJ].
- Brudner, C. Edwin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.
- Brudner, C. Edwin, *Jack M., How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005).
- Brudner, C. Edwin, *The Proliferation of Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 5 (2003).
- Brudner, C. Edwin, *Jack M. & Reva B. Siegel, Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006).
- Brudner, C. Edwin, *John M. T., Corporate Brand Cultures and Communities*, in *BRAND CULTURE* 34 (Jonathan E. Schroeder & Miriam Salzer-Mörling eds., 2006).
- Brudner, C. Edwin, *Joshua, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM* (2013).
- Brudner, C. Edwin, *Robert S., So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, in 37 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 219 (Mark P. Zanna ed., 2005).
- Brudner, C. Edwin, *Wayne, THE RIGHT'S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM* (2016).
- Brudner, C. Edwin, *Lucian Arye, Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).
- Brudner, C. Edwin, *Daniel, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (1973).
- Brudner, C. Edwin, *Robert N. et al., THE GOOD SOCIETY* (1991).
- Brudner, C. Edwin, *Robert W., How Many Strikes Do Big Corporations Get? The Petition to Revoke UNOCAL's Corporate Charter*, 55 GUILD PRAC. 113 (1998).
- Brudner, C. Edwin, *Peter L. & Richard John Neuhaus, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).
- Brudner, C. Edwin, *Jr., A.A., The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639 (1952).
- Brudner, C. Edwin, *Jr., Adolf A., Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952).
- Brudner, C. Edwin, *Foreword, in THE CORPORATION IN MODERN SOCIETY*, at ix (Edward S. Mason ed., 1959).
- Brudner, C. Edwin, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954).
- Brudner, C. Edwin, *Jr., Adolf A. & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).
- Brudner, C. Edwin, *Isaiah, THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* (Henry Hardy & Roger Hausheer eds., 1998).
- Brudner, C. Edwin, *Björnsson, Gunnar & Kendy Hess, Corporate Crocodile Tears? On the Reactive Attitudes of Corporate Agents*, 94 PHIL. & PHENOMENOLOGICAL RES. 273 (2017).
- Brudner, C. Edwin, *Margaret M., Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785.
- Blair, Margaret M. & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673 (2015).
- Blau, Peter M. & W. Richard Scott, *FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH* (1962).
- Bleifuss, Joel, *Corporations Are Not People*, IN THESE TIMES (Sept. 19, 2011), http://inthese-times.com/article/1937/corporations\_are\_not\_people [https://perma.cc/7XVZ-ZYRK].
- Blumberg, Phillip I., *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283 (1990).
- Boudin, Louis B., *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U. L.Q. REV. 19 (1938).
- Bourdieu, Pierre, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814 (1987).
- Bratton, William W., *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180 (1992).
- Bratton, Jr., William W., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989).
- Brennan-Marquez, Kiel, *A Business Can Exercise Religion, but Hobby Lobby Still Gets It Wrong*, BOS. REV. (July 7, 2014), http://bostonreview.net/blogs/kiel-brennan-marquez-hobby-lobby-for-profit-corporations-religion [https://perma.cc/3ZMJ-6V8A].
- Brief of Amici Curiae Corporate Law Professors in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 5127303.
- Brief for Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16–111), 2017 WL 3913762.
- Briloff, Abraham J., *LBOs and MBOs in the Takeover Alphabet Soup: Some Questions for Lawyers, Answers from an Accountant*, 15 J. CORP. L. 171 (1990).
- Brodbeck, May, *Methodological Individualisms: Definition and Reduction*, in *READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES* 280 (May Brodbeck ed., 1968).
- Brooks, Richard R. W., *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).
- Brown, W. Jethro, *The Personality of the Corporation and the State*, 21 LAW Q. REV. 365 (1905).
- Buccola, Vincent S. J., *Corporate Rights and Organizational Neutrality*, 101 IOWA L. REV. 499 (2016).
- Buell, Samuel W., *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).
- Butler, Henry N., *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV., no. 4, Summer 1989, at 99.
- Butler, Henry N. & Larry E. Ribstein, *THE CORPORATION AND THE CONSTITUTION* (1995).
- Calmore, John O., *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995).
- Carrithers, Michael et al., eds., *THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY* (1985).
- Carruthers, Peter, *INTRODUCING PERSONS: THEORIES AND ARGUMENTS IN THE PHILOSOPHY OF MIND* (1986).
- Chambers, Jr., Henry L., *Telescoping and Collectivizing Religious Free Exercise Rights*, 75 MD. L. REV. 392 (2015).
- Chapple, Chris, *THE MORAL RESPONSIBILITIES OF COMPANIES* (2014).
- Chemerinsky, Erwin, *The Most Important Decision of the Term*, TRIAL, May 2010, at 54.
- Chen, Ronald & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).
- Chia, Robert, *Discourse Analysis as Organizational Analysis*, 7 ORGANIZATION 513 (2000).

- Chirinko, Robert S. & Daniel J. Wilson, *Can Lower Tax Rates Be Bought? Business Rent-Seeking and Tax Competition Among U.S. States* (Fed. Reserve Bank of S.F. Working Paper Series, Paper 2009-29, 2010), [www.frbsf.org/economic-research/files/wp09-29bk.pdf](http://www.frbsf.org/economic-research/files/wp09-29bk.pdf) [<https://perma.cc/AM84-8WHP>].
- Clark, Elizabeth A. & W. Cole Durham, Jr., *The Emergence of Corporate Religious Freedom*, in *THE CHANGING NATURE OF RELIGIOUS RIGHTS UNDER INTERNATIONAL LAW* 256 (Malcolm D. Evans et al. eds., 2015).
- Clements, Jeff, *Citizens United and Corporate Personhood: Jeff Clements Responds to Kent Greenfield's Washington Post Op-ed*, *FREE SPEECH FOR PEOPLE* (Jan. 23, 2012), <http://freespeechforpeople.org/node/315> [<https://perma.cc/9HKD-SLNX>].
- Clements, Jeffrey D., *CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT* (2012).
- Cnty. Envtl. Legal Def. Fund, *Statement on Efforts to Amend the U.S. Constitution Following Citizens United* (Jan. 2012), <https://celdf.org/wp-content/uploads/2015/08/CELDF-CITIZENS-UNITED-STATEMENT-JANUARY-17-2012.pdf> [<https://perma.cc/7AK8-F4UW>].
- Cnty. Envtl. Legal Def. Fund et al., *Model Brief of Amici Curiae*, Preface (2003), [www.ratical.org/corporations/demoBrief.pdf](http://www.ratical.org/corporations/demoBrief.pdf) [<https://perma.cc/8YWK-H6WZ>].
- Coates IV, John C., *Corporate Politics, Governance, and Value Before and After Citizens United*, 9 *J. EMPIRICAL LEGAL STUD.* 657 (2012).
- Coates, John C. & Taylor Lincoln, *Fulfilling the Promise of 'Citizens United'*, *WASH. POST: OPINIONS* (Sep. 6, 2011), [www.washingtonpost.com/opinions/fulfilling-the-promise-of-citizens-united/2011/09/02/gIQAa4np7J\\_story.html](http://www.washingtonpost.com/opinions/fulfilling-the-promise-of-citizens-united/2011/09/02/gIQAa4np7J_story.html) [<https://perma.cc/2Q8M-TEBM>].
- Coffin, Roger, *A Responsibility to Speak: Citizens United, Corporate Governance and Managing Risks*, 8 *HASTINGS BUS. L.J.* 103 (2012).
- Coglianes, Cary, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 *U. PA. L. REV.* 85 (2001).
- Cohen, Felix S., *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809 (1935).
- Coleridge, Greg, *Gorsuch's Gory Expansion of Corporate Personhood*, BY WHAT AUTHORITY (Program on Corps., Law & Democracy, South Yarmouth, MA), Mar./Apr. 2017, [www.poclad.org/BWA/files/2017/BWAMarchApril2017.pdf](http://www.poclad.org/BWA/files/2017/BWAMarchApril2017.pdf) [<https://perma.cc/N423-MQVW>].
- The System Isn't Broken, It's Fixed: Ending Big Money and Corporations in Our Elections*, 44 *U. TOLEDO L. REV.* 541 (2013).
- Collins, Jane L. & Walker N. Kahn, *The Hijacking of a New Corporate Form? Benefit Corporations and Corporate Personhood*, 45 *ECON. & SOC'Y* 325 (2016).
- Colombo, Ronald J., *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2015).
- The Naked Private Square*, 51 *HOUS. L. REV.* 1 (2013).
- Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 *U. PA. L. REV.* 861 (1969).
- Constantinescu, Mihaela, *Attributions of Moral Responsibility: From Aristotle to Corporations*, 62 *ANNALS U. BUCHAREST PHIL. SERIES*, no. 1, 2013, at 19.
- Constantinescu, Mihaela & Muel Kaptein, *Mutually Enhancing Responsibility: A Theoretical Exploration of the Interaction Mechanisms Between Individual and Corporate Moral Responsibility*, 129 *J. BUS. ETHICS* 325 (2015).
- Cooke, Robert A. & Janet L. Szumal, *Using the Organizational Culture Inventory to Understand the Operating Cultures of Organizations*, in *HANDBOOK OF ORGANIZATIONAL CULTURE & CLIMATE* 147 (Neal M. Ashkanasy et al. eds., 2000).
- Cooter, Robert, *Expressive Law and Economics*, 28 *J. LEGAL STUD.* 585 (1998).

