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Speech, Authorship, and Inventorship: A New Approach to Corporate Personhood

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Abstract

Recent developments relating to corporate speech, authorship, and inventorship suggest a collision of three policy principles: the right of associations to speak with a collective voice; the right of individuals to own or receive credit for the products of their intellect; and the need of innovation firms to control the intellectual output of individuals hired to create. In Citizens United, the Supreme Court upheld a right to corporate political speech as a form of collective voice. But in Stanford v. Roche, the Court affirmed the rule that patentable inventions vest ab initio with their natural person inventors. Meanwhile, in copyright the line between work made for hire and assignments is being tested as the first set of termination rights established in the Copyright Act of 1976 are now eligible for exercise. Recording artists have given notice of termination, but record labels are resisting by claiming the copyrighted materials are works made for hire and thus ineligible for the termination rights. This article weaves together recent work in the history of corporations, authorship, and inventorship to produce a fresh approach to corporate personhood and the allocation of products of the human mind.
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I. INTRODUCTION

The second anniversary of *Citizens United v. Federal Election Commission*\(^1\) has been marked by fierce debate over a movement to override the decision through a constitutional amendment.\(^2\) While the case decided the constitutionality of a federal law restricting the use of general treasury funds by corporations for “electioneering communications,”\(^3\) it became a rallying point for those who wish to revoke the status of corporations as legal persons.\(^4\) In an era where corporations are equated by some with corrupt power and influence, the legal personhood of corporations is an easy target for populist reform. However, *Citizens United* did not rule that “corporations are people.” It instead held that the First Amendment rights of an *association* of people cannot be abridged just because they have chosen a corporation as their form of association.\(^5\) Some reformers consider this a technical point consistent with the larger issue that diverse laws bestow the legal rights of natural persons on corporations.\(^6\) They argue that corporations have more rights than natural persons because, *e.g.*, corporations have perpetual existence and cannot be imprisoned.\(^7\)

While one might expect this debate to break along liberal-conservative lines, with liberals against corporate personhood, at least one progressive supports corporate personhood for its role in social and progressive causes. Kent Greenfield reminds us that

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\(^1\) 130 S. Ct. 876 (2010).
\(^3\) 130 S. Ct. at 886.
\(^5\) 130 S. Ct. at 900, 913.
\(^6\) Clements, *supra* Note 2.
\(^7\) Id.
while “corporations are not people” (at least where “people” means natural persons), corporations are not only business corporations. Citizens United is a Virginia nonprofit corporation. And Common Cause, a proponent of the constitutional amendment to revoke legal personhood for corporations, is a corporation. Greenfield argues that corporate personhood is socially desirable for both nonprofit and for profit corporations: Google’s servers should not be searched and seized by the Government without Fourth Amendment protections; the New York Times and CNN cannot bring us uncensored news without First Amendment protections; and ACLU and Public Citizen cannot freely engage in advocacy without First Amendment, Fourth Amendment, and other constitutional rights. The importance of constitutional protections for these corporations is that they can “amplify” individual voices in beneficial ways.

The counter argument is that profit-minded corporations may amplify the voices of individuals acting in self-interest. Separately, “Super PACs” flooding the 2012 election cycle with campaign cash contributions may represent only narrow special interests. Greenfield’s response is that the constitutional amendment solution is too broad: the problem is not corporate personhood but rather issues of disclosure and control that allow abuse of the political system.

Yet, is the issue only voice “amplification”? And might the amplification rationale simply lead to an arms race? What about the value in having some speech?

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9 130 S. Ct. at 886.
11 Kent Greenfield, supra Note 8.
12 See, e.g., Jeff Zeleny and Jim Rutenberg, Obama Yields in Marshaling of ‘Super PAC’, N.Y. TIMES (Feb. 6, 2012).
13 Greenfield, supra Notes 2 and 8.
attributed solely to the corporation \textit{qua} institution? This is important for other types of institutions such as governments, churches, and membership organizations. In all of these cases, the entity needs to make authoritative pronouncements that are the result of collective deliberation. They may not represent the full and exact position of any one natural person affiliated with the entity. But they are important as institutional precepts to guide behavior or establish authoritative knowledge.

The attribution of authorship to natural persons can diminish the impact of the statement or report. Readers may infer that it represents only the views of named natural persons. Or, even if they believe that it represents the controlling positions of the organization at the time of issuance, they may have little confidence that successors to the named authors will abide by it? Accordingly, there is value in having some speech attributed as the statement of an \textit{institution} that transcends a particular aggregation of individuals. In fact, this notion of an entity that is distinct from its aggregation of individuals underlies both ancient and modern distinctions between partnerships and incorporated entities, as well as views of the state as a transcendent institution.

At the center of this is the concept of \textit{authorship}, broadly construed. Currently, we tend to adopt a Romantic sense of authorship in which the creative genius natural person is the originator of the work. As such, she should be the owner \textit{ab initio} of the copyright and receive attribution for the work. However, our copyright system does not

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15 Note the endless parsing that ensues from the fact that Supreme Court justices are listed by name on majority, concurrence, and dissent opinions. This distinction was also involved in discussions over whose views were being represented in the Internet blackouts by some new media corporations protesting the Stop Online Privacy (“SOPA”), H.R. 3261, 112 Cong., 1st Sess. (2011), and Protect I.P. Act, S. 968, 112 Cong., 1st Sess. (2011), bills in Congress. See Jonathan Weisman, \textit{In Fight Over Piracy Bills, New Economy Rises Against Old}, N.Y. TIMES (Jan. 18, 2012).
always work this way. Under the work made for hire (WMFH) provisions of the Copyright Act, parties who hire individuals to create can stand in as the sole author for the works. They need neither give attribution to the natural person creators nor pay any extra compensation to secure title to the works. There is no copyright at all for U.S. Government works, created by natural person employees, and agencies routinely issue publications solely in the agency’s name.

A fundamental right of modern corporate personhood is the right to own and divest property, which should therefore include intellectual property (“IP”). These rights are not the focus of our inquiry. Rather, we are concerned with the corporation qua speaker, author, or inventor and its capacity to have IP rights and attribution vest \textit{ab initio} in it for this reason. WMFH permits this. Patent law does not: patent rights must vest \textit{ab initio} with natural person inventors. Common law does provide a “hired to invent” exception to the shop rights doctrine in which courts can use their equitable powers to transfer ownership of patent rights from employees to employers in the absence of a written agreement. But this is still a conveyance and the patent rights do not vest \textit{ab initio} in the employer. Further, the natural person inventors must all and only be listed as inventors in the patent. Thus corporations can only be assignees or licensees of patent rights and may not claim attribution as inventors. Possible origins for this stark difference between patent and copyright systems are explored in Part III.

\footnotesize
\begin{itemize}
\item[17] 17 U.S.C. §§ 101, 201(b).
\item[19] See, e.g., American Bar Association, Model Business Corporation Act §§ 3.02(4)-(5) [hereinafter “MBCA”]; Delaware General Corporation Law § 122(4) [hereinafter “DGCL”].
\item[21] See Part III infra.
\item[22] Id.
\end{itemize}
This article is concerned in part with the tension between organizations and individuals for control and attribution of products of the mind. More precisely though it is concerned with the difference between presenting the illusion of the organization as a hive which can think and act with one mind and presenting it as an aggregation of individuals who conditionally grant rights to their separate inputs.\textsuperscript{23} Equally important then are theories of corporate personhood, which we explore in Part II. The dominant contract theory holds that firms are simply a nexus of contracts among corporate stakeholders. But, this does not fully address the ontological and procedural commitments that corporations law appears to make with regard to both the status of corporations as legal persons distinct from their human agents and the necessity of the state taking action to create such legal persons. One alternative is concession theory which holds that corporations exist solely at the discretion of the sovereign as a privilege. But this gives too much power to the state for what are largely the actions of private actors and is not an accurate account of the rights of individuals to incorporate in modern systems of free or general incorporation.

More ancient than contract and concession theories, however, is what we are calling the corpus theory in which the corporation is a singular body comprised of individual members who participate actively in its governance. This concept was relied on for the earliest acts of incorporation, which gave rights of legal personhood to the entity only because it was considered to be one body and not merely an alliance of

\textsuperscript{23} To employ a dated pop culture reference, this is like the difference between the Borg and the Federation in the television series \textit{Star Trek: The Next Generation}. 
individuals such as a partnership. This concept lives on in some membership corporations, but it is not the dominant use of the corporate form today.

We also propose a new *license* theory of the corporation, which fits free incorporation systems better than do the contract, concession, or corpus theories. The license theory analogizes to license systems for professionals and activities in which individuals have the right to engage in the profession or activity so long as they meet certain fixed and publicly disclosed requirements. This is different from contract theory because it acknowledges the power of the state to withhold or recall rights of incorporation. It is different from concession theory because it acknowledges that states no longer have discretionary power to withhold or deny these rights.

We also consider the team production theory of the corporation because it maps well onto the practical nature of the modern business firm organized to produce goods or services. Under this theory, individuals subordinate themselves and assets to a “mediating hierarch” that can allocate and direct resources to maximize profitable production. However, as its proponents limit it to public for profit corporations, it captures only a portion of the universe of corporations with which we are concerned.

Another strand of literature uses the perspective of employment law to explore the allocation of ownership and attribution of IP as between employers and creative employees. This threads together two of the three major policy strands this article seeks to weave together. But it generally fails to address the third one: the importance for organizations (including government agencies and nonprofits) to speak with an

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24 The membership corporation is a nonprofit corporation that elects to have one or more classes of members established in its charter. See, e.g., Washington Nonprofit Corporation Act, Members – Member committees, REV. CODE WASH. § 24.03.065.

institutional voice. This policy strand seems to justify giving control over rights and attribution of at least some products of the mind to corporate employers.

In sum, this article seeks to advance multiple literatures by addressing the roles of different theories and policy goals impacting the allocation and attribution of products of the mind between individuals and corporate persons. It breaks new ground by weaving together broader conceptualizations of both products of the mind and the corporation. The article proceeds by considering theories of the corporation and the roles of associative, organizational, and institutional voice in Part II. It then compares copyright and patent doctrines that determine ownership and attribution of products of the mind with regard to individuals and corporations in Part III. Finally, Part IV weaves together aspects of these theories to advance a new approach to corporate, speech, authorship, and inventorship.

II. THEORIES OF THE CORPORATION: CONCESSION, CONTRACT, CORPUS, OR LICENSE?

Corporations obtain the status and rights of personhood by being duly formed under the law and procedures of a state.\(^\text{26}\) This is not to adopt the concession theory of corporate personhood but rather to make a practical point. Similar to the rights to secure patents,\(^\text{27}\) enforce copyrights,\(^\text{28}\) engage in public offerings of securities,\(^\text{29}\) and market drugs,\(^\text{30}\) private parties have a right to form a corporation, but one that is subject to a kind

\(^{26}\) See, e.g., DGCL § 101.
\(^{28}\) 17 U.S.C. §§ 102, 411, 501(a)-(b). Copyright inheres as soon as the work is fixed in a tangible medium, with no formalities required. However, before the owner can bring a suit to enforce a copyright, the copyright must be registered with the Copyright Office and a copy of the work must be deposited with the Library of Congress.
of veto. In all these cases, if the party has not satisfied the requirements for the right to be exercised, then the agency can withhold or stay the action. The bar to clearing various vetoes varies quite a bit. It is low for registering a copyright forming a corporation. It is high to have a patent issued, publicly offer securities, and market new drugs.

The corporate form is not limited to the business corporation, even though much of the corporation law literature treats it that way. In fact, the origins of the concept of incorporation—to make a single body out of a group of individuals—was not primarily concerned with business. Rather it arose to allow a group to act and speak as one, such as in the case of a municipality, religious organization, or fraternal association. Thus, modern inquiries into the roots of the “corporation” must be divided into those seeking the origins of the business corporation and those seeking the origins of the act of incorporation generally. In the former, the inquiry is guided by the search for organizations exhibiting modern business corporation law criteria including: “(1) limited liability for investors; (2) free transferability of investor interests; (3) legal personality (entity-attributable powers, life span, and purpose); and (4) centralized management.”

Some commentators have thus considered certain partnerships and associations in Ancient Rome and India as proto-business corporations. In the latter, however, the

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inquiry is guided by the search for entities in which individuals come together to act as one body.\textsuperscript{35} We are concerned with the nature of the corporation \textit{qua} incorporated body.

The conventional contemporary theories of the corporation are \textit{concession} and \textit{contract}.\textsuperscript{36} Concession theory views the corporation as a creature existing solely at the discretion of the state.\textsuperscript{37} By contrast, contract theory views the corporation as a “nexus of contracts” among its stakeholders that creates a legal persona.\textsuperscript{38} The action of the state is reduced to recognizing the corporate persons through registration and establishing default rules that mimic what the stakeholders of the corporation would have negotiated if they could engage in complete contracting.\textsuperscript{39} Concession theorists favor limited, conditional grants of powers to corporations: “whether the corporate privilege shall be granted is always a matter of state policy.”\textsuperscript{40} Contract theorists favor broad grants of powers and free incorporation.\textsuperscript{41} One might expect contract theorists to not view the corporation as a distinct entity because it is simply a nexus of contracts. But, most do view the corporation as a legal person, albeit one created by private not public action.\textsuperscript{42}

We reject both of these conceptions and instead propose a \textit{license} theory of corporations in this Part. We also review the history of incorporation, especially including that of religious corporations, and argue that the \textit{corpus} corporation in which individuals fuse themselves indivisibly into one body provided the justification for

\textsuperscript{35} Goodman, \textit{supra} Note 32; Thomas, \textit{supra} Note 32
\textsuperscript{36} \textit{See, e.g.}, O’Melinn Note 31.
\textsuperscript{37} \textit{Id.}; Pistor, \textit{supra} Note 31.
\textsuperscript{39} O’Melinn, \textit{supra} Note 31; Mahoney, \textit{supra} Note 34 at 873-75; Michael E. DeBow & Dwight R. Lee, \textit{Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation}, 18 \textsc{Del. J. Corp. L.} 393, 397 (1993).
\textsuperscript{40} Mahoney, \textit{supra} Note 34 at 873-75 (quoting Justice Brandeis’ dissent in Louis K. Liggett Co. v Lee, 288 U.S. 517, 545 (1933) (Brandeis, J., dissenting)).
\textsuperscript{41} O’Melinn, \textit{supra} Note 31 at 201-202.
\textsuperscript{42} \textit{See, e.g.}, Mahoney, \textit{supra} Note 34 at 874
corporate personhood. That this type of corporation rarely exists anymore presents problems for many policy positions that implicitly rely on it.

A. Early History of Incorporation and the Corpus Corporation

Historically, the essential characteristic of incorporation was the voluntary joining of individuals into a new unitary body. The term and concept were derived from the universitas, corpus, and collegium of Roman Law. Under Justinian, the state itself was conceived of as an institution formed under higher political authority. At the same time, municipalities and private organization including political clubs and guilds of traders were proto-corporations in which the members agreed to act and speak as one in certain regards.

The early Christians arguably set the framework in the West for thinking about the corporation as something corporeal in which ownership and attribution of products of the human (or divine) mind could vest ab initio. The early Church was self-organized as a corporation and its members considered themselves quite literally to be the body, or corpus, of Christ. Similarly, the early Germanic genossenschaft, which was an

43 Goodman, supra Note 32.
44 Id.
45 Id.
46 Id.
47 Goodman, supra Note 32 (citing 1 COR. 12:27). In his First Epistle to the Corinthians, Paul explains the corporate nature of the Church in the following manner:
12 For as the body is one, and hath many members, and all the members of that one body, being many, are one body: so also is Christ.
13 For by one Spirit are we all baptized into one body, whether we be Jews or Gentiles, whether we be bond or free; and have been all made to drink into one Spirit.
14 For the body is not one member, but many.
15 If the foot shall say, Because I am not the hand, I am not of the body; is it therefore not of the body?
association that constituted the household, warrior band, clan, or village, also treated incorporation as the creation of a distinct persona that transcended its members. These types of corporations proliferated in the Middle Ages. However, they generally required concession or privilege from a sovereign to be recognized as secular legal persons. Thus, while the Church considered its members to be part of one body, secular authorities only recognized specific units of the Church within their jurisdiction as legal persons such as abbeys, monasteries, and individual churches or parishes.

