Multiple Personalities Incorporated: Accepting the Multi-Dimensional Personhood of the Modern Corporation

Susanna K. Ripken
I. INTRODUCTION

II. LEGAL THEORIES OF THE CORPORATE PERSON
   A. Corporation as an Artificial and Dependent Person
   B. Corporation as an Aggregate Person
   C. Corporation as a Real and Independent Person

III. PHILOSOPHICAL DIMENSIONS OF THE CORPORATE PERSON
   A. Arguments Against Corporate Moral Personhood
   B. Arguments in Favor of Corporate Moral Personhood
   C. Stages of Moral Development
   D. Comments

IV. ORGANIZATIONAL, PSYCHOLOGICAL, AND SOCIOLOGICAL DIMENSIONS OF THE CORPORATE PERSON
   A. Organization Theory and Psychology
   B. Corporate Culture
   C. External Sociological Component

V. POLITICAL DIMENSIONS OF THE CORPORATE PERSON
   A. Political Individualism v. Political Pluralism
   B. Social Contract Theory
   C. Comments

VI. SPIRITUAL DIMENSION OF THE CORPORATE PERSON
   A. The Spiritual Identity and Purpose of the Corporation
   B. Comments
VII. ECONOMIC THEORY OF THE CORPORATION
   A. Nexus of Contracts Model
   B. Comments

VIII. MULTI-DIMENSIONAL MODEL OF THE CORPORATE PERSON

IX. CONCLUSION
Multiple Personalities Incorporated:
Accepting the Multi-Dimensional Personhood of the Modern Corporation

© 2008 Susanna Kim Ripken*

I. INTRODUCTION

One of the most intriguing debates in corporate law is over the personhood of corporations. Scholars, legislators, and jurists have never been able to resolve entirely the question whether we should treat the large corporation as a “person” with the same sorts of rights and duties that human persons have.¹ Viewing the corporation as a “person” leads to consequences that are very different from those that follow from seeing the corporation as merely a “thing” or a form of “property.”² When we call the corporation a person, we afford it certain rights, such as the right to hold property, the right to sue, the constitutional right to due process and equal protection, and even the right to exercise its freedom to participate in the political and legislative process.³ If the

¹ The corporate form is employed by a wide variety of business enterprises, both small and large. The qualitative differences between small, privately held corporations and their large, publicly held counterparts make any comprehensive analysis of the personhood of corporations even more difficult. A discussion of those qualitative differences is beyond the scope of this Article. The focus here is only on the large, profit-making, publicly held corporation.

² See Jeffrey Nesteruk, Persons, Property, and the Corporation: A Proposal for a New Paradigm, 39 DePaul L. Rev. 543, 543 & n.2 (1990) (describing the distinction between persons and property as a distinction between that which acts and that which is acted upon). The person, as actor, is usually regarded as the subject of rights and duties, while the notion of property, as a thing that is acted upon, implies a more passive status. See id.

corporation is merely an object, or a piece of property, it seems incongruous to extend these rights to the corporation. They are privileges that are uniquely held by those who enjoy the status of persons in our society.

By the same token, if we call the corporation a person, we are inclined to hold it responsible when it fails to fulfill its duties as a member of society. It can be held criminally liable when it breaks the law, civilly liable when its actions inflict harm on others, and perhaps even morally and socially responsible for behavior that violates our sense of what is ethically right and just. Because of the meaning and value we attach to personhood in our society, deciding whether a corporation is a person helps us decide what its legal rights and duties are and how we can expect it to behave. It gives us a normative framework for how we should view corporations, how they should be treated, and how they should treat us.

For years, legal theorists and philosophers have engaged in debate over the essence of the corporation. Some have argued that the corporation is not a person at all. While the civil and criminal liability of corporations is firmly established in our legal system, the question whether corporations should bear moral and social responsibility for their actions and omissions is the subject of strident debate. Parts III.A and III.B, infra, discuss the philosophical debate over corporate moral personhood and the propriety of ascribing moral and social responsibility to corporations.

This inquiry into corporate personhood involves more than merely asking whether the corporation is a person for legal purposes. Some scholars argue that the narrow question of legal personality should be analyzed purely from a pragmatic instrumentalist approach, i.e., if the corporation is of such a nature that certain rights and duties can be attributed to it, we can label it a person, making the existence of corporate personhood dependent on the circumstances. See, e.g., John Dewey, The Historic Background of Corporate Legal Personality, 35 Yale L.J. 655, 659-62 (1926); see also Robert S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought – A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 Cornell L. Rev. 861, 865 (1981) (discussing pragmatic instrumentalism and identifying John Dewey as a subscriber of this view). From this view, it does not matter whether we decide a corporation is a person because the term “person” can signify whatever we want the law to make it signify. See Dewey, supra, at 655. This Article seeks to explore other dimensions of corporate personhood beyond just the legal status of corporations.

See, e.g., ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS (1897); FREDERICK HALLIS, CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE (1930); H.L.A. HART, DEFINITION AND THEORY IN JURISPRUDENCE: AN INAUGURAL LECTURE (1953); ALEXANDER NEKAM, THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY (1938); S.J. STOLJAR, GROUPS AND ENTITIES: AN INQUIRY INTO CORPORATE THEORY (1973); George F. Canfield, The Scope and Limits of the Corporate
It is merely a legal construct, a fictional entity, an artificial creation of the natural persons who form the corporation for their own purposes. It has no real, independent ontological existence of its own because it has no body, mind, or soul. Its personhood status is simply a legal abstraction, and we can define it to be whatever we want. The corporation is a creature of statute and is dependent on the law to give it form and function.

Others have argued that the corporation is not so much a creature of law as it is an association forged by mutual agreement of the individuals composing it. No corporations would exist and no corporate actions would ever occur without the actions and consent of the human beings who make up the corporate entity. Corporations themselves cannot literally “act” or “decide” or “intend” apart from their human members. Therefore, the corporation is better described as a collection, or aggregate, of its individual human constituents, without whom the corporation would have no identity or ability to function at all.

Still others believe the corporation is a real person, not an artificial, fictional entity. It is an independent reality that exists as an objective fact and has a real presence in society. It is not the law that gives the corporation life. The corporation exists prior to and separate from the state; the state merely grants it official recognition and permission to operate. Under this view, the corporation is also separate and distinct from the individual human beings who participate in the corporate enterprise. Individual employees and agents can come and go without affecting the continuity or identity of the organization itself. The corporation can have a collective consciousness or will that is

---


7 This is often called the artificial entity theory of the corporation. Part II.A., infra, discusses this theory.

8 Many refer to this view as the aggregate, associational, or contract theory. See PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 27 (1993). Part II.B., infra, discusses this theory of the corporate person.

9 This theory is called the real entity, natural entity, or organic theory of the corporation. Part II.C., infra, discusses this theory.
not reducible to the individual consciousness and will of each human member. As a whole that is greater than the sum of its parts, the corporation is a real person, qualitatively different in kind from the human persons that are part of its make up.

All of these personhood theories of the corporation have their own normative features. Viewing the corporation as a creature of statute and a product of state action supports a public-oriented view of corporations and corporate law. The laws that create corporations should constrain and shape them to act in ways that serve the public interest. In contrast, if the corporation is viewed as an aggregate of the human beings who compose it, then corporations should be regarded as the product of private initiative, private contract, and private property arrangements. The rights and duties of the corporation are simply the rights and duties of its individual members. The role of the law should be to support the rights of these private parties and to avoid interfering with their consensual actions. At the same time, those individuals should be the sole subject of regulation. For example, if corporate managers make decisions that cause the corporation to pollute the environment or defraud shareholders, the managers alone should be punished. The corporation itself is not a person who should be criminally or

---

10 Historically, corporate law reflected a public-oriented view of corporate activity, as early corporations were perceived to be created for the public benefit. See Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1425 (1982) (noting that regulatory public law premises had dominated the law of corporations prior to 1819); see also JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970, at 17-21 (1970) (discussing the special charters that historically were granted to corporations that served a public utility function); D. Gordon Smith, The Shareholder Primacy Norm, 23 J. Corp. L. 277, 292-96 (1998) (discussing the relationship between early business corporations and the public interest).

11 This private model of the corporation focuses on the “private relations between the shareholders of the corporation and management” and on “the governance problems that arise inside the corporation.” David Millon, Theories of the Corporation, 1990 Duke L.J. 201, 201-02. The distinction between public and private views of the corporation is part of a much larger, ongoing debate over the fundamental nature and purpose of corporations. See Lawrence E. Mitchell, Private Law, Public Interest?: The ALI Principles of Corporate Governance, 61 Geo. Wash. L. Rev. 871, 872, 877-80 (1993) (discussing the contrasting public and private views of the corporation and corporate law).

12 The “ideology of ‘privatization’” has deep roots in political and economic “laissez faire” theory. See Joan Williams, The Development of the Public/Private Distinction in American Law, 64 Tex. L. Rev. 225, 225 & n.5 (1985) (discussing “laissez faire” theorists’ antagonism toward government interference with the private sphere of economic activity).
civilly liable for such harms. Alternatively, a view of the corporation as a distinct person, independent of its individual members, demands that corporations themselves be held accountable for corporate acts. If the corporation is a real person in society, it should bear the same sorts of legal, social, and moral responsibilities that natural persons carry.

Each of these conceptions of the corporate person captures elements of truth, and each makes valid points. But they cannot all be accepted at the same time because they dictate diametrically opposing results. Therefore, we often feel compelled to select the most plausible theory and apply it consistently if we want to build a coherent body of corporate law. If none of the theories so far proposed are satisfactory, we believe we must continually strive to develop a single, all-encompassing theory that can describe the corporation and explain its behavior in a comprehensive and consistent manner.

However, this Article argues that the endless endeavor to construct such a unitary theory is misguided and fails to appreciate the multiple personas that make up the modern corporation. No one of the current legal theories of the personhood of corporations, standing alone, is sufficient to give us a complete picture of the corporation and its role in our society. We need more than just our legal academic perspective to understand the nature of the large corporation. It is a multi-faceted entity that requires several different lenses to see it in its entirety. The corporation can be viewed independently from the lenses of philosophy, law, moral theory, political science, sociology, psychology, organizational theory, theology, and economics, all of which highlight separate but essential features of the corporate person. Depending on the lens one chooses to utilize, the subject bears a very different image. Taken together, they reveal that the corporation is a multi-dimensional person with coinciding and conflicting properties that defy classification into a neat and tidy unitary theory. The modern corporation simply cannot be understood apart from the broader context in which it functions, and that context can be fruitfully analyzed only from multiple academic perspectives.

This Article therefore takes a unique interdisciplinary approach to the conundrum of corporate personhood. It draws upon theories from several different schools of academic thought to shed light on the questions: what is the corporation, and how should it be regulated by the law? Each discipline offers unique insights into the corporate person that the other disciplines cannot. Part II of the Article begins with a summary of the legal theories of the personhood of corporations. Historically, three different conceptions of the corporation appeared in cycles as political and economic climates for business changed in America during the 19th and 20th Centuries.13 These legal theories of the corporate person tried to address the issues of corporate purpose, corporate rights, and corporate responsibility.

These issues can be approached not just from a legal standpoint, but also from the viewpoint of moral philosophy. Part III turns to the philosophical dimensions of the corporate person. Moral philosophers have something to say about the moral personhood and moral agency of corporations. Some argue that the corporation is incapable of having moral responsibilities because it has no conscience or capacity to act or feel on its own.\textsuperscript{14} Any good or evil that corporations do essentially boils down to the actions and intentions of the individuals within the corporation. Others insist that the corporation as an entity is a moral person and can carry moral responsibility for collective acts and intentions that simply cannot be attributed to any one human member.\textsuperscript{15}

A fascinating aspect of this philosophical debate that has been largely neglected in the scholarly literature is whether corporations, if they are moral persons, have the capacity for moral development. Could Lawrence Kohlberg’s well-known philosophical and psychological theory of stages of individual moral growth apply to corporations such that they could learn to become more moral and just?\textsuperscript{16} Part III discusses this issue and the viability of using moral stage typology to talk about corporate moral development.

Part IV explores the organizational, psychological, and sociological dimensions of the corporate person. Observers of organizational behavior believe the corporation is an independent, functional entity that does not require metaphorical or metaphysical

\textsuperscript{14} See Manuel G. Velasquez, \textit{Why Corporations Are Not Morally Responsible for Anything They Do}, 2 Bus. & Prof. Ethics J. 1, 6-10 (1983) (arguing that moral responsibility cannot be ascribed to corporations because they cannot fulfill the \textit{actus reus} and \textit{mens rea} elements). Some philosophers argue that even if corporations are capable of acting intentionally, they still do not qualify as moral persons because they are incapable of having the same moral rights as human beings. \textit{See, e.g.}, Thomas Donaldson, \textit{Moral Agency and Corporations}, 10 Phil. Context 54, 58 (1980).

\textsuperscript{15} See, \textit{e.g.}, PETER FRENCH ET AL., \textit{CORPORATIONS IN THE MORAL COMMUNITY} 12-23 (1992).

explanations of its existence. Its structure, decisionmaking systems, and goal orientation give it a formal identity of its own.\textsuperscript{17} The corporation’s culture, character, and norms have profound effects on the thoughts, attitudes, and behavior of the individuals who make up the corporation. To the extent individuals’ values and principles are shaped by their corporate environment, the individuals are in some sense creatures of the corporation, rather than the other way around.

Sociologists also place significance on the external role that corporations play as persons in society. Large corporations have a particular identity and presence in society. They use sophisticated branding techniques to create unique and attractive public personalities for themselves.\textsuperscript{18} As social entities, corporations literally dominate the landscape. Places of public enjoyment like sports stadiums, parks, and concert halls bear corporate names today, where in times past, such places were often named after public benefactors or heroic figures.\textsuperscript{19} Local communities often come to depend on the presence of corporate business to provide needed jobs, tax revenues, and even charitable contributions. A corporation that decides to withdraw its operations from one geographic area in favor of another can dramatically alter the social structure of the affected communities.

The complex social dimension of corporations relates to another aspect of corporate personhood that has important consequences for society – the political role of corporations. Drawing on political theory and philosophy, Part V examines the nature of the corporation as a political entity. The appropriate role for large corporations in a

\textsuperscript{17} See ARTHUR G. BEDEIAN, ORGANIZATIONS: THEORY AND ANALYSIS 5 (1980) (stating that “organizations exhibit a tendency to . . . take on a momentum of their own [and] develop a unique self, a distinctive identity, that is referred to as \emph{organization character}”). See \textit{generally} ORGANIZATIONAL IDENTITY: A READER (Mary J. Hatch & Majken Schultz eds., 2004) (collecting essays on organizational identity theory); DAVID A. WHETTEN & PAUL C. GODFREY, IDENTITY IN ORGANIZATIONS 1-80 (1998) (discussing organizational identity).

\textsuperscript{18} Brand creation and management is an important asset for large corporations today. A significant segment of business management literature is devoted to branding. \textit{See, e.g.}, DAVID A. AAKER, MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME (1991); SCOTT M. DAVIS, BRAND ASSET MANAGEMENT: DRIVING PROFITABLE GROWTH THROUGH YOUR BRANDS (2000); HARVARD BUSINESS REVIEW ON BRAND MANAGEMENT (1999); JON MILLER & DAVID MUIR, THE BUSINESS OF BRANDS (2004).

democratic society is tied to our deeper political convictions about government power and individual freedom. For example, a philosophy of liberal political individualism places great weight on protecting individual liberties from what it regards as the most dangerous potential source of coercive power in society: the government.\textsuperscript{20} To the extent corporations are viewed as aggregates of individuals, the rights of those individuals to utilize the corporation as a means of private enterprise should be protected from government interference.