- Copp, David, *The Collective Moral Autonomy Thesis*, 38 *J. SOC. PHIL.* 369 (2007).
- Corbin, Caroline Mala, *Corporate Religious Liberty*, 30 *CONST. COMMENT.* 277 (2015).
- Cormode, D. Scott, *Does Institutional Isomorphism Imply Secularization?: Churches and Secular Voluntary Associations in the Turn-of-the-Century City*, in *SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS* 116 (N. J. Demerath III et al. eds., 1998).
- Cornelissen, Joep P. et al., *Bridging and Integrating Theories on Organizational Identity*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY* 200 (Michael G. Pratt et al. eds., 2016).
- Cortright, S. A. & Ernest S. Picrucci, *Clearing Ground: Toward a Social Ethic of Corporate Management*, in *RETHINKING THE PURPOSE OF BUSINESS* 136 (S. A. Cortright & Michael J. Naughton eds., 2002).
- Cressey, Donald R., *The Poverty of Theory in Corporate Crime Research*, in 1 *ADVANCES IN CRIMINOLOGICAL THEORY* 31 (William S. Laufer & Freda Adler eds., 1989).
- Cressman, Derek D., *WHEN MONEY TALKS: THE HIGH PRICE OF "FREE" SPEECH AND THE SELLING OF DEMOCRACY* (2016).
- Dan-Cohen, Meir, *RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY* (2d ed. 2016).
- Danziger, Kurt, *Historical Psychology of Persons: Categories and Practice*, in *THE PSYCHOLOGY OF PERSONHOOD: PHILOSOPHICAL, HISTORICAL, SOCIAL-DEVELOPMENTAL, AND NARRATIVE PERSPECTIVES* 59 (Jack Martin & Mark H. Bickhard eds., 2013).
- Davis, Joseph Stancliffe, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (Vol. 2) (Lawbook Exch. 2006) (1917).
- DeBow, Michael E. & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 *DEL. J. CORP. L.* 393 (1993).
- De George, Richard T., *Corporations and Morality*, in *SHAME, RESPONSIBILITY AND THE CORPORATION* 57 (Hugh Curtler ed., 1986).
- Social Reality and Social Relations*, 37 *REV. METAPHYSICS* 3 (1983).
- de Tocqueville, Alexis, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840).
- Deiser, George F., *The Juristic Person*, 57 *U. PA. L. REV.* 300 (1909).
- Dempsey, James, *Corporations and Non-Agential Moral Responsibility*, 30 *J. APPLIED PHIL.* 334 (2013).
- Dennett, Daniel C., *BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY* (MIT Press 1981) (1978).
- Dewey, John, *The Historic Background of Corporate Legal Personality*, 35 *YALE L.J.* 655 (1926).
- Dibadj, Reza, *Expressive Rights for Shareholders after Citizens United?*, 46 *U.S.F. L. REV.* 459 (2011).
- Dixon, Bruce A., *Time for a Corporate Death Penalty*, *BLACK AGENDA REP.* (June 9, 2010), <https://blackagenda.com/content/time-corporate-death-penalty> [<https://perma.cc/4GX9-H3KZ>].
- Dodd, Senator Christopher S., *Press Release, Sen. Dodd Introduces Constitutional Amendment to Reverse Supreme Court Campaign Finance Ruling*, *U.S. FED. NEWS*, Feb. 25, 2010, 2010 *WLNR* 3913103.
- Donaldson, Thomas, *CORPORATIONS AND MORALITY* (1689).
- Drucker, Peter F., *CONCEPTS OF CORPORATE CULTURE* (1985).
- Dubbink, Wim & Jeffery S., *ETHICAL THEORY & MORALITY* (2010).

- Dunlavy, Colleen A., *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 66 (Kenneth Lipartito & David B. Sicilia eds., 2004).
- Eagles, Thad, Note, *Free Exercise, Inc.: A New Framework for Adjudicating Corporate Religious Liberty Claims*, 90 N.Y.U. L. REV. 589 (2015).
- Easterbrook, Frank H. & Daniel R. Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).
- Edmonds, S. Chris, *THE CULTURE ENGINE: A FRAMEWORK FOR DRIVING RESULTS, INSPIRING YOUR EMPLOYEES, AND TRANSFORMING YOUR WORKPLACE* (2014).
- Edwards, Jan & Molly Morgan, *Abolish Corporate Personhood*, RECLAIM DEMOCRACY (May 20, 2004), <http://reclaimdemocracy.org/abolish-corporate-personhood/> [https://perma.cc/7K4V-NDQY].
- Egan, Matt, *Wells Fargo Uncovers up to 1.4 Million More Fake Accounts*, CNN MONEY (Aug. 31, 2017), <http://money.cnn.com/2017/08/31/investing/wells-fargo-fake-accounts/index.html> [https://perma.cc/Y24F-Q5KT].
- Wells Fargo Ups Its Customer Settlement to \$142 Million over Fake Accounts*, CNN MONEY (Apr. 21, 2017), <http://money.cnn.com/2017/04/21/investing/wells-fargo-expands-customer-settlement/index.html> [https://perma.cc/Q3LV-ZZ2E].
- Eggen, Dan, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 17, 2010), [www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html) [https://perma.cc/7RQD-ZEDQ].
- Ehrhart, Mark G. et al., *ORGANIZATIONAL CLIMATE AND CULTURE: AN INTRODUCTION TO THEORY, RESEARCH, AND PRACTICE* (2014).
- Elsbach, Kimberly D. & Janet M. Dukerich, *Organizational Identity and the Undesired Self*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY* 257 (Michael G. Pratt et al. eds., 2016).
- Emerson, Thomas I., *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).
- Epstein, Richard A., *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 HARV. J.L. & PUB. POL'Y 639 (2011).
- Eskridge, Jr., William N., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).
- Estes, Ralph, *TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* (1996).
- Fama, Eugene F., *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).
- Fama, Eugene F. & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301 (1983).
- Feldman, Daniel C. & Olivia Amanda O'Neill, *The Role of Socialization, Orientation, and Training Programs in Transmitting Culture and Climate and Enhancing Performance*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL CLIMATE AND CULTURE* 44 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- Finnis, John, *Corporate Persons II: Persons and Their Associations*, in 63 PROC. ARISTOTELIAN SOC'Y, SUPP. VOL. 267 (1989).
- Fisch, Jill E., *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593 (2006).
- Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637 (2006).
- Flamholtz, Eric G. & Yvonne Randle, *CORPORATE CULTURE: THE ULTIMATE STRATEGIC ASSET* (2011).