In the 12th century, the entire Church declared itself a corporate entity that transcended secular governments and did not require secular concessions for personhood. The Church developed an early form of free incorporation under canon law which held that any association of persons formed for a specific purpose, such as to run an almshouse or hospital, was a legal corporate person without need for a secular

16 And if the ear shall say, Because I am not the eye, I am not of the body; is it therefore not of the body?
17 If the whole body were an eye, where were the hearing? If the whole were hearing, where were the smelling?
18 But now hath God set the members every one of them in the body, as it hath pleased him.
19 And if they were all one member, where were the body?
20 But now are they many members, yet but one body.
21 And the eye cannot say unto the hand, I have no need of thee: nor again the head to the feet, I have no need of you.
22 Nay, much more those members of the body, which seem to be more feeble, are necessary.
23 And those members of the body, which we think to be less honourable, upon these we bestow more abundant honour; and our uncomely parts have more abundant comeliness.
24 For our comely parts have no need: but God hath tempered the body together, having given more abundant honour to that part which lacked:
25 That there should be no schism in the body; but that the members should have the same care one for another.
26 And whether one member suffer, all the members suffer with it; or one member be honoured, all the members rejoice with it.
27 Now ye are the body of Christ, and members in particular.

1 COR. 12:12-12:27 (HOLY BIBLE, KING JAMES VERSION).

48 Goodman, supra Note 32.
49 Id.
50 Pistor, supra Note 31 at 806.
51 Goodman, supra Note 32.
52 Id.
concession.\textsuperscript{53} Canon law corporations had some degree of sovereign power over members, and could levy taxes, but consent was required for the exercise of certain powers.\textsuperscript{54} Property was held by the corporation.\textsuperscript{55} Governance rules required appointment of a head who had exclusive powers to administer corporate property and adjudicate disputes.\textsuperscript{56} Interestingly, this is consistent with the mediating hierarchy of team production theory.\textsuperscript{57}

Canon law also permitted delegates who had full power to act and speak on behalf of the corporation in secular governance bodies as well as in royal and ecclesiastical.\textsuperscript{58} Binding consent of the members was central however: “‘what concerns everyone ought to be considered and approved by everyone’” was as important as “‘no man can withdraw from the common consent of his community.’”\textsuperscript{59} Following from the early Church’s “body of Christ” notion of incorporation and the medieval demphasis of the individual, the focus was on the group as unitary entity, and not on members as aggregated individuals. Decisions, actions, and products of the mind seem to have been attributed to the entity, not the individual producers. We call this the \textit{corpus corporation} and its continuing influence appears in later secular ideas of “one body politick and corporate.”\textsuperscript{60}

By contrast, business activities up through the Renaissance tended to occur through what today would be considered proprietorships and partnerships.\textsuperscript{61} A prime example of this was the Italian \textit{commenda}, an early contractual form of limited

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\textsuperscript{53} \textit{Id.} at 203.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} See \textit{infra} Notes 166-71 and accompanying text.
\textsuperscript{58} Goodman, \textit{supra} Note 32 at 203.
\textsuperscript{59} \textit{Id.} at 203-204 (quoting Harold Berman, \textit{LAW AND REVOLUTION} 215-21 (1983)).
\textsuperscript{60} Goodman, \textit{supra} Note 32 at 204; \textit{infra} Notes 77-82 and accompanying text.
\textsuperscript{61} See Mahoney, \textit{supra} Note 34 at 880-88.
partnership. Generally formed for a single venture or voyage, the commenda arguably enabled the first limited liability structure for passive investors. This allowed the venture to pool greater amounts of capital than available through a typical general partnership. Merchant law courts on the Continent recognized and enforced these purely contractual arrangements almost as if the commenda were a legal person.

But English common law courts were hostile to merchant law courts and effectively made it impossible for merchants to rely on the commenda form in England. Thus, they usually operated through general partnerships with joint and several liability for all partners. There were practical size limits to these ventures because of both risk and the difficulty of governing with too many partners. Infrequently, English merchants were able to obtain charters from the Crown or Parliament to form regulated corporations. These were corpus corporations and required all members to be active in governance. British merchants also used the joint stock company for large partnerships, especially where the venture would last beyond a single voyage. The joint-stock company was a contractual arrangement based on a partnership that pooled assets under a “court” that divided ownership into transferable pro rata shares. It could not provide limited liability and was not a distinct legal person.

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63 Id.; Mahoney, supra Note 34 at 880-81.
64 Harris, supra Note 71; see also Sean M. O’Connor, The central role of law as a meta method in creativity and entrepreneurship in Shubha Ghosh and Robin Paul Malloy, eds., CREATIVITY, LAW AND ENTREPRENEURSHIP 95-97.
65 Ibid.
66 Harris, supra Note 71; Mahoney, supra Note 34 at 881-82.
67 Harris, supra Note 71 at 25-27; Mahoney, supra Note 34 at 884.
68 Harris, supra Note 71 at 25-27.
69 Mahoney, supra Note 34 at 883-84.
71 Harris, supra Note 71 at 25-27.
During the late sixteenth century, the Dutch used sophisticated *commenda* partnerships with great success in the lucrative Asian trade.\(^{72}\) British merchants responded with an innovative solution: the merging of the joint stock company with a regulated corporation in the form of the British East India Company established in 1600 (the “EIC”).\(^{73}\) This was the forerunner to the modern business corporation in that it had all the capital-raising flexibility of the *commenda* coupled with true legal personhood granted by the Crown.\(^{74}\) Personhood gave *de facto* limited liability to investors because the EIC alone owned its assets and had liability for its actions.\(^{75}\) While it was a corpus corporation as to its registered members, the layering of the joint stock device created an external set of investors who were not members, but who were generally granted similar voting rights.\(^{76}\) Royal chartering also brought the benefit of perpetual existence, especially when King James reissued EIC’s charter in 1609 declaring that it “‘for ever be, and shall be one body corporate and politick.’”\(^{77}\)

In 1612, Lord Coke implicitly emphasized the value of formal incorporation when he ruled that “incorporation cannot be created without the King” in the *Case of Sutton’s Hospital*.\(^{78}\) This re-established a stark contrast between corporations as legal persons with perpetual duration and limited liability for members and partnerships without such rights. But securing a royal charter was difficult and expensive: the promoters needed to be well-

\(^{72}\) *Id.* at 22-25.
\(^{73}\) *Id.* at 27-30. The British East India Company was formally named “Governor and Company of Merchants of London Trading into the East Indies” from the time of its charter until 1708. *Id.* at 31.
\(^{74}\) Harris, *supra* Note 71 at 28.
\(^{75}\) *Id.*
\(^{76}\) *Id.* at 28-29. Members were “brethren” who could then subdivide their equity stake and convey parts to “adventurers” who were investors with contractual, but not membership, rights to profits. *Id.*
\(^{77}\) Harris, *supra* Note 71 at 28.
\(^{78}\) 77 Eng. Rep. 960, 964-65 (1612).
connected and wealthy. The charter was a royal privilege, often accompanied by a grant of monopoly for the corporation’s business or trade. Perceived abuses in this system based on court politics led to enactment of the Statute of Monopolies in 1624.

While the Act is usually cited for its role in the history of patent law, it has special purpose for our inquiry as it restricted the grant of patents to natural person inventors for the working and making of new manufactures while voiding and prohibiting all grants to “Bodies politick or Corporate.” This meant that in one important regard, corporations could no longer enjoy one of the powers of natural personhood: the award of letters patent. But because few business, religious, or social associations focused on the invention of new manufactures, this development did not significantly diminish the value of obtaining a corporate charter.

Meanwhile, merchant associations not well-situated enough to obtain a charter found ways to approximate legal personhood. Paul Mahoney, a leading contract theorist, argues that a contract-based form of the modern business corporation could have emerged from common law rules during this period. However, in 1719 Parliament passed the Bubble Act, at the height of the speculative frenzy of the South Sea Bubble, that flatly prohibited both legal personhood and the use of transferable stock without a

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79 Mahoney, supra Note 34 at 887.  
80 Id.  
81 See An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof, 21 Jac. 1, c. 3, § 1 (1623) (Eng.) [hereinafter “Statute of Monopolies”].  
82 Id. at §§ 1, 6.  
83 In some cases, merchants bought charters from moribund corporations. Pistor, supra Note 31 at 806. In other cases, legal personhood was approximated by placing the shares of a joint stock company into a trust which was then sole owner of shares. The trustee could hold and devise property, and sue and be sued, on behalf of the trust, and thus of the company as well. Id. at 884-85. Some joint stock companies relied on arbitration provisions in all of the company’s contracts that create some degree of contractual limits on liability. Id.  
84 Id. at 886-90.
charter from the Crown or Parliament.\textsuperscript{85} This firmly placed England into a concession model for more than a century.

B. The Emergence of Free or General Incorporation

Up through the mid-eighteenth century, incorporation remained either a matter of royal privilege, special legislative grant, or canon law (collectively “special incorporation”) across England, its colonies, and Europe. But following the American Revolution, New York, New Jersey, and Delaware established free or general incorporation for churches during the 1780s.\textsuperscript{86} These statutes gave religious organizations a right to incorporate so long as they met certain statutory requirements (“general incorporation”). In some cases, they also covered charitable, literary, educational, or even fire fighting organizations\textsuperscript{87}—generally all those activities that would be considered nonprofit today. South Carolina had general incorporation implicit in rights granted under its constitution even earlier, in 1778.\textsuperscript{88} In Europe, France introduced a general incorporation system for businesses following the French Revolution in 1791, but returned to a concession system under the Napoleonic Code in 1807.\textsuperscript{89}

Liam O’Melinn argues that in America the former colonies were passing these statutes because they recognized the moral imperative of associations that were

\textsuperscript{85} “[T]he acting or presuming to act as a Corporate Body or Bodies, the raising or pretending to raise transferable Stock or Stocks . . . without legal Authority . . . shall for ever be deemed to be illegal and void, and shall not be practiced or in any wise put in execution.” 6 Geo., c. 18 (1719) (Eng.).
\textsuperscript{86} O’Melinn, supra Note 31 at 220-22.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 217-18.
\textsuperscript{89} Pistor, supra Note 31 at 807. During the period 1793-1796, France temporarily reversed the policy due to a boom and bust of start-ups following the initial period of free incorporation. Id. General incorporation was reintroduced in 1867. Id.
performing the bulk of public services. His thesis is that the modern corporate form is based on neither contract nor concession, but rather on a model of the corporation as an ensouled, immortal being that has social obligations. He locates part of the impetus for these religious and nonprofit general incorporation statutes on a need for a legal person that could hold the organization’s assets as against individuals and the government. This was especially important in the wake of the American Revolution when many special privileges and incorporations from British times were abolished or denuded. New York’s statute fits this theory well in its preamble stating that “charitable and well disposed Persons have been prevented from contributing to the Support of Religion, for Want of proper Persons authorized by Law, to take Charge of their pious Donations, and many Estates purchased and given for the Support of religious Societies, now vest in private Hands.”

By contrast, Virginia forbade general or special incorporation for churches all the way until 2002. Its rationale was based on separation of church and state: incorporation amounted to a state establishment of a particular religion. At the same time, unincorporated associations were often held to be too impermanent to be treated as any kind of unitary entity or person for purposes of holding property. But, while Virginia chose to address the religious establishment issue by allowing no churches to incorporate,

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90 O’Melinn, supra Note 31 at 220.
91 Id. at 221-22.
94 See Turpin v. Locket, 10 Va. 113, 167-68 (1804) (holding that state legislature had power to take lands from former Church of England in state because Revolution dissolved the legal person holding such lands).
95 Id. at 168; see also O’Melinn, supra Note 31 at 222.
other states solved it by allowing all churches to incorporate through general incorporation acts.\textsuperscript{96}

O’Melinn argues that this was based on the states’ recognition of the righteousness and social utility of the various churches, but the evidence does not compel this conclusion. Rather, it points equally well to the pragmatic rationale that it would have been perilous on freedom of religion and anti-establishment grounds for legislatures or courts to get into the business of deciding which religions were deserving of incorporation. Further, prohibitions on any incorporation, such as in Virginia, could be seen as disfavoring all religious associations as against other associations who could incorporate through either special or general incorporation acts. O’Melinn also argues that the states “ceded government power” to the religious corporations based again on the latter’s moral standing so that the churches could govern themselves.\textsuperscript{97} But, it seems equally likely on his evidence that states simply did not want to get involved in how the churches were administered—this could be problematic from a religious freedom perspective. Thus, the state’s sole job was to create a neutral legal infrastructure accessible to all within which any religious, educational, or charitable organization could incorporate and operate.

In 1811, New York enacted the first American general incorporation statute for businesses.\textsuperscript{98} However, no other states would follow suit until the 1830s. In the meantime, in 1819 the Supreme Court decided the seminal corporate law case of \textit{Trustees

\textsuperscript{96} See O’Melinn, \textit{supra} Note 31 at 234.
\textsuperscript{97} O’Melinn, \textit{supra} Note 31 at 224-229.
of Dartmouth College v. Woodward. While it is usually cited for business corporations law, it centered on the nonprofit educational corporation of Dartmouth College. Some commentators cite it as support for the concession theory: “[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 . . . .” Mahoney rejects the centrality of this case while also interpreting it to support contract theory because the promises and obligations of the parties are invoked to resolve the property question at issue.

O’Melinn argues that neither contract nor concession interpretations of Dartmouth College are correct. He contrasts Justice Marshall’s statements in Dartmouth College with Lord Coke’s statements in Sutton Hospital to contend that the former instituted a revolution in corporate law by replacing the latter’s concession based ruling with a view of corporations as ensouled, immortal beings. Thus, whereas Coke states that corporations “cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls.” Marshall opines that “It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.”

There are two problems with this argument. First, Justice Marshall is not saying that corporations are immortal beings, he literally says they are like an immortal being, a

\[^{99}\text{17 U.S. 517 (1819).}\]
\[^{100}\text{17 U.S. at 636; Mahoney, supra Note 34 at 873.}\]
\[^{101}\text{Mahoney, supra Note 34 at 873.}\]
\[^{102}\text{O’Melinn, supra Note 31 at 207.}\]
\[^{103}\text{Case of Sutton’s Hosp., 77 Eng. Rep. 960, 973 (K.B. 1612).}\]
\[^{104}\text{17 U.S. at 636.}\]
metaphor. Second, Lord Coke also refers to corporations as being immortal in Sutton’s Hospital: “a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law; and therefore cannot have predecessor nor successor.” The jurists are both saying the same thing: corporations are “immortal” not because they have metaphysical being, but simply as legal constructs that are temporally unbounded. They are “immortal” because they are not flesh and blood mortal beings. The point was important because partnerships were generally held to terminate upon the death or departure of any partner. The corporation was a legal construct designed as a property holding vehicle that would endure beyond the death or departure of any particular member.

In England, Parliament finally repealed the Bubble Act through the Bubble Companies Act of 1825 allowing joint stock companies to flourish again. In the United States, a number of other states—but not including Delaware—followed New York’s earlier lead to enact general incorporation acts for businesses. Thus, in both countries businesses and speculators were being freed to engage in aggressive stock-based schemes. England was particularly hard hit with the “railway mania” speculation and fraud based on “watered” stock during the 1830s and 1840s. Parliament responded with the Joint Stock Companies Act of 1844 that—rather than banning joint stock companies—effectively co-opted them. It created a process of general incorporation in which business corporations could be formed without Crown or Parliamentary action on

105 Case of Sutton’s Hospital, 77 Eng. Rep. 960, 973 (K.B. 1612).
106 6 Geo. 4, c. 91 (1825) (Eng.).
107 Pistor, supra Note 31 at 808.
109 7 & 8 Vict., c. 110; see also O’Connor, supra Note 108 at 749.
the condition that they comply with specific governance, disclosure, and audit requirements. While its provisions did not extend to royally chartered or Parliamentary created corporations, other acts passed around the same time introduced similar governance and disclosure requirements for these other forms. Statutory limited liability was also introduced in the Limited Liability Act of 1855.

While these developments in business corporations law were moving away from the corpus corporation in their provisions for governance that allowed a growing separation of members—now shareholders—and management, religious and nonprofit corporations law saw a temporary reemphasis in the mid-nineteenth century on corpus corporation member-wide consultation and consent governance. In *Baker v. Fales*, the Supreme Judicial Court of Massachusetts asserted that it was “not at all consistent with the spirit of the times, that the great majority should . . . be subject to the minority” in deciding who was entitled to vote for church ministers. Likewise, in *Robertson v. Bullions*, the New York Court of Appeals held that all members of the congregation comprised the corporation and not just the church trustees.