In contrast, a political pluralist philosophy sees large corporations as centers of vast concentrations of wealth that give them power in society, much like that of the state.\textsuperscript{21} Care must be taken to shield individuals from the potential abuse of corporate control. The only source of power strong enough to combat corporate power is the law, which must impose restraints on the corporation for the benefit of the public interest. Part V discusses these various political viewpoints, revealing several significant political dimensions of the corporate person.

In addition to the role that corporations play as legal, economic, social, and political institutions, the corporate person may also have theological significance. Part VI considers the possible spiritual dimension of the corporation, an element that is not often discussed in mainstream academia. Proponents of the spiritual approach to corporations believe the corporation is an instrument that can be used for the spiritual flourishing of human beings and for the common good of society.\textsuperscript{22} The corporate setting creates a community of work where individuals can acquire and exercise important virtues like honesty, respect, patience, courage, and loyalty. Some religious

\textsuperscript{20} MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATION 164-65 (1986).


\textsuperscript{22} See, e.g., TIMOTHY L. FORT, ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION 25-28 (2001); \textit{see also id.} at 179-98 (discussing the connections between theology and business).
thinkers believe people spend so many waking hours at work today that the work environment has come to supplement, if not replace, the traditional mediating institutions of family, church, and neighborhood as the setting where virtues either will or will not be learned.23

The normative applications of this spiritual approach to corporations are similar to those associated with communitarian or stakeholder models of the corporation.24 The maximization of profits is an important objective of corporate activity, but should not be regarded as the sole or primary purpose of the corporation. Instead, profit-making should be partnered with other important goals such as supporting human dignity, protecting the environment, preventing labor exploitation, and promoting the good of society.

In stark contrast to the ideas associated with the spiritual model, the economic theory of the corporation repudiates the belief that corporations can or should have any purpose beyond acting as a contractual center for economic exchanges. Part VII describes the neoclassical economic paradigm of the corporation. Under this model, the corporate person is merely a fiction that serves as a nexus of contracts among the firm’s various individual participants.25 Market forces bring shareholders, managers, creditors,

23 See D. Stephen Long, Corporations and the Common Good, 4 Ave Maria L. Rev. 77, 98 (2006) (“Work consumes too much time for one to think that virtuous habits are only cultivated in some separate cultural sphere and then brought to the corporation.”); see also FORT, supra note 22, at 28, 30 (discussing the importance of traditional mediating institutions such as the “family, local community, and church” and suggesting that “[b]ecause so much time is spent working, . . . there is also a need to consider the extent to which businesses should also be mediating institutions”).

24 See R. Edward Freeman, A Stakeholder Theory of the Modern Corporation, in ETHICAL THEORY AND BUSINESS 56, 56 (Tom L. Beauchamp & Norman E. Bowie eds., 6th ed. 2001). “Stakeholder theory argues that the corporation ought to be managed for the benefit of all affected by corporate actions, not simply the shareholders.” FORT, supra note 22, at 125. Kenneth Goodpaster explains that the term “stakeholder” was invented in the 1960s as a play on the term “stockholder” to indicate that there are other members of the corporation, in addition to the stockholders, who have a “stake” in the decisions of the firm. Kenneth E. Goodpaster, Business Ethics and Stakeholder Analysis, 1 Bus. Ethics Q. 53, 54 (1991).


[The] corporation or firm is simply one form of legal fiction which serves as a nexus of contracting relationships . . . . There is in a very real sense only a multitude of complex
employees, suppliers, and others together to seek the benefit of their bargains with each other. Their web of interrelated contracts is what constitutes the corporation. As a normative matter, the private parties who participate in the corporate enterprise should be free to order their affairs in whatever manner they choose without government regulation or interference. The corporation’s primary concern should be to maximize profits; it should not be asked to carry the same social, moral, or ethical duties of persons in society.

The nexus of contracts model has become the dominant paradigm in legal academia today. In the debate over corporate personhood, this contractual approach has arguably overshadowed all other theories of the corporation. The theory is not without its critics.\textsuperscript{26} Part VII outlines some of the criticisms and suggests that the unidimensional focus of the nexus of contracts theory is both a strength and a weakness. It gives the theory explanatory and predictive power, but it limits that power to just one of the many dimensions of the corporate person.

relationships (i.e., contracts) between the legal fiction (the firm) and the owners of labor, material and capital inputs and the consumers of output.


This Article argues that the current preoccupation with the contractual elements of the corporation obscures the complex reality of the corporate person. For too long, scholars have debated theories of the organization as if trying to win a competition in which one academic theory must rise victorious over the others and be crowned the single, all-encompassing paradigm of the corporation. Those who favor the nexus of contracts theory declare themselves the winner of this competition, challenging others to present a better model of the corporation. The problem with this mindset is that it not only assumes we prefer to have a single, unitary theory of the corporate person, but it also requires that we choose one theory and reject all the others. This narrow approach is dangerous because it restricts us from seeing the corporation in all of its complexity when viewed from multiple vantage points.

Part VIII of this Article presents an argument for adopting a multi-dimensional model of the corporation. The many interdisciplinary approaches to corporate activity all represent different and valid ways of analyzing the separate dimensions of the corporate person. Each theory informs the other, and only when they are taken together can they tell the full story of the corporation. All of the theories are hopelessly incomplete without the others because they each describe only one of the many relations that constitute the totality of the corporation. A multi-dimensional model of the corporation would take into account the numerous ways the corporate person is conceived.

This Article asserts that the law must be sensitive to the multifaceted nature of the corporation. The law should remain malleable and adaptable as various theories of the corporation bring new and different issues to light. The corporation is a constantly evolving entity, and its place in our lives depends on our own continually changing moral, legal, philosophical, and political imagination. The law of corporations should reflect the dynamic nature of the theories that describe the corporate person, and should avoid any narrow and fixed framework for analyzing corporate activity. Some may object to this approach on the grounds that the inevitable clash of theories, based on their conflicting descriptions and norms, will produce inconsistent and contradictory legal rules. They would prefer we choose one unitary theory of the corporation that, when methodically applied, will render clear and consistent rules of law. This objection, however, underestimates the value of indeterminacy in the law and the importance of allowing contradictions to arise as a necessary part of the process of creating legal judgments of high quality. Consistency, clarity, and coherency in the law are overrated. Ambiguity is valuable when it brings us closer to reality and produces balanced legal results that mediate between legitimate alternatives. By demonstrating the many different ways the corporate person can be perceived, this Article rejects the idea that there is a single “best” theory of the corporation and instead recommends that we adopt a more open-ended, multi-dimensional approach to the corporate person.
II. LEGAL THEORIES OF THE CORPORATE PERSON

A. Corporation as an Artificial and Dependent Person

One way of characterizing the corporation is to say that it is nothing more than a legal construct. It is not a real or natural person, but an artificial creation of human beings and the law. We give it personhood status solely as a legal fiction to facilitate commerce. By calling the corporation a person, the law grants it the capacity for legal relations of all kinds. The corporation has standing to enter into contracts, to hold property, to sue and be sued, and ultimately to carry on business in the corporate name. The artificial person theory is thus composed of two separate elements: (1) the fictional aspect of the corporation, and (2) the dependence aspect of the corporation, i.e., its dependence on the law to give it legal personality.

The fictional component emphasizes the fact that the corporation is a human invention, a constructed entity, unlike the natural persons who create the corporation for their own use. The corporation has no soul, no mind, no corporeal body. When we refer to it as a person, we do so only out of convenience. It is an abbreviation we adopt for the practical purpose of making the corporation the bearer of specific rights and duties under the law. No one actually believes a corporation is a real person. Everyone recognizes that this fictional juridical person is merely a legal abstraction. In fact, legal

---

27 See Model Bus. Corp. Act § 3.02 (“[E]very corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including power: (1) to sue and be sued . . . (4) to own, hold, improve, use, and otherwise deal with, real or personal property . . . (7) to make contracts and guarantees . . .”).

28 Nesteruk, supra note 2, at 564 n.133 (“A corporation is artificial in that it is a human creation subject to human choices.”); James V. Schall, The Corporation: What Is it?, 4 Ave Maria L. Rev. 105, 118 (2006) (describing the corporation as primarily a human invention created for man’s use).

29 See JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray ed., MacMillan, 1921) (stating that “person” usually means a human being, “but the technical legal meaning of a ‘person’ is a subject of legal rights and duties”); Wolff, supra note 6, at 506 (arguing that the legal fiction of the corporation is an abbreviation allowing us to apply the same legal rules to human beings and corporations). One advantage of the fiction theory is its flexibility. It permits certain entities to be treated as persons for some purposes and not for others. See id. at 511.
personality can be given to just about any object if it is deemed to serve the ends of justice.30

The dependence aspect of the corporation focuses on the idea that corporations cannot exist without the law’s consent. Also referred to as the concession theory, it argues that corporations are legally formed when the state approves their charters, and therefore, the personhood of corporations is not a natural reality but merely a government concession.31 The classic statement of the theory is found in Chief Justice Marshall’s description of the corporation in Trustees of Dartmouth College v. Woodward: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . ”32 The corporation is artificial, fictional, and conditional because it cannot come into being unless and until the law sanctions it. It is a creature of state law and nothing else.

The artificial person or concession theory dominated American thinking about corporate personhood in the first half of the 19th Century.33 Corporations during that period required a special act of the state legislature to approve their charters on a case by case basis.34 States typically granted corporate charters for enterprises that served a public function and met specific social needs, e.g., public utilities, banks, insurers,
transportation services, and water works. “[T]he corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.” Thus, legislative approvals of charters were seen as special grants or privileges by the sovereign, underscoring the view of corporations as concessions of the government. The state played a decisive role in creating corporations and circumscribing their actions within limited spheres of activity. Early charters often contained specific provisions maintaining some measure of control over corporations to protect the public from abusive corporate practices.

The fiction theory normatively supported a public oriented view of corporations and corporate law. Because the corporation derives its existence from the state, the corporation presumably is incorporated for public purposes and the state can regulate its operations for the public interest. What the state can give, the state can take away. The

---

35 See HURST, supra note 10, at 15, 17-18; William W. Bratton, Jr., The New Economic Theory of the Firm: Critical Perspectives from History, 41 Stan. L. Rev. 1471, 1484 (1989); see also Martha T. McCluskey, The Substantive Politics of Formal Corporate Power, 53 Buff. L. Rev. 1453, 1475-76 (2006) (“U.S. law often treated the corporate charter as a public benefit and the corporation as a quasi-government agency, not private property.”). Because corporations were considered bodies created by law for the purpose of attaining some public end, they were therefore “arms of the state.” Warren J. Samuels & Arthur S. Miller, Introduction: Corporate America, in CORPORATIONS AND SOCIETY, supra note 24, at 1, 3.


37 For example, states often strictly regulated banking activity through limited powers granted in bank charters and through strict construction of those charters by the courts. Gregory A. Mark, Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441, 1444 (1987). Sometimes legislatures required corporations to give equal voting power to smaller investors, provide favorable treatment to the poor, or ensure that investors and managers could be individually liable for corporate debts. See McCluskey, supra note 35, at 1478. At times, states even regulated the prices that corporations could charge and the rate of return that investors could earn. Id. at 1476. Courts also tended to support broad state powers over corporations. See, e.g., Leep v. St. Louis, I.M.&S. Railway Co., 58 Ark. 407, 427-28, 25 S.W. 75, 81 (1894) (holding that even though legislatures lacked the power to dictate how natural persons paid their employees, legislatures had the power to do so with corporate employers).

38 Many legal opinions reflected this view. See, e.g., Hale v. Henkel, 201 U.S. 43, 74 (1904) (“[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public.”). Chief Justice Marshall explained it as an exchange between the corporation and the state: “The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant [of incorporation].” Trustees
very laws that create corporations can also constrain them to act in ways that benefit, or at least do not harm, the public.39

By the mid-19th Century, special chartering gave way to general incorporation statutes. Special incorporations for businesses came to be regarded by the public as the corrupt result of legislative bribery, political favoritism, and monopolistic practices.40 In response to this public dissatisfaction, states adopted general incorporation statutes allowing businesses to incorporate freely without special grants from the legislature.41 The act of incorporation with the state was merely a formality of filing and played little role in the personhood of corporations. The idea that corporations existed only because of the concession of the state held far less force and was replaced with the belief that the corporation actually owed its existence to the individuals who formed the corporation to conduct their business. As a result, the artificial person theory of the corporation

of Dartmouth College v. Woodward, 17 U.S. 518, 637 (1819); see also Phillips, supra note 33, at 1087 (stating that the concession/fiction theory supports the assertion that corporations are essentially public and the state can regulate their internal affairs); A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 Del. J. Corp. L. 33, 36 (1991) (noting that while the organizers of early corporations did expect profits from the business, “the corporations were to serve a public purpose and as such were overseen closely by the state which sanctioned their organization”).

39 See Timothy L. Fort, Goldilocks and Business Ethics: A Paradigm That Fits “Just Right,” 23 J. Corp. L. 245, 260 (1998) (asserting that “the strong sense that corporations ought to benefit the public” is rooted in the historical legislative practice of chartering corporations only if the business benefited the public); Millon, supra note 11, at 211 (noting that “the idea of the corporation as an artificial creature of the state” supported “a conception of corporate law as public law”).

40 See Morton J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. Va. L. Rev 173, 181 (1985); Mark, supra note 37, at 1453-54 (discussing the corruption and political favoritism associated with the special privileges of incorporation); see also CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 20 (1975) (noting that the special charter procedure became increasingly unpopular because of its association with monopoly favors and legislative corruption).

41 See FRIEDMAN, supra note 34, at 512 (“It was cheap and easy to incorporate under general laws – a few papers filed, a few forms and signatures; the privilege of incorporation lay open to whoever wanted it.”); Avi-Yonah, supra note 13, at 792 (discussing the elimination of corrupt special chartering and the subsequent enactment of general incorporation laws “permitting anyone to form a corporation on payment of a fee, without permission by the state legislature”); see also STONE, supra note 40 (noting that by the end of the 19th Century, general incorporation statutes had displaced special charters entirely).
diminished in relevance over time.

Some commentators believe that the artificial person or concession theory carries little weight today. Because corporations can be formed quickly by simple filings under state general incorporation laws, the state is viewed as playing only an administrative role in creating corporations. The state’s technical power to revoke corporate charters for corporate abuses or violations of the law seems meaningless because such revocations are too draconian to be a realistic threat. Penalizing a corporation by dissolving its charter may punish numerous innocent individuals like shareholders and employees who will suffer the loss of their investments or jobs due to no fault of their own. In spite of these sentiments, adherents of the concession theory today still persist. Recent attempts in California to revoke the charter of Union Oil Co. for alleged environmental violations and human rights abuses are a good example. The underlying sentiment in such cases is that corporations are privileged to exist by concession of the state, and this privilege can be revoked when corporations act in ways that violate the public trust. Thus, there is

---

42 See HENRY N. BUTLER & LARRY E. RIBSTEIN, THE CORPORATION AND THE CONSTITUTION ix (1995) (arguing that the theory of the corporation as a creation or concession of the state “has no relevance today, when corporations are freely formed by making a simple filing under general incorporation laws”); Phillips, supra note 33, at 1101 n.223 (asserting that the concession/fiction theory is not taken seriously today “because the emergence of general incorporation statutes deprived it of whatever relevance it once had.”).