- Implications of Organizational Life Cycles for Corporate Culture and Climate*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL CLIMATE AND CULTURE* 235 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- Flynn, John J., *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 131 (Warren J. Samuels & Arthur S. Miller eds., 1987).
- Forsyth, Donelson R., *GROUP DYNAMICS* (6th ed. 2014).
- Fort, Timothy L., *Business as Mediating Institution*, 6 BUS. ETHICS Q. 149 (1996).
- Frankfurt, Harry G., *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).
- Franzen, Giep & Margot Bouwman, *THE MENTAL WORLD OF BRANDS: MIND, MEMORY AND BRAND SUCCESS* (2001).
- Freeman, R. Edward, *A Stakeholder Theory of the Modern Corporation*, in *ETHICAL THEORY AND BUSINESS* 56 (Tom L. Beauchamp & Norman E. Bowie eds., 6th ed. 2001).
- French, Peter A., *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984).
- The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979).
- Freund, Ernst, *THE LEGAL NATURE OF CORPORATIONS* (Chicago, Univ. of Chi. Press 1897).
- Friedman, Lawrence M., *A HISTORY OF AMERICAN LAW* (2d ed. 1985).
- Galanter, Marc, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369 (2006).
- Gans, David H. & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643 (2011).
- Gans, David H. & Ilya Shapiro, *RELIGIOUS LIBERTIES FOR CORPORATIONS?: HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION* (2014).
- Gaylord, Scott W., *For-Profit Corporations, Free Exercise, and the HHS Mandate*, 91 WASH. U. L. REV. 589 (2014).
- Gedicks, Frederick Mark, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion under RFRA*, 85 GEO. WASH. L. REV. 94 (2017).
- Geisinger, Alex, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002).
- Geisinger, Alex C. & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061 (2016).
- Geldart, W. M., *Legal Personality*, 27 LAW Q. REV. 90 (1911).
- Gibson, David, *Doing Good and Doing Well: Faith-Based Investing Converts the Skeptics*, USA TODAY (May 31, 2017), [www.usatoday.com/story/news/nation/2017/05/31/faith-based-investing/102351062](http://www.usatoday.com/story/news/nation/2017/05/31/faith-based-investing/102351062) [https://perma.cc/775N-P4RX].
- Gibson, Kevin, *Toward an Intermediate Position on Corporate Moral Personhood*, 101 J. BUS. ETHICS (SUPP. 1) 71 (2011).
- Gibson, Jr., Roger F., *Corporations, Persons, and Moral Responsibility*, 21 J. THOUGHT, no. 2, Summer 1986, at 17.
- Gierke, Otto, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* (George Heiman ed. & trans., 1977).
- POLITICAL THEORIES OF THE MIDDLE AGE* (Frederic William Maitland trans., Lawbook Exch. 2002) (1900).
- Gill, Christopher, ed., *THE PERSON AND THE HUMAN MIND: ISSUES IN ANCIENT AND MODERN PHILOSOPHY* (1990).
- Gioia, Dennis A. & Aimee L. Hamilton, *Great Debates in Organizational Identity Study*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY* 21 (Michael G. Pratt et al. eds., 2016).

- Gobé, Marc, *EMOTIONAL BRANDING: THE NEW PARADIGM FOR CONNECTING BRANDS TO PEOPLE* (2001).
- Goodman, Michael F., ed., *WHAT IS A PERSON?* (1988).
- Goodpaster, Kenneth E., *CONSCIENCE AND CORPORATE CULTURE* (2007).
- Gordon, Gwendolyn, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Māori Corporation Walk into a Bar . . .*, 39 *SEATTLE U. L. REV.* 353 (2016).
- Graham, Howard Jay, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 *YALE L.J.* 371 (1938).
- The "Conspiracy Theory" of the Fourteenth Amendment*: 2, 48 *YALE L.J.* 171 (1938).
- An Innocent Abroad. The Constitutional Corporate "Person,"* 2 *UCLA L. REV.* 155 (1955).
- Grantham, Ross, *Commentary on Goddard*, in *CORPORATE PERSONALITY IN THE 20TH CENTURY* 65 (Charles E. F. Rickett & Ross B. Grantham eds., 1998).
- Gray, John Chipman, *THE NATURE AND SOURCES OF THE LAW* (Roland Gray ed., Macmillan Co. 2d ed. 1921) (1909).
- Green, David, *MORE THAN A HOBBY* (2005).
- Greenawalt, Kent, *Religious Toleration and Claims of Conscience*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 3 (Micah Schwartzman et al. eds., 2016).
- Greendorfer, Marc A., *Blurring Lines Between Churches and Secular Corporations: The Compelling Case of the Benefit Corporation's Right to the Free Exercise of Religion (with a post-Hobby Lobby Epilogue)*, 39 *DEL. J. CORP. L.* 819 (2015).
- Greenfield, Kent, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018).
- THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006).
- In Defense of Corporate Persons*, 30 *CONST. COMMENT.* 309 (2015).
- Greenfield, Kent & Adam Winkler, *The U.S. Supreme Court's Cultivation of Corporate Personhood*, *ATLANTIC* (June 24, 2015), [www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773](http://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773) [https://perma.cc/FV24-LTS3].
- Greenwood, Daniel J. H., *Essential Speech: Why Corporate Speech Is Not Free*, 83 *IOWA L. REV.* 995 (1998).
- Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 *U. ILL. L. REV.* 163.
- Grossman, Richard L. & Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation*, *NEW SOLUTIONS*, Spring 1993, at 7.
- Guldenschuh, David, *Article V Progress Report*, *ARTICLE V CAUCUS*, <http://articlevcaucus.com/news/article-v-progress-report-4/> [https://perma.cc/25QX-N4SC].
- Guthey, Eric, *New Economy Romanticism, Narratives of Corporate Personhood, and the Antimanagement Impulse*, in *CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE* 321 (Kenneth Lipartito & David B. Sicilia eds., 2004).
- Hacking, Ian, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* (1995).
- Hadani, Michael, Jean-Philippe Bonardi & Nicolas M. Dahan, *Corporate Political Activity, Public Policy Uncertainty, and Firm Outcomes: A Meta-Analysis*, 15 *STRATEGIC ORG.* 338 (2016).
- Hadani, Michael & Douglas A. Schuler, *In Search of El Dorado: The Elusive Financial Returns on Corporate Political Investment*, 34 *STRATEGIC MGMT. J.* 165 (2013).
- Hager, Mark M., *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 *U. PITT. L. REV.* 575 (1989).
- Haji, Ish, *On the Ultimate Responsibility of Collectives*, 30 *MIDWEST STUD. PHIL.* 292 (2006).

- Haliburton, Rachel, *AUTONOMY AND THE SITUATED SELF* (2014).
- Hallowell, Billy, *Here Are 5 Christian Companies That Join Chick-fil-A in Publicly-Proclaiming Their Bible-Based Views*, *BLAZE* (Aug 2, 2012), [www.theblaze.com/news/2012/08/02/here-are-5-christian-companies-that-join-chick-fil-a-in-publicly-proclaiming-their-bible-based-faith/](http://www.theblaze.com/news/2012/08/02/here-are-5-christian-companies-that-join-chick-fil-a-in-publicly-proclaiming-their-bible-based-faith/) [https://perma.cc/9R7S-4XQN].
- Hamilton, Sheryl N., *IMPERSONATIONS: TROUBLING THE PERSON IN LAW AND CULTURE* (2009).
- Hammerstrom, Doug, *The Hijacking of the Fourteenth Amendment, RECLAIM DEMOCRACY* (2002), [http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/fourteenth\\_amendment\\_hammerstrom.pdf](http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/fourteenth_amendment_hammerstrom.pdf) [https://perma.cc/TSL5-W5VE].
- Why Bother with Corporate Personhood*, [www.nancho.net/corperson/cpbother.html](http://www.nancho.net/corperson/cpbother.html) [https://perma.cc/K4XK-B7CQ].
- Handy, Charles, *What's a Business For?*, *HARV. BUS. REV.*, Dec. 2002, at 49.
- Hansmann, Henry et al., *Law and the Rise of the Firm*, 119 *HARV. L. REV.* 1333 (2006).
- Harris, Ron, *INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844* (2000).
- The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 *WASH. & LEE L. REV.* 1421 (2006).
- Hart, H. L. A., *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983).
- Hart, Oliver, *An Economist's Perspective on the Theory of the Firm*, 89 *COLUM. L. REV.* 1757 (1989).
- Härtel, Charmine E. J. & Neal M. Ashkanasy, *Healthy Human Cultures as Positive Work Environments*, in *THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 85 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- Hartley, Roger C., *HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE* (2017).
- Hartman, Edwin, *ORGANIZATIONAL ETHICS AND THE GOOD LIFE* (1996).
- Hartman, Edwin M., *The Commons and the Moral Organization*, 4 *BUS. ETHICS Q.* 253 (1994).
- Hartmann, Thom, *THE CRASH OF 2016: THE PLOT TO DESTROY AMERICA - AND WHAT WE CAN DO TO STOP IT* (2013).
- UNEQUAL PROTECTION: HOW CORPORATIONS BECAME "PEOPLE" - AND YOU CAN FIGHT BACK* (2d ed. 2010).
- Hasen, Richard L., *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* (2016).
- Hasnas, John, *The Phantom Menace of the Responsibility Deficit*, in *THE MORAL RESPONSIBILITY OF FIRMS* 89 (Eric W. Orts & N. Craig Smith eds., 2017).
- Should Corporations Have the Right to Vote? A Paradox in the Theory of Corporate Moral Agency*, *J. BUS. ETHICS*, doi:10.1007/s10551-016-3172-0 (2016).
- Hatch, Mary Jo, *Material and Meaning in the Dynamics of Organizational Culture and Identity with Implications for the Leadership of Organizational Change*, in *THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 341 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- Hatch, Mary Jo, with Ann L. Cunliffe, *ORGANIZATION THEORY: MODERN, SYMBOLIC, AND POSTMODERN PERSPECTIVES* (3d ed. 2013).
- Hatch, Mary Jo & Majken Schultz, *TAKING BRAND INITIATIVE: HOW COMPANIES CAN ALIGN STRATEGY, CULTURE, AND IDENTITY THROUGH CORPORATE BRANDING* (2008).
- Heider, Fritz & Marianne Simmel, *An Experimental Study of Apparent Behavior*, 57 *AM. J. PSYCHOL.* 243 (1944).