In O’Melinn’s account, the wave of business general incorporation statutes that swept the United States after the wave of religious general incorporation statutes was dependent on the moral force behind the latter. There may well be a connection between the two movements, but the lesson to be drawn may be different than O’Melinn’s conclusion. If the impetus behind the religious general incorporation trend

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110 See *id.* at 749; Pistor, *supra* Note 31 at 806-807.
111 The Chartered Companies Act of 1837 set standard provisions for royal charter corporations, 7 Will. 4 & 1 Vict., c. 73 (1837) (Eng.), while the Companies Clauses Consolidation Act set standard provisions for statutory corporations, 8 & 9 Vict., c. 16 (1845) (Eng.). See O’Connor, *supra* Note 10 at 749-50.
112 18 & 19 Vict., ch. 133 (1855) (Eng.).
113 16 Mass. 488, 521 (1820); O’Melinn, *supra* Note 31 at 225.
114 11 N.Y. 243 (1854); O’Melinn, *supra* Note 31 at 225.
115 *Id.* at 229-233.
was simply state legislatures choosing to allow all religious associations to incorporate and have wide latitude for governance structures so as not to disfavor any of them, then the analogous rationale behind the business general incorporation trend was that states should not favor any particular groups or types of activities. After all, special incorporation still constituted *de facto* legal privileges over unincorporated competitors. Both of these movements would thus be explainable by nothing more than the democratic and egalitarian emphasis of states in the early Republic: when corporate “privileges were restricted to a few . . . it was opposed to every principle of democracy.”

In the end, what O’Melinn really might be trying to say, or what might flow more naturally from his insights, is that the corporation creates or becomes an institution which then takes on a life of its own, regardless of whether the law recognizes it as a legal person. This is not unreasonable, although such a position would bring his views closer to those of Mahoney than he might like. At the same time, Mahoney and O’Melinn’s apparently different positions may be reconciled by understanding both as trying to establish the corporation as an institution that does not rely on the concession of a sovereign. In Mahoney’s case, the locus of the institution is in the contracts among the parties affiliated with the organization. In O’Melinn’s case, the locus is in a kind of social contract in which individuals create organizations through constitutions that establish rights and obligations for the corporation and its community transcending the natural persons affiliated with either. The challenge with this interpretation is that it might prove too much. Other organizations and activities create institutions as well; it is not clear what is special about corporations for this purpose.

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Notwithstanding the question of why corporations might be a special case, their role as institutions is important in our larger inquiry about corporate speech, authorship, and inventorship. If we acknowledge that institutions have a life of their own distinct from the natural persons affiliated with them, then it makes sense in some situations to attribute at least speech and authorship to the institution itself. The question then, is who decides what is attributed to the institution? We will take up that question later in Parts II.D, Parts III, and IV.

C. A License Theory of the Corporation

One set of problems remain for those who oppose concession theory: if the corporation is not a creation of the state, then what accounts for the state’s power to: (i) impose detailed registration, capital stock (for business corporations), and governance rules as a condition of incorporation; (ii) withhold legal recognition and rights from unregistered “corporations”; and (iii) dissolve registered corporations upon transgressions of the state’s corporations law? The solution is to separate out two types of concession theory. The first is the traditional concession theory in which states have discretion to grant charters under special incorporation. This discretionary concession theory is the kind that commentators as varied as Mahoney and O’Melinn oppose. It is implicitly rejected by states with general incorporation statutes. The second is what we will call the license theory. Under it, the state retains the power to fashion rules that all who seek the license must comply with to obtain and maintain the license. This is similar to other license regimes including those for professionals (e.g., doctors, lawyers, accountants) and
activities or services (e.g., hunting, fishing, selling liquor, serving food, providing health care). In each, the state establishes criteria and then all qualified individuals who meet the criteria have the right to obtain the license. Failure to maintain compliance with the criteria permits the state to revoke the license. The license theory fits the development of corporations law in the United States during the late nineteenth and twentieth centuries quite well.

General incorporation statutes for businesses continued to be enacted during the nineteenth century up through passage of Delaware’s first general incorporation statute in 1883.117 As a latecomer Delaware sought to lure in corporations with business friendly provisions. It ultimately won what some call a “race to the bottom” in which states competed for corporate franchises by passing business friendly laws.118 As described in the federal Industrial Commission’s 1902 Final Report: “It is important to observe that whenever any State has put conservative restrictions upon corporations, either as to their formation or management, other States have take advantage of the situation and enacted such liberal laws that corporations have removed to them from other States.”119 But even as states competed in this manner, none ever reached the level of a true registration system in which there are no statutory requirements other than registration.120

117 Act Concerning Private Corporations, 17 Del. Laws 147 (1883).
120 All current state business corporations laws still require things such as: a registered agent and address; the use of “incorporated” or similar device to signal limited liability; a cap on authorized shares in the charter; annual shareholder meetings in which certain matters must be decided by shareholder vote; and provision for the state to dissolve the corporation upon certain transgressions of the law.
The dramatic expansion in business corporations in the late nineteenth century may have led to the perception that the business corporation is “the” corporation. Business corporations statutes were also changing dramatically as part of the competition for business company charters. This may explain the increasing focus of legal scholars on business corporations law culminating in the twentieth century conception of “corporations law” a exclusively that of business corporations law. Business corporations were presenting novel social, political, and legal challenges as they grew in size and influence. The power over these behemoths and their assets was becoming concentrated in small groups of professional managers as against the “members” or “owners” who were now merely “shareholders.” This led to seminal works, such as Berle and Means The Modern Corporation and Private Property, that further consolidated the focus of legal scholars on business corporations.

But traditional discretionary concession theory seems to have still held sway into the mid-twentieth century, possibly because of awareness that the corpus corporation was still the deep historical justification for corporate personhood. The realities of the competition for corporate charters among the states and the continuing push for fair and accessible general incorporation, however, drove changes in business corporations law that removed any vestiges of corpus corporation purpose and structure. Corporate purpose requirements were loosened until reaching the modern standard that allows corporations to be formed simply “for any lawful purpose.” Stock par value requirements that were intended to keep a lid on favoritism and questionable stock grants

121 See O’Melinn, supra Note 31 at
123 See, e.g., MBCA § 3.01; DGCL § 101(b).
were reduced to *de minimis* amounts, or even eliminated entirely. 124 The term of the corporation’s existence was allowed to be perpetual (until or unless dissolved by shareholders or state action). 125 Ultimately this led to the twentieth century notion that business corporations were simply profit-making ventures with the primary goal of wealth maximization for their shareholders. 126

Fitting as a logical extension of license theory and the mandate for fair and accessible legal entity forms, states also expanded their repertoire of entity types that required registration and compliance. Registered limited partnerships, limited liability partnerships, limited liability companies, co-operative associations, and even condominium corporations, each addressed particular needs in the “market” for legally recognized organization types. But how and why do organizations differentially select from among the various entity types? One might argue that the different entity types map onto different kinds of contractual arrangements that private parties had sought to establish. States then have created convenient “plug and play” structures that private parties can adopt and that contain default rules and structures which make it easier for the parties to minimize transaction costs and incomplete contracting problems raised by purely contractual arrangements. 127 This is similar to the role of the Uniform Commercial Code for commercial transactions. Accordingly, we might split out two versions of contract theory, with this one called *state-assisted contract theory*. The other could be called *private* or *pure* contract theory, because it would rely entirely on private

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124 See, e.g., MBCA § 6.21 (board may determine the level of adequate value to be received in exchange for shares); DGCL § 151 (classes of stock may have par value or no par value).
125 See, e.g., MBCA § 3.01(1); DGCL § 122(1).
127 In fact, contract theorists have argued that this is exactly the function of modern business corporations law. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416, 1444-45 (1989).
contracting with the state then merely recognizing the legal personhood of the contractual “corporation” through a basic registration system.

None of this satisfactorily explains why many organizations choose the corporate form, which has the highest burden of compliance requirements of all the registered entities. Further, the corporate form is no longer exclusive in its ability to provide aspects of personhood, because other registered entity forms have aspects of personhood as well. Margaret Blair and Lynn Stout’s team production theory of the corporation may provide answers. In seeking to explain what they see as the puzzle of the legal requirement for boards of directors in public corporations, as well as the peculiar legal circumstances of the public corporation generally, they position the board of directors as a “mediating hierarch” that can allocate control and benefits of inputs and outputs among the public corporation’s stakeholders efficiently to produce complex or capital-intensive goods. They place their model within contract theory, but reject the shareholder primacy tendencies of other contract theorists.

The need for their model as a necessary “second best” alternative to private contracting, or pure contract theory, is based on the inability of parties to negotiate

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128 See, e.g., Washington Uniform Limited Partnership Act, Powers, REV. CODE WASH. § 25.10.031 (“A limited partnership has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership.”); Washington Limited Liability Companies, Nature of Business Permitted—Powers, REV. CODE WASH. § 25.15.030(2) (“Unless this chapter, its certificate of formation, or its limited liability company agreement provides otherwise, a limited liability company has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs.”).
129 Blair, supra Note 25.
130 Id. at 251-52. They note that some state corporations law allows closely held corporations to dispense with a board of directors. Id. (citing DGCL §§ 350, 351).
131 Id. at 254-57.
132 Id. at 253-57.
133 Id. at 253-54.
complete contracts in the circumstances they describe.\textsuperscript{134} Thus it is a form of our state-assisted contract theory. Parties select it precisely for its strong board that is typically insulated from control by corporate insiders and others by common law and state corporations law (\textit{e.g.}, the business judgment rule), which can then act as the objective mediating hierarch against interest groups within the corporation, including officers, other insiders, and even shareholders.\textsuperscript{135} This is part of why Blair and Stout limit their theory to public corporations. The other reason they give is that smaller entrepreneurial firms can more readily engage in complete contracting with lower transaction costs.

The limitation of team production theory to public corporations makes it less useful for us, because we are considering the nature of the corporation in all its business and nonprofit forms. But we will consider a modified form of their theory in Part IV that can be used to allocate ownership and attribution of products of the human mind as between innovation producer corporations and individuals affiliated with them. At the same time, their model shows how far we have come from the corpus corporation. Not only is there no fusing of individual members into one metaphysical body, with full consultation and consent of the members required for corporate speech or action, but also the implication of the model is that the board alone should decide on what speech and acts can be undertaken by and attributed to the corporation.

There is nothing wrong with this model, and it may in fact be an accurate representation of the nature of public corporations today. But it underscores the extent to which contract theory in its form of state-assisted contract theory really fits better into our license theory than pure contract theory. In the team production model it is important not

\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 254-57.
only that business corporations law sets some basic defaults for private parties seeking to organize, but that it also mandates a particular view of the board and its role in the corporation. This seems fairly interventionist for contract theorists who usually emphasize private ordering with a touch of libertarianism. If we view team production through the license theory lens, these problems disappear. But regardless of which theory best fits current business corporations law, one thing is clear: the corpus corporation is gone. This is equally true under nonprofit corporation law. Yet, vesting ownership and attribution of products of the mind in the corporation seemed originally justified by the corpus corporation. In the remainder of this Part, we examine how the Supreme Court still implicitly relies on corpus theory to justify corporate speech rights.

D. Attributing Speech to the Corporation and the Rhetoric of Association in *Citizens United*

So who decides which speech acts are attributed to the corporation? References to corporate statutory powers only show that those who control a corporation are likely authorized to attribute speech to the corporation. For business corporations, both the Model Business Corporation Act (“MBCA”) and the Delaware General Corporation Law (“DGCL”) set out non-exhaustive lists of powers of personhood.\(^{136}\) But they also include catch-all provisions that allow business corporations to have all the same powers as an individual to do all things necessary or convenient to carry out their affairs.\(^{137}\) This would

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\(^{136}\) MBCA § 3.02; DGCL § 121-22.

\(^{137}\) “Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . .” MBCA § 3.02; “In addition to the powers enumerated in . . . this title, every corporation, its officers, directors and
seem to include the power to engage in speech acts in the corporation’s name only. Nonprofit corporation law is similarly situated. The Washington Nonprofit Corporation Act, for example, grants substantially all the same powers, including the catch-all provision, as does the MBCA.

Given the control vested in the board for both nonprofit and business corporations, the directors would seem to have statutory authority to select and attribute speech to the corporation. To the extent they have delegated this power to officers, the latter may have this statutory power as well. But should a handful of individuals alone be able to attribute speech to a large organization with many stakeholders? Further, should they have full discretion or should there be some criteria or limits for what gets attributed to the corporation? This latter is especially important when one considers the tendency of individuals to take personal credit for successes while depersonalizing or placing blame elsewhere for failures. For example, an officer of a company may tend to speak of his decisions that led to a successful outcome for the company, while speaking of the corporation’s decisions that led to a bad outcome. The corporation can be the perfect foil for human guile as it has neither emotions, rationality, nor capacity to retaliate or contest a natural person’s actions. At the same time, the board might not fully control corporate attribution. Under agency principles, officers or other employees may be able to speak for and bind the corporation. The board may try to revoke these later, but if the

**stockholders shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its certificate of incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.”** DGCL § 121.

138 **REV. CODE WASH.** § 24.03.035.

139 In some cases, we have decided that natural persons cannot hide behind the corporate voice. For example, under the Sarbanes-Oxley Act, CEOs and CFOs must personally certify the mandatory annual and quarterly disclosures of reporting public companies. Sarbanes-Oxley Act of 2002, § 302, P.L. 207-104, 116 Stat. 745 (Jul. 30, 2002).
employee had actual, inherent, or apparent authority, then the statements or acts may still bind the corporation as principal.

Equally important is the question of whether the board or its delegates can compel allocation or attribution of products of the mind from employees exclusively to the corporation. Given the broad sweep of powers under the statutes, one might expect this power to be included. Yet, the current situation is more complicated: directors and officers can compel allocation and attribution of copyright authorship exclusively to corporation, but they can compel only allocation of patent rights to the corporation, the natural person creators must always be attributed as inventors. While copyright then seems to provide an avenue for corporate attribution of speech, this only applies to copyrightable works. Uncopyrightable factual statements, for example, would not not be covered.

But regardless of the resolution of attribution as between natural persons and the corporation, there remains the question of whether the corporation has the full free speech rights of natural persons. While Citizens United seems to grant this, it does so by relying on essentially the anachronistic corpus corporation model. But before examining the decision, we must briefly review different categories of corporate speech. Commercial speech includes advertising and other statements about the corporation’s products and services. It can be heavily regulated but not restricted entirely. Regulatory speech includes factual statements about the corporation’s structure, finance, personnel, transactions, and affiliates that are in fact required for tax, securities, and other

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140 See Part III infra.
government agency filings (as well as court proceedings). Political speech includes statements and other material support for political campaigns, political parties, and advocacy of legislative positions.

Political speech was the focus of the Supreme Court in *Citizens United*. The case addressed complicated issues of campaign finance reform law beyond the scope of this article. Accordingly, we focus only on the corporate political speech aspects. Citizens United, a nonprofit corporation, released a documentary about then-presidential candidate Hillary Clinton and intended to run advertisements for it within 30 days of primary elections. Under the Bipartisan Campaign Reform Act of 2002 such advertisements might constitute prohibited “electioneering communications” if funded from the general treasury of Citizens United. Citizens United brought an action seeking declaratory judgment against the Federal Election Commission that its actions would not violate the law. After summary judgment was granted for the Federal Election Commission, the Supreme Court took the case and had it re-argued in order to determine whether it should overturn some of its precedents in this area.