43 See STONE, supra note 40, at 36 (“Forfeiture of corporate charter . . . is simply too draconian to be a realistic threat . . . .”), and 58 (“If you dissolve the offending corporation, you throw great undertakings out of gear . . . to the infinite loss of thousands of entirely innocent persons and to the great inconvenience of society as a whole.” (quoting Woodrow Wilson)); Thomas Linzey, Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations, 13 Pace Envtl. L. Rev. 219, 224 (1995) (arguing that the ability to revoke corporate charters has become meaningless); Michael B. Metzger, Organizations and the Law, 25 Am. Bus. L. J. 407, 413 n.35 (1987) (asserting that the tendency of dissolution to “punish the innocent as well as the guilty means . . . that dissolution is unlikely ever to be employed on any regular basis”).

some indication that the concession theory may again be on the rise.  

B. Corporation as an Aggregate Person

An alternative view of the corporate person arose during the last half of the 19th Century. With the advent of the general incorporation laws, the corporation was seen less as a creature of the state, and more as an association created by mutual agreement of the individuals composing it. The aggregate theory emphasized that the corporation could not be formed by law without the action and agreement of human beings. In fact, no corporate acts would ever occur without the human persons who made up the corporate entity. Therefore, the corporation was seen more as a collection, or aggregate, of individual human beings, who contracted with each other to utilize the corporation for their mutual benefit. The aggregate theory, also called the contractual or associational theory, holds that the corporate person has no existence or identity that is separate and apart from the natural persons in the corporation. The entity is "owned, managed, and administered by people, [and] its so called actions are but manifestations of actions by..."

45 See Brooks I, supra note 44, at D2 ("Corporate charter revocation is gaining popularity as a legal maneuver."); see also Donald C. Langevoort, Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering, 75 Fordham L. Rev. 1615, 1619 (2006) (holding the view that "the corporation is a creature of the state whose nature and purposes are simply defined by law, from which a norm of law-abidingness follows easily").

46 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 24 (2d ed. 1886); Blumberg, supra note 31, at 293 ("The subsequent growth of general incorporation statutes making corporate status freely available moved the predominant role in corporate organization from the state to the incorporators and shareholders."); Bratton, supra note 35, at 1486 ("With equal access to the form assured, corporations no longer seemed a product of sovereign grace but the result of the "creative energy of the individuals conducting it."); Horwitz, supra note 40, at 184-85 ("In this conception, the corporation was not a creature of the state but of individual initiative and enterprise.").

47 This theory resonates with an "inheritance theory" of corporations which suggests that "men have a natural right to form a corporation by contract for their own benefit, welfare, and mutual self-interest." ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 22 (1979).

48 1 MORAWETZ, supra note 46, at 1-2 (It is "self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose [it]."); PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 51 (1985) ("Corporations have no reality over and above their constituents, because they are created by and function only because of them.").
real persons.” Corporations are “mere clusters or aggregates of individuals,” and all corporate actions are reducible to those of individuals. It makes no sense to see the corporation literally as a distinct person.

Under this view of the corporate person, “the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.” The United States Supreme Court implicitly relied on this view in *Santa Clara v. Southern Pacific Railroad* when it declared that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals. The underlying reasoning was that the corporation’s property was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner. “To deprive the corporation of its property . . . is, in fact, to deprive the corporators of their property . . . . [T]he courts will look through the ideal entity and name of the corporation


50 DAN-COHEN, *supra* note 20, at 15; see also LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 11-18 (1987) (discussing the claim that social groups such as corporations are nothing more than the individuals who constitute them).

51 See MAY, *supra* note 50, at 10 (asserting that “[a]ll talk of social groups can be reduced to talk of individual persons”).

52 1 MORAWETZ, *supra* note 46, at 3; see also Millon, *supra* note 11, at 213-14 (noting that the aggregate theory emphasizes that “corporate property rights are nothing more than individual property rights and therefore entitled to the same protections”).

53 118 U.S. 394 (1886).

54 Professor Horwitz explained that the Court’s decision relied on the aggregate theory arguments of John Pomeroy, counsel for the railroad company, and Justice Field in his circuit court opinion in the companion case, County of San Mateo v. Southern Pacific R. Co., 13 F. 722 (C.C.D. Cal. 1882). See Horwitz, *supra* note 40, at 177-78. Justice Field wrote: “It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.” County of San Mateo, 13 F. at 744. Based on this aggregate view of the corporation, Justice Field asserted that “the courts will always look beyond the name of the artificial being to the individuals whom it represents.” *Id.*
to the persons who compose it, and protect them.”

The normative implications of the aggregate paradigm are that corporations should be regarded as the product of private initiative and natural market forces, that corporations reflect forms of private property and private contract, and that corporate law should therefore be viewed as private law, not public law. Unlike the artificial person or concession theory, the aggregate theory supports a hands-off, anti-regulatory approach that allows shareholders to contract freely. Instead of seeing the corporation as existing for the public interest, the aggregate theory views the corporation as existing for the private interests of the individuals who constitute it. The role of the law is to support the rights of these private parties and avoid interfering with their consensual actions.

By the early 20th Century, dispersed shareholder ownership and immense growth in the size of corporations revealed a deep separation of ownership and control in large corporations. Widely scattered shareholders of giant corporations were passive investors with small individual holdings who no longer controlled the corporation in any meaningful sense. The large corporation appeared to take on its own identity as a functioning organization, separate from the individual shareholders who came and went without changing the nature of the organization’s operations. It made it difficult to

---


56 Bratton, supra note 35, at 1489-90 (discussing aggregate theory’s hostility to state regulation of corporations); Millon, supra note 11, at 202.

57 See David Millon, The Ambiguous Significance of Corporate Personhood, 2 Stan. Agora: Online J. of Leg. Perspectives 39, 42 (2001) (“By appealing to the individual property rights of the shareholders, the aggregate idea offered a potentially useful theoretical justification for shielding big business from public supervision.”). Alternatively, a broader conception of the aggregate paradigm could support a more communitarian view of the corporation. For example, if one were to say that the corporation is an aggregation of not only the corporation’s individual shareholders, but also its employees, creditors, suppliers, and local communities, then their corporate membership presumably entitles them to certain rights and protections, and the law should support their interests as well. See Abram Chayes, The Modern Corporation and the Rule of Law, in CORPORATION AND MODERN SOCIETY, supra note 21, at 25, 41.

continue to see the corporation as an aggregate of the individual shareholders. The corporation by its nature had a longevity, a perpetual existence, that its individual members did not share. Because the aggregate theory was not an entirely satisfactory description of the corporate person, a new theory, the real entity theory, emerged to explain the personhood of corporations.

C. Corporation as a Real and Independent Person

At the turn of the 20th Century, the real entity, or natural entity, theory became the popular way of describing the corporate person. It posited that the corporation’s existence is not only independent of the individual members who compose the corporation, but also independent of the state that legally recognizes its form.

In contrast to the artificial person theory, the real entity theory views the corporation as an undeniably real and non-imaginary person. As one commentator suggested: that which is artificial can still be quite real; an artificial lake is not an imaginary lake, it is something very real that we can see and touch. Perhaps corporate legal personality can be regarded as a fiction, but the entity which is personified is by no means fictional. It is a full-fledged, living reality that exists as an objective fact and has a real personality in society.

59 See Phillips, supra note 33, at 1067; see also Mark, supra note 37, at 1472 (noting that as the distance between shareholders and the operations of the business grew, the “life” of the corporation could no longer be identified with the shareholders, but had to be recognized as autonomous).

60 See Jess M. Krannich, The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation, 37 Loy. U. Chi. L.J. 61, 80 (2005); Millon, supra note 11, at 211 (referring to the emergence of the natural entity theory); see also Blumberg, supra note 31, at 295 (noting that the theory took on different names: “natural entity, or real entity, or realism theory”).

61 See W. Jethro Brown, The Personality of the Corporation and the State, 21 Law Q. Rev. 365, 370 (1905); Phillips, supra note 33, at 1067-70 (discussing the real entity theory). German legal theorist Otto Gierke is often credited with introducing the real entity model into Western thought. See Horwitz, supra note 40, at 179-81 (citing OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (F.W. Maitland ed. 1900)).

62 Arthur W. Machen, Jr., Corporate Personality, 24 Harv. L. Rev. 253, 257 (1911).

63 See Katsuhito Iwai, Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance, 47 Am. J. Comp. L. 583, 584 (1999) (describing the
Rejecting the concession theory’s view of the corporation as dependent on the state for its existence, the real entity theory holds that the corporation exists prior to and separate from the state. Just as the state may record the birth of every baby, or the sale of every land parcel, so does the state record the formation of every corporation—a formation that occurs by virtue of agreement of the private parties who constitute the business, not by virtue of any state action. In fact, if an existing corporation were suddenly to cease to be recognized by the state as a legally viable institution, the corporation would not cease to exist in an objective sense: “If the law, acting through some instrumentality, declared that they did not exist, the entities would be found to be not fictitious, but factual. . . . The huge machine would keep right on rolling. This is of the essence of an institution, and not of a legalistic creation.” The large corporation is simply a natural outgrowth of the economic tendency toward business combination. Rather than being a creature of the state, the corporation is a naturally existent entity “which has compelled the law to grant it official recognition.”

64 Robert Hessen, Creatures of the State? The Case Against Federal Chartering of Corporations, Barron’s, May 24, 1976, at 7, 7. The state merely adds “legal legitimacy” to the corporation by its public recognition of the entity, but it has nothing to do with the actual creation of the corporation. Roger Pilon, Corporations and Rights: On Treating Corporate People Justly, 13 Ga. L. Rev. 1245, 1305 (1979). “What really happens is that the state, finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.” George F. Deiser, The Juristic Person, 57 U. Pa. L. Rev. 300, 304 (1909).


66 See Horwitz, supra note 40, at 197; Krannich, supra note 60, at 81 (noting that the real entity metaphor grew out of the belief that the corporate entity seemed to be a natural way of conducting business); Millon, supra note 11, at 213 (“[T]he phenomenal growth in the size of corporations prompted new ideas about the inevitability of economic concentration.”).

67 Brown, supra note 61, at 370; see also Edward S. Mason, Introduction, in CORPORATION AND MODERN SOCIETY, supra note 21, at 14 (arguing that the law does not create the corporation but instead acts simply as “a device for facilitating and registering the obvious and the inevitable”); Machen, supra note 62, at 261 (“A corporation exists as an objectively real entity; . . . the law merely recognizes and gives legal effect to the existence of this entity.”). Some commentators observed that corporations “existed and were recognized before a theory was invented to explain their existence and recognition.” W.M. Geldart, Legal Personality, 27 Law Q. Rev. 90, 96 (1911).
The real entity theory also views the corporation as distinct from the individual human members who participate in the corporate enterprise. When several natural persons come together to form an association for some shared purpose, the group entity that is formed is larger and different in kind from the members themselves. In opposition to the aggregate theory, real entity proponents believe the corporation is much more than the sum of its individual parts. The corporation is an independent entity whose existence and identity remain the same, even if its membership of individuals changes over time or is in a constant state of flux. This is because one of the distinguishing features of large corporations is their longevity. “[O]rganizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones.”

---

68 See Bryant Smith, Legal Personality, 37 Yale L.J. 283, 286 (1928) (discussing the nature of group formation).

69 See PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 19-30 (1984) (demonstrating that the identity of a corporation is independent of the aggregate identities of those associated with it at any particular time, in spite of the fact that its operations require that persons be associated with it); Brown, supra note 61, at 366 (observing that the corporation remains the same although its personnel changes entirely). The corporation “is a totality of which the parts are constantly changing without affecting the continuity of the totality itself.” Id. at 367. In fact, Arthur Machen argued that any group whose membership is changing is necessarily an entity separate and distinct from its constituent members. Machen, supra note 62, at 259. Some even argued that corporations can exist for periods of time, with all of their rights and duties, despite having no members whatsoever. Roger Scruton, Corporate Persons, in 63 Supp. Vol.: Proc. of the Aristotelian Soc’y 239, 246 (1989); see also DAN-COHEN, supra note 20, at 46-49 (telling an allegory of the “Personless Corporation” to show that one may “strip the corporation of all individuals and yet preserve, both conceptually and legally, the identity of [the corporation]”).

70 PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 1 (1962); see also Scruton, supra note 69, at 251 (noting that institutions have a longevity that is not shared by individuals because of the procedures and roles that remain in the organization independently of the individuals who make use of them); Vinogradoff, supra note 6, at 595 (observing that a firm does not break up when one of its individual members dies; “it has an existence of its own – a life which transcends the lives of individuals engaged in it”). In fact, some argue that the existence of the organization “typically predates the membership in it of any particular individual.” DAN-COHEN, supra note 20, at 50; see also PETER F. DRUCKER, CONCEPT OF THE CORPORATION 21 (1972) (“The corporation is permanent, the shareholder is transitory. It might even be said without much exaggeration that the corporation is really socially and politically a priori whereas the shareholder’s position is derivative.”).
Under the real entity view, a corporation can have its own will and pursue its own goals in a way that cannot be equated with the will and goals of each individual member. The corporation has a “collective consciousness” or “collective will” that results from discussion and compromise among the individual members, and may not reflect the particular preferences of any one person. Actions of the corporation are qualitatively different from those of its individual constituents, who each may have contributed some part to the act, but no one person can be said to be responsible for the unified corporate action. “[A]n organization may produce consequences, like profits, that are true properties of the organization; they come about because of the way people behave together, not just as aggregate effects of their separate behaviors.” Corporations can initiate and be responsible for their own actions and intentions. From a criminal law perspective, a corporation could be convicted of a crime, due to its own organizational acts and culpable intent, independent of any criminal conviction of particular individuals within the corporation. By assuming that the corporation is a separate person, the real entity theory allows it to be treated much like an autonomous individual.

Real entity theorists believe this view of corporations comports with common sense and is consistent with our natural compulsion to see organizations as independently

---

71 See OTTO GIERKE: ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 7 (George Heiman ed. & trans., 1977) (“The association, or group, is a living entity . . . . Every group has a real and independent communal life, a conscious will, and an ability to act that are distinct from the lives and wills of its individual members.”); Deiser, supra note 64, at 301, 310 (referring to the “collective consciousness” as the corporation’s personality).

72 I have discussed elsewhere the ways in which the acts of the corporation sometimes may not sensibly be reduced to the actions of individuals within the organization. See Susanna M. Kim, Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations, 2000 U. Ill. L. Rev. 763, 790-91; see also WERHANE, supra note 48 (arguing that “not all actions of corporations are redescribable merely as individual actions”).

73 MICHAEL KEELEY, A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS 230 (1988). Michael Keeley cites this as an example showing that “organizations can have numerous properties that are not simply aggregates of (or reducible to) individual properties.” Id.

functioning realities. It is relevant that we regard corporations as persons in our ordinary thinking and discourse. Our normal linguistic usage reflects our perception of corporations as persons who “act,” “decide,” “think,” and “feel,” on their own. We say, for example, that Nike denied that it knew about the wrongdoing, Exxon believes its employees are treated fairly, AOL signed a merger agreement with Time-Warner, and the Disney Channel loves young audiences. We use singular verbs and possessive pronouns when we refer to corporations, and we describe groups in terms that do not refer to their constituent members. The corporation’s personhood status is woven into the fabric of our language, indicating the corporation’s nature as a real and independent person, or at least our inevitable tendency to accept it as such. This is the way we talk and think about corporations, and that has to be relevant for something.