- Held, Virginia, *Corporations, Persons, and Responsibility*, in SHAME, RESPONSIBILITY AND THE CORPORATION 159 (Hugh Curtler ed., 1986).
- Helfand, Michael A. & Barak D. Richman, *The Challenge of Co-Religionist Commerce*, 64 DUKE L.J. 769 (2015).
- Henn, Harry G. & John R. Alexander, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES (3d student ed. 1983).
- Hess, Kendy, *The Unrecognized Consensus About Firm Moral Responsibility*, in THE MORAL RESPONSIBILITY OF FIRMS 169 (Eric W. Orts & N. Craig Smith eds., 2017).
- Hess, Kendy M., *Because They Can: The Basis for the Moral Obligations of (Certain) Collectives*, 38 MIDWEST STUD. PHIL. 203 (2014).
- Hess, Kendy M., *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241 (2014).
- "If You Tickle Us...": *How Corporations Can Be Moral Agents Without Being Persons*, 47 J. VALUE INQUIRY 319 (2013).
- The Modern Corporation as Moral Agent: The Capacity for "Thought" and a "First-Person Perspective"*, 26 SW. PHIL. REV., no. 1, Jan. 2010, at 61.
- Hessen, Robert, IN DEFENSE OF THE CORPORATION (1979).
- Editorial, *Creatures of the State? The Case Against Federal Chartering of Corporations*, BARRON'S NAT'L BUS. & FIN. WKLY., May 24, 1976, at 7.
- Hightower, Jim, *Organize in 2012*, OTHER WORDS (Jan. 9, 2012), [https://otherwords.org/organize\\_in\\_2012/](https://otherwords.org/organize_in_2012/) [<https://perma.cc/W332-PL99>].
- Hindriks, Frank, *How Autonomous Are Collective Agents? Corporate Rights and Normative Individualism*, 79 ERKENNTNIS 1565 (2014).
- Hilt, Eric, *Early American Corporations and the State*, in CORPORATIONS AND AMERICAN DEMOCRACY 37 (Naomi R. Lamoreaux & William J. Novak eds., 2017).
- Holmes, Jr., O. W., THE COMMON LAW (Lawbook Exch. 2005) (1881).
- Horwitz, Morton J., *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985).
- Horwitz, Paul, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014).
- Hovenkamp, Herbert, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988).
- Huber, Win. Dennis, *Law, Language and Corporatehood: Corporations and the U.S. Constitution*, 1 INT'L J. FOR RULE LAW, no. 2, Dec. 2017, at 78.
- Hurst, James Willard, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970).
- INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT (2017), <https://assets.documentcloud.org/documents/3549238/Wells-Fargo-Sales-Practice-Investigation-Board.pdf> [<https://perma.cc/4JKQ-P382>].
- Ingber, Stanley, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.
- INTERBRAND, *Best Global Brands 2017 Rankings*, [www.interbrand.com/best-brands/best-global-brands/2017/ranking/](http://www.interbrand.com/best-brands/best-global-brands/2017/ranking/) [<https://perma.cc/QD6E-CDNT>].
- Isaacs, Tracy, MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS (2011).
- Iuliano, Jason, *Do Corporations Have Religious Beliefs?*, 90 IND. L. J. 47 (2015).
- Iwai, Katsuhito, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).
- Janis, Irving L., GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982).
- Jeavons, Thomas H., *Identifying Characteristics of "Religious" Organizations: An Exploratory Proposal*, in SACRED COMPANIES: ORGANIZATIONAL ASPECTS OF RELIGION AND RELIGIOUS ASPECTS OF ORGANIZATIONS 79 (N. J. Demerath III et al. eds., 1998).

- Jensen, Michael C. & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).
- Johnson, Lyman, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135 (2012).
- Johnson, Lyman & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1 (2014/2015).
- Jo, Thomas W., *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1 (2001).
- Kadlac, Adam, *Humanizing Personhood*, 13 ETHICAL THEORY & MORAL PRAC. 421 (2010).
- Kahan, Dan M., *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).
- Kant, Immanuel, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Robert Paul Wolff ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).
- Keeley, Michael, *Organizations as Non-Persons*, 15 J. VALUE INQUIRY 149 (1981).
- A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS (1988).
- Kennedy, Robert G., *Corporations, Common Goods, and Human Persons*, 4 AVE MARIA L. REV. 1 (2006).
- Kim, Susanna M., *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763.
- Kish-Gephart, Jennifer J. et al., *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCHOL. 1 (2010).
- Korten, Fran, *10 Ways to Stop Corporate Dominance of Politics*, YES! MAG. (Jan. 25, 2010), [www.yesmagazine.org/people-power/10-ways-to-stop-corporate-dominance-of-politics](http://www.yesmagazine.org/people-power/10-ways-to-stop-corporate-dominance-of-politics) [<https://perma.cc/KZT6-FXWV>].
- Krannich, Jess M., *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61 (2005).
- Kreiner, Glen E., *Organizational Identity: Culture's Conceptual Cousin*, in THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE 463 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- Kuhner, Timothy K., CAPITALISM V. DEMOCRACY: MONEY IN POLITICS AND THE FREE MARKET CONSTITUTION (2014).
- Ladd, John, *Morality and the Ideal of Rationality in Formal Organizations*, 54 MONIST 488 (1970).
- Persons and Responsibility: Ethical Concepts and Impertinent Analogies*, in SHAME, RESPONSIBILITY AND THE CORPORATION 77 (Hugh Curtler ed., 1986).
- LaFollette, Hugh, *Introduction*, in THE OXFORD HANDBOOK OF PRACTICAL ETHICS 1 (Hugh LaFollette ed., 2003).
- Lakoff, George & Mark Johnson, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999).
- Lakoff, Sanford A., *Private Government in the Managed Society*, in PRIVATE GOVERNMENT 218 (Sanford A. Lakoff with Daniel Rich eds., 1973).
- Lambert III, Lake, SPIRITUALITY, INC.: RELIGION IN THE AMERICAN WORKPLACE (2009).
- Lamoreaux, Naomi R., THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 (1985).
- Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture*, in CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 29 (Kenneth Lipartito & David B. Sicilia eds., 2004).
- Lamoreaux, Naomi R. & William J. Novak, *Corporations and American Democracy: An Introduction*, in CORPORATIONS AND AMERICAN DEMOCRACY 1 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