The Court had earlier upheld limits on electioneering communications in *McConnell v. Federal Election Commission*, which relied on the holding in *Austin v. Michigan Chamber of Commerce* that political speech may be banned based on the

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142 This has led some commentators to warn of a coming “collision” between Supreme Court jurisprudence on commercial speech and political (First Amendment) speech over the compulsion and regulation of corporate speech in the form of securities disclosures, especially where those disclosures might contain “politically tinged” statements. See Michael R. Siebecker, *Corporate Speech, Securities Regulation, and an Institutional Approach to the First Amendment*, 48 WM. & MARY L. REV. 613 (2006); James C. Goodale, *The First Amendment and Securities Act: A Collision Course?*, N.Y.L.J., Apr. 8, 1983 at 1. So far this collision has yet to occur.
143 130 S. Ct. at 886-88.
145 Id. at 888.
146 Id.
speaker’s corporate identity.\textsuperscript{148} However, other precedents held that: corporations had First Amendment rights;\textsuperscript{149} and Government lacks the power to restrict political speech based on the speaker’s corporate identity.\textsuperscript{150} Congress and the courts have argued that unlimited corporate political speech can have “distorting effects” on the political process because of amount of resources they can bring to bear.\textsuperscript{151} Political speech in the form of corporate political expenditures might also corrupt the politicians who received the contribution or other support.\textsuperscript{152} However, the \textit{Citizens United} Court argued that those were not sufficient to outweigh the First Amendment rights of corporations and the chilling effects of \textit{McConnell} and \textit{Austin}.\textsuperscript{153}

The Court first focused on First Amendment protections for association: “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or \textit{associations of citizens}, for simply engaging in political speech.”\textsuperscript{154} It then linked corporations with associations: “If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an \textit{association that has taken on the corporate form}.”\textsuperscript{155} Finally, the Court returned to the trope of freedom of association and political speech: “\textit{Austin} interferes with the ‘open marketplace’ of ideas protected by the First Amendment” because “[i]t permits the

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\textsuperscript{148} 494 U.S. 652 (1990).
\textsuperscript{151} \textit{See} 130 S. Ct. at 899-913; \textit{Austin v. Michigan Chamber of Comm.}, 494 U.S. 652 (1990).
\textsuperscript{152} \textit{Ibid}.
\textsuperscript{153} 130 S. Ct. at 899-913.
\textsuperscript{154} \textit{Id.} at 904 (emphasis added).
\textsuperscript{155} \textit{Id.} (emphasis added).
\end{flushleft}
Government to ban the political speech of *millions of associations of citizens.*”\(^{156}\)

Accordingly, it overturned *Austin.*\(^ {157}\)

The Court expressly included business corporations in its set of “associations.”\(^ {158}\)

But even as it equated *corporations* with *associations,* it acknowledged—and dismissed—concerns that corporate management could effectively force dissenting shareholders to fund political speech the latter disagreed with because management could approve the use of general treasury funds without shareholder approval, much less unanimous consent.\(^ {159}\) The Court blithely mentioned that “there is . . . little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”\(^ {160}\) This is disingenuous in that members of the majority were surely aware of the shortcomings of “corporate democracy” that drove enactment of both Sarbanes-Oxley and the Dodd-Frank Act.\(^ {161}\)

More importantly, this dicta underscores the Court’s implicit reliance on the anachronistic corpus model of the corporation. While there are some membership corporations today that approximate corpus type corporations, and are truly governed by consent of their members, no other corporations fit the model. Should board controlled business and nonprofit corporations then be considered “associations of citizens” in the way in which the Court relies on the term for rhetorical justification of its conclusions? While it may have been satisfactory for the Court to reach its holding simply on the grounds that corporations are legal fictions that represent the interests of their directors or

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\(^{156}\) *Id.* at 906-7 (emphasis added). Query whether the majority meant to say “millions of citizens” rather than “millions of *associations* of citizens.”

\(^{157}\) *Id.* at 913.

\(^{158}\) *Id.*

\(^{159}\) *Id.* at 911.

\(^{160}\) *Id.* at 911 (quoting Bellotti, 435 U.S. at 794).

\(^{161}\) Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111-203,
officers, or that they serve as focal points for certain perspectives on the political realm, or that they have become institutions that need to have voice in the political process, the Court’s reliance on the rhetoric of association belies a concern that these (or other) grounds would not have been equally compelling.

At the same time, the Court fails to address fully the power of giving a legal fiction speech rights on par with those for a natural person. When it points out that other forms of association, such as partnerships and other unincorporated associations, are not disfavored for political speech purposes this is a bit of legal sleight of hand. These other associations are just that—aggregations of individuals, not distinct legal persons. The association does not have any existence, much less perpetual existence, outside of the aggregation of individuals. Further, these aggregations of individuals are far more likely to be governed and act by consent of their members.

In sum, the evolution of the “corporation” from its roots in corpus corporations to board controlled general incorporation business and nonprofit corporations has resulted in a useful, but misleading, rhetorical device. Equally important, the privileged status of the corporation as a legal person arose only because of its corpus roots. Such status was not historically extended to partnerships or unincorporated associations. The Citizens United Court misleadingly links the First Amendment freedom of association with the modern corporation. While it is impractical to expect a broad return to the corpus corporation, the fact that few corporations follow the model today requires us to re-examine the privileged status of the corporation as legal person. There may be practical reasons for retaining some of the legal fictions of the corporate person. But we can no longer rely on anachronistic justifications to reflexively hold that the corporation is a legal person.
entitled to all the rights of natural persons. For purposes of this article, we are especially concerned with rights of the corporate person to have speech, authorship, and inventorship attributed exclusively to it. We thus now turn to the interplay of corporate persons and natural persons with regard to allocation and attribution of authorship and inventorship.

III. AUTHORSHIP, INVENTORSHIP, AND THE CORPORATE PERSON

Today, we tend to think of authorship and inventorship as the archetypes of individual expression. This may be because we immediately think of the solitary novelist, painter, or tinkerer. Of course, many works and inventions are created by multiple individuals, cooperatively or competitively. But we still view this, with good reason, as the product of human minds and agency. The question is who should own or receive attribution for group productions. How do we decide who should get credit for “important” aspects of the creation, while relegating others to the status of assistants? There is a growing literature on the role of groups versus individuals in producing creative or inventive works. But little attention has been paid to the issue of allocating and attributing these works to the corporate person as if it created them (rather than as assignee or licensee). Scholarship that has focused on how IP affects the boundaries of the business firm, or that considers the economic benefits of allocating rights to those

162 See, e.g., Eric von Hippel, DEMOCRATIZING INNOVATION (MIT Press, 2005); Mark A. Lemley, The Myth of the Sole Inventor, 110 MICH. L. REV. __ (2011). Note that Lemley’s article actually argues that multiple individuals or groups simultaneously invent the same or similar things.
individuals or groups in the best position to exploit them (the classic “prospect theory” of patents), for example, does not address this crucial question of corporate person attribution.

If corporations are legal persons with full rights of personhood, then it would seem that those rights should extend to ownership and attribution of creative works. This would fit naturally with corpus corporations. And in fact, there is some evidence that the medieval European artisan guilds operated this way. Similarly, many of the Catholic Church’s doctrines and creeds have been produced by committee and attributed to the committee or the church, not the individuals who produced them. Government bodies act in similar ways when agencies issue reports in the name of the agency only. Similarly, committee members may be listed on, or sign, a report to show their assent to it, but not necessarily as authors; authorship is reserved to the committee itself as a body. A related phenomenon was the allocation and attribution of creative fine art works to famous masters such as Michelangelo, even where teams of artisans were actually producing components of the works. In this case, there was no corpus corporation, but still individual contribution was masked and blended into one legal person as if he had produced all of it.

Accordingly, there was longstanding precedent for attributing creative and works to corporate and natural persons who did not actually or wholly produce them. On the corporate side, this was justified by the fact that the corpus corporation was one body

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166 See, e.g., Council of Trent, WIKIPEDIA available at http://en.wikipedia.org/wiki/Council_of_Trent (last visited Feb. 27, 2010). Note that the members of the Council signed the decrees it issued, but it does not appear that portions of the decrees were attributed to any particular members, or even whether there were dissents.
with multiple members. Just as it would make no sense to say that the hand produced the work rather than the person (except in a poetic or metaphorical sense), it would make no sense to say a member of the corporation produced the work. On the natural person side, the attribution made sense in the context of pre-modern notions of authorship and authority discussed below.

But today’s corporation is rarely the corpus type corporation.\textsuperscript{167} And our sense of authorship has changed, including the fact that we have cleaved off inventorship from authorship. In some cases, our legal doctrines have changed along with these changes; in other cases not. The following sections give an overview of the evolution and current different states of the law for allocating and attributing authorship and inventorship as between individuals and corporations. We do not treat trade secrets here, because by definition they are secret and thus not broadcast to the world in the same manner as speech, authorship, and inventorship (with regard to patentable inventions).

A. Authorship and Work Made for Hire

Under the current WMFH provisions of the Copyright Act, employers and parties who commission the creation of copyrightable works can stand in as sole author.\textsuperscript{168} They need not give attribution to the natural person creators, nor pay any extra compensation to secure title. However, the means of establishing the WMFH relationship differ with regard to employees and independent contractors.\textsuperscript{169} Employees are deemed to have submitted to the WMFH relationship simply by being employees and creating a work

\footnote{\textsuperscript{167} See Part II \textit{supra}.\
\textsuperscript{168} 17 U.S.C. §§ 101, 201(b).\
\textsuperscript{169} See discussion of Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), \textit{infra}.}
within the scope of their employment.\textsuperscript{170} No writing is required. In fact, to alter this
default, the employer and employee must enter into a signed writing specifically
disclaiming the WMFH relationship.\textsuperscript{171} Parties contracting with independent contractors,
by contrast, must secure a writing expressly contracting for WMFH and the work must fit
within one of nine categories of works.\textsuperscript{172}

Determining whether an individual is an employee or an independent contractor is
not always easy. The Copyright Act gives no set criteria for distinguishing one from the
other. The question usually arises with regard to creator as employee, because no written
WMFH agreement is required and the scope of works that qualify is broader. While
“work[s] prepared by an employee within the scope of his or her employment”\textsuperscript{173} is
neither defined nor unlimited— \textit{i.e.}, the scope of the employment needs to be
determined—it generally gives more latitude than project-specific independent contractor
agreements.

The leading case on determining the nature of the relationship, and hence whether
WMFH applies, is \textit{Community for Creative Non-Violence v. Reid}.\textsuperscript{174} Artist James Earl
Reid was commissioned, without a written contract, by the Community for Creative Non-
Violence (“CCNV”) to create a sculpture to CCNV’s specifications.\textsuperscript{175} CCNV is a

\textsuperscript{170} See \textit{id.}
\textsuperscript{171} 17 U.S.C. § 201(b).
\textsuperscript{172} 17 U.S.C. § 101. The categories include works specifically ordered or commissioned as a contribution:
to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a
supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as
an atlas. A “supplementary work” is “a work prepared for publication as a secondary adjunct to a work by
another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting
upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps,
charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendices,
and indexes.” An “instructional text” is “a literary, pictorial, or graphic work prepared for publication and
with the purpose of use in systematic instructional activities.” \textit{Id.}
\textsuperscript{173} 17 U.S.C. § 101.
\textsuperscript{174} 490 U.S. 730 (1989).
\textsuperscript{175} 490 U.S. at 733-34.
During the course of development of the statue, CCNV regularly monitored and directed Reid’s progress. Neither party argued in litigation that Reid was a formal, salaried employee of CCNV, but there was a mixed record of how closely CCNV directed the project. Neither party registered a copyright in the final work up through its initial display. However, the parties disagreed about what should be done with the statue afterwards. Reid took possession to make some repairs and then refused to transfer it back to CCNV. He then registered a copyright to it solely in his name.

Mitch Snyder, the member and trustee of CCNV who had overseen much of the commission and subsequent work on the statue, then filed a competing copyright registration in his capacity as trustee for CCNV and sued Reid for return of the sculpture and a determination of copyright ownership, joining CCNV as a plaintiff. The district court ruled in favor of CCNV and Snyder, finding that Reid was an employee for purposes of WMFH, ordering the return of the sculpture, and declaring Snyder, as trustee for CCNV, the exclusive owner of the copyright. The Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) reversed and remanded on the basis that Reid was not an employee under standard agency law principles.

\[176\] Id. at 733.  
\[177\] Id. at 733-35.  
\[178\] Id. at 751-53.  
\[179\] Id. at 733-35.  
\[180\] 490 U.S. at 733-35  
\[181\] Id. at 735.  
\[182\] Id.  
\[183\] Id.  
\[184\] Id.  
\[185\] 490 U.S. at 736.
The Supreme Court granted certiorari to resolve a circuit split over the proper construction of WMFH under the Copyright Act.\textsuperscript{186} It confirmed that the relationship between Reid and CCNV could not qualify for WMFH under the independent contractor provision because it did not fit under one of the nine categories and there was no written agreement between the parties.\textsuperscript{187} Thus the inquiry was confined to whether Reid could be considered an employee for WMFH purposes. The Court examined four interpretations of where the creator would be considered an employee for WMFH purposes: (i) the hiring party retains the right to control the product; (ii) the hiring party has actually wielded control with respect to the creation of a particular work; (iii) common law agency principles would find the creator to be an employee; and (iv) the creator was a formal, salaried employee.\textsuperscript{188} CCNV/Snyder advocated for (i) and (ii), but the Court rejected these.\textsuperscript{189} It failed to address (iv), but it is hard to know what this means. Neither party seems to have suggested that Reid was a formal salaried employee, and at any rate the evidence would clearly have been against that finding.

The Court adopted the D.C. Circuit’s reliance on (iii).\textsuperscript{190} Despite having rejected the control tests of (i) and (ii), the Court still relied on some assessment of control in applying the common law agency test: “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”\textsuperscript{191}

Notwithstanding the apparent reintroduction of control as the test, the Court gave a non-

\textsuperscript{186} Id.
\textsuperscript{187} Id. at 738.
\textsuperscript{188} Id. at 738-39.
\textsuperscript{189} Id. at 741-43.
\textsuperscript{190} 490 U.S. at 740-41.
\textsuperscript{191} Id. at 751.
exhaustive list of factors to be considered in determining whether a creator is an employee: “Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

In applying these factors to Reid’s relationship with CCNV, the Court found that Reid was not an employee. It then held that “CCNV is not the author of [the work] by virtue of the work made for hire provisions of the Act.” But that was never the proposition. Snyder had taken out the copyright registration as trustee of CCNV, which may have had some functional similarity to CCNV registered the copyright in its own name, but it was not the same thing. Was this a distinction without a difference? No, as a review of the D.C. Circuit opinion reveals in a passage of great import for our purposes.

Judge Ruth Bader Ginsburg, then a judge on the D.C. Circuit, writing for the majority in the D.C. Circuit appeal of CCNV explained in a footnote:

Snyder filed the certificate of copyright registration in his own name without mentioning CCNV. The district court indicated, however, that Snyder’s registration was as CCNV’s trustee. . . . On the prudence of this filing in light of the voluntary and unincorporated nature of CCNV, see

192 Id. at 751-52 (cites removed).
193 Id. at 752-53.
194 Id. at 753.
Thus, the D.C. Circuit—and presumably later the Supreme Court—was using “CCNV” as a kind of beneficial proxy for the actual registration in Snyder’s name alone. One would presume that courts would enforce a trustee’s obligations to the association in a case like this. But the deeper question is why is was “prudent” for Snyder to register the copyright in his own name.

The case cited, *Motta v. Samuel Weiser, Inc.* is instructive for our purposes. Motta, the purported leader of a mystic cult, sought to enforce the copyright in works handed down by an earlier leader. The problem was that the cult had broken into at least three different associations, only one of which was incorporated, and which had tenuous connections with each other. At the same time, the bequest of copyright from the earlier leader was clearly to one of the unincorporated associations, Ordo Templi Orientis (“OTO”). Motta’s claim to standing to enforce the copyrights as head of OTO was too dubious based on the evidence and the district court denied it. Motta’s other ground for standing to enforce the copyright was as head of the incorporated association, Society Ordo Templi Orientis (“SOTO”), that was arguably a member of OTO. But,
the district court found the membership in OTO to be too indeterminate—even assuming that SOTO was a member—for it to hold any property, including the copyrights.\textsuperscript{202}

The Court of Appeals for the First Circuit affirmed the district court on both grounds.\textsuperscript{203} Most relevant for our purposes was its arguments about the capacity of unincorporated associations to hold property. The court agreed that the Massachusetts state supreme court case of \textit{Byam v. Bickford} stood for the proposition that members of a voluntary or unincorporated association could take title to real property as tenants-in-common.\textsuperscript{204} While unincorporated associations are not recognized as legal persons or entities capable of owning property in and of themselves,\textsuperscript{205} some courts have held that property ownership may vest in the individuals who comprise the organization.\textsuperscript{206} But this may be allowed only where all of the association’s members can be ascertained.\textsuperscript{207} Where membership is not fixed and new members are being constantly added or lost, then ownership may not be allowed to vest in the members.\textsuperscript{208} The court cited the policy basis for this prohibition: “Without this limitation . . . the public, or even the members of the association, would not have notice or be cognizant of who claimed ownership in a particular property.”\textsuperscript{209} Accordingly, because membership in OTO was uncertain then its members, including SOTO, could not hold title to the copyrights as tenants-in-common or any other theory based on a collection of members.\textsuperscript{210}

\begin{itemize}
\item \textsuperscript{202}Id.
\item \textsuperscript{203}Id. at 485.
\item \textsuperscript{204}Id. (citing \textit{Byam v. Bickford}, 140 Mass. 31 (1885)).
\item \textsuperscript{205}Id. at 485-86 (citing Moffat Tunnel League v. United States, 289 U.S. 113 (1933)).
\item \textsuperscript{206}768 F.2d at 486 (citing \textit{Byam v. Bickford}, 140 Mass. 31 (1885)).
\item \textsuperscript{207}Id.
\item \textsuperscript{208}Id. (citing State v. Sunbeam Rebekah Lodge No. 180, 169 Or. 253 (1942)).
\item \textsuperscript{209}Id. (citing Johnson v. South Blue Hill Cemetery Assoc., 221 A.2d 280 (Me. 1966)).
\item \textsuperscript{210}Id. at 486-87.
\end{itemize}
This brings us back to the central importance of corporate personhood. In Part I, we saw how New York justified its first religious general incorporation act on the basis that for “want of legal Persons” churches were having problems receiving and holding property. And centuries before that, the Catholic Church in Europe had declared itself a kind of multinational corporation that transcended any secular state boundaries, in large part to protect its property claims in various jurisdictions. At the same time, the act of incorporation was expressly to create a corpus corporation that fused the individuals of the church as members into one body. Likewise, the early English chartered corporations required a fixed list of members who were merged into “one body politick and corporate.” Thus, the value of incorporation for membership associations lives on to this day, especially in its property holding function. But this function has outlived its justification: the act of incorporation no longer requires formation of a corpus corporation. Yet, the corporation still acquires legal personhood and can hold property such as copyrights.