---

75 See Harold J. Laski, The Personality of Associations, 29 Harv. L. Rev. 404, 405 (1916) (“Clearly, there is compulsion in our personalising [the corporation]. We do it because we must. We do it because we feel in these things the red blood of a living personality.”); Machen, supra note 30, at 363 (“We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view.”). Arthur Machen argued that the only thing needed to apply the correct doctrine of corporate personality (presumably the real entity theory) was “sturdy common sense.” Machen, supra note 30, at 365.

76 See Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563, 601 (1987) (illustrating that singular institutional nouns such as the names of corporations are incompatible with plural verbs, pronouns, and adverbials). We say “the corporation has aligned itself with labor,” not “the corporation have aligned themselves with labor.” Id. Sanford Schane’s article discusses the linguistic basis for treating the corporation as a person. Id. at 592-609. He argues that it is a part of ordinary language to speak about institutions as though they are persons, and that this way of speaking is independent of the law. Id. at 595.

77 “For example, while Germany is said to be populous, no individual German can be so described; and when one says that a corporation is large, one is not referring to the size of its members.” Phillips, supra note 33, at 1105 n.237 (citing Richard T. De George, Social Reality and Social Relations, 37 Rev. Metaphysics 3, 9-10 (1983); Anthony Quinton, Social Objects, in 1976 Proc. Aristotelian Soc’y 1, 8)).

78 Sameul W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L.J. 473, 491-92 (2006) (discussing our linguistic tendency to attribute culpable intent to entities and arguing that “[w]orking out ground rules for such talk is unnecessary” because the “words themselves show that we understand entities to exist independent of individual actors and to be responsible”). But see Phillips, supra note 33, at 1105-06 (responding that these linguistic points do not necessarily prove the corporation’s real existence outside of thought and language). However, there is the
The real entity theory supports two contrasting normative visions of the corporation. On the one hand, if the corporation is viewed as a real and natural entity, much like an individual person, the corporation should be entitled to the same rights and privileges that are afforded to natural persons. Property rights in particular stand out among those that ought to be protected.\(^{79}\) Indeed, in the constitutional arena, the Supreme Court has held that corporations are entitled to protections of their property rights.\(^{80}\) Interestingly, the Supreme Court has also held that the corporation is entitled to various liberty rights under the Constitution.\(^{81}\) The Court has often justified those decisions by utilizing language similar to that used to protect the liberty rights of individual human beings.\(^{82}\) Under this approach to the real entity theory, corporations

\(^{79}\) See Mark M. Hager, Bodies Politics: The Progressive History of Organizational “Real Entity” Theory, 50 U. Pitt. L. Rev 575, 580 (1989) (“As opposed to the fiction theory, for example, the real entity theory might more easily account for the notion that corporations possessed ‘natural rights,’ especially property rights, immune to regulation or deprivation at the hands of the state.”).

\(^{80}\) See Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 592 (1896) (“It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”).

\(^{81}\) For example, the Supreme Court has held that corporations are entitled to protections from unreasonable searches under the Fourth Amendment, see Hale v. Henkel, 201 U.S. 43, 76 (1906), protection from double jeopardy under the Fifth Amendment, see United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), free speech rights under the First Amendment, see First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and right to trial by jury under the Seventh Amendment, see Ross v. Bernhard, 396 U.S. 531, 542 (1970). See generally Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 Hastings L.J. 577 (1990) (discussing Supreme Court jurisprudence for corporate guarantees under the Bill of Rights).

\(^{82}\) See, e.g., Dow Chemical Co. v. United States, 476 U.S. 227, 236 (1986) (observing that a corporation does have a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings for purposes of the Fourth Amendment); United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977) (observing that the Fifth Amendment’s double jeopardy clause protects accused defendants from the fear of embarrassment, anxiety, and insecurity, and holding that the clause protects a corporation from further prosecution). However, the Fifth Amendment privilege against self-incrimination has been denied to corporations on the grounds that it is a purely personal right applying only to natural persons. See United States v. White, 322 U.S. 694, 698 (1944).
should be viewed as private institutions, rather than public ones, and should be free from burdensome state regulation of corporate activity. The corporation is a product of private entrepreneurial initiative and natural market tendencies toward economic consolidation. It is not a creature of the state and thus is not beholden to the state for its existence or operations.

On the other hand, a slightly different interpretation of the real entity theory, implies a more public-oriented view of corporations. If the corporation is a real person in society, it should have the same sorts of moral and social responsibilities that individuals have. As a citizen of a larger community, it enjoys certain rights and privileges, but it should also have the corresponding duties of a citizen “to be sensitive to the impact of its activities on others, including not just its investors, but also employees, creditors, consumers, and the larger society in which it operates.” Big business is not just a matter of private concern because everything it does is bound to affect the public in significant ways. The role of the law is to regulate corporations to use their powers not merely to maximize profits for their shareholders, but also to benefit other participants in the corporation and promote the good of the general public. This view supports a

---

83 See Millon, supra note 11, at 202-03 (observing that the natural entity theory implies a “private law, anti-regulatory, shareholder-centered program”).


85 Millon, supra note 57, at 48; see also Millon, supra note 11, at 216-20 (discussing Merrick Dodd’s use of the natural entity theory to support calls for corporate social responsibility). Dodd believed corporations should have “a social service as well as a profit-making function.” E. Merrick Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1148 (1932).

86 See Harold J. Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105, 111-12 (1916) (“Business has ceased to be mere matter of private concern. . . . [W]e are compelled to turn away from every conception of the business relation which does not see the public as an effective, if silent, partner in every enterprise.”).

87 Millon, supra note 11, at 220. George Deiser stressed the need to regulate real corporate entities, paying particular attention to businesses’ internal and external affairs. See Deiser, supra note 64, at 309. Early real entity theorists believed that the theory supported a stronger regulatory environment for corporations and supported greater tort and criminal liability for corporate persons who violated the law. See Hager, supra note 79, at 587-89, 604-09, 627 (discussing the views of Gierke, Deiser, Laski, and Maitland); see also Phillips, supra note 33, at 1086-87
public law of corporations.

The three legal theories (artificial/fiction, aggregate, real/natural entity) all provide their own unique insights into the legal personhood of corporations. Courts have used all three theories to support their decisions, sometimes invoking multiple theories in a single case. Although the theories appear to contradict each other at times, each theory plays a complimentary role in describing a certain aspect of the corporation. As we shall see, theories from other academic disciplines illuminate additional elements of the corporation. The personhood of corporations can be analyzed from more than just a legal standpoint. The following section explores the deeper philosophical aspects of the corporate person.

III. PHILOSOPHICAL DIMENSIONS OF THE CORPORATE PERSON

Moral philosophy has much to say about the corporate personhood topic. If corporations are persons, they may have not only legal rights and duties, but also moral rights and duties from a philosophical perspective. For example, if I deliberately poison someone, I am morally responsible for that act. If a corporation deliberately poisons a community by leaking toxic chemicals into the groundwater, is the corporation likewise morally responsible? Moral responsibility in this context means that the person’s action is worthy of praise or blame for the consequences of the action, aside from any legal accountability that may arise from it. “The presence or absence of corporate moral personhood determines whether corporations are subject to moral obligations and to blame for their failure to meet those obligations.”

Moral philosophy has much to say about the corporate personhood topic. If corporations are persons, they may have not only legal rights and duties, but also moral rights and duties from a philosophical perspective. For example, if I deliberately poison someone, I am morally responsible for that act. If a corporation deliberately poisons a community by leaking toxic chemicals into the groundwater, is the corporation likewise morally responsible? Moral responsibility in this context means that the person’s action is worthy of praise or blame for the consequences of the action, aside from any legal accountability that may arise from it. “The presence or absence of corporate moral personhood determines whether corporations are subject to moral obligations and to blame for their failure to meet those obligations.”

88 In Hale v. Henkel, for example, the Supreme Court relied on the artificial person theory to hold that corporations are not entitled to the Fifth Amendment privilege against self-incrimination. 201 U.S. 43, 70 (1906). The Court stated that “the corporation is a creature of the State . . . presumed to be incorporated for the benefit of the public.” Id. at 74. In the same opinion, the Court used the aggregate theory to decide that corporations are protected by the Fourth Amendment from unreasonable searches. Id. at 71. The Court stated that a “corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity.” Id. at 76.


90 Michael J. Phillips, Corporate Moral Personhood and Three Conceptions of the Corporation, 2
blameworthiness of the corporate person itself, not the blameworthiness of its individual members. It asks whether the corporation is a person capable of making moral choices and distinguishing between what is morally right and wrong.

Society certainly perceives the corporation as being a moral entity and often condemns harmful corporate actions as being immoral and inexcusable. The large scale reach and operations of corporations today have the potential to inflict tremendous harm on individuals, the environment, and the international community. Corporate actions have been implicated in many cases involving devastating environmental disasters, hazardous and defective products, employee alienation and discrimination, and occupational diseases. This has led some commentators to call the corporation a “pathological institution” with almost psychopathic traits reflecting its single-minded interest in profits and its lack of moral concern for others. As a philosophical matter, the question whether it is appropriate to hold corporations morally blameworthy has been difficult to resolve.


91 THOMAS DONALDSON, CORPORATIONS AND MORALITY 1-2 (1982). Donaldson discusses the case of a corporation in Japan that was forced by the courts to pay massive damages for dumping poison in the ocean. The poison triggered crippling birth defects in local communities. The corporation, however, had broken no laws because the dumping levels fell within accepted ranges under Japanese regulations. The verdict against the corporation nonetheless “expressed[] the common intuition that corporations have a moral, and not merely legal, character.” Id. at 2. We have a tendency to ascribe moral responsibility to many collective groups, such as nations, towns, clubs, and teams. See D.E. Cooper, Collective Responsibility, 43 Phil. 258, 258 (1968).

92 Some argue that the profit-making dynamic of the corporation causes it to dangerously minimize, if not ignore, many of the concerns of the flesh-and-blood individuals who populate the world in which it operates. See JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 71 (2004) (describing the views of Robert Monks, businessman and author of THE EMPEROR’S NIGHTINGALE: RESTORING THE INTEGRITY OF THE CORPORATION IN THE AGE OF SHAREHOLDER ACTIVISM (1998)). Others have expressed similar concerns about the vulnerability of individuals vis-à-vis large corporations: “the moment a powerful group begins to act toward a common end, it produces a capacity for aggression that individuals can only in the rarest cases combat.” Deiser, supra note 64, at 302.

A. Arguments Against Corporate Moral Personhood

From one point of view, attributing moral blame to a corporation is “no wiser than attributing intention and blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”94 It is not the corporation that has blameworthy intentions and commits blameworthy acts, but the individuals behind the corporation who engage in the wrongdoing.95 Therefore, only the individuals, not the corporation, may be regarded as moral persons who are morally accountable for their actions. Moral personhood requires a certain level of autonomy: moral responsibility for an act can be attributed only to the person who originated the act in his own body, a body over which he or she has direct autonomous control.96 Since corporate action never originates in a body belonging to the corporation, but in the bodies belonging to those human beings who have direct control over their own actions, corporations do not originate acts in the manner required for moral responsibility to attach. Therefore, it is inappropriate to blame or punish a corporation for acts brought about wholly by bodily movements that are under the autonomous control of agents other than itself.97


95 See Jan E. Garrett, Unredistributable Corporate Moral Responsibility, 8 J. Bus. Ethics 535, 539-544 (1989) (rejecting the theory that corporations can be morally responsible and criticizing the idea that corporate responsibility cannot be redistributed to the individuals involved); see also WERHANE, supra note 48, at 39 (arguing that “it is not corporations who engage in self-reflection and moral self-analysis, but rather their constituents who do so on behalf of the corporation”).

96 See Velasquez, supra note 14, at 7. The importance of the body exists in many philosophical conceptions of personhood. See, e.g., THE PHILOSOPHY OF THE BODY: REJECTIONS OF CARTESIAN DUALISM (Stuart F. Spicker ed., 1970) (collecting several essays that discuss the philosophical conception of the body as it relates to personhood).

97 Elizabeth Wolgast calls this a state of “fractured autonomy” and concludes that, in these circumstances, “it is theoretically impossible for one person to take responsibility for actions done
The same reasoning applies to the element of corporate intentionality. Moral responsibility requires that a person’s actions be intentional, but corporations are incapable of having their own intentions because they do not have minds; rather, their intentions are really just the intentions of their human members. \(^\text{98}\) Under this view, it is inappropriate to speak of the goals and intentions of an organization; rather, we should speak of the goals and intentions for the organization of various individual human constituents. \(^\text{99}\) Drawing upon the same principles of individualism underlying the aggregate theory of corporate personhood in the legal realm, this philosophy concludes that any good or evil that corporations do essentially comes down to the actions and intentions of the individuals within the corporation. \(^\text{100}\)

Some philosophers argue that even if we could prove that corporations can have their own intentions, such intentionality is only a necessary, not a sufficient, condition for moral personhood. The essential component of moral responsibility that corporations lack is the capacity to feel emotion. \(^\text{101}\) Human beings feel pain, suffer pangs of

\(^{98}\) See Larry May, *Vicarious Agency and Corporate Responsibility*, 43 Phil. Stud. 69, 71 (1983) (“[T]he corporation cannot hold any intentions that were not first held by one of the members of the corporation. The so-called corporate intention is completely determined by the intentions of the individual members of the corporation.”); see also Velasquez, *supra* note 14, at 8-9 (discussing the inability of corporations to have their own intentions).

\(^{99}\) Christopher McMahon, *The Ontological and Moral Status of Organizations*, 5 Bus. Ethics Q. 541, 545 (1995) (describing a portion of the views of Michael Keeley). Michael Keeley argues that “organizations have no intentions or goals at all.” Michael Keeley, *Organizations as Non-Persons*, 15 J. Value Inquiry 149, 149 (1981). He believes there is no point pretending that organizational goals or intentions exist, or that organizations resemble persons in any significant way. *Id.* at 150. This does not mean that one cannot make moral judgments about corporations as social systems. *See id.* at 154.

\(^{100}\) See discussion of aggregate theory *supra* Part II.B; see also Phillips, *supra* note 90, at 439 (“According to the aggregate theory, therefore, only individual officers, employees, or other agents can be morally responsible for ‘corporate’ misdeeds.”).

conscience, and experience moral blame, shame, and anguish due to their actions. Corporations, however, do not have a “heart” or “soul” per se, and lack the ability to empathize with others who are affected by their actions. Thus, without a conscience, corporations cannot be regarded as morally responsible persons.102

A related philosophical argument is that corporations are simply not the types of entities that can be categorized as moral persons because of the constraints built into their very structure. Philosopher John Ladd believes corporate organizations are more “like machines,” than persons, and “it would be a category mistake to expect a machine to comply with the principles of morality.” 103 This is because formal organizations like corporations must act exclusively to maximize the achievement of a specified set of goals, e.g., profit. That is how they are structured and that is how they are to be evaluated. “[A]ny considerations that are not related to the aims or goals of the organization are automatically excluded as irrelevant to the organizational decision-making process.” 104 Like a machine, a corporation is unable to understand the language of morality and cannot take into account moral considerations in its decision-making operations. This theory admonishes us not to expect corporations or their official human representatives “to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity. Such concepts are not in the vocabulary, so to speak, of the organizational language-game.” 105

---

102 See Thomas Donaldson, Personalizing Corporate Ontology: The French Way, in SHAME, RESPONSIBILITY AND THE CORPORATION, supra note 89, at 99, 109-10 (arguing that a creature can be rational and intentional in every way, but without a heart or the ability to sympathize with others, it cannot be a moral person); Larry May, Negligence and Corporate Criminality, in SHAME, RESPONSIBILITY AND THE CORPORATION, supra note 89, at 137, 152-56 (arguing that the corporation does not have a conscience which is distinct from its members’ consciences). Some theorists have argued that emotion and arousal level is integral to ethical decision-making even for individual human beings. See Alice Gaudine & Linda Thorne, Emotion and Ethical Decision-Making in Organizations, 31 J. Bus. Ethics 175, 179-84 (2001).