- Laski, Harold J., *The Personality of Associations*, 29 HARV. L. REV. 404 (1916).
- Latham, Earl, *The Body Politic of the Corporation*, in THE CORPORATION IN MODERN SOCIETY 218 (Edward S. Mason ed., 1959).
- Laufer, William S., CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY (2006).
- Lawrence, Paul R. & Davis Dyer, RENEWING AMERICAN INDUSTRY (1st paperback ed. 1984).
- Laycock, Douglas, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839.
- Lcvitt, Justin, *Confronting the Impact of Citizens United*, 29 YALE L. & POL'Y REV. 217 (2010).
- Lewis, Anthony, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).
- Linzey, Thomas, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PAC. ENVTL. L. REV. 219 (1995).
- Petition to Attorney General of Delaware to Revoke Corporate Charters of WMX Technologies and Chemical Waste Management Inc., 52 GUILD PRAC. 116 (1995).
- Lipartito, Kenneth & David B. Sicilia, *Afterword: Toward New Renderings*, in CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 343 (Kenneth Lipartito & David B. Sicilia eds., 2004).
- Introduction: *Crossing Corporate Boundaries*, in CONSTRUCTING CORPORATE AMERICA: HISTORY, POLITICS, CULTURE 1 (Kenneth Lipartito & David B. Sicilia eds., 2004).
- List, Christian, *What Is It Like to Be a Group Agent?*, NOÛS 1, doi:10.1111/nous.12162 (2016).
- List, Christian & Philip Pettit, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).
- Long, Norton E., *The Corporation, Its Satellites, and the Local Community*, in THE CORPORATION IN MODERN SOCIETY 202 (Edward S. Mason ed., 1959).
- Lund, Christopher C., *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466 (2010).
- Macfarlane, Alan, THE ORIGINS OF ENGLISH INDIVIDUALISM (1978).
- Machen, Jr., Arthur W., *Corporate Personality*, 24 HARV. L. REV. 253 (1911).
- Magid, Henry Meyer, ENGLISH POLITICAL PLURALISM: THE PROBLEM OF FREEDOM AND ORGANIZATION (AMS Press, Inc. 1966) (1941).
- Maitland, Ian, *How Insiders Abuse the Idea of Corporate Personality*, in THE MORAL RESPONSIBILITY OF FIRMS 106 (Eric W. Orts & N. Craig Smith eds., 2017).
- Mäkelä, Pekka, *Collective Agents & Moral Responsibility*, 38 J. SOC. PHIL. 456 (2007).
- Maltz, Earl M., CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990).
- Manski-McCabe-Graves: 'Overrule the Court' Rally in Madison, DEMOCRACY SQUARE (Feb. 16, 2010), <http://ds.liberalart.space/news/manski-mccabe-graves-overrule-court-rally-madison> [<https://perma.cc/TJ4C-JB8G>].
- Mark, Gregory A., *Hobby Lobby and Corporate Personhood: Taking the U.S. Supreme Court's Reasoning at Face Value*, 65 DEPAUL L. REV. 535 (2016).
- Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).
- Martin, Jack & Mark H. Bickhard, *Introducing Persons and the Psychology of Personhood*, in THE PSYCHOLOGY OF PERSONHOOD: PHILOSOPHICAL, HISTORICAL, SOCIAL-DEVELOPMENTAL, AND NARRATIVE PERSPECTIVES 1 (Jack Martin & Mark H. Bickhard eds., 2013).
- Mason, Edward S., *Introduction*, in THE CORPORATION IN MODERN SOCIETY 1 (Edward S. Mason ed., 1959).

- Mauss, Marcel, *A Category of the Human Mind: The Notion of Person; the Notion of Self* (W.D. Halls trans.), in THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY 1 (Michael Carrithers et al. eds., 1985).
- May, Larry, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS (1987).
- Vicarious Agency and Corporate Responsibility, 43 PHIL. STUD. 69 (1983).
- Mayer, Carl J., *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).
- Mayer, David M., *A Review of the Literature on Ethical Climate and Culture*, in THE OXFORD HANDBOOK OF ORGANIZATIONAL CLIMATE AND CULTURE 415 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- McAdams, Richard H., *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043.
- McCall, Catherine, POWERS OF LAW: THEORIES AND LIMITS (2015).
- McCluskey, Martha T., *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453 (2006).
- McConnell, Michael W., *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412 (2013).
- McDonald, Michael, *The Personless Paradigm*, 37 U. TORONTO L.J. 212 (1987).
- McKenna, Michael, *Collective Responsibility and an Agent Meaning Theory*, 30 MIDWEST STUD. PHIL. 16 (2006).
- Meese, Alan J. & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014).
- Messich, Nancy, *12 Tech Companies That Offer Their Employees the Coolest Perks*, NEXT WEB (Apr. 9, 2012), <https://thenextweb.com/insider/2012/04/09/12-startups-that-offer-their-employees-the-coolest-perks/> [<https://perma.cc/H2U7-X4DY>].
- Metzger, Michael B., *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1 (1984).
- Meyers, William, THE SANTA CLARA BLUES: CORPORATE PERSONHOOD VERSUS DEMOCRACY (2000), [http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/santa\\_clara\\_blues.pdf](http://reclaimdemocracy.org/wordpress/wp-content/uploads/2012/07/santa_clara_blues.pdf) [<https://perma.cc/RZ78-XIY9>].
- Miller, Arthur S., *Corporations and Our Two Constitutions*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 241 (Warren J. Samuels & Arthur S. Miller eds., 1987).
- Miller, Darrell A. H., *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887 (2011).
- Millon, David, *Personifying the Corporate Body*, 2 GRAVEN IMAGES 116 (1995).
- The Single Constituency Argument in the Economic Analysis of Business Law, in LAW & ECONOMICS: TOWARD SOCIAL JUSTICE 43 (Dana L. Gold ed., 2009).
- Theories of the Corporation, 1990 DUKE L.J. 201.
- Moore, Geoff, *Corporate Moral Agency: Review and Implications*, 21 J. BUS. ETHICS 329 (1999).
- Moore, John D., *The First Amendment Case for Corporate Religious Rights*, 16 NEV. L.J. 1 (2015).
- Morawetz, Victor, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS (Vol. 1) (Boston, Little, Brown, & Co. 2d ed. 1886).
- A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE (Boston, Little, Brown, & Co. 1882).
- Morgan, Molly & Jan Edwards, *Abolish Corporate Personhood*, 59 GUILD PRAC. 209 (2002).
- Morris, Paul et al., *Beyond Anecdotes: An Empirical Study of "Anthropomorphism,"* 8 SOC'Y & ANIMALS 151 (2000).