At the same time, there is no limitation that WMFH applies only to corporations—much less corpus corporations. Further, any employer or hiring party can have authorship, and thus copyright, vest ab initio in it so long as the statutory WMFH criteria are satisfied. While it makes sense for any hiring party to be able to control and use the commissioned work and rights of copyright attendant to it, it does not follow that in all cases the natural person creators need to be stripped of attribution. What sense does it make to call the legal fiction of the corporate person the author as a matter of origination and attribution? However, full authorship rights can be justified for hiring parties who are natural persons, innovation production units, or corpus corporations. The
is explored further below in this section and in Part IV. In preview, however, the justification is that the creative director, visionary, or producer—whether individual or collective—should be able to “author” their vision and its implementation.

A further consequence of having WMFH status apply to a work is that it cuts off the termination rights that natural person authors have when they assign or license their works.\textsuperscript{211} This termination right was added into U.S. copyright law as part of the Copyright Act of 1976, and as such it only applies to assignments or licenses executed after January 1, 1978. The right vests 35 years after the execution of the grant and continues for five years from that date.\textsuperscript{212} Its purpose was to allow authors (especially musicians) to be able to get out of unfavorable deals they struck when starting out and held no negotiating power. The termination right gives such artists a second bite at the apple and is not waivable.\textsuperscript{213} But given the right’s first appearance in the 1976 Act, the first termination windows only opened in 2011.\textsuperscript{214}

The provision is now being put to the test and assignees/licensees are contesting termination notices.\textsuperscript{215} In particular, record labels are claiming that artist recording contracts were actually WMFH agreements.\textsuperscript{216} The artists, in response, are denying the WMFH interpretation and asserting that the contracts were assignments or licenses.\textsuperscript{217} We do not know whether the labels are claiming that the artists were employees or independent contractors. This may vary for each case. If they claim the relationship was that of independent contractor, then they will need to show that the contract explicitly

\begin{itemize}
\item \textsuperscript{211} 17 U.S.C. § 203.
\item \textsuperscript{212} 17 U.S.C. § 203(a)(3).
\item \textsuperscript{213} 17 U.S.C. § 203(a)(5).
\item \textsuperscript{214} See, e.g., Larry Rohter, \textit{Record Industry Braces for Artists’ Battle Over Song Rights}, N.Y. TIMES (Aug. 15, 2011).
\item \textsuperscript{215} \textit{Id}.
\item \textsuperscript{216} \textit{Id}.
\item \textsuperscript{217} \textit{Id}.
\end{itemize}
claimed WMFH and that the commissioned work fits within one of the statutory categories. The only categories that seem to fit are collective works and compilation works. These would not work for singles, but might work for albums. The contract language should be straightforward in the independent contract case. It may be less clear where labels claim an employment relationship. In that case, the agreement need only set out grounds for an employment relationship with composition and/or recording of songs as the scope of employment. WMFH for the works would then follow without any specific mention of the doctrine in the contract. This scenario could explain how both labels and artists are claiming the agreements support their side. The label believes that it can meet enough of the indicia of employment as set out in cases such as CCNV, whereas the artists think that the agreements show an independent contractor relationship.

Debates over WMFH have also arisen in academia. Some academics believe that either they are not employees for purposes of WMFH or that the so-called “teachers exception” developed under the Copyright Act of 1909 survived the overhaul of copyright in the 1976 Act. Although faculty are certainly formal, salaried employees of a university, the CCNV Court declined to address whether that test is dispositive. But it is hard to see how a formal salaried employee is not an employee under the common law agency principles set out by the CCNV Court. Nonetheless, scholarly works have traditionally not been treated by either faculty or universities as WMFH. However, there is no current statutory basis for this “teachers exception.” To the extent that a judicial teachers exception existed under the 1909 Copyright Act, it was not codified in the Copyright Act of 1976, even as the latter made some revisions to WMFH.218

218 P.L. 94-553, 90 Stat. 2541 (Oct. 19, 1976). Some have argued that the legislative history of the 1976 Act is silent on the point because Congress had no intention of eliminating the teacher exception. See Elizabeth
The case that is often cited for the proposition that the teachers exception survived—Weinstein v. University of Illinois—actually established the opposite. The U.S. Court of Appeals for the Seventh Circuit (“Seventh Circuit”) noted that the 1976 Act likely eliminated whatever teachers exception existed under the 1909 Act. It explained that the University of Illinois, like many other academic institutions, instituted a new copyright policy after the 1976 Act changes to preserve the status quo that scholarly works were not WMFH. The 1976 Act made all works created in the scope of employment WMFH “unless the parties have expressly agreed otherwise in a written instrument signed by them.” Full-time faculty are employees and must publish as part of their academic appointment, including for tenure and promotion review. Thus, even though the works are not done “for” the university—and the topics, content, and manner of scholarship is not controlled by the university—the works are likely still done within the scope of their employment and thus constitute WMFH. The Weinstein court
determined that the University’s policy was sufficient to serve as the written instrument disclaiming WMFH.\textsuperscript{224}

The court then proceeded to parse \textit{this policy} and was not ruling on whether the teachers exception still existed.\textsuperscript{225} While the court made several references to the tradition of allowing academics to retain copyright to their scholarly works, it did so simply as part of interpreting the policy because the court had determined that the \textit{intention} of the policy was to preserve the pre-1976 Act status quo.\textsuperscript{226} Overall, the policy disclaimed faculty works as WMFH, but with three exceptions: (i) works created under the terms of a university agreement with an outside party that required the university to hold or transfer ownership of the work; (ii) works expressly commissioned in writing by the university; and (iii) works created as a specific requirement of employment or as an assigned duty.\textsuperscript{227}

The University argued that the work at issue—an article on a clinical program that the faculty member taught in—fit into category (iii) and therefore was WMFH.\textsuperscript{228} While the trial court accepted this argument, the Seventh Circuit reversed on the grounds that this interpretation allowed the exception to swallow the rule.\textsuperscript{229} It would essentially make all academic articles WMFH and thus negate the University’s intention to preserve the pre-1976 Act status quo for faculty works.\textsuperscript{230} Accordingly, the Seventh Circuit ruled that

\textsuperscript{224} 811 F.2d at 1094.
\textsuperscript{225} \textit{See id.} at 1094-95.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.} at 1094.
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} 811 F.2d at 1094.
\textsuperscript{230} \textit{Id.} at 1094-95. “The University concedes in this court that a professor of mathematics who proves a new theorem in the course of his employment will own the copyright to his article containing that proof. This has been the academic tradition since copyright law began, . . . a tradition the University’s policy purports to retain.” \textit{Id.} at 1094 (citation omitted) (emphasis added).
the work did not fall under category (iii) of the policy, and therefore, *under the main provision of the policy* it was not WMFH.\textsuperscript{231}

Another factor cutting against arguments that the teachers exception survived the 1976 Act is whether there is a commercial aspect to the work.\textsuperscript{232} Course materials have also been the subject of WMFH litigation. Dispositive factors include whether the materials were created within the scope of employment and whether there was a written agreement disclaiming WMFH.\textsuperscript{233} Non-academic works, and those created by non-academic employees have been found to be WMFH.\textsuperscript{234}

Also important for our inquiry is statutory preclusion of copyright for U.S. Government works.\textsuperscript{235} This is a kind of public domain WMFH rule for “work[s] prepared by an officer or employee of the United States Government as part of that person’s official duties.”\textsuperscript{236} Functionally, it seems to vest authorship in the Government, but then place the work in the public domain.\textsuperscript{237} An unanswered question is whether the Government or creative individuals have any attribution rights to the works. There is nothing on point in the Copyright Act and so where individuals or corporations reproduce

\textsuperscript{231} Id.
\textsuperscript{232} See, e.g., Rouse v. Walter & Associates, L.L.C., 513 F.Supp.2d 1041 (S.D. Iowa 2007). This case did not decide whether the teachers exception still existed, because it was decided on the grounds that the commercial nature of the work was dispositive to judge it a clear work made for hire even if such an exception still existed.
\textsuperscript{233} See, e.g., Bosch v. Ball-Kell, 2006 WL 2548053, 80 U.S.P.Q.2d 1713 (C.D. Ill. 2006); *but see contra* Vanderhurst v. Colorado Mountain College District, 16 F.Supp.2d 1297 (D. Colo. 1998). Because Bosch v. Ball-Kell was a decision based on a motion for summary judgment, it did not need to resolve the WMFH question. Thus it did not specify whether a teachers exception still exists for class materials (or otherwise). It also over-interpreted the Seventh Circuit’s references to the “longstanding traditions” related to the teachers exception in *Weinstein* and *Hays*. Teachers in grades lower than the college level will generally have their teaching materials deemed WMFH. See, e.g., Shaul v. Cherry Valley-Springfield Central School District, 363 F.3d 177 (2nd. Cir. 2004). However, evidence that teaching materials were created outside of the scope of employment alters the analysis. Pavlica v. Behr, 397 F.Supp.2d 519 (S.D.N.Y. 2005).
\textsuperscript{234} Works created by staff or regular employees that are administrative, promotional, or otherwise non-academic are generally WMFH. See, e.g., Forasté v. Brown University, 248 F.Supp.2d 71 (D. R.I. 2003); Manning v. Board of Trustees Community College, 109 F.Supp.2d 976 (C.D. Ill. 2000).
\textsuperscript{235} 17 U.S.C. § 105.
\textsuperscript{236} 17 U.S.C. § 101.
\textsuperscript{237} See H. Rep. No. 94-1476, Notes of Committee on the Judiciary.
Government works with no attribution to the Government or the creative individuals neither of the latter may have legal recourse.

One justification for the doctrine is so that the “authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.”\(^{238}\) But that only seems apt for statutes, regulations, cases, and perhaps some guidance statements. What about informational or research works by, say, the National Institutes of Health? In fact, the House Report on the Copyright Act of 1976 that introduced the current version of the prohibition on copyright for U.S. Government works did not rely on the “free publication of the law” rationale, but rather simply asserted that any works created by U.S. Government officers and employees are not subject to copyright.

Returning to WMFH, the real question for our purposes is how it arose. Catherine Fisk has one explanation, based on how the doctrine appears to have developed in the United States during the nineteenth century.\(^{239}\) In her account, the (apparent) creation of the corporate legal person in the late nineteenth century gave courts the link they needed at “exactly the right time” to bridge the gap between their sense of authors as individuals and the corporation as a collective enterprise.\(^{240}\) The first step was for courts to equate the modern corporation with the studio or atelier of great artists, in which the master would direct assistants to do background work fleshing out and realizing the work: “Walt

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\(^{238}\) Banks v. Manchester, 128 U.S. 244, 253 (1888). The seminal case for this position is Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).


\(^{240}\) *Id.* at 213.
Disney was to his animated films as Titian was to his paintings.”241 From here it was a slippery slope for courts to abstract out the need for the corporation’s president to actually have any role in the vision or creative genius behind the work, while still granting the copyright to the corporation as “author.”242

There are some problems with this narrative. First, the corporate person was not created in the nineteenth century.243 She points out that where “judges saw authorship as a collaborative process, the fact that a business entity was a corporate body helped the employer’s case [in asserting ownership of the copyright]. . . . [t]he claim of a corporate ‘author,’ composed of many different people working toward a common end, had greater rhetorical appeal than the claim of one individual partner to another.”244 On one level this is right, some judges were using the corpus corporation model to justify granting ownership of copyrights to corporations. But on another level, her narrative is misleading because the corpus corporation had preceded copyright itself in Europe and thus this sense of collaborative corporate authorship was nothing new.245 The second problem with her narrative is that the great master example she uses is not the same in operation or conceptual justification as the corpus corporation model. In the former, the master does not get authorial rights because he is the personification of the collective of individuals. He gets the rights based on a more ancient sense of what it means to “author” a work. In the latter, the corporation is the only legal person—the members are not considered to be individual legal persons qua members of the corporation.

241 Id. at 212.
242 Id. at 213-15.
243 See Part I supra.
244 Fisk, supra Note 299 at 214.
245 See infra.
At any rate, the cases Fisk cites do not seem to support the notion that courts were attributing authorship, or at least ownership of copyrights, to corporations because they were corpus corporations.\textsuperscript{246} Rather, they seem to follow, in part, the studio master model. Fisk’s concern is that this justification ceases to work when ownership is granted to corporations in which professional managers direct creativity but do not generate the vision or participate in the creativity in any way. This is a legitimate concern, but it belies the alternative that the courts were not relying solely on the studio master model, or more precisely, that they were implicitly relying on the roots of the studio master model, which actually have little to do with creativity or genius as the locus or rationale for authorship. The issues in Fisk’s account thus stem in part from the fact that her subject is the development of corporate IP since 1800. While her book is an excellent resource on the case law and related developments of the tension between employees and employers with regard to IP rights, it begins from the premise that the Romantic genius conception of authorship (and inventorship) and the high point of humanistic individualism that reigns at the beginning of her period of study is the baseline for IP rights, authorship, and inventorship. This is not the case, as the remainder of this section outlines.

In classical antiquity there was no such thing as the self-expressing creative \textit{artiste} genius that we are so familiar with today—that concept only arose in the eighteenth century.\textsuperscript{247} Works were created as functional with pleasing elements.\textsuperscript{248} Much of what we would consider the “fine arts” today were considered the “imitative arts”—

\begin{footnotes}
\textsuperscript{246} Id. at 214-24. Neither do these cases seem to actually attribute authorship to the corporate legal person, but rather only ownership of the copyrights.
\textsuperscript{247} See, e.g., Long, supra Note 219 at 7-10, 43-45; Biagioli, supra Note 16.
\end{footnotes}
imitating pleasing aspects of nature in painting, sculpture, and music.\textsuperscript{249} Literary works were either factual treatises, allegorical stories or drama intended to convey moral messages, or poetry.\textsuperscript{250} Only the last was considered to be “new” or original to the writer, but even there it was not so much attributed to the writer as a human individual, but rather was seen by Plato and others as the product of divine madness in which the poet was essentially channeling divine messages.\textsuperscript{251}

Concomitant with this absence of a sense of the creative genius of the artist was any sense that the “author” of a work had to be individuals who were producing part or all of it. Instead, the “author” was the person or entity who \textit{authorized} the work to be produced, or under whose \textit{authority} it was produced.\textsuperscript{252} From these exemplars it is clear how the term “author” arose in the first place.\textsuperscript{253} This sense of author as authority then helped explain the practice of experts, learned men, or even rulers to have books written under their name as author for which they neither crafted the content nor scribed the work.\textsuperscript{254} It was perfectly acceptable for them to have merely selected or edited the work of others to be included in the “new” work.\textsuperscript{255} This selected material could itself either have been commissioned for creation specifically for the new volume or it could have been pre-existing content from other sources.\textsuperscript{256} In this way, there was neither copyright infringement (because there was no copyright) nor plagiarism even when exact passages

\textsuperscript{249} Id. at 504.
\textsuperscript{250} Long, supra Note 219 at 7-10, 18-45.
\textsuperscript{251} Kristeller, supra Note 307 at 500.
\textsuperscript{252} Long, supra Note 219 at 7-10, 16-45.
\textsuperscript{254} Long, supra Note 219 at 7-10, 18-45.
\textsuperscript{255} Id.
\textsuperscript{256} Id.
were copied from the works of other authors. The role of the author was simply to put his imprimatur of authority on the volume. Readers wanted to know that a certain known expert had endorsed the content, from whatever source it originated. Even beyond this, during one period of European history, merely being the patron of a creator’s work entitled one to be the sole attributed author.