104 Id. at 496.

105 Id. at 499. Thus, corporations seem to be logically locked into selfishness by virtue of their structure as formal organizations. See McMahon, supra note 99, at 551 (restating John Ladd’s argument that “we cannot legitimately hold organizations to moral standards because the language game that governs how we think and talk about them regards them as capable only of the single-minded pursuit of the goals that define them”).

33
Espionage and deception do not make organizational action wrong; rather they are right, proper and, indeed, rational, if they serve the objectives of the organization.106

The difficulty that many moral philosophers, including John Ladd, seem to have with the prospect of granting corporations moral personhood status is that, by doing so, corporations will have not only moral responsibilities but also moral rights.107 Even if we would like to impose duties on corporations to act morally, we feel uncomfortable with the idea that corporations would then, in turn, have moral rights to be treated and respected as persons. One way of grappling with this dilemma is to invoke the Kantian moral philosophical distinction between means and ends. According to Kant, all human beings are ends in themselves and should always be treated as such, never as means to another end.108 In contrast, corporations are human creations that are formed as means to achieve the ends of those human beings who choose to participate in the corporate enterprise.109 If corporations have the same moral standing as natural persons, then

106 Ladd, supra note 103, at 500. John Ladd does believe that a corporation can incorporate moral considerations into its goal set, but these would simply be limiting conditions on corporate action, not an authentic use of moral language. See Thompson, supra note 89, at 131. Some scholars rely heavily on this philosophy to argue that corporations should not be treated as persons for criminal law purposes. See Martin Benjamin & Daniel A. Bronstein, Moral and Criminal Responsibility and Corporate Persons, in CORPORATIONS AND SOCIETY, supra note 21, at 277, 277-279.

107 See, e.g., Keeley, supra note 99, at 154 (fearing that “the moral-person approach, while assigning responsibilities to organizations, at the same time assigns them inordinate rights to pursue organizational welfare”); Ladd, supra note 103, at 508 (arguing that because corporations “are not moral persons, and have no moral responsibilities, they have no moral rights”).


109 See John Ladd, Persons and Responsibility: Ethical Concepts and Impertinent Analogies, in SHAME, RESPONSIBILITY AND THE CORPORATION, supra note 89, at 77, 95. In Kantian terms, organizations do not hold the same elevated status that individuals do: “While the Kantian notion of individual autonomy is closely linked to the perception of individuals as ends, formal organizations exist only as means. As such they are not equal members in the Kantian kingdom of ends, and they do not deserve or admit of the special kind of respect that gives rise to the
corporations are entitled to the same moral rights, in particular, the right to be treated as an end in itself. Many moral philosophers denounce that result because, among other problems, it leads to bizarre conclusions.\footnote{See Roger F. Gibson, Jr., \textit{Corporations, Persons, and Moral Responsibility}, 21 J. Thought 17, 24 (1986) (noting with dismay that if corporations are admitted into the moral community, it “would have the effect of assigning to corporations all of the rights, privileges, duties, and obligations accorded biological person[s]”); Keeley, \textit{supra} note 99, at 154 (warning that by giving corporations moral personhood status, “we may give away too much in the way of corporate rights to gain too little in the way of corporate accountability”). David Ozar argues that corporations do not have moral rights because corporations are purely conventional creatures that are created by continued acts of acceptance of relevant social rules. \textit{See} David T. Ozar, \textit{Do Corporations Have Moral Rights}, 4 J. Bus. Ethics 277, 280 (1985).} For example, the involuntary dissolution of a corporation would be comparable to murder, and the voluntary merger of one company into another would be a form of suicide.\footnote{See Ladd, \textit{supra} note 109, at 86 (rhetorically asking, “If a corporation is dissolved or incorporated into another one, is that a denial of its right to life? Has the corporation been murdered?”); McMahon, \textit{supra} note 99, at 549 (“An organization can divide into two or more organizations, or two or more can merge into one. Are we to regard such processes as contrary to the survival interest of the organizations that cease to exist as a result, or not?”); Raymond S. Pfeiffer, \textit{The Meaning and Justification of Collective Moral Responsibility}, 2 Pub. Aff. Q. 69, 75 (1988) (“It is one thing to be told that a corporation should not be dissolved because jobs would be lost. But it is quite another to advocate the moral sanctity of a corporate internal decision structure.”).} To avoid this result, theorists like John Ladd argue that moral personhood, with its concomitant moral rights and responsibilities, should not extend to corporations. Instead, corporations should be viewed as creations, or machines, serving solely as means to achieve human ends, and their moral responsibility should be exhausted by their legal responsibility.\footnote{See DeGeorge, \textit{supra} note 101, at 60-61 (arguing that corporations are human creations formed for limited purposes, and therefore do not deserve the same protections as human beings, but rather, should merely be subject to the law); R.E. Ewin, \textit{The Moral Status of the Corporation}, 10 J. Bus. Ethics 749, 749 (1991) (“The moral personality of a corporation is exhausted by its legal personality.”). So, for example, Ewin argues: “[i]f greater profits are to be made by trading with [apartheid] South Africa, then that is what the officers of the corporation should do provided that it is not illegal for them to do so.” \textit{Id.} at 755.}

However, an alternative, more nuanced approach may be to say that corporations are moral actors for purposes of having moral responsibilities, but are not full-fledged


dan-cohen, \textit{supra} note 20, at 61.
moral persons entitling them to exercise moral rights. Because corporations do not have the same standing as autonomous persons in the Kantian kingdom of ends, they cannot claim full moral personhood status, and we can treat them as moral subjects for some purposes, but not for others.

B. Arguments in Favor of Corporate Moral Personhood

While the philosophical arguments against corporate moral personhood are plentiful, it is possible to argue just as strenuously in favor of it. To the extent that intentionality and the ability to act are important components for moral personhood, some philosophers believe the corporation possesses both. In many cases, the acts and intentions of a corporation simply cannot be attributed to those of its individual human members. To be sure, a corporation is dependent on human persons to carry out its actions. But, the collective nature of the corporation has the capacity to translate

113 There may be different ways to arrive at this conclusion. Patricia Werhane argues that corporations are “secondary moral agents,” not full persons, and therefore lack the same rights that individuals do. See WERHANE, supra note 48, at 57-62. From an autonomy perspective, Meir Dan-Cohen argues that organizations cannot make the same claims or have the same rights as individuals because corporations are more like intelligent machines. DAN-COHEN, supra note 20, at 57, 62. Richard DeGeorge makes the distinction between moral actors and moral persons and argues that as creatures of law, corporations have no independent status or claim to a certain kind of treatment based on their moral status, even though they do have moral responsibilities. See DeGeorge, supra note 101, at 63-64, 70-71.

114 One may object to this approach as being an inconsistent, all too convenient method of avoiding the consequences of viewing corporations as moral persons. See, e.g., W. Michael Hoffman & Robert E. Frederick, Corporate Moral Responsibility: A Reply to Professor Gibson, 21 J. Thought 27, 32 (1986) (arguing that “[i]f corporations are moral persons, or at least like them in the morally relevant aspects, then we must treat them as such regardless of the disadvantages”).

115 See David T. Risser, Power and Collective Responsibility, 9 Kinesis 23, 23, 28 (1978) (realizing there are cases where some harm is properly attributed to group faults, but not to the fault of every, or even any, individual group member, and therefore finding it reasonable to say that groups can be moral agents subject to responsibility and blame). In such situations, it makes sense to conclude that the corporation itself can be morally evaluated for its conduct. See J.R. LUCAS, THE PRINCIPLES OF POLITICS 281 (1966) (“Just as a collective action is not simply a number of individual actions, so . . . a corporate morality is not simply a number of individual moralities.”).
individual actions into corporate ones.\footnote{Certain acts, such as declaring a dividend or agreeing to a merger, are inherently corporate acts in that they cannot be executed solely by individuals, but only by corporate bodies pursuant to relevant rules and policies. Although each member of the board of directors has the power to vote in favor of such actions, only the board as a whole can authorize them. The authorization is a corporate action that constitutes more than the aggregation of all individual actions. \textit{See} Paul E. Wilson, \textit{Barring Corporations from the Moral Community – The Concept and the Cost}, 1 J. Soc. Phil. 74, 75 (1992) (“[T]he idea that individuals are independently responsible for the execution of all acts seems to ignore the fact that some acts are public acts accomplished only through cooperative effort.”).}

It is not always appropriate to limit moral responsibility to the individual members of the corporation because sometimes immoral corporate actions can result from a series or combination of blameless primary individual actions, and no one person is at fault for the harm caused by the collective corporate act.\footnote{\textit{See} WERHANE, \textit{supra} note 48, at 56 (describing situations where the corporate decisionmaking process transforms individual inputs into a collective action different from the primary individual ones). Peter French describes the 1974 crash of a McDonnell-Douglas DC-10 airplane that fell from the sky outside of Paris, killing 346 passengers, as a case where a reckless corporate environment transformed a combination of independent individual actions into the improper design and rushed construction of the defective aircraft. \textit{See} Peter French, \textit{What Is Hamlet to McDonnell-Douglas or McDonnell-Douglas to Hamlet: DC-10}, 1 Bus. & Prof. Ethics J. 1 (1982).} A large corporation’s organizational design may not allow individuals in different sections of the corporation to communicate effectively with one another, making it difficult for them to foresee the potentially harmful impact of their combined individual actions. It may be impossible to identify any individual wrongdoers when dozens of corporate departments and hundreds of employees are involved in the entire decisionmaking process, all contributing only a finite amount to the final corporate action.\footnote{In such cases, trying to pinpoint individual responsibility is futile: Large corporations, employing thousands of people and making millions of decisions, impose impossible burdens on society to isolate and identify a particular individual to be held responsible where only the last link in the long decision chain is visible. Even if the entire corporate decision process were exposed to public scrutiny, it might still be impossible to isolate and identify the guilty person because of the collectivity of actions that resulted in law violation and the lack of specific intent or direct knowledge on the part of the thousands of people who may have contributed in some minuscule sense to that direction.} It is a structural feature of the corporation
that allows for a nexus of actions by its members to ultimately produce harm, a result that
can only properly be attributed to the corporation, not the individuals themselves. 119 In
fact, in some corporate structures, the individual might well be said to be dispensable
because certain wrongful corporate acts could persist even if particular individuals were
removed from the system. In those situations, the corporation should be morally
responsible for the policies and practices that provide the environment in which
individual actions are likely to combine to cause harm. 120

Some philosophers argue that not only can corporations act in a way that is
distinct from their members’ acts, but corporations can also have their own intentions,
i.e., “a deliberate disposition to do something in a certain manner or to realize a state of

S. Prakash Sethi, Executive Liability for Corporate Law Violations, 5 L.A. Bus. & Econ. 10, 15
(1980).

119 MAY, supra note 50, at 87; Michael B. Metzger, Corporate Criminal Liability for Defective
of the wrong [can be] internal bureaucratic failures rather than the deliberate act of any particular
corporate employee”). There may be situations where separate employees of the corporation each
know a certain portion of information, but there is nothing in the company’s internal operating
procedures to bring the agents together. If harm occurs as a result of a corporate act, it may be
more reasonable to blame the corporation rather than the employees who each separately could not
have foreseen the dangers. See Christopher D. Stone, Corporate Vices and Corporate Virtues: Do
Velasquez disagrees. He maintains that in those situations where wrongdoing has occurred but no
identifiable human beings knew about or intended that outcome, the corporate act is simply one
for which no one is morally responsible: “it is an unintentional happening.” See Velasquez, supra
note 14, at 10.

120 Patricia H. Werhane, Corporate and Individual Moral Responsibility: A Reply to Jan Garrett, 8
J. Bus. Ethics 821, 822 (1989); see also Pfeiffer, supra note 111, at 73 (“To name the corporation
as the culprit is to specify the corporate environment as playing a central role in what led to the
matters in question . . . . It is a shorthand way of attributing moral responsibility in the presence of
complex human relationships and conditions of uncertainty.”); Thompson, supra note 89, at 123
(noting that the corporate structure itself must be held accountable when it has a role in
coordinating individual contributions that cause harm). One concern that some commentators
have with placing blame on the corporation is that it may have the tendency to obscure the
blameworthy individuals within the corporation who will escape moral judgment. See Velasquez,
supra note 14, at 15. However, holding a corporation morally responsible does not preclude
individual members from responsibility for their own culpable conduct as well. The two forms of
moral responsibility are not mutually exclusive.
affairs.” Corporate intent, or will, is not the same as the individual intentions or wills of the corporation’s members. For example, in the corporate decisionmaking process, certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated in the big picture. As a result, none of them fully understand the larger implications of their singular contributions. It is inappropriate in such cases to pinpoint the final intent of the corporation on specific individuals who each played only a small role in forming the broader intentionality of the corporation:

[T]he claim that corporate intentions can be nothing but the intentions of individuals does not seem correct. . . . Human motivation is complex, and it would be implausible to think that corporate decisions do reflect the intentions of the members in a completely reducible way. It is much more believable to think that as a multitude of persons with varying amounts of power and influence contribute to a corporate decision, the outcome is certainly shaped in ways that produce corporate “intentions” quite different from those that entered into the

---

121 WERHANE, supra note 48, at 36. Contemporary philosopher Daniel Dennett articulates a set of three conditions for describing an “intentional system,” i.e., “a system whose behavior can be (at least sometimes) explained and predicted by relying on ascriptions to the system of beliefs and desires (and other intentionally characterized features).” Daniel Dennett, Conditions of Personhood, in THE IDENTITIES OF PERSONS 175, 179 (Amelie O. Rorty ed., 1976). The three conditions require, first, that persons be rational, second, that states of consciousness can be attributed to them, and third, that others see them as persons and treat them that way. See id. at 177-78. Some philosophers have argued that corporations meet the criteria for intentional systems or that intentional language can be used to describe corporate actions. See, e.g., WERHANE, supra note 48, at 37; Austen Clark, Beliefs and Desires Incorporated, 91 J. Phil. 404, 405-08 (1994).


123 See DAN-COHEN, supra note 20, at 32-33. The “total information that leads to a certain [organizational] decision (or action or product) is not normally possessed by any single individual nor is it straightforwardly related to the combined knowledge possessed by a number of identifiable individuals.” Id. at 32.
The individual inputs are transformed by the collective nature of the corporation’s decisionmaking system, making the individual intentions and actions often unrecognizable when the final corporate intention is formulated.

Philosopher Peter French believes it is a corporation’s intentionality that gives it the status of a moral person because intentionality is both a necessary and sufficient condition for moral personhood. French argues that corporate intentionality may be traced to the corporation’s internal decision structure (CID Structure). CID Structures have two elements: (1) an organizational flowchart delineating the various levels within the corporate hierarchy and (2) corporate rules that are usually manifested in corporate policy. Before the corporation acts, it must first contemplate that action and determine whether it is appropriate and feasible. The CID Structure receives input from various individuals within the corporate hierarchy, evaluates that information in light of basic corporate policies, and engages in a decisionmaking and ratification process. “When operative and properly activated, the CID Structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate

124 Held, supra note 122, at 171-72. To illustrate her point, Virginia Held describes a hypothetical case in which a corporation’s ultimate intention to proceed with moving a plant is not the true intention of any of the corporate executives who collectively made the final decision. See id. at 171. David Risser uses a similar example to show how each member of a board of directors may have the intention to meet a corporate pollution issue head on, but because they cannot agree on a unified corporate political position, they compromise and adopt a policy to suppress the pollution issue, a stance that does not reflect the intention of any of the individual members. See Risser, supra note 115, at 29-30; see also Thomas W. Smythe, Problems About Corporate Moral Personhood, 19 J. Value Inquiry 327, 328 (1985) (using an illustration to show how the stated intention of the corporation is merely a compromise position and not identical with the intentions of any of the individual participants).