- MOVE TO AMEND, THE PATH TO THE 28TH AMENDMENT: STRATEGIC PLAN TO PASS THE "WE THE PEOPLE AMENDMENT" TO THE UNITED STATES CONSTITUTION (2016), [https://movetoamend.org/sites/default/files/move\\_to\\_amend\\_strategic\\_plan.pdf](https://movetoamend.org/sites/default/files/move_to_amend_strategic_plan.pdf) [<https://perma.cc/24K3-V8WM>].
- Myers, Joe, *How Do the World's Biggest Companies Compare to the Biggest Economies?*, WORLD ECON. F. (Oct. 19, 2016), [www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/](http://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/) [<https://perma.cc/G3QD-C3HQ>].
- Naffine, Ngaire, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346 (2003).
- Needleman, Martin L. & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517 (1979).
- Nelson, James D., *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565.
- Nesteruk, Jeffrey, *Bellotti and the Question of Corporate Moral Agency*, 1988 COLUM. BUS. L. REV. 683.
- Law and the Virtues: Developing a Legal Theory for Business Ethics*, 5 BUS. ETHICS Q. 361 (1995) (book review).
- Law, Virtue, and the Corporation*, 33 AM. BUS. L.J. 473 (1996).
- The Moral Status of the Corporation: Comments on an Inquiry*, 2 BUS. ETHICS Q. 461 (1992).
- Nesteruk, Jeffrey & David T. Risser, *Conceptions of the Corporation and Ethical Decision Making in Business*, 12 BUS. & PROF. ETHICS J., no. 1, Spring 1993, at 73.
- Neuborne, Burt, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769 (2012).
- Nichols, John, *The Senate Tried to Overturn 'Citizens United' Today. Guess What Stopped Them?*, NATION (Sep. 11, 2014), [www.thenation.com/article/senate-tried-to-overturn-citizens-united-today-guess-what-stopped-them/](http://www.thenation.com/article/senate-tried-to-overturn-citizens-united-today-guess-what-stopped-them/) [<https://perma.cc/J9PC-6JZW>].
- Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982).
- Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745 (2001).
- Oakes, Jeannie et al., *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339 (2008).
- O'Kelley, Jr., Charles R., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979).
- Olins, Wally, *How Brands Are Taking over the Corporation*, in *THE EXPRESSIVE ORGANIZATION: LINKING IDENTITY, REPUTATION, AND THE CORPORATE BRAND* 51 (Majken Schultz et al. eds., 2000).
- Öncer, Ayla Zehra & Müge Leyla Yildiz, *The Impact of Ethical Climate on Relationship Between Corporate Reputation and Organizational Identification*, 58 PROCEDIA SOC. & BEHAV. SCI. 714 (2012).
- Oppenheimer, Mark, *Few Resist the Temptation to Opine on Chick-fil-A*, N.Y. TIMES (Aug. 3, 2012), [www.nytimes.com/2012/08/04/us/taking-sides-on-chick-fil-a-is-a-temptation-few-can-resist.html](http://www.nytimes.com/2012/08/04/us/taking-sides-on-chick-fil-a-is-a-temptation-few-can-resist.html) [<https://perma.cc/7JDJ-3ZY7>].
- Orts, Eric W., *BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM* (2013).
- Theorizing the Firm: Organizational Ontology in the Supreme Court*, 65 DEPAUL L. REV. 559 (2016).
- Orts, Eric W. & N. Craig Smith, eds., *THE MORAL RESPONSIBILITY OF FIRMS* (2017).
- Padfield, Stefan J., *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases*, 15 U. PA. J. CONST. L. 831 (2013).

- Patton, William & Randall Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (1981).
- Peters, Ellen A., *Reality and the Language of the Law*, 90 YALE L.J. 1193 (1981).
- Peterson, Danc K., *Deviant Workplace Behavior and the Organization's Ethical Climate*, 17 J. BUS. & PSYCHOL. 47 (2002).
- Petriglieri, Jennifer L. & Beth A. Devine, *Mobilizing Organizational Action Against Identity Threats*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY* 239 (Michael G. Pratt et al. eds., 2016).
- Petit, Philip, *MADE WITH WORDS: HOBBS ON LANGUAGE, MIND, AND POLITICS* (2008).
- Responsibility Incorporated*, 117 ETHICS 171 (2007).
- Phillips, Michael J., *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 BUS. ETHICS Q. 435 (1992).
- Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061 (1994).
- Phillips, Nelson & Cynthia Hardy, *DISCOURSE ANALYSIS: INVESTIGATING PROCESSES OF SOCIAL CONSTRUCTION* (2002).
- Pibel, Doug, *Real People v. Corporate "People": The Fight Is On*, YES! MAG. (May 27, 2010), [www.yesmagazine.org/issues/water-solutions/real-people-v.-corporate-people-the-fight-is-on](http://www.yesmagazine.org/issues/water-solutions/real-people-v.-corporate-people-the-fight-is-on) [<https://perma.cc/4B52-A787>].
- Piecy, Tamara R., *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008).
- BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012).
- Why Personhood Matters*, 30 CONST. COMMENT. 361 (2015).
- Pilon, Roger, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245 (1979).
- Plitt, Mark, Ricky R. Savjani & David M. Eagleman, *Are Corporations People Too? The Neural Correlates of Moral Judgments About Companies and Individuals*, 10 SOC. NEUROSCIENCE 113 (2015).
- Pollman, Elizabeth, *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).
- Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639 (2016).
- Line Drawing in Corporate Rights Determinations*, 65 DEPAUL L. REV. 597 (2016).
- Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629.
- Pollock, Frederick & Frederic W. Maitland, *Corporation and Person*, in *ANTHROPOLOGY AND EARLY LAW* 300 (Lawrence Krader ed., 1966).
- PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *VOCATION OF THE BUSINESS LEADER: A REFLECTION* (4th ed. 2014), [www.stthomas.edu/media/catholicstudies/center/ryan/publications/publicationpdfs/vocationofthebusinessleaderpdf/PontificalCouncil\\_4.pdf](http://www.stthomas.edu/media/catholicstudies/center/ryan/publications/publicationpdfs/vocationofthebusinessleaderpdf/PontificalCouncil_4.pdf) [<https://perma.cc/LEL9-U8A7>].
- Poole, Ross, *On Being a Person*, 74 AUSTRALASIAN J. PHIL. 38 (1996).
- Posner, Eric, *Stop Fussing over Personhood*, SLATE (Dec. 11, 2013), [www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/12/personhood\\_for\\_corporations\\_and\\_chimpanzees\\_is\\_an\\_essential\\_legal\\_fiction.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html) [<https://perma.cc/3AR2-DHFT>].
- Post, Robert C., *CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION* (2014).
- Pratt, Michael G., *Disentangling Collective Identities*, in *5 RESEARCH ON MANAGING GROUPS AND TEAMS: IDENTITY ISSUES IN GROUPS* 161 (Jeffrey T. Polzer ed., 2003).
- Prede, Adina, *Group Rights and Group Agency*, 9 J. MORAL PHIL. 229 (2012).
- Price, Nancy & David E. Delk, *Corporations Are Not People*, ALLIANCE FOR DEMOCRACY, [www.thealliancefordemocracy.org/brochure.pdf](http://www.thealliancefordemocracy.org/brochure.pdf) [<https://perma.cc/3WH3-HKXM>].

- Program on Corps., Law & Democracy, *Why Abolish All Corporate Constitutional Rights*, BY WHAT AUTHORITY, Nov. 2010, www.poclad.org/BWA/files/2010-11/BWANov2010.pdf [https://perma.cc/T3LD-UJXK].
- Quigley, William, *Catholic Social Thought and the Amoralism of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109 (2004).
- Quinton, Anthony, *Social Objects*, 76 PROC. ARISTOTELIAN SOC'Y 1 (1976).
- Radin, Margaret Jane, *Reflections on Objectification*, 65 S. CAL. L. REV. 341 (1991).
- Radin, Max, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).
- THE LEGISLATION OF THE GREEKS AND ROMANS ON CORPORATIONS (Tuttle, Morehouse & Taylor Press 1910).
- Rafanelli, Lucia M., *A Defense of Individualism in the Age of Corporate Rights*, 25 J. POL. PHIL. 281 (2017).
- Ravitch, Frank S., *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 BYU L. REV. 55.
- FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (2016).
- Redish, Martin H. & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).
- Rienzi, Mark L., *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 GEO. MASON L. REV. 59 (2013).
- Ripken, Susanna K., *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009).
- Ripken, Susanna Kim, *Citizens United, Corporate Personhood, and Corporate Power: The Tension Between Constitutional Law and Corporate Law*, 6 U. ST. THOMAS J. L. & PUB. POL'Y 285 (2012).
- Corporate First Amendment Rights After Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. PA. J. BUS. L. 209 (2011).
- Risser, David Troup, *Power and Collective Responsibility*, 9 KINESIS 23 (1978).
- Riva, Paola et al., *Humanizing Machines: Anthropomorphization of Slot Machines Increases Gambling*, 21 J. EXPERIMENTAL PSYCHOL. APPLIED 313 (2015).
- Robbins, Stephen P. & Timothy A. Judge, *ORGANIZATIONAL BEHAVIOR* (17th ed. 2017).
- Robinson, Zoë, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605 (2016).
- Rodionova, Zlata, *World's Largest Corporations Make More Money Than Most Countries on Earth Combined*, INDEPENDENT (Sep. 13, 2016), www.independent.co.uk/news/business/news/worlds-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-a7245991.html [https://perma.cc/QBU5-RUYC].
- Roc, Mark J., *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001).
- Rönnegard, David, *THE FALLACY OF CORPORATE MORAL AGENCY* (2015).
- How Autonomy Alone Debunks Corporate Moral Agency*, 32 BUS. & PROF. ETHICS J. 77 (2013).
- Rönnegard, David & Manuel Velasquez, *On (Not) Attributing Moral Responsibility to Organizations*, in *THE MORAL RESPONSIBILITY OF FIRMS* 123 (Eric W. Orts & N. Craig Smith eds., 2017).
- Rorty, Amélie Oksenberg, ed., *THE IDENTITIES OF PERSONS* (1976).
- Rorty, Richard, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).
- Rosen, Mark D., *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669 (2003).