Even once the Romantic sense of the artist as a creative genius producing uniquely self-expressive works took root centuries later, it did not fully displace this sense of “author” as the one who commissions, oversees, or produces the work. This may be in part because many masterworks required a staff of artisans to help fulfill the artist/author’s vision, as the nineteenth century American jurists Fisk cites still acknowledged. Thus, the precedent of Michelangelo, Titian, and other great artists employing artisans to help execute the great work continued. Notwithstanding these contributions—many of which could be quite substantial—the studio director retained the sole authorship of the final product. The justification for this was not a theory of collective ownership, but rather the ancient and continuing notion of author as the authority under which the work was produced.

A missing piece of the puzzle for many of those who look only at the interaction of employers and creative individuals is the role of institutional voice in the notion of authorship.

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257 Id. at 10-12.
258 Id.
259 Long, supra Note 219 at 7-12.
260 Id. at 9.
261 See, e.g., Biagioli, supra Note 16.
263 See Fisk, supra Note 299 at 212-25.
authorship and speech.\textsuperscript{264} States, sovereigns, churches, and other institutional organizations often must make pronouncements as the organization. Attributing this speech to natural persons affiliated with the organization could undermine its authority. Some may read the speech as signifying the views of the organization only so long as those natural persons are still affiliated with it. An example of this is the careful analysis and speculation commentators engage in with regard to Supreme Court opinions.

In other settings, observers may view speech attributed to natural persons within an organization as not necessarily binding on the whole organization. In this way, note the tendency of many committees to issue reports in the name of the committee only, and not attribute any parts of the report to natural persons. This may be unfortunate for the natural persons who in fact drafted parts or all of the report. And yet, the importance of attribution exclusively to the committee is such that natural persons routinely forego personal attribution. Even in cases where a dissent is strong enough to require release, it may be done in the form of a “minority report” not attributed to natural persons. While such reports and similar speech can be viewed as the product of a collective, they are still not the same thing as a speech produced by the collective of the whole organization. Rather they are supposed to be statements from the authority of the organization towards its citizens or members. A similar device intended to counter the potential for diminishment of the authority of a statement because it was issued by a natural person is the \textit{ex cathedra} pronouncement of a Pope, which is held to be an infallible interpretation or statement of Church doctrine.\textsuperscript{265}

\textsuperscript{264} A major proponent of the importance of institutional voice is Frederick Schauer. \textit{See} Frederick Schauer, \textit{Towards an Institutional First Amendment}, 89 MINN. L. REV. 1256 (2004).

\textsuperscript{265} \textit{See}, e.g., Catechism of the Catholic Church, Part I, § 2, ch. 3, art. 9, para. 4, at 891 \textit{available at http://www.vatican.va/archive/ENG0015/__P2A.HTM} (last visited Feb. 23, 2012).
In this way, the development of corporate authorship need not be justified solely—or even primarily—from a notion of corpus corporations. Rather, it can also be justified as an important part of the corporation’s authority to make statements as an institution. Further, this notion of corporate authorship is hardly limited to for profit business corporations—which is where Fisk limits her analysis—but instead equally applies to nonprofit corporations. The real problem then may be not that corporations can be authors, but that WMFH allows any hiring party to be an author, even where that party may not qualify as a legal person. This was one of the potential problems for CCNV discussed above. Authorship was, and likely had to be, registered in the name of Snyder alone, as CCNV’s unincorporated status would have jeopardized the ownership of any copyright registered in the name of CCNV as an association.

A related dimension of the problem is that WMFH applies to all copyrightable works without regard to the role they play for the hiring party. But both of these dimensions may result simply from the two strands of the authority justification for WMFH: one strand represents creative works envisioned or commissioned by the hiring authority; the other strand represents speech or statements that need to be attributed solely to the organization. Neither of these strands is limited to having value or relevance for corporations only. Individuals and unincorporated organizations can use these justifications as well.

These justifications also are consistent with the establishment of a formal WMFH statutory provision in the Copyright Act of 1909.266 Leading up to this, Fisk argues that courts shifted to a contractarian perspective of the allocation of copyrights between employer and employee, with the copyright just another alienable asset that could be

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negotiated for in an employment relationship.\textsuperscript{267} This would seem to also be consistent with the roots of the contract theory of the corporation, as the traditional concession theory receded in the face of general incorporation. Fisk alleges that courts relied on this contractarian perspective as only a transitional device before they then began operating from the presumption that creative works were owned by employers.\textsuperscript{268} She then positions the passage of the first formal WMFH statutory provision in the United States as a consequence of both this bias towards employers as well as the lobbying of influential publishers and similar employers.\textsuperscript{269} And yet, the interests of creative individuals were also represented.\textsuperscript{270} Her upshot is that following passage of the 1909 Act, “Authorship became a legal fiction just as corporations became, at least in the public mind, ever more real.”\textsuperscript{271}

But neither of these is really true. Authorship has always been a legal and/or conceptual construct. It is no less real than any other kind of property or contract right. More to the point, it did not have a longstanding fixed history as representing the attribution of works to natural person creators. To the contrary, that sense of the term had only emerged less than a century before her narrative begins. For nearly two millennium before that, the term fluctuated significantly in meaning, but more often signified the authority under which any kind of project was undertaken. These projects included not only what we would consider works of fine arts today, but also the design and

\textsuperscript{267} Fisk, supra Note 299 at 219-20.
\textsuperscript{268} Id. at 219.
\textsuperscript{269} Id. at 224-26. One oddity in her account is that she gives part of the final WMFH language of the 1909 Act and then states that this “language has been in the statute ever since.” Id. at 226. This could lead the reader to believe that the quoted language is in the current WMFH statute. But it is not. The 1976 Act changed the language. The change is not really material, but it is still an odd statement.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
construction of buildings, public works projects, laws and other governing devices, and even inventions.

At the same time, Western civilization had been well aware of the existence and “reality” of corporations at least since the Church declared itself an independent corporate entity transcending secular rule and boundaries in the twelfth century. Even on the business corporation side, major entities such as the EIC had existed since the dawn of the seventeenth century. The change that did occur in the nineteenth century was that the corporate form largely displaced the partnership form for manufacturing enterprises. While this was significant, it does not at all signal a sea change in the public’s understanding of either corporations *qua* corporations or the broader notion of authorship that survived even the rise of the narrow sense of author *qua* creative genius natural person in the eighteenth century.

Further, contrary to Fisk’s suggestion, there may have been no *necessary* linkage to the passage of statutory WMFH in 1909 and the rise of “big business” corporations (or at least it may not be the sole or primary explanation). Rather, it is equally plausible that WMFH was added then simply because no major changes to the Copyright Act had been passed since the original Copyright Act of 1790. In other words, had the Copyright Act been overhauled in the nineteenth century, WMFH may have been added then as it was already in the case law.

In sum, the problems with WMFH may not be that corporate persons can be authors, but rather that there are no distinctions of types of works or purposes for which WMFH applies (except in the case of independent contractors). There are two major modes of justification for corporate authorship. One is the corpus corporation joint
production mode in which the work is a collaboration of many members, and should be attributed to the corporate body as an equitable matter and for the certainty of having a recognized legal person own the property rights. The other is the authority mode in which the corporation as organization or institution needs to be able to speak in its own voice, without the distraction or diminishment attendant with natural person attribution. The first mode means that WMFH should only apply in the context of corpus corporations. The second mode would justify adding WMFH for any type of corporation, but only for works that can legitimately be held to be official pronouncements of the corporation qua institution.

By contrast, the creative director model that played a role in development of WMFH does not necessarily require assignment of authorship to the hiring party. It is true that the hiring party may have strong arguments for getting automatic control of the work for copyright purposes, but stripping the natural person employees of attribution absent a showing that they in fact acted as the “master’s assistants” is not justified. Further, the board and senior management of a major media company may play little to no role in proposing, selecting, or implementing specific creative project, which means that employees who direct the relevant creative unit within the company are the creative producers. Thus the model would seem to support lodging authorship in that employee. Clearly there is something wrong with the conceptualization and implementation of this model, for which we will propose a new approach in Part IV below.
B. Inventorship, Shop Rights, and the Hired to Invent Exception

In stark contrast to the copyright system, the patent system does not allow for corporate persons to be inventors. Interestingly, while it is commonly understood that inventorship lies only in natural person inventors, nothing in the Patent Act expressly states this.\(^{272}\) However, it is generally understood to arise from various provisions within Title 35 as a kind of penumbral rule.\(^{273}\) Donald Chisum, the leading patent treatise author, states that “The presumptive owner of the property right in a patentable invention is the single human inventor.”\(^{274}\) Further, this limit against corporations as inventors may be one of many principles the U.S. patent system adopted from the English patent system. In this case, corporations were prohibited from being inventors under the Statute of Monopolies.\(^{275}\) At any rate, the Patent Act also establishes express rules of inventorship that seem to support this position.\(^{276}\) Further, the Supreme Court implicitly affirmed this principle in Stanford v. Roche, by citing its many precedents which state that title vests only in inventors as an initial matter, and not in their employers.\(^{277}\)

The salient facts of Stanford v. Roche are as follows. Dr. Mark Holodniy became a research fellow at Stanford University in 1988.\(^{278}\) He executed Stanford’s then standard Copyright and Patent Agreement (“CPA”) which provided that he “‘agree[d] to assign’ to Stanford his ‘right, title, and interest in’ inventions resulting from his employment” at

\(^{273}\) Commentators generally point to 35 U.S.C. §§ 101, 102(c), and 102(f).
\(^{274}\) Donald Chisum, 8 CHISUM ON PATENTS § 22.01 (2011).
\(^{275}\) See Part II supra.
\(^{277}\) 131 S. Ct. 2188, 2192, 2194-2195 (2011).
\(^{278}\) Id. at 2192; Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc., 583 F.3d 832, 837 (Fed. Cir. 2009).
His work required him to learn and use the polymerase chain reaction technique (“PCR”) that Cetus Corporation had pioneered. Cetus was already collaborating with Stanford on research in this area, and Holodniy’s supervisor arranged for him to learn PCR at Cetus and pursue a substantial part of his research there with Cetus employees. Upon arriving at Cetus, Holodniy executed Cetus’ Visitor’s Confidentiality Agreement (“VCA”), which provided that he “will assign and do[es] hereby assign’ to Cetus his ‘right, title and interest in each of the ideas, inventions and improvements’ made ‘as a consequence of [his] access’ to Cetus.”

After nine months, during which the invention at the heart of this case was conceived, Holodniy returned to Stanford to test and refine the invention. He worked with colleagues there, allegedly under federal funding. In 1991, Roche Molecular Systems, Inc. (Roche), purchased all of Cetus’ PCR-related assets. Over the next few years it conducted clinical trials on the PCR HIV technique as it had been developed while Holodniy was still at Cetus, and then developed and distributed commercial kits worldwide. In 1992, Holodniy and his Stanford colleagues finished testing and refining the invention. Stanford then obtained invention assignments from them all and filed patent applications on the technique. Three patents ultimately issued, in 1999, 2003, and 2006. In 2000, Stanford approached Roche about taking a license to the Holodniy patents, but Roche responded that it was a co-owner or licensee of the inventions—under the terms of the VCA, some materials transfer agreements, and under common law shop

279 131 S. Ct. at 2192.
280 Id.
281 583 F.3d at 838; 131 S. Ct. at 2192. Stanford was never able to produce the government funding agreement.
282 131 S. Ct. at 2192.
283 583 F.3d at 838; 131 S. Ct. at 2192.
284 Ibid.
rights—and declined to take a license.\textsuperscript{285} Stanford sued Roche for patent infringement in 2005.\textsuperscript{286}

The district court resolved the case largely in Stanford’s favor by relying on the issue of federal funding and its interpretation of the Bayh-Dole Act.\textsuperscript{287} While it adopted Roche’s argument that the VCA would normally have given Roche title to the patents, it argued that Bayh-Dole operated by law to vest title in Stanford as the Federal contractor.\textsuperscript{288} The district court did not clearly articulate its views on the interaction of the CPA and VCA, but rather relied on a view that Bayh-Dole grants the government a right of first refusal to inventions arising under federal funding agreements, and grants the recipient of federal funds (the “contractor” in Bayh-Dole parlance) a “right of second refusal.”\textsuperscript{289} This would leave the actual inventor—who is generally not a party to the funding agreement—with only a residual interest in the inventions conditional on both the government and contractor electing not to exercise their rights.

On appeal, the Federal Circuit reversed the district court’s Bayh-Dole holding and articulated why the VCA trumped the CPA. This left Roche with an ownership interest in the patents and thus deprived Stanford of standing in the case.\textsuperscript{290} The court also rejected the district court’s “right of second refusal” construct for contractors.\textsuperscript{291} It adopted another district court’s ruling that “‘the primary purpose of the Bayh-Dole Act is to regulate relationships of small business and nonprofit grantees with the Government, not

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\item \textsuperscript{285} 583 F.3d at 838.
\item \textsuperscript{286} 131 S. Ct. at 2193.
\item \textsuperscript{287} Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc., 487 F.Supp.2d 1099, 1117-19 (N.D. Cal. 2007).
\item \textsuperscript{288} Id.
\item \textsuperscript{289} Id. at 1119.
\item \textsuperscript{290} Stanford continued to have rights to the patents through Holodniy’s Stanford research colleagues, who had not signed away their rights to any other party.
\item \textsuperscript{291} 583 F.3d at 844
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between grantees and the inventors who work for them.”  However, the Federal Circuit allowed that if the contractor or its employees have done anything to violate provisions of the Bayh-Dole Act, then the government may be able to void these actions and take title for itself. With regard to the CPA and VCA, the Federal Circuit held that the former had only established a promise to do some act in the future at Stanford’s request—essentially a call option—while the latter transferred rights upon its execution. Thus, while Holodniy arguably breached the CPA when he signed the VCA, Stanford had no action against Roche directly and would have to pursue recourse against Holodniy.

Stanford petitioned the Supreme Court for certiorari on the Bayh-Dole issue only. The Supreme Court granted certiorari and affirmed the Federal Circuit. In particular, it reaffirmed its earlier holdings that rights in an invention belong to the inventor, absent some express transfer between the inventor and his employer or another. It then rejected Stanford’s argument that Bayh-Dole is a “vesting statute” similar to the Atomic Energy Act, in which title to relevant inventions is vested in designated agencies by act of law. Further, it focused on the definition under Bayh-Dole which requires that a “subject invention” (those inventions subject to the provisions of Bayh-Dole) be an “invention of the contractor.” Under the majority’s view, the emphasized portion would be superfluous if any invention arising under federal funding were subject to Bayh-Dole. Instead, the Court held that a subject invention is one to which the contractor

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292 Id. at 845 (quoting Fenn v. Yale Univ., 393 F.Supp.2d 133, 141-2 (D. Conn. 2004)).
293 By contrast, the Stanford district court had held that such actions were automatically void. 487 F.Supp.2d at 1118-9.
294 The district court and the Federal Circuit also considered Stanford’s arguments based on the bona fide purchaser provisions of the Patent Act, 35 U.S.C. § 261, but found them unpersuasive. Discussion of that topic is beyond the scope of this short article.
295 131 S. Ct. at 2195.
296 Id. at 2195-6.
297 Id. at 2196 (emphasis added).
lawfully has rights or title. Most importantly, the title allocation rules under Bayh-Dole, which leave the inventor with only a conditioned residual interest where neither the government nor the contractor elect to take title, only apply to subject inventions.

The problem that perennially arises though cases such as these is that not everyone seems to believe that “inventors” are, or should be, only natural persons. The Stanford Court made clear once again that only natural persons can produce inventions: “an inventor owns ‘the product of [his] original thought.’” But, again, nothing in the Patent Act expressly provides this. At the same time, the Court stated that Congress has passed statutes vesting title in entities and Government agencies in specific circumstances rather than the natural person inventors. The Court then suggests that Congress could also do so for federal contractors and their inventors under the Bayh-Dole Act, but that nothing in the language of the statute supports that reading under the current law. At the same time, the Court did not make it clear whether it believes that the existing vesting statutes (e.g., Atomic Energy Act) actually make the entity or agency (e.g., the Atomic Energy Commission) the inventor or simply the immediate assignee by law. If the former, then the Court is implicitly saying that inventors can be corporate persons if the statutory language is clear enough on this point. If the latter, then the Court is simply saying that such statutes act only as formal “hired to invent” rules that assign title even absent an assignment agreement between the natural person inventor and the corporate entity.