125 See Peter A. French, The Corporation as a Moral Person, 16 Am. Phil. Q. 207, 211, 215 (1979). The concept of the Davidsonian agent is used to represent intentionality. See id. at 211.

126 See FRENCH, supra note 69, at 41. Every corporation presumably has such an internal decision structure. The organization chart clarifies the ranking and responsibilities of individuals within the corporation. The corporate rules are a reflection of the basic corporate policies that “must subordinate individual ambitions and decisions to the needs of the corporation’s welfare and survival.” Id. at 43 (quoting Drucker, supra note 70, at 36). Corporate policies are “independent of and not reducible to the wants, beliefs, and desires of those persons associated with the corporation.” FRENCH, supra note 69, at 111.
decision.” Corporate acts may be done for corporate reasons that are qualitatively different from the individual reasons component members may have for doing what they do. The CID Structure provides the corporation with the capacity to act intentionally and to order its behavior. Corporations with CID Structures that facilitate non-programmed, non-routinized, adaptive decisionmaking meet the conditions of moral personhood. What this shows, according to French, is that corporations can be intentional actors and therefore exist as “full-fledged moral persons” with all the rights, privileges, and duties that such status implies.

An alternative method of establishing corporate moral personhood is to identify the features belonging to human beings that make them moral persons, and then project moral responsibility onto corporations if they display those same features. Kenneth Goodpaster and John Matthews argue that two essential traits which are rooted in long and diverse philosophical traditions and which characterize the morally responsible person are: rationality (the capacity of rational decisionmaking) and respect (the awareness of the effects of one’s decisions on others). Because corporations are capable of gathering information about the impact of their actions on others and using it in making decisions, corporations exhibit both rationality and respect and, hence, can be considered moral persons. In fact, in light of the bounded rationality of human

127 FRENCH, supra note 69, at 41.

128 See id. at 44. “[W]hen the corporate act is consistent with an instantiation or an implementation of established corporate policy, then it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.” Id.

129 See Peter A. French, Principles of Responsibility, Shame, and the Corporation, in SHAME, RESPONSIBILITY AND THE CORPORATION, supra note 89, at 17, 37.

130 See French, supra note 125, at 207. For a critique of French’s views on corporate intentionality and moral personhood, see DONALDSON, supra note 91, at 20-23; MAY, supra note 50, at 69-72. But see Christopher Meyers, The Corporation, Its Members, and Moral Accountability, 3 Bus. & Prof. Ethics J. 33, 38 (1983) (relying on French’s “perceptive and plausible” account of the CID Structure); Thompson, supra note 89, at 133 (finding French’s theory “logically coherent” and “a good way to determine the ontological standing of corporat[ions]”).


132 Id. at 135-36. The authors respond to nine separate objections to treating a corporation as a morally responsible person. Id. at 139-41. For a critique of their views, see Gibson, supra note
reasoning, corporations may be even more capable than individual human beings of acting in a purposeful, rational, and calculating manner, incorporating multiple concerns in their decisionmaking processes. This proposition has led one commentator to argue that corporations “can and should have access to practical and theoretical knowledge which dwarfs that of individuals,” and therefore corporations “must have, in addition to good intentions, superhuman intelligence.”133 Under this view, corporations should be held to even higher moral standards than human beings when corporations fail to utilize such intelligence in morally appropriate ways.

C. Stages of Moral Development

An interesting aspect of this philosophical debate over corporate moral personhood that has been largely neglected is whether or not corporations, if they are moral persons, have the capacity for moral development. Lawrence Kohlberg’s well-known psychological and philosophical theory of individual moral development suggests that all human beings, from childhood to adulthood, advance through stages of moral judgment.134 In particular, Kohlberg’s model showed that as children mature, they move progressively from lower levels of moral reasoning to higher ones. Children start at a “preconventional” level of moral thinking where actions are evaluated in terms of whether they lead to rewards or punishment; then they move to a “conventional” level of moral judgment where actions are evaluated in terms of maintaining a good image in the eyes of others; and finally, they arrive at a “postconventional” morality where actions are judged in terms of abstract, universal ethical principles of justice and autonomy.135

110, at 17-19. One criticism is that rationality and respect may be necessary conditions to ascribe moral responsibility, but not sufficient ones. Id. at 19.

133 DONALDSON, supra note 91, at 125.

134 See KOHLBERG, supra note 16, at 16-19. Lawrence Kohlberg had many critics, in response to which he reformulated and refined his stage definitions over time, but the general form of his model continues to remain intact. See LAWRENCE KOHLBERG ET AL., MORAL STAGES: A CURRENT FORMULATION AND A RESPONSE TO CRITICS (1983); see also JAMES REST ET AL., POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH 9-33 (1999) (discussing psychological and philosophical criticisms of Kohlberg’s theory); Robin Stanley Snell, Complementing Kohlberg: Mapping the Ethical Reasoning Used by Managers for Their Own Dilemma Cases, 49 Hum. Rel. 23, 26-29 (1996) (discussing three strong criticisms of Kohlberg’s approach, but noting that Kohlberg’s main model still persists).

135 See KOHLBERG, supra note 16, at 17-20. Each of the three levels of moral development are actually composed of two separate stages, totaling six discernible stages of moral thinking. See
These stages of moral development, according to Kohlberg, are universal and invariant. All human beings, regardless of nationality, religion, or culture, move through these stages; movement is always forward in sequence and does not skip steps; and moral growth is stimulated by experience and education in moral dilemmas. Projecting these concepts onto collective groups, Kohlberg believed societies themselves undergo moral stage evolution, and different cultures advance at different speeds depending on their level of societal differentiation, political integration, and economic productivity.

For our purposes, the interesting question raised by Kohlberg’s model is whether corporations as persons can also advance through stages of moral development. Could a corporation begin at a preconventional stage of weighing its actions based only on their anticipated consequences for reward or punishment, then move to a conventional level of concern for how the corporation’s image and actions are perceived by others, to a final postconventional stage of behavior that reflects a desire to do what is right because it is the good and just thing to do? Little scholarly attention has been paid to this question. Only a few commentators have suggested that corporations can progress through stages of ethical development in ways that are analogous to Kohlberg’s typology for human and societal moral development. Vicky Arnold posits a four-stage model of ethical decisionmaking in which corporations move sequentially through stages of development, id.; see also RONALD DUSKA & MARIELLEN WHELAN, MORAL DEVELOPMENT: A GUIDE TO PIAGET AND KOHLBERG 53-79 (1975) (discussing in detail Kohlberg’s six stages of moral development).


A few commentators have flatly concluded without explanation that “just as the moral responsibility displayed by an individual develops over time from infancy to adulthood, so too we may expect to find stages of development in organizational character that show significant patterns.” Goodpaster & Matthews, supra note 131, at 136; see also Sherwin Klein, Is a Moral Organization Possible?, 7 Bus. & Prof. Ethics J. 51, 59 (1988) (concluding, without discussion, that “there can be stages in the moral development of a corporation, just as there are in a person”). Based purely on our observations of corporate behavior, we might hypothesize that corporations that achieve a certain amount of success in the market, move from being concerned solely with survival and profits, to having higher level goals, such as employee well-being, expansion, prestige, and community involvement. See STONE, supra note 40, at 38-39 (arguing that this observed change in corporate focus may reflect different stages of development in a corporation).
but can easily backslide into earlier, less ethical stages depending on changes in personnel, policies, and leadership. This is in obvious contrast to the invariance of Kohlberg’s sequencing whereby individuals cannot slip into lower stages of moral reasoning once they have achieved a higher stage. Eric Reidenbach and Donald Robin propose a five-stage model of corporate moral development: corporations can progress from being “amoral,” to “legalistic,” to “responsive,” to “emergent ethical,” and finally to “ethical.” According to their model, corporations can begin in any one of the five stages of development, can skip stages, and can regress to lower stages at any time.

My own sense is that even if corporations could be characterized as moral persons with moral rights and responsibilities, ascribing formal stages of moral development to them is implausible. We would be hard pressed to identify the particular moral stage a company occupies at any given time, especially when large corporations are diversified so heavily in many different industries and broken into multiple divisions and departments. Some of those segments might operate in ways that appear to reflect higher level moral reasoning, while others do not. To say that the corporation occupies several different stages of moral development simultaneously is not that instructive. If stage typology does apply to corporations, they certainly do not exhibit the stability of development that is characteristic of Kohlberg’s model. In fact, corporations seem very vulnerable to regression to lower stages depending on factors as common as changes in management. Even shifts in external circumstances, such as a stricter regulatory environment for the company’s operations, or instability in the surrounding industry that threatens the company’s survival, can prompt the corporation to switch to different stages in response. If corporations can so easily skip stages, or quickly move backward and forward among stages due to these factors, their moral development appears precarious indeed, and it seems strained to characterize this process as “growth” or “development.” Perhaps we might do better to refer to corporations as being in certain states, rather than stages, of moral condition, and then praise or blame corporate conduct as it is manifested at any one time.


141 See id. at 275.

142 One argument may be that an organization with multiple divisions could occupy different stages of moral development at the same time based on its different subcultures. See id. at 275.
D. Comments

The corporate moral personhood question carries deep normative implications. There is a sense from those who argue in favor of moral personhood that corporations should have moral obligations that go beyond the demands of both the law and market forces. Corporate activity has the capacity to improve as well as damage human life. If responsibility is typically tied to capacity, we are inclined to assign moral responsibility to corporations for the good and bad outcomes they are capable of producing. We ask, at the very least, that corporations “do no unjustifiable harm.”143 We expect corporate activity to produce benefits in our society, but not at too high a cost to our own personal and societal welfare.

I believe many of those who argue against corporate moral personhood hold the same normative outlook on corporate activity, but they fear the consequences of concluding that corporations are moral persons. They worry that granting corporations personhood status will somehow result in diminishing the status of human persons and eclipsing individual rights when they are juxtaposed against larger-than-human corporate persons.144 They would prefer to throw out the concept of corporate moral personhood altogether to avoid the risk of giving so much to corporations that individuals end up having less. However, it is not entirely clear that viewing corporations as moral persons would necessarily have that effect.

Whether or not corporations are metaphysical moral persons, the impact they have on society creates a tendency to feel that corporations must be controlled to comply with the demands of morality. We may not believe a vicious dog has a moral responsibility to refrain from attacking a child, but we must nonetheless control its behavior because of the dangers its actions pose to others. If we focus primarily on the social impact of corporate activity, it may make little difference how we define the corporation either legally or morally. Instead, we could work on shaping corporate behavior to conform with our notions of what is just. We may ultimately conclude that we are all better off assuming that corporations are moral persons with moral obligations, even if we cannot prove it in purely philosophical terms.

The philosophical discussion of corporate personhood tends to press hard on

143 DeGeorge, supra note 101, at 69.

144 See, e.g., WERHANE, supra note 48, at 40 (“If a corporation is a moral person, what is the status of employee-persons? Are they lesser moral persons?”); Velasquez, supra note 14, at 15 (expressing concern that we may be “tempted to look upon the corporation as a larger-than-human person whose ends and well-being are more important than those of its members”).
analogy to individual personhood, but we may be missing something by relying so heavily on standards of individual moral responsibility. It might be more helpful to analyze corporations as unique entities with functions and features that cannot be equated with those of human individuals. Rather than employing the same standards of moral personhood and responsibility that apply to individuals, we could consider devising criteria of moral personhood and responsibility that are specifically tailored to corporations.  

“Instead of assuming that a single concept of moral agency underlies both human and corporations, why not consider the prospect of a double concept? Why not consider the possibility that both human and corporation qualify as moral agents, and yet refuse to reduce each agency to a common denominator?” Such an approach would accept the distinct and special nature of the corporation as a person without diminishing individual personhood with its accompanying rights and duties.

Beyond legal and philosophical theories of corporate personhood, we can gain even greater understanding of the uniqueness of the corporate person from the perspectives of organizational theory, psychology, and sociology. As the following section explains, these social science disciplines offer important insights into the nature of the corporation, its role in society, and its powerful influence on human thought and behavior.

IV. ORGANIZATIONAL, PSYCHOLOGICAL, AND SOCIOLOGICAL DIMENSIONS OF THE CORPORATE PERSON

A. Organization Theory and Psychology

Organizational theory is concerned with the structure and processes of organizations. It starts with the premise that organizations are not like people, and a

145 See Held, supra note 122, at 168. Virginia Held believes that “we need to recognize two different kinds of responsibility: corporate and personal.” Id. She suggests: “‘Responsibility’ may be something which is quite different for corporations than it is for individual persons, and applying a notion of responsibility worked out for individual persons to corporate entities, whatever they are, may be the wrong way to approach the questions we want to ask.” Id. at 161; see also Cooper, supra note 91, at 263 (noting that we should “cease to assume that the standards used for judging individuals should be the same as those we use for judging collectives”).

146 Donaldson, supra note 102, at 111. We should not blindly assume that “whatever makes something a moral person is equally present in corporate as well as individual human agents.” Id. at 110.

147 HENRY L. TOSI, THEORIES OF ORGANIZATION 1-2 (2d. ed. 1984). In organization theory, the main focus of analysis is the organization and not the individuals within it. Id. at 2, 13.
“preoccupation with natural persons [can] get in the way of a fuller understanding of organizational reality.” Organizations are viewed as entities that can be studied and understood in their own right. When a group of individuals, in a cooperative effort to achieve specified goals, join together to form an organization, “there is created something new in the world that is . . . different in quantity and quality from anything present in the sum of the efforts of the [individuals]” who constituted it. Organizations produce and affect real behavior that would not otherwise exist without the organization.

There are dozens of approaches in organizational theory to define what the organization is and how it functions. What binds the various lines of thought together is the object of study, the large complex organization, which is believed to have several essential characteristics making it a unified and distinctive phenomenon. These characteristics include structure, permanence, decisionmaking, large size, formality, complexity, functionality, and goal orientation.

Structure refers to the existence of a fixed pattern or order that can be represented in the form of an organizational chart defining the various roles within the organization. The corporation is not a free form entity, but a structured firm with an internal order.


148 See Michael B. Metzger & Dan R. Dalton, Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency, 33 Am. Bus. L.J. 489, 492 (1996). We must recognize that “if organizations have characteristics of their own, and if these characteristics affect the behavior of their members, then organizational characteristics must be understood if we are to understand human behavior.” RICHARD H. HALL, ORGANIZATIONS: STRUCTURE AND PROCESS 40 (3d ed. 1982).

149 Chester Barnard, The Functions of the Executive, in TOSI, supra note 147, at 62, 65.

150 For example, an organization can be seen as a cultural product, an independent agency, a system of structures and functions, an exchange agent with environment, a structure in action over time, a processing system, an input-output system, or a structure of subgroups. TOSI, supra note 147, at 17; see also Jeffrey Pfeffer, Organizations and Organization Theory, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY: THEORY AND METHOD 379, 379 (Gardner Lindzey & Eliot Aronson eds., 1985) (noting the broad interdisciplinary nature of organization theory).