- Rosenberg, David, *The Corporate Paradox of Citizens United and Hobby Lobby*, 11 N.Y.U. J. L. & LIBERTY 308 (2017).
- Rothschild, Matthew, *Corporations Aren't Persons: Amend the Constitution*, PROGRESSIVE, Apr. 2010, at 16.
- Rovane, Carol, *THE BOUNDS OF AGENCY: AN ESSAY IN REVISIONARY METAPHYSICS* (1998).
- Rowland, Wade, GREEED, INC.: WHY CORPORATIONS RULE THE WORLD AND HOW WE LET IT HAPPEN (Arcade Publ'g 2012) (2005).
- Rubin, Dale, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523 (2010).
- Rucker, Philip, *Mitt Romney Says 'Corporations Are People'*, WASH. POST (Aug. 11, 2011), www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQA8wZ38I\_story.html [https://perma.cc/6LF6-BE5C].
- Rutledge, Thomas F., *A Corporation Has No Soul - The Business Entity Law Response to Challenges to the PPACA Contraceptive Mandate*, 5 WM. & MARY BUS. L. REV. 1 (2014).
- Sackman, Sonja A., *Culture and Performance*, in *THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 188 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- Samuels, Warren J., *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 113 (Warren J. Samuels & Arthur S. Miller eds., 1987).
- Samuels, Warren J. & Arthur S. Miller, *Introduction: Corporate America*, in *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* 1 (Warren J. Samuels & Arthur S. Miller eds., 1987).
- Schall, James V., *The Corporation: What Is It?*, 4 AVE MARIA L. REV. 105 (2006).
- Schane, Sanford A., *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987).
- Schein, Edgar H., *THE CORPORATE CULTURE SURVIVAL GUIDE* (new & rev. ed. 2009).
- Schein, Edgar H., with Peter Schein, *ORGANIZATIONAL CULTURE AND LEADERSHIP* (5th ed. 2017).
- Scherer, Andreas Georg, *Modes of Explanation in Organization Theory*, in *THE OXFORD HANDBOOK OF ORGANIZATION THEORY* 310 (Haridimos Tsoukas & Christian Knudsen eds., 2003).
- Schneider, Benjamin & Karen M. Barbera, *Introduction*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 3 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- Schrager, Richard & Micah Schwartzman, *Some Realism About Corporate Rights*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 345 (Micah Schwartzman et al. eds., 2016).
- Scott, W. Richard, *ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS* (5th ed. 2003).
- Scruton, Roger, *Corporate Persons*, in 63 PROC. ARISTOTELIAN SOC'Y, SUPP. VOL. 239 (1989).
- Searle, John R., *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* (2010).
- Selznick, Philip, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* (1957).
- Sepinwall, Amy J., *Blame, Emotion, and the Corporation*, in *THE MORAL RESPONSIBILITY OF FIRMS* 143 (Eric W. Orts & N. Craig Smith eds., 2017).
- Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575 (2012).
- Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897 (2015).
- Corporate Piety and Impropriety: Hobby Lobby's Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 172 (2015).



- Denying Corporate Rights and Punishing Corporate Wrongs, 25 BUS. ETHICS Q. 517 (2015).
- Sepper, Elizabeth, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012).
- Shapiro, Ilya & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. MARSHALL L. REV. 701 (2011).
- Shapiro, Robert J. & Douglas Dowson, Manhattan Inst., *Corporate Political Spending: Why the New Critics Are Wrong* (2012), [www.manhattan-institute.org/pdf/lpr\\_15.pdf](http://www.manhattan-institute.org/pdf/lpr_15.pdf) [https://perma.cc/L3ZM-UKQM].
- Sherman, Steven J. & Elise J. Percy, *The Psychology of Collective Responsibility: When and Why Collective Entities Are Likely to Be Held Responsible for the Misdeeds of Individual Members*, 19 J. L. & POL'Y 137 (2010).
- Shiffrin, Steven H., *WHAT'S WRONG WITH THE FIRST AMENDMENT?* (2016).
- Siegel, Reva B., *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).
- Sims, Ronald R. & William I. Sauser, Jr., *Received Wisdom, Groupthink, and Organizational Ethical Culture*, in *RECEIVED WISDOM, KERNELS OF TRUTH, AND BOUNDARY CONDITIONS IN ORGANIZATIONAL STUDIES* 373 (Daniel J. Svyantek & Kevin T. Mahoney eds., 2013).
- Smedley, Audrey & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005).
- Smith, Bryant, *Legal Personality*, 37 YALE L.J. 283 (1928).
- Smith, Thomas A., *The Use and Abuse of Corporate Personality*, 2 STAN. ACORA 69 (2001).
- Soares, C., *Corporate Versus Individual Moral Responsibility*, 46 J. BUS. ETHICS 143 (2003).
- Solomon, Robert C., *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* (1992).
- Somin, Ilya, *People Organized as Corporations Are People Too*, VOLOKH CONSPIRACY (Jan. 21, 2010, 5:12 PM), <http://volokh.com/2010/01/21/people-organized-as-corporations-are-people-too/> [https://perma.cc/6GXF-P25 L].
- Sopoci-Belknap, Kaitlin, *Citizens United v. FEC: Supreme Court Sides with Large Corporations*, DEMOCRACY UNLIMITED OF HUMBOLDT COUNTY (Feb. 28, 2010), [www.duhc.org/profiles/blogs/citizens-united-v-fec-supreme](http://www.duhc.org/profiles/blogs/citizens-united-v-fec-supreme) [https://perma.cc/7GNE-E6DY].
- Spicker, Stuart F., ed., *THE PHILOSOPHY OF THE BODY: REJECTIONS OF CARTESIAN DUALISM* (1970).
- Stevenson, Jr., Russell B., *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709 (1974).
- Stolberg, Sheryl Gay, *Obama Turns Up Heat Over Ruling on Campaign Spending*, N.Y. TIMES, Jan. 24, 2010, at A18.
- Stone, Christopher D., *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441 (1982).
- WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975).
- Strassfeld, Robert N., Note, *Corporate Standing to Allege Race Discrimination in Civil Rights Actions*, 69 VA. L. REV. 1153 (1983).
- Stratman, Thomas & J. W. Verret, *How Does Corporate Political Activity Allowed by Citizens United v. Federal Election Commission Affect Shareholder Wealth?*, 58 J.L. & ECON. 545 (2015).
- Strauss, David A., *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).
- Strine, Jr., Leo E., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015).