It may be equally reasonable to hold that copyrightable works are “the product of [a natural person’s] original thought.” So, why should the Supreme Court believe that

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298 Id. (quoting United States v. Dubilier Condenser Corp., 289 U.S. 178, 188 (1933)).
299 Id. at 2195.
300 131 S. Ct. at 2196.
inventors can only be natural persons, while authors can include corporate persons?

Again, it may be that the *Stanford* Court is only asserting that under current and prior patent statutes Congress had restricted inventors to natural persons. If Congress chose to change the statute to institute a form of WMFH for patents, and define “inventors” as including corporate persons or other employers, then the Supreme Court might have no objection.

At the same time, there seems to be no equivalent to the ancient sense of the term “author” to mean authority under which a project is done for the term “inventor.” The term “invention” can mean more than just the technology based or utility invention that we are accustomed to in the patent system. In broader use it can mean any creation including a story, fabrication, contrivance, solution to a non-technical problem, a mode of rhetoric, the devising of a subject, idea, or method of treatment in fine art or literature, etc. Thus an “inventor” can be anyone who does any of these things.

301 Notwithstanding this, there seems to be nothing in the history or etymology of the term to indicate that anyone or thing other than the natural person who “invents” something can be considered an “inventor.” Therein may lie the root of this profound difference between copyright and patent law.

The only thing close to an “entity” that may be considered an inventor under patent law is the “inventorship entity” created in cases of joint inventorship. However, it is not a distinct legal person and instead acts simply like a general partnership. As such, it is a collective of the inventors, such as an unincorporated association, in which each

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303 *See, e.g.*, DONALD D. CHISUM, 1 CHISUM ON PATENTS § 3.08[2] (2011).
member has the power to assign or license their rights to the patent. But because inventorship rights are indivisible, each joint inventor’s share covers the entirety of the patent, regardless of what his or her inventive contribution was. Thus, for example, any joint inventor’s license to a third party will destroy the ability of the other joint inventors to grant an exclusive license. The corollary of this is that all joint inventors—to the extent that they are still all, and the only, co-owners of the patent—must be joined as plaintiffs in any suit to enforce the patent. This is because if even one is not so joined, then that non-joined inventor could still license or assign his or her rights in the patent to the defendant. This failure to list an inventor on the issued patent is called non-joinder and can result in the invalidity of the patent until the inventorship is corrected.

There can also be “misjoinder” of inventors in which an individual is named as an inventor but in fact did not make a substantial contribution to the invention. Misjoinder may be fairly common especially in large labs where a principal investigator (PI) believes that he or she should be listed as an inventor on every patent application coming out of his or her laboratory. However, as harmless an exercise in vanity this may seem, it can also invalidate the patent. Accordingly, it is critical for patent applicants and their

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306 35 U.S.C. § 262. In Ethicon, Inc. v. United States Surgical Corp., the Federal Circuit affirmed the trial court’s grant of a motion to dismiss the infringement case based on the trial court’s finding that there was an omitted, or non-joinder, inventor who had retroactively licensed the infringement defendant. 135 F.3d 1456 (Fed. Cir. 1998). The trial court also ordered the correction of inventorship on the patent under 35 U.S.C. § 256. Id.
308 Misjoinder and nonjoinder can be remedied under the correction of inventorship statutory provision of 35 U.S.C. §256. However, there must have been no deceptive intent behind the misjoinder or nonjoinder. A court can order the correction of inventorship upon a finding that a true inventor was omitted, or an illegitimate inventor was listed, so long as no deceptive intent was found. In this way, the patent can be saved from invalidation during an infringement proceeding. Thus, misjoinder or nonjoinder are not necessarily fatal to a patent owner’s infringement suit, but the added complexity is surely not worth the convenience of casualness by the patent applicant ex ante.
assignees to be diligent about ensuring that all and only those who made substantial contributions to the invention are listed as inventors on the patent application.

As in copyright, in patent law ownership can be separated from inventorship. The key difference is that because there is no WMFH doctrine in patent law, patent rights always vest ab initio in the natural person inventors, even where they have been “pre-assigned” to another person (including a corporate person). But where they have been pre-assigned they essentially pass directly through and equitably vest in the assignee. The Patent Act gives patents the attributes of personal property, establishing that they are freely alienable.\footnote{309} Inventors (and any subsequent assignee owners) can assign their patents and patent applications, as well as grant exclusive licenses under them, so long as such assignments and exclusive licenses are in writing.\footnote{310} Presumably, nonexclusive licenses can be granted verbally, as well as in writing.

While the Patent Act establishes the nature and requirements of ownership, assignments, and licenses, it is not the exclusive source of law for these transactions, because the contracts and equitable relationships underlying them are governed by state contract law, as well as possibly Federal case law.\footnote{311} If there is an express contract, then contract law principles will govern the interpretation of it. In some states, statutory law provides limits to the extent that employers can require assignment of employees’ IP through contract. Sometimes referred to as “freedom to create” statutes,\footnote{312} they currently

exist in California, \(^{313}\) Minnesota, \(^{314}\) North Carolina, \(^{315}\) and Washington. \(^{316}\) These statutory sections primarily seek to limit employer’s use of contract clauses requiring new employees to assign over patent rights to inventions created even before the term of employment, as well as “trailer clauses” that require assignment of patent rights the employee might claim to have invented during some fixed time period after terminating employment. They also limit the ability of employers to require assignments of inventions with no connection to the employee’s job description, the employer’s lines of business, and for which the employee did not use any employer resources.

But in the absence of a written agreement things get interesting. First, Nevada now has a patent assignment statute that automatically assigns inventions to an employer so long as they were made during the term of employment and fell within the scope of the employee’s job description. \(^{317}\) Essentially, it has created a modified WMFH for patents, but which retains attribution for the natural person inventor (as it must under the supremacy of Federal Patent Act rules of inventorship). Also like WMFH, it is an “opt-out” system in which the default is that employers own any IP developed by employees as part of their job description. The parties would have to execute an express writing to the contrary to opt out.

Second, generally applicable around the United States, a tripartite scheme of default common law rules often mistakenly referred to in toto as “shop rights” governs how and when employees will have to assign or license their inventions to their

\(^{313}\) **CAL. LABOR CODE** § 2870.  
\(^{314}\) **MINN. STAT. ANN.** § 181.78.  
\(^{315}\) **N.C. GEN. STAT.** § 66-57.1, 66-57.2.  
\(^{316}\) **REV. CODE WASH.** § 49.44.140, 49.44.150.  
\(^{317}\) **NEV. REV. STAT.** § 600.500.
employers. The first part is the true shop right: where an employee uses his employer’s resources or time to invent, the employee may retain title but must grant a perpetual, non-exclusive, non-transferable license to the shop. It is important that the license not be transferable, and questions have arisen as to whether a shop right can survive the acquisition of the firm by another firm, or any other succession of ownership in which a material change of control takes place. The second part is the “hired to invent” exception to the shop right: where the employee was specifically hired to invent the sort of thing ultimately invented, title to the invention will equitably vest in the employer. The challenge with this part is the evidentiary support required of employers to show that an employee was specifically hired to invent a kind of good or service. The third part has no specific name, but is where the employee invents on his own time and with his own resources, and was not hired to invent that kind of thing. In this case, the employee retains the title free and clear, with no license necessarily granted to the employer (unless the employee decides to grant one).

For our purposes, the issue raised by the shop rights doctrine’s “hired to invent” exception is that some parties have attempted to make it into a patent law version of WMFH. It is not. The clear difference is that the natural person inventors remain as inventors, and must be listed so in the patent on pain of misjoinder and nonjoinder. Thus it has no effect on inventorship. It only has to do with allocation of ownership of the invention and any patent (application) arising from the invention. While this might seem

See U.S. v. Dubilier Condenser Corp., 289 U.S. 178 (1933). Note that Dubilier involved United States Government employees and was decided before a presidential executive order established the requisite writing to supersede the common law default rules as to government employees and their inventions. Thus, ironically, Dubilier does not currently control the disposition of rights in inventions created by government employees, but it does control for the disposition of rights in inventions created by employees of other organizations where no other written agreement or binding policy was in place.

See, e.g., Board of Trustees of Leland Stanford Junior University v. Roche Molecular Systems, Inc., 583 F.3d 832 (Fed. Cir. 2009).
to be a distinction without a material difference, such a view overlooks the significant value that many inventors place on their attribution as inventors. Promotions in industry, government, and the academy can flow in part from being named as an inventor on an important patent.\textsuperscript{320} Accolades and recognition from one’s professional community can follow being listed as such an inventor.\textsuperscript{321} Further, the first-to-invent patent system in the U.S., which is only now being changed by implementation of the America Invents Act,\textsuperscript{322} has in some cases provided evidence of priority for science discovery disputes.

Under WMFH in the copyright system, no such attribution need be given to the natural person creators, and so they must forego these non-economic (or at least not directly financially remunerative) benefits. If they assign or license the copyright instead, where it is not a WMFH, then they can contractually require the assignee or licensee, as applicable, to give them attribution. Note that the Copyright Act also does not require the listing of the author anywhere, but only the copyright owner. Thus an assignment can result in the assignee being able to register the copyright in only their name, with no record of the author (corporate or natural person). While the Patent Act thus seems more creator-friendly than the Copyright Act, the latter does have one advantage for natural person authors in that if they assign or license their works, then they have termination rights.\textsuperscript{323} The Patent Act has no analogue to this.

In sum, the patent system does not raise the same troubling issues of the individual versus the collective, or natural person versus corporate person, that the copyright system does. This seems to be based on the difference in the ancient

\textsuperscript{320} See, e.g., Chou v. Univ. of Chicago, 254 F.3d 1347 (Fed. Cir. 2001).
\textsuperscript{321} See id.
\textsuperscript{322} P.L. 112-29, 125 Stat. 284 (Sep. 16, 2011).
\textsuperscript{323} See supra Part III.
conceptualizations and definitions of “author” and “inventor.” Inventorship can only be attributed to natural persons and thus there is no justification for corporate inventors. This undermines to some degree the legitimacy of attributing other products of the human mind—speech and authorship—to corporations. Is there something really that different about inventions that justifies a special exception for them? In the end, it may simply come down to the different needs we have for the constructs of speech, authorship, inventorship, and the corporate person. In the last Part of this paper, we will bring these issues together to synthesize a new approach to corporations and products of the human mind.

IV. A NEW APPROACH TO CORPORATE PERSONHOOD, AUTHORSHIP, AND INVENTORSHIP

In Parts II and III above we described three legal traditions that underwent profound change during the nineteenth and twentieth centuries and then influenced each other in unintended and confused ways. First, the general incorporation movement was transforming both nonprofit and business corporations away from the original corpus corporation that had justified their status as legal persons into powerful entities controlled by a small subset of the natural persons affiliated with them (i.e., the board and senior officers). The corpus origins also justified the sense that speech and authorship could be attributed solely to the corporation as the fused collective of its members. Similar to membership corporations, and many formal committees today, the corpus corporation demanded the consultation, consent, and then binding commitment of members in all
major decisions and positions. Its pronouncements could be seen as the truest form of the majestic or royal “we” expression.

Second, in copyright the ancient senses of “author” as the authority or creative producer/director were being invoked by courts to allocate ownership and/or attribution of creative works to individuals and associations in early informal versions of WMFH. The challenges confronting unincorporated associations in receiving and holding property reinforced the reasons to use the corporate form as it made WMFH arrangements more reliable in group or collective situations. But the attribution of yet another form of both speech and property to corporate persons further expanded their reach and power as legal persons.

Third, courts were developing the shop rights doctrine, and its hired to invent exception, to equitably resolve master-servant type issues with regard to ownership of inventions and patents developed in collective settings. But inventorship had no senses or history equivalent to the authority and creative director senses of authorship. Thus, attribution was not being allocated to anyone other than the natural persons who contributed to the invention. Nonetheless, the more secure capacity of corporations to hold property likely gave added reason to inventive organizations to choose the corporate form over unincorporated forms like partnerships.

This complicated set of interactions, layered over the complex transition of the United States economy from agrarian to industrial, led to some odd results as legal rules moved far away from their origins and justifications, or had other justifications blended in. The net result is that courts of today, including the Citizens United Court, seem to be selectively mixing and matching these rules and justifications, without clear regard for
harmonizing them for a contemporary age in which corporations, authorship, and inventorship are three of the largest forces in our day-to-day lives. In the remainder of this Part, we develop a new approach to corporate speech, authorship, and inventorship by distinguishing different types of corporate ventures and then arguing that ownership and attribution of products of the human mind should be allocated differently based on aligning justifications with organizational form and purpose.

As a preliminary manner, there are two ways in which corporate persons can be connected to speech, authorship, and inventorship. The first is where the corporation receives ownership, control, and/or authorization as a conveyance or permission from natural persons affiliated with it. In this case the speech, authorship, or inventorship is attributable *ab initio* to the natural persons and must be assigned or licensed to the corporation. This is what happens in the case of assignments of patents or copyrights. The second is where the speech, authorship, or inventorship is attributable *ab initio* and *in toto* to the corporate person. This is what happens in WMFH and what many managers of corporations—especially for-profit corporations—likely conceptualize as what is happening when they issue statements on behalf of the corporation. Under current law, it cannot happen for inventorship.

Why does this distinction matter? First, because attribution, which can be equally or even more important than economic rights, hangs in the balance. Second, because the attribution of speech, authorship, or inventorship *ab initio* to the corporate person takes our ontological commitments to what may simply be the legal fiction or construct of the corporate person to a different and more consequential plane. Third, the distinction matters because we currently use the different conceptualizations to justify different legal
constructs that should instead have the same underlying rationale. Fisk is right to organize her study of corporate IP around the shift from the norm of solo and small partnership entrepreneurial professionals in the early nineteenth century to the norm of middle class “man in the grey flannel suit” professionals employed by large corporations in the mid-twentieth century. But a limit of her arguments is that they seem to use the early nineteenth century as a fixed baseline for how things should be, even though the concepts of authorship, inventorship, and corporate personhood were malleable and fluctuating in that period.

Fisk shares with us an appreciation for the value of attribution and argues for it as a “new kind of intellectual property.” But she seems to treat the evolution of copyright and patent law as roughly the same with regard to the changes in allocation of ownership and attribution. As we have seen, however, the “hired to invent” doctrine is far more limited than WMFH. The former is an exception to the general default rule of shop rights (in which the employee maintains ownership of the patent), while the latter is the general rule, which must be disclaimed in writing. Most important, however, is the stark distinction between the two for attribution rights. Neither the “hired to invent” doctrine nor any form of assignment or license agreement can remove the requirement under Federal patent law that the natural person inventors be given attribution. By contrast, the employer in WMFH has complete discretion whether to allow the natural person creators to have any attribution (except in the case where the employee has negotiated a written agreement contracting around WMFH that expressly retains attribution rights).

324 Fisk, supra Note 299 at 240-251.
325 Id. at 251-55.
326 Except in Nevada. See supra Part III.
It is not clear whether Fisk understands that the attribution rights are dramatically different for patent and copyright. In a section on patents and inventions, Fisk writes: “When the corporate management of intellectual property began to obscure proper attribution of inventions [in the late nineteenth century], it hurt workers deeply. Firms that claimed ownership of employee intellectual property . . . negotiated a complex balance of claiming corporate ownership where possible while also attributing individual creativity properly so as not to sap the morale of workers.”327 In a later section she also writes:

Within firms, what began to loom larger for many employees than intellectual property ownership was credit for the work they did and acknowledgement of the importance of their creative effort in creating the company’s products. Most chemists at Du Pont seemed to accept quite readily the legal obligation to assign their patents to the firm. What they could not accept so easily was failing to be listed as an inventor, even if it had no legal consequence for ownership of a patent, and failing to be acknowledged within the firm as the originator of an idea, a patent, or a copyrighted work. Increasingly, employees sought recognition as much as financial reward from their employers. Attribution, and the respect accorded to inventors and authors, began to substitute for intellectual property (and the legal status of being the inventor or author) as the currency that would enable employees to advance their careers.328

327 Fisk, supra Note 299 at 125 (emphasis added).
328 Id. at 209-10.
Fisk is quite right to focus on the severability of attribution from ownership in IP.\textsuperscript{329} But the fact remains that natural person inventors always retain attribution under the patent law, and there is no such thing as a corporate person inventor. It is undoubtedly true that corporate managers—as well as academic ones—may try to deny such credit and attribution, and take it for themselves. But any such moves are actionable under patent law, and have been successfully redressed in cases such as \textit{Chou v. University of Chicago}.\textsuperscript{330} Not so in WMFH under copyright law. The only argument a natural person creator of a copyrightable work might have where WMFH seems to apply is that they were not in fact an employee or that the work was not done in the scope of their employment. Thus, the copyright and patent systems work in profoundly different ways for attribution.