151 See DAN-COHEN, supra note 20, at 31-38 (discussing eight clusters of organizational properties). Henry Tosi identifies a related set of essential characteristics that includes large size, formalization, rationality, hierarchical structure, and specialization. See TOSI, supra note 147, at 2-3. The following discussion draws on Meir Dan-Cohen’s insights into the organization.
Permanence reflects the fact that individuals within the organization may leave, but the organization remains without losing its fundamental existence or identity. It maintains a memory of how things are done and can project its activities into the future in a way that is not dependent on the identity of its individual members at any given time. As previously discussed, organizations also have decisionmaking systems that incorporate, synthesize, and coordinate individual inputs into a collective decisionmaking process, producing a corporate action that supports its own organizational goals. The ultimate corporate decision is very different from the aggregate decisions of the individuals whose input was used. The large size of the organization indicates the substantial scale of its operations as well as the large number of its human members, making it difficult to tie the organization’s broader activities, interests, and preferences to those of any particular individuals. The organization’s size gives it an identifiable presence in the world. The organization’s formality is expressed by the formally defined roles, procedures, and policies that direct individual behavior within the organization. The identities of the persons who fill specific offices and roles are irrelevant because the role descriptions are stable and individuals are required to act in accordance with their defined roles. The aim of organizational formality is to provide stability so that one person can be replaced by another without disrupting the smooth functioning of the organization. The complexity of the organization indicates the web of interdependent sub-units, relations, and operations, all of which interact to produce corporate decisions and actions that are non-linear and not directly traceable to the wills or actions of particular individuals.

152 See French, supra note 125, at 214 (“[T]he melding of disparate interests and purposes gives rise to a corporate long range point of view that is distinct from the intents and purposes of the collection of incorporators viewed individually.”).

153 See supra notes 121-30 and accompanying text (discussing corporation’s decisionmaking system and CID Structure for purposes of understanding corporate intentionality); see also James G. March & Zur Shapira, Behavioral Decision Theory and Organizational Decision Theory, in DECISION MAKING: AN INTERDISCIPLINARY INQUIRY 92, 97 (Gerardo R. Ungson & Daniel N. Braunstein eds., 1982) (“Organizational decisions are no more made by individuals than the choices of individuals are made by the hands that sign the papers.”).

154 See James S. Coleman, Organizational Actors and the Irrelevance of Persons, in CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 95, 103 (M. David Ermann & Richard J. Lundman eds., 2002) (noting that the “irrelevance of persons in the structure [of organizations] is a question of the form of the structure”); see also Barnard, supra note 149, at 64 (defining a formal organization “as a system of consciously coordinated activities or forces” rather than as a system of human beings who engage in various activities).
Functionality refers to the organization’s instrumental purpose to attain the specified goals of those who form the organization. For example, generating profits for shareholders fulfills the organization’s function on behalf of those who formally established it. In contrast, organizations can also display their own goal orientation when, over time, they strive for their own survival, growth, and expansion, reflecting their autonomy to deviate from the pursuit of their originally specified instrumental goals. The combination of these essential features of the organization gives us a picture of a real, independent, and functional entity that does not need metaphors or metaphysics to describe its nature.

The field of organizational behavior examines individual and group behavior within organizations from a psychological standpoint. It demonstrates the ways

155 See DAN-COHEN, supra note 20, at 35-36; see also JAMES D. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY 54-59, 79-81 (discussing organizational interdependence and complexity).

156 See BLAU & SCOTT, supra note 70, at 5 (“[T]he distinctive characteristic of . . . organizations is that they have been formally established for the explicit purpose of achieving certain goals.”); AMITAI ETZIONI, MODERN ORGANIZATIONS 3 (1964) (“Organizations are social units (or human groupings) deliberately constructed and reconstructed to seek specific goals.”); TALCOTT PARSONS, STRUCTURE AND PROCESS IN MODERN SOCIETIES 17 (1960) (“[T]he defining characteristic of an organization which distinguishes it from other types of social systems” is its “primacy of orientation to the attainment of a specific goal.”); W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 9 (2d. ed. 1987) (Organizations are typically conceived “as social structures created by individuals to support the collaborative pursuit of specified goals.”).

157 This phenomenon has been labeled “goal displacement” and has been discussed widely in studies in the field of organizational theory. See Iwai, supra note 63, at 615; see also ETZIONI, supra note 156, at 10-12 (discussing goal displacement). See generally Lawrence B. Mohr, The Concept of Organizational Goal, 67 Am. Pol. Sci. Rev. 470 (1973); Herbert A. Simon, On the Concept of Organizational Goal, 9 Admin. Sci. Q. 1 (1964); W. Keith Warner & A. Eugene Havens, Goal Displacement and the Intangibility of Organizational Goals, 12 Admin. Sci. Q. 539 (1968). Observers outside the field of organization theory also sense this trend: “[O]verall [corporations] are moving away from their origins as instruments devoted to supplying specific goods or services to natural persons and are increasingly guided by concerns with their own power, longevity, and reputation.” Galanter, supra note 19, at 1398.

158 See TOSI, supra note 147, at 14 (describing the study of organizational behavior as a distinct discipline). For a good discussion of multiple theories of organizational behavior, see generally JOHN B. MINER, ORGANIZATIONAL BEHAVIOR: FOUNDATIONS, THEORIES, AND ANALYSIS (2002).
corporate persons affect the thoughts, attitudes, and behavior of natural persons. Situational forces can lead people to act differently in group settings than they would as solitary individuals. For example, the psychological tendency called “risky shift” occurs when people in groups, who must reach a consensus on an appropriate level of risk for a given situation, typically select a risk level that is higher than their own individual risk tolerance. Collective corporate decisions often reflect an acceptance of risk most people would regard as unacceptable had they been asked to make the decision alone. “Groupthink” is the process by which group members desire so strongly to conform to a group mode of thinking, it overrides their ability to realistically evaluate group practices and alternative courses of action. Group loyalty can lead members to continue with certain policies even when those policies are obviously working out badly and have unintended consequences that disturb the conscience of each member. Individuals can internalize group goals and norms through a process of socialization that pressures dissenting members to conform. The group takes on an esprit de corps, or force of its own. People are changed and affected by being in groups, whether they are conscious of it or not. Group decisionmaking can result in compromises that fail to implement the


161 Id. at 11. In fact, group members may have a tendency to become overly optimistic and disregard facts that signal danger. See id. at 174. The group setting only heightens the psychological biases that already exist in individuals. I have discussed elsewhere the human tendency toward excessive optimism and confirmation biases motivating individuals to resist evidence their prior decisions may have been wrong. See Susanna Kim Ripken, The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation, 58 Baylor L. Rev. 139, 168-76 (2006).

intentions of any of the individual participants. Thus, the organizational structure has a way of absorbing individual attitudes and creating a collective corporate perspective in their place.

These psychological dimensions of organizational behavior lend support to the idea that the corporation is not the sum total of the individuals in the organization, but rather, an entity supplying an environment that affects the behavior of its individual members in very real and powerful ways. How can the corporate environment exert such influence? Much of it comes from the culture and character of the corporation.

B. Corporate Culture

At the most fundamental level, the culture of the corporation plays a significant role in influencing individuals within the organization. Corporate culture is “the body of shared beliefs, values, expectations, and norms of behavior that shape life in the organization.” It is communicated by continual socialization through peer pressure, modeling, rituals, symbols, stories, and traditions. The cultural values and principles

\[163\] See supra notes 121-24 and accompanying text (discussing the corporate decisionmaking process in the context of corporate intentionality); see also WERHANE, supra note 48, at 55-56.


of the corporation are conveyed by way of examples, from which members of the organization learn what sorts of behavior and attitudes are permitted and even rewarded. A certain corporate ethos develops, an “abstract and intangible character” that is “separate from the substance of what [the corporation] actually does.”

It permeates the organization and can remain the same for years even though some or all of the individual members change. For example, researchers have found that certain corporations display consistently ethical or unethical conduct over time, reflecting the persistence of particular corporate cultures fostering such behavior.

In organizations with strong corporate cultures, the culture is integrated into the lives of the members and it becomes difficult to see oneself apart from it. There are psychological and sociological dimensions to this integration: “[G]roups are not only external features of the world that people encounter and interact with, . . . they are also internalized so that they contribute to a person’s sense of self. Groups define who we are, what we see, what we think and what we do.”

People naturally develop a sense of

---

166 See Pamela H. Bucy, Corporate Ethos: A Standard for Imposing Corporate Criminal Liability, 75 Minn. L. Rev. 1095, 1123 (1991). The term “ethos” refers to the “characteristic spirit or prevalent tone of sentiment of a community, institution or system.” Id. Courts also have recognized the existence of corporate culture. See, e.g., Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB, 363 F.3d 437, 442 (D.C. Cir. 2004) (finding corporate “anti-union conduct so pervasive as to have created a corporate culture of lawlessness”) (citation omitted).

167 See MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME 58-60 (1980) (summarizing research). Research showed that certain corporations were “multiple violators,” with a measurable percentage of violating corporations committing a disproportionate share of infractions. See id. at 116-19. One longitudinal study revealed that certain corporations acted as criminal “recidivists,” exhibiting chronic violations of the law even after convictions and punishment. See id. at 126-27. Researchers concluded that some corporations “have developed a corporate atmosphere favorable to unethical and illegal behavior.” Id. at 117. Tamar Frankel describes corporate culture as a “social habit” and notes that certain corporate behaviors, “like old habits,” can persist in spite of changes in management and personnel. Tamar Frankel, Using the Sarbanes-Oxley Act to Reward Honest Corporations, 62 Bus. Law. 161, 162-65 (2006).

168 See S. ALEXANDER HASLAM, PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH 22 (2001); see also ROBERT C. SOLOMON, ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS 161 (1992) (“[W]hat we think of ourselves and how we behave is molded through and through by the various groups and institutions of which we have been members, beginning with our family and our schools and culminating, for millions of people, in the corporation.”). Robert Solomon argues that it is wrong to distinguish between “who I really am” and “the person I am on the job” because “corporate role identity is genuine identity,” and it arises naturally out of the integration of our personal values and corporate values. SOLOMON, supra, at 161.
loyalty to groups, identifying with the goals and values of the group and making them their own. 169 Strong cultures can actually help determine what makes one happy and what kind of person one wants to be, in part, by defining for the person what counts as success. In Frankfurrian terms, cultures can affect one’s second-order desires, causing one not only to want certain things, but also to want to want them, i.e., to desire to be the type of person who values these things. 170 For example, in a corporate culture that values competitiveness, one not only wants to win, but also wants to change one’s personality to be the sort of person who genuinely values winning. 171 In the view of one commentator, we normally regard religion as teaching an individual to strive to be a certain sort of person with the right kind of desires and dispositions, but corporate cultures now can arguably perform that function by influencing people’s second-order desires. 172 To the extent individuals’ principles are shaped by their corporate environment, they are, in some sense, creatures of the corporation. 173

From a moral perspective, corporate cultures can influence individual moral choices. Research has shown that “individual characteristics alone are insufficient to

169 See John M. Darley, The Cognitive and Social Psychology of Contagious Organizational Corruption, 70 Brook. L. Rev. 1177, 1191 (2005) (“When an individual is a member of a group, in the sense that she is committed to the purposes of the group and that a group has tasks to do, the task of the individual is to first become a prototypical member of that group, and then help the group as best she can in reaching its goals.”). An organization’s success can be tied to how well it socializes its members to identify with its goals. See SOLOMON, supra note 168, at 76 (“It is not just the rare, eccentric individual who makes a company successful. It is also all of those individuals who are perfectly content with submerging their personal identities into the organization and maintaining its structure as part of their own being.”).

170 See Edwin M. Hartman, The Commons and the Moral Organization, 4 Bus. Ethics. Q. 253, 255 (1994). Harry Frankfurt’s well-known philosophical theory of the concept of the person posits that having freedom of will is essential to being a person, and that one has this freedom of will only when one can have the will one wants to have, i.e., the capacity for second-order desires. See Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. Phil. 5, 5-20 (1971); see also DANIEL C. DENNETT, BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY 283-85 (1978) (discussing Frankfurt’s theory).

171 See Hartman, supra note 170, at 255.

172 HARTMAN, supra note 164, at 152.

173 See SOLOMON, supra note 168, at 152.
explain moral and ethical behavior.”174 Corporate culture affects the degree to which an individual can spot an ethical issue or interpret a given situation as raising moral concerns.175 If the social consensus within the organization indicates that certain types of questionable acts are acceptable or expected, individuals may not see the behavior as being ethically problematic at all. It is “the individual’s perception of social consensus within that individual’s relevant social sphere that is most important in determining whether an individual will recognize a moral issue.”176 Organizations can induce normally “good” and “ordinary” individuals to ignore temporarily the moral consequences of their actions and engage in acts that in hindsight seem astonishingly immoral.177 In the grip of “groupthink,” group members can come to believe unreservedly in the morality of their group and disregard the moral ramifications of their actions.178 Recent accounts of what appeared to be outrageous employee conduct in the highly aggressive, competitive, and law-defying corporate culture at Enron, prior to its demise, highlight this moral insensitivity.179


175 See James R. Rest, The Major Components of Morality, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 24, 24 (William M. Kurtines & Jacob L. Gewirtz eds., 1984) (suggesting that the first major component of moral behavior is “interpreting the situation and identifying a moral problem”).

176 Kenneth D. Butterfield et al., Moral Awareness in Business Organizations: Influences of Issue-Related and Social Context Factors, 53 Hum. Rel. 981, 990 (2000). Ethical decision-making is “very much a social process. If a decision maker perceives that others in the social environment will see an issue as ethically problematic, she or he will be more likely to consider the ethical issues involved.” Id. at 1001.

177 See John M. Darley, How Organizations Socialize Individuals into Evildoing, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 13-14 (David M. Messick & Ann E. Tenbrunsel eds., 1996). John Darley notes that individual-level psychology is largely irrelevant to “organizational pathology,” which often produces evil actions by individuals in organizations. A more sociological description is needed to explain “how human institutions can purposely move or accidentally lurch toward causing these actions, somehow neutralizing or suspending or overriding or replacing the moral scruples of their members.” Id. at 41.

178 See JANIS, supra note 160, at 174.

Sociologists have identified certain criminogenic or crime-facilitative corporate systems in which internal cultural factors generate or encourage criminal activity within the organization. Individuals are socialized into “accept[ing] a climate of unethical behavior that is conducive to criminality.” Corporate cultures with heavy demands to achieve certain profit goals can cause deviant behavior. The corporate environment presents pressures or extremely tempting conditions that facilitate the commission of crime by members of the corporation.

example involved an Enron employee who used $30 million of company hardware and enlisted 380 Enron employees to develop an unethical trading system; the employee was not reprimanded because the trading system proved to be profitable. The culture of the corporation encouraged employees to work around the laws and company rules to make money. Enron’s socialization process was called “Enronizing” and those who did not fit in were labeled “damaged goods” or “shipwrecks.” The competitive, backbiting culture was so pervasive that some Enron traders were “afraid to go to the bathroom because the guy sitting next to them might use information off their screen to trade against them,” and they “locked [their] desks every night so [their] colleagues wouldn’t steal [their] work.”


182 See CHARLES H. MCCAGHY, DEVIAN'T BEHAVIOR: CRIME, CONFLICT, AND INTEREST GROUPS 218 (1976) (noting that “pressure for profit remains the single most compelling factor behind deviance by industry”); W. B. Fisse, The Social Policy of Corporate Criminal Responsibility, 6 Adel. L. Rev. 361, 377 (1977-78) (observing that the profit motive “usually is the predominant motive” behind corporate crime); LaRue T. Hosmer, The Institutionalization of Unethical Behavior, 6 J. Bus. Ethics 439, 439-47 (1987) (showing how unethical behavior is driven by divisionalized corporate structures and management styles that cause different sectors to compete against each other to reach profit goals).

183 See Needleman & Needleman, supra note 180, at 521. For example, certain corporate policies may set various quotas and deadlines that place pressures on corporate managers to do whatever is necessary to maximize profits, including illegal or unethical behavior. Sears Auto Centers’ highly criticized practice of overcharging customers for unneeded repairs is an example. Sears employees were required to meet minimum work and sales quotas or face the loss of their jobs. It placed considerable pressure on them to falsify charges and led ultimately to forty state attorney generals filing claims against Sears for these illegal practices. See Dallas, supra note 179, at 39-40.
with the system may choose to give in to systemic pressures for personal or financial reasons, especially when they are instructed by their supervisors to act in certain ways. Researchers consistently have found that the behavior of supervisors is a dominant influence on individuals’ ethical behavior because it provides the model for how subordinates should act in the organization. If organizational goals are successfully achieved as a result of unlawful conduct, the conduct tends naturally to be reinforced. Individual decisions to use unethical methods to attain organizational goals feed back into the system, thereby sustaining the pattern of unethical conduct. In this manner, unlawful behavior receives additional support from systemic and cultural forces in the corporation. Thus, “at least some criminal behavior usefully may be viewed not as personal deviance, but rather as a predictable product of the individual’s membership in or contact with certain organizational systems.”

Of course, not all individuals will respond in the same manner to organizational


187 Needleman & Needleman, supra note 180, at 517. The opposite can also be true: a corporation’s culture may do much to cultivate lawful and ethical behavior. See Tim Barnett & Cheryl Vaicys, The Moderating Effect of Individuals’ Perceptions of Ethical Work Climate on Ethical Judgments and Behavioral Intentions, 27 J. Bus. Ethics 351, 351, 360 (2000) (finding that ethical work climates are relevant to individuals’ ethical judgments).
pressures. Recognizing that cultural factors play a role in the behavior of individuals does not deny the importance of the interactive relationship between individuals and their environment. Rather, it highlights the power of the corporate culture to shape and direct individual behavior in the corporation. 188 These findings normatively imply that moral individual behavior requires the support of the right sort of organization and that corporations should create cultures in which people need not be heroes of self-sacrifice to do the right thing. 189 “[I]t is inappropriate for organizations to rely totally on individual integrity to guide behavior. . . . [Rather], organizations must provide a context that supports ethical behavior and discourages unethical behavior.” 190 The way to build a moral organization is not by ensuring that all individual members are moral people, but by creating an environment in which ordinary people will have reason to act morally.

If corporate culture can be viewed as the character or personality of the corporate person, it not only affects individuals within the corporate setting, but it also affects how the corporation is perceived by outsiders. As the next section discusses, there is an external sociological dimension to the corporate person that is an important part of its identity.

C. External Sociological Component

Corporations have a particular identity and presence in society. Popular culture is filled with images of specific corporate personalities, largely due to corporations’ own use of “branding” techniques to create unique and attractive identities for themselves in the public eye. 191 Ronald McDonald, the Michelin Man, and the Pillsbury Doughboy are


189 HARTMAN, supra note 164, at 68, 72.


191 The branding industry has become increasingly important as corporations recognize the value of creating and maintaining successful brand images. The popular business literature is filled with guidebooks on branding methods. See, e.g., ALINA WHEELER, DESIGNING BRAND IDENTITY: A COMPLETE GUIDE TO CREATING, BUILDING, AND MAINTAINING STRONG BRANDS (2006); see also ALYCIA PERRY & DAVID WISNOM III, BEFORE THE BRAND: CREATING THE UNIQUE DNA OF AN ENDURING BRAND IDENTITY (2003); BERND SCHMITT & ALEX SIMONSON, MARKETING AESTHETICS: THE STRATEGIC MANAGEMENT OF BRANDS, IDENTITY, AND IMAGE (1997); PAUL TEMPORAL,
easily identifiable corporate symbols. Corporate slogans, such as “Just Do It” for Nike, or “Are you in good hands?” for Allstate Insurance, help to form corporations’ external personality. These symbols and slogans have a way of personifying and linking the corporation to the public. They do so by creating intellectual and emotional bonds with people. Certain mental impressions are triggered when one hears the names of various companies: “Disney is fun,” “Ben & Jerry’s is caring,” and “Apple is innovative.” What corporate marketing strategists and public relations managers recognize is that corporations as social beings project a particular image and have a certain relationship with other members of society.

From a sociological perspective, the social dimension of the corporate person is a natural outgrowth of the human tendency to join together to form groups. In many ways, groups are natural entities that exist in all societies. No large undertakings of a substantial nature can realistically be carried out without some kind of social cooperation. As a community of individuals that has joined together to pursue specified goals, the corporation is also a person operating within a community of individuals.

If the corporation is considered a member of society, deeper normative questions arise regarding its role and responsibilities. Aside from the perennial debate whether corporations should operate exclusively to maximize shareholder profits or should carry broader corporate social responsibilities, we might also question whether corporations

ADVANCED BRAND MANAGEMENT: FROM VISION TO VALUATION (2002).


193 This Article does not attempt to address that debate, as it has been, and continues to be, explored effectively by proponents on both sides. For articles supporting broader corporate social responsibilities and criticizing exclusive shareholder profit-maximization theories, see, e.g., Lynne L. Dallas, Working Toward a New Paradigm, in PROGRESSIVE CORPORATE LAW 36, 36-65 (Lawrence E. Mitchell ed., 1995); Ronald M. Green, Shareholders as Stakeholders: Changing Metaphors of Corporate Governance, 50 Wash. & Lee L. Rev. 1409 (1993); Kent Greenfield, There’s a Forest in Those Trees: Teaching about the Role of Corporations in Society, 34 Ga. L. Rev. 1011 (2000); Lewis D. Solomon & Kathleen J. Collins, Humanistic Economics: A New Model for the Corporate Social Responsibility Debate, 12 J. Corp. L. 331 (1987); Christopher D. Stone, Corporate Social Responsibility: What It Might Mean, If It Were Really to Matter, 71 Iowa L. Rev. 557 (1986). For articles favoring theories of shareholder primacy and profit maximization, see, e.g., Eugene V. Rostow, To Whom and for What Ends Is Corporate Management Responsible?, in CORPORATION IN MODERN SOCIETY, supra note 21, at 46; Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to
bind our society together by facilitating the fulfillment of society’s beliefs, hopes, and promises. Moreover, we might want to examine how the corporation can be utilized to promote the survival and stability of our modern industrialized society, and whether the corporation’s status as an autonomous social entity may conflict with the goals and needs of the society in which it functions.\(^{194}\) In whatever way these questions are resolved, we cannot ignore the expectations we have for corporations to fill multiple social roles in our society: as a source of profitable investment, as a producer of essential products, as a law-abiding citizen, as an honest employer, as a responsible manager of environmental resources, as a charitable neighbor, as a fair competitor, and as an innovative social designer.\(^{195}\) The fact that corporations can serve these multiple functions speaks to the complexity of our society today and the interdependence between corporations and individuals.

This complex social dimension of corporations raises additional concerns about another aspect of corporate personhood with significant consequences for society – the political role of corporations. The corporation is not only a social entity, but also a political institution with influence and power that, in some ways, masks that of individual citizens. To what extent must we reckon with the corporate person as a political being?

**V. POLITICAL DIMENSIONS OF THE CORPORATE PERSON**

Political theory and philosophy reveal important insights into the political dimensions of the corporation. In various visions of the political state, the corporate person plays different and contrasting roles. In some contexts, the corporation is to be feared and restrained. In others, the corporate person is welcomed and encouraged to thrive.

---


\(^{194}\) See DRUCKER, *supra* note 70, at 13. The fact that corporations have the capacity to affect society dramatically in both beneficial and harmful ways makes these questions especially important. The answers, as in the corporate social responsibility debate, depend a great deal on one’s normative view of the purpose of the corporation.

\(^{195}\) See STONE, *supra* note 40, at 231-32.
A. Political Individualism v. Political Pluralism

In one possible image of the political structure of society, only two main entities are of real significance: the government on the one hand, and isolated individual natural persons on the other. This image comes from what might be called a liberal political individualism that sees no significant social or political role for organizations as independent entities.196 “In the bipolar political ontology of Anglo-American liberalism, between the state and the individual there is precious little room for metaphysically ‘real’ intermediate entities.”197 To the extent such entities exist, they are viewed either as creatures and concessions of the state, or as aggregates of their individual members.198 They are not regarded as entities in their own right wielding any political power or serving any political purpose.

This individualistic conception tends to view the state as an all-powerful entity with a monopoly on the use of coercive force. Deep concern about the state’s potential ability to threaten individual liberties results in an insistence on establishing laws to protect individual rights.199 There is little concern that corporate persons might grow to be so powerful that they too could have the capacity to violate individual rights. In fact, to the extent corporations are viewed merely as aggregates of individual human members, corporations are simply placeholders for their members, and should be protected against

196 See DAN-COHEN, supra note 20, at 164. Meir Dan-Cohen notes that the works of such liberal thinkers as Bruce Ackerman, Ronald Dworkin, Robert Nozick, and John Rawls, do not deal seriously with the role of organizations as separate entities. To the extent organizations are treated at all, they are subsumed in the category of individuals. id. The following discussion owes much to Meir Dan-Cohen’s insights.


198 As we have seen, these two conceptions of the corporation are expressed in the artificial person and aggregate theories of legal personhood. See discussion supra Parts II.A. and II.B. These fictional conceptions of the corporation are in sharp contrast to the real entity theory which does count organizations as separate members of society. See Hager, supra note 79, at 612 (“The fictional paradigm held that the only ‘real’ units in political life were individuals on the one hand and the state itself on the other.”).

199 See DAN-COHEN, supra note 20, at 164-65 (noting that political individualism’s exaggeration of the state’s uniqueness as a political and legal entity “breeds great apprehension of the state, conceived as a locus of coercive and potentially repressive force” and “insists on the unique importance of protecting individual rights against it”).
the coercive powers of the state as well. As we have seen, the United State Supreme Court has previously utilized this aggregate view of corporations in holding that they are constitutional persons, entitled to the same protections as natural persons from state deprivations of their property.200

In contrast to this political individualist perspective, a political pluralist vision recognizes the distinctiveness and significance of organizations in society.201 Because human beings associate in groups to pursue their interests and to accomplish coordinated tasks, groups and organizations are considered important centers of representation and participation. Society consists of more than just atomistic individuals and the all-powerful state; organizational entities also populate the community and are an integral part of society. While recognizing the significance of organizations, political pluralism projects two very different and, in some sense, opposing images of the large corporation. The first sees the corporation as a harmful source of coercive power, the second sees the corporation as a critical instrument of freedom and democracy.

Under the first view, corporations’ vast concentrations of wealth give them enormous power, and great care must be taken to protect individuals from the potentially coercive effects of corporate control. Individuals stand in a vulnerable position vis-à-vis large corporate entities because “the moment a powerful group [like the corporation] begins to act toward a common end, it produces a capacity for aggression that individuals can only in the rarest cases combat.”202 The dangers associated with abuses of concentrated economic power fuel the concern that the state is not the only source of control to threaten individuals in society. Rather, large corporations similarly possess functions and powers that are traditionally associated with the state, making corporations comparable to sovereign government-like bureaucracies.203 Under this political pluralist

---


202 Deiser, *supra* note 64, at 302. The corporation with its large-scale operations is believed to create incomparable “dangers to life and limb because ‘in its methods of operation, it tends to be less careful of human life’ than smaller-scale enterprise.” Hager, *supra* note 79, at 608 (quoting Laski, *supra* note 86, at 124).

203 Latham, *supra* note 21, at 218 (describing large corporations “as systems of private government” that “rival the sovereignty of the state itself”); Miller, *supra* note 21, at 242
view, corporations are “not only constitutive elements of the modern state, but also centers of political and economic power equivalent to the power of the state.”

Individuals arguably can be victims of corporate oppression as easily as victims of state oppression. Their basic rights must be as scrupulously protected from invasion by the private governments of corporations as they are from invasion by public sources of government. Indeed, it has been suggested that the constitutional protections of the Bill of Rights should be extended to shield individuals from corporate power.

---

204 Tsuk, supra note 201, at 181. In the early 20th Century, Adolf Berle and Gardiner Means saw strong similarities between corporations and the state:

Corporate structure resembled government structure. Corporate financial capacities resembled sovereign economic powers. Like government authorities, corporate managers exercised power by means of a rationalized system of control and administration. Like the sovereign state, large corporations formulated laws and policies affecting individuals and groups. Like states, corporations were social, economic and political entities.

Id. at 192. Modern commentators agree with this characterization of corporate persons. See, e.g., Daniel J.H. Greenwood, Essential Speech: Why Corporate Speech Is Not Free, 83 Iowa L. Rev. 995, 1007 (1998) (“The modern publicly traded multinational corporation . . . appears to be as large and well organized, as in control of resources and potential instruments of coercion or power over individuals as are most local governments.”); Tsuk, supra note 201, at 180 n.2 (“While the corporation’s power to enforce its rule is different from the power of the sovereign state to do so, the corporation’s economic, social, and cultural impact has become so pervasive in modern society so as to make corporate power, in effect, comparable to the coercive power of the state.”).

205 See Sanford A. Lakoff, Private Government in the Managed Society, in PRIVATE GOVERNMENT 218, 225 (Sanford A. Lakoff & Daniel Rich eds., 1973) (noting that private governments “could be even more oppressive than the state”); Sameuls & Miller, supra note 35, at 6 (arguing that “supercorporations are private bureaucracies” and today “natural persons are overwhelmed by the power of bureaucracies, both public and private”).

206 See, e.g., Adolf A. Berle, Jr., The Developing Law of Corporate Concentration, 19 U. Chi. L. Rev. 639, 643 (1952); Adolf A. Berle, Jr., Constitutional Limitations on Corporate Activity – Protection of Personal Rights from Invasion Through Economic Power, 100 U. Pa. L. Rev. 933, 943 (1952) (introducing the theme of “constitutionalizing” the corporation). One commentator argued that the enactment of a “Corporate Bill of Rights” would destroy the myth “that our society
Even deeper suspicion of corporate power arises when corporations transform their massive economic power into significant political influence in the legislative and political arena. Large corporations spend millions of dollars annually in lobbying efforts to impact government policies. Corporate money is used to make campaign contributions, to lobby public officials, and to engage in issue advocacy, sometimes in ways that seem difficult to countenance: “Coal producers, for example, have met efforts to restrict strip mining . . . by arguing in state legislatures that the problem should be dealt with only at the federal level, and in Congress, that the subject should be dealt with exclusively by the states.” Even Justices of the United States Supreme Court have observed that corporations give substantial sums of money to both major national parties and to competing candidates with the expectation that, in return, corporations will gain special access to the officials who are ultimately elected, and with that access, “a disproportionate influence on those in power.” The public is well aware that “[a]t a sufficiently atomistic that the only concentration of political and social power against which we must be on our guard is that which resides in the state.”

207 See Jill E. Fisch, The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty, 75 Fordham L. Rev. 1593, 1605-07 (2006) (describing the immensity of