- Suchman, Mark C., *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475.
- Sugerman, Jeff, *Persons and Historical Ontology*, in *THE PSYCHOLOGY OF PERSONHOOD: PHILOSOPHICAL, HISTORICAL, SOCIAL-DEVELOPMENTAL, AND NARRATIVE PERSPECTIVES* 81 (Jack Martin & Mark H. Bickhard eds., 2013).
- Suggs, Robert E., *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257 (1991).
- Summers, Robert S., *Pragmatic Instrumentalism in Twentieth Century American Legal Thought - A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).
- Sunstein, Cass R., *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).
- Sunstein, Cass R. & Reid Hastie, *WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER* (2015).
- Szanto, Thomas, *Do Group Persons Have Emotions - Or Should They?*, in *ANALYTIC AND CONTINENTAL PHILOSOPHY: METHODS AND PERSPECTIVES: PROCEEDINGS OF THE 37TH INTERNATIONAL WITTGENSTEIN SYMPOSIUM* 261 (Sonja Rinofner-Kreidl & Harald Wilsche eds., 2016).
- Taylor, Henry O., *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK* (Philadelphia, Kay & Brother 1884).
- Teachout, Zephyr, *CORRUPTION IN AMERICA* (2014).
- Teles, Steven M., *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).
- Tergesen, Anne, *Financial Advisers Put Faith in Religion-Based Investing*, WALL ST. J. (Apr. 5, 2017), [www.wsj.com/articles/financial-advisers-put-faith-in-religion-based-investing-1490363559](http://www.wsj.com/articles/financial-advisers-put-faith-in-religion-based-investing-1490363559) [https://perma.cc/C7JR-QCXII].
- Thompson, Paul B., *Why Do We Need a Theory of Corporate Responsibility?*, in *SHAME, RESPONSIBILITY AND THE CORPORATION* 113 (Hugh Curtler ed., 1986).
- Tisaw, Michael A., *The Person Concept and the Ontology of Persons*, in *THE PSYCHOLOGY OF PERSONHOOD: PHILOSOPHICAL, HISTORICAL, SOCIAL-DEVELOPMENTAL, AND NARRATIVE PERSPECTIVES* 19 (Jack Martin & Mark H. Bickhard eds., 2013).
- Tolbert, Pamela S. & Richard H. Hall, *ORGANIZATIONS: STRUCTURES, PROCESSES, AND OUTCOMES* (10th ed. 2009).
- Tollefsen, Deborah Perron, *GROUPS AS AGENTS* (2015).
- Tosi, Henry L., *THEORIES OF ORGANIZATION* (2d ed. 1984).
- Tribe, Laurence H., *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).
- Trumbull, Mark, *Can 'Occupy Wall Street' Really Get Money out of Politics?*, CHRISTIAN SCI. MONITOR (Oct. 14, 2011), [www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics](http://www.csmonitor.com/USA/Politics/2011/1014/Can-Occupy-Wall-Street-really-get-money-out-of-politics) [https://perma.cc/AzXT-D8UJ].
- Tsuk, Dalia, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005) (book review).
- Tucker, Anne, *Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in Citizens United*, 61 CASE W. RES. L. REV. 497 (2010).
- Tur, Richard, *The 'Person' in Law*, in *PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY* 116 (Arthur Peacocke & Grant Gillett eds., 1987).
- Tushnet, Mark, *Do For-Profit Corporations Have Rights of Religious Conscience?*, 99 CORNELL L. REV. ONLINE 70 (2013).
- U.S. COMM'N ON CIVIL RIGHTS, *PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES* (2016), [www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF](http://www.usccr.gov/pubs/Peaceful-Coexistence-09-07-16.PDF) [https://perma.cc/9K7K-9K7K].

- U.S. Conf. of Cath. Bishops, *HHS Proposal Falls Short in Meeting Church Concerns; Bishops Look Forward to Addressing Issues with Administration* (Feb. 7, 2013), <http://uscceb.org/news/2013/13-037.cfm> [<https://perma.cc/TN87-EPWS>].
- Vacharkulksemsuk, Tanya et al., *Establishing a Positive Emotional Climate to Create 21st-Century Organizational Change*, in *THE HANDBOOK OF ORGANIZATIONAL CULTURE AND CLIMATE* 101 (Neal M. Ashkanasy et al. eds., 2d ed. 2011).
- van Kleef, Gerben A. & Agnetta H. Fischer, *Emotional Collectives: How Groups Shape Emotions and Emotions Shape Groups*, 30 *COGNITION & EMOTION* 3 (2016).
- vanden Heuvel, Katrina, *Stanching the Flow of Corporate Dollars into Campaigns*, WASH. POST: OPINIONS (Nov. 8, 2011), [www.washingtonpost.com/opinions/stanching-the-flow-of-corporate-dollars-into-campaigns/2011/11/04/gIQAyzcR1\\_M\\_story.html](http://www.washingtonpost.com/opinions/stanching-the-flow-of-corporate-dollars-into-campaigns/2011/11/04/gIQAyzcR1_M_story.html) [<https://perma.cc/GzLQ-QKU2>].
- Vargas, Michael, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, *BUS. L. TODAY*, July 2016, [www.americanbar.org/publications/blt/2016/07/01\\_vargas.html](http://www.americanbar.org/publications/blt/2016/07/01_vargas.html) [<http://perma.cc/JW2L-MP5S>].
- Velasquez, Manuel, *Debunking Corporate Moral Responsibility*, 13 *BUS. ETHICS Q.* 531 (2003).
- Velasquez, Manuel G., *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 *BUS. & PROF. ETHICS J.*, no. 3, Spring 1983, at 1.
- Victor, Bart & John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 *ADMIN. SCI. Q.* 101 (1988).
- A Theory and Measure of Ethical Climate in Organizations*, 9 *RES. CORP. SOC. PERFORMANCE & POL'Y* 51 (1987).
- Vincent, Andrew, *Can Groups Be Persons?*, 42 *REV. METAPHYSICS* 687 (1989).
- Vinogradoff, Paul, *Juridical Persons*, 24 *COLUM. L. REV.* 594 (1924).
- Vischer, Robert K., *Do For-Profit Businesses Have Free Exercise Rights?*, 21 *J. CONTEMP. LEGAL ISSUES* 369 (2013).
- Wade, Cheryl L., *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 *WASH. & LEE L. REV.* 1187 (2017).
- Walt, Steven & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*, 11 *LAW & ETHICS HUM. RTS.* 1 (2017).
- Watkins, J. W. N., *Methodological Individualism and Social Tendencies*, in *READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES* 269 (May Brodbeck ed., 1968).
- Werhane, Patricia H., *Corporate and Individual Moral Responsibility: A Reply to Jan Garrett*, 8 *J. BUS. ETHICS* 821 (1989).
- Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights?*, 1 *BUS. & HUM. RTS. J.* 5 (2016).
- PERSONS, RIGHTS, AND CORPORATIONS* (1985).
- Werhane, Patricia H. & R. Edward Freeman, *Corporate Responsibility*, in *THE OXFORD HANDBOOK OF PRACTICAL ETHICS* 514 (Hugh LaFollette ed., 2003).
- Whetten, David A. & Peter Foreman, *An Organizational Identity Lens for Organizational Climate Scholarship*, in *THE OXFORD HANDBOOK OF ORGANIZATIONAL CLIMATE AND CULTURE* 443 (Benjamin Schneider & Karen M. Barbera eds., 2014).
- White, James Boyd, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 *YALE L.J.* 1416 (1985).
- JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* (1990).
- Whitehouse, Sheldon, *CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY* (2017).

- Winkler, Adam, *Citizens United, Personhood, and the Corporation in Politics*, in *CORPORATIONS AND AMERICAN DEMOCRACY* 359 (Naomi R. Lamoreaux & William J. Novak eds., 2017).
- Corporate Personhood and the Rights of Corporate Speech*, 30 *SEATTLE U. L. REV.* 863 (2007).
- Masterpiece Cakeshop's Surprising Breadth*, *SLATE* (June 6, 2018), <https://slate.com/news-and-politics/2018/06/masterpiece-cakeshop-grants-constitutional-religious-liberty-rights-to-corporations.html> [<https://perma.cc/XM18-1-7J2G>].
- "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 *GEO. L.J.* 871 (2004).
- WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* (2018).
- Wolfe, Alan, *The Modern Corporation: Private Agent or Public Actor?*, 50 *WASH. & LEE L. REV.* 1673 (1993).
- Wolfe, Christopher J., *"An Artificial Being": John Marshall and Corporate Personhood*, 40 *HARV. J.L. & PUB. POL'Y* 201 (2017).
- Wolff, Martin, *On the Nature of Legal Persons*, 54 *LAW Q. REV.* 494 (1938).
- Wolgast, Elizabeth, *ETHICS OF AN ARTIFICIAL PERSON* (1992).
- Yener, Müjdele et al., *The Effect of Ethical Climate on Work Engagement*, 58 *PROCEDIA SOC. & BEHAV. SCI.* 724 (2012).
- Yosifon, David G., *The Public Choice Problem in Corporate Law: Corporate Social Responsibility After Citizens United*, 89 *N.C. L. REV.* 1197 (2011).
- Zolt, Eric M., *Tax Deductions for Charitable Contributions: Domestic Activities, Foreign Activities, or None of the Above*, 63 *HASTINGS L.J.* 361 (2012).