Turning to our categories of corporate venture or purposes, we will consider membership corporations, large manufacturing or distribution corporations, and small to medium enterprise (“SME”) innovation production corporations. Membership corporations are the closest contemporary version of corpus corporations. Generally they are nonprofit organizations that operate for private or charitable purposes.\textsuperscript{331} In the former, they often take the form of private golf course member organizations or professional associations;\textsuperscript{332} in the latter, they can be religious or educational organizations. Their distinguishing feature is that they are composed of members who participate in governance and activities of the organization, even as there may also be a board of directors or management committee as well as professional staff. However, state

\textsuperscript{329} Id. at 125, 209-210, 251-55.
\textsuperscript{330} 254 F.3d 1347 (Fed. Cir. 2001).
\textsuperscript{331} \textit{See}, e.g., New York Not-For-Profit Corporation Law art 6; Washington Nonprofit Corporation Law § 24.03.065.
\textsuperscript{332} \textit{See}, e.g., Northeast Harbor Golf Club, Inc. v. Nancy Harris, 725 A.2d 1018 (1999).
nonprofit corporation laws do not require such participation,\textsuperscript{333} and so in some cases members act similarly to shareholders in for profit corporations for governance purposes. Further, corporate and other non-natural person entities can be permitted by law to be members.\textsuperscript{334} Accordingly, not all contemporary membership corporations fit the corpus corporation model. However, the archetypal local recreational, fraternal, religious, etc. membership corporation with a relatively small number of active members fit the model well. In these organizations, the charter, bylaws, and other rules require active participation by the members. These small membership corporations fit the broad reach of current WMFH because the members are unified into one body. However, this may not justify—by itself—WMFH as applied to employees who are not members. The nature of member participation in these small membership corporations also makes them a good model for the \textit{Citizens United} Court’s view of First Amendment political speech rights for corporations as associations.

Large manufacturing and distribution corporations present a far different profile. In some cases they are closely held, such that the natural persons who are shareholders may have meaningful input and governance roles as officers or directors in addition to their limited shareholder rights, But in most cases they are public corporations with large numbers of diffuse shareholders who have little real connection to the company. Employees in both cases will generally be outside of the governance of the firm. The large for profit public corporation has been the focus of most corporate law scholarship and contract theory was designed with it in mind. Team production theory is also expressly oriented to the public corporation, because Blair and Stout believe that smaller

\textsuperscript{333} \textit{See}, e.g., New York Not-For-Profit Corporation Law art 6; Washington Nonprofit Corporation Law § 24.03.065.
\textsuperscript{334} \textit{Ibid.}
firms and entrepreneurs will not have the same transaction cost and incomplete contracting problem as large firms.\textsuperscript{335} We will return to the team production model below as we believe it actually does have a role to play in the law regarding smaller innovative production firms.

For the large manufacturing and distribution corporation, the only sort of speech that seems justified for attribution to it is commercial and regulatory speech: official pronouncements, governmental disclosures (such as SEC filings), marketing, or advertising. Based on the authority sense of “author,” especially in its institutional sense, a large public corporation needs to be able to make statements attributable solely to it, without the distraction or diminishment that might attend speech attributed to natural persons affiliated with the corporation. But this regulatory and commercial speech must be distinguished from political speech and creative speech (such as that embodied in commercial media products).\textsuperscript{336} Further, where the corporation manufacture or distributes non-media (or non-speech) products, the primary speech we would want to attribute to it would be regulatory and commercial anyway. There seems to be no morally justifiable reason to allocate ownership or attribution of speech, authorship, or inventorship for things other than regulatory or commercial speech to the corporation, despite the pragmatic convenience benefits to the corporation. Neither the corpus nor creative director/producer rationales avail here. The shareholders are hardly active members who

\textsuperscript{335} See Blair, supra Note 25.

\textsuperscript{336} Greenfield uses the example of news reporting to support his position that we should not attempt to prohibit corporate speech rights. The New York Times is a for profit corporation and yet we believe that it is important for it to have free speech rights similar to those of a natural person. But a response to this is that the individual reporters would have free speech rights. Greenfield’s position is that this would not help if the government could shut down the corporation’s facilities without the buffer of free speech. But it is not hard to see that courts could develop case law creating a narrow necessity defense in which media corporations could come under the free speech rights of their reporters, etc. where this was clearly necessary to allow the reporter to get the story out.
have fused themselves together as members of one body. And the creative director or producer tends to be an employee who runs a product or unit within the corporation. Thus it is hard to justify default allocation of ownership or attribution of speech (other than regulatory or commercial), authorship, or inventorship to these corporations. They can, of course, contract for allocation of these things, subject to the compelling need for attribution to be retained by natural person creators outside of narrow situations (such as again regulatory or commercial speech).

Further, just as the contract theorists tell us, we should let the parties to commercial enterprises make their own arrangements as much as possible. Corporations law simply provides a framework for this, as well as some defaults that the parties would likely bargain for in the absence of high transaction costs and incomplete contracting problems. WMFH might then be thought of as conceptually a part of corporations law that was placed in the Copyright Act instead because it had to do with the allocation of copyright ownership and attribution. But if WMFH exists because of transaction costs or incomplete contracting problems, then why is there no analogue in patent law? Are not patents equally important to commercial enterprises? Turning this around, we might consider eliminating WMFH and leaving the parties to contract for allocation of rights just as they do for most patent allocations.

Team production theory, as a subset of contract theory, might provide a justification for WMFH. By forcing the allocation of ownership and attribution to the employer, WMFH essentially empowers the mediating hierarch to further allocate these resources. That is good as far as it goes, but again what about patents? If it is so important for copyrights to be allocated to the firm, then why has neither patent law nor state
corporations law evolved this way? Of course, it may just be that there was never an attempt to harmonize corporations, patent, and copyright law in this manner. Thus, the real question is how they should be harmonized, or at least reconciled, if we could gather the political will to do so.

At the risk of painting with far too broad a brush, one characterization of the state of contemporary American large public corporations is that they tend to focus on and excel at manufacturing and distribution (leaving aside those in the financial or other service industries). But while they claim to focus on innovation, there is a strong sense that innovation occurs far more at SME innovation production firms such as start-ups and research and development (“R&D”) firms. This may lead some to question the ongoing value or role of the large corporations. However, this would be to miss the important role they play as capital sources, experts in regulatory processes, and of course manufacturing and distribution.

A model seems to have emerged of large anchor corporations, such as big information technology and big pharma companies, who collect around themselves a bevy of innovative SMEs. The anchor corporation strategically invests in some or all of these SMEs in its space so as to buy a window into the innovation the latter are developing. Often these arrangements will come with some form of license or even assignment option rights to the SME’s IP. As winners emerge among the SMEs, the anchor corporation will increase its investment up to and including an outright acquisition of the most successful SMEs. For the SME’s this can be a mutually beneficial relationship. Not only do they receive much needed capital, but they also get access to

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337 Of course, one counter example is Nevada’s statute that institutes a form of WMFH for patents and inventions, except that it does not allocate attribution away from the natural person inventors. See supra Part III.B.
R&D, regulatory, and other kinds of expertise. At later stages, they also can avoid the costly and risky development of major manufacturing, distribution, marketing, and sales capacities by contracting with the anchor corporation for these things instead.

In this way, these anchor corporations could be conceived of as almost a kind of regulated utility. Their function is to be permanent aggregations of major amounts of capital and expertise in management, regulatory compliance, manufacturing, distribution, marketing, and sales. But their very size and longevity makes them disproportionately powerful and influential. It also makes them very difficult to negotiate against as either an individual or an SME. Accordingly, an admittedly controversial approach would be to treat them as regulated utilities that have a very certain public function to play in the economy.

For our purposes, the implications of this are that they should have limited rights to speech, authorship, and inventorship. For speech, they should be limited to regulatory and commercial speech (as both were defined in Part III.A above) in their own names.338 A principle behind this would be to attempt to limit the selective attribution of speech as between individuals and the corporation that is used to game the system by attributing good things to the individuals and bad things to the corporation. With regard to copyright for creative speech/works, no WMFH automatic ownership and attribution would be allowed. Further, attribution would never be allowed for these works; instead it would always remain with the natural person creators just as inventorship always remains with the natural person inventors. Ownership would have to be negotiated up front or on a case by case basis and would take the form of assignment or license. It might even be

338 Although, even here some speech may still be required to be attributed to individuals for certification or accountability purposes, such as those instituted by Sarbanes-Oxley. See supra Part I.
preferable to limit such corporations to copyright licenses with durations less than the copyright term, with the possibility of negotiated renewal, to curb their powerful aggregation of permanent rights to IP. At the same time, the existing termination rights provisions of the Copyright Act could take care of this. Termination rights would work particularly well for these purposes if we reformed WMFH to eliminate attribution of authorship to corporate persons. All copyright held by such corporations would be subject to termination rights as all would have been granted under assignment or license and not WMFH corporate authorship.

These changes would likely not be popular to anchor corporations. And they may be difficult to implement fairly in practice, especially given the range of actual corporations that may blur the line between primarily manufacturing/distribution expertise firms and the innovation production firms we will turn to next. In particular, such corporations may claim that such changes would subject them to untenable holdup and holdout problems. Nonetheless, we are not proposing anything much different from the current state of affairs for patentable inventions—with the exception that patent assignments and licenses are not subject to a termination right. But this might also suggest that a termination right should be placed into the Patent Act for assignments and licenses. Of course, the entire patent term of 20 years from the date of filing is already shorter than the termination rights period under copyright law. Thus, the patent

See supra Part III.A.

“Holdup” occurs when a party must invest significant resources up front, but faces uncertainty in contracting and performance by the other party such that its investment faces increased risk. In this case, firms tend to underinvest. “Holdout” occurs when a party needs to aggregate rights from a number of different sources and risks that the last rights holders to negotiate will demand higher than market prices because they know the aggregator has already invested in the other rights but will not be able to proceed without the remaining rights. See, e.g., Thomas J. Miceli and Kathleen Segerson, Holdups and Holdouts: What do They Have in Common?, University of Connecticut, Department of Economics Working Paper 2011-06 (Apr. 2011) available at http://www.econ.uconn.edu/working/2011-06.pdf (last visited Feb. 27, 2012).
termination rights would have to be shorter than 20 years, which may become too disruptive for firms.

The third category of corporation we consider is the innovation production firm. These are SMEs that design and deliver specific productions (such as movies and music) or perform research and development in experimental areas that will then be turned into mass market products to be manufactured and distributed by big corporations according to the model just described above. These firms best fit into the ancient creative director/producer studio model, and often have as their head an entrepreneur or visionary who truly is directing the development of what are largely his or her own projects. Thus, these firms have better claim to allocation of both ownership and attribution of speech, authorship, and inventorship. Notwithstanding this, the discussion above of the value of attribution to natural person creators—again outside of narrow exceptions such as regulatory or commercial speech—may outweigh the legitimate justification for innovation production firms to be allocated such attribution. But a broad revised WMFH rule, applying to inventions as well, that allocates ownership only by law as the default could be justified here.

Despite Blair and Stout’s contention that their team production model is not needed for these sorts of SMEs—because the entrepreneurs can contract for the resources they need—it actually is quite useful for these firms. Their theory’s emphasis on the central role of a mediating hierarch who can objectively balance out competing visions and interests in the execution of the firm’s projects meshes with our view, developed elsewhere, of the role of the innovation producer who sees the overall market need.

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341 Blair, supra Note 25.
342 [redacted for anonymity]
conceives of a potential solution, and marshals resources and personnel to develop a product or service to realize it.

The innovation producer construct is simply an abstraction of various specific production roles such as that of movie producer, music producer, academic research lab director, etc. For example, Thomas Edison was really an innovation producer—more than an inventor—in that he excelled at bringing together people and materials, along with a vision of what products were needed, such that inventions and know-how could be developed into useful products such as the first commercially viable electric light bulb. Likewise, Michelangelo and Titian were innovation producers who had sizeable staffs and resources to help them realize their grand artistic visions.

Blair and Stout might reject these individuals as mediating hierarchs because they might perceive the latter to not be objective enough given the innovation producer’s deep involvement in the visions and ideas of the project. By contrast, their team production mediating hierarch construct is an independent outsider so she can be an objective referee, essentially, among the competing interests of other company stakeholders. This is a compelling story, but we feel it is not limited to public companies and independent directors. Instead, as we argue elsewhere,\textsuperscript{343} the entrepreneur \textit{qua} entrepreneur (as opposed to entrepreneur \textit{qua} inventor) can be quite objective and clear headed in her assessment of what resources are needed and how best to deploy them. So long as she is not too wedded to a particular form of the solution or technology, then she can be a highly effective mediating hierarch among the other competing stakeholders. This model may make even more sense when one considers successful innovation producers such as

\textsuperscript{343} \textit{Id.}
movie and music producers, who excel at marshaling and allocating ideas, resources, and personnel.

For these firms, we might retain the default ownership allocation of WMFH and expand the hired to invent doctrine in patent law to match it (similar to what Nevada has done). Attribution would always remain with the natural persons creators, except that perhaps the criteria for allowing individuals to claim a contribution to a copyrightable work or patentable invention sufficient to earn co-authorship or co-inventorship would be heightened to ensure that only those individuals who really contributed something substantial could qualify and retain attribution. But this harmonized WMFH would apply only to these corporations.

Part of the criteria for these companies to qualify for this allocation right would be that they are formed for a specific project, actually led by an innovation producer, and will stay incorporated only so long as that project is being completed. This would bring them in line with most pre-general incorporation corporations (profit and nonprofit), business firms, and even letters patent or privileges that had limited duration tied to the completion of a particular venture or project built right into their statutory charter or grant. In fact, many movies and other media properties are placed into limited purpose limited partnerships created just to develop, produce, and then sell or license the property to a distributor.

Accordingly, these limited purpose and duration firms could be justified as recipients of ownership of speech, authorship, and inventorship. The analogy in the technology space would be development stage companies taking risky new ideas through proof of concept and then selling or licensing them out to manufacturing/distribution
corporations. While the project duration requirement might be hard, especially for production companies that see themselves as ongoing serial developers of properties, the solution might be that ownership of the IP rights does not vest in the ongoing entity, but rather in the special purpose entities set up for each project or property. Again, this could match well with existing practice in movies and other media. It also has analogues in venture capital and private equity in which fund managers are primarily associated, for employment and other administrative purposes, to a management LLC, while each particular fund is housed in a single or nested set of limited partnerships with which the management LLC has contractual arrangements. Thus, the ongoing production firm’s administrative entity would not hold the rights, rather they would be placed in a special purpose vehicle such as a limited partnership.

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In conclusion, the interrelation of corporations, speech, authorship, and inventorship has been inadequately studied. While each separate area has a significant literature associated with it, the influence of the areas on each other has not been fully developed. Most importantly, the different strands of corporate law history reaching back to classical antiquity have also not been brought together by more than a couple of scholars, and then not brought together with the developments of authorship and inventorship over the same long time period. This article sought to first develop the history and principles of each category before comparing and contrasting them to synthesize underlying principles. This then led to the advancement of a new license
theory of corporations as well as the identification of the corpus corporation as the original justifying rationale for incorporation. Speech, authorship, and inventorship—especially in their related doctrines of WMFH, hired to invent, and to a lesser extent, the First Amendment—were then also compared and contrasted. The ancient broad senses of “author” were introduced as a means of explaining both WMFH in copyright law and the lack of a robust WMFH in patent law. Finally, a new approach to corporate speech, authorship, and inventorship was advanced based on the form and purposes of three corporate archetypes: the membership corporation; the large manufacturing/distribution corporation; and the SME innovation production corporation. This approach can be used to guide specific changes in the law that could result in a more equitable and rationalized allocation of ownership and attribution of products of the human mind between natural person creators and corporations that employ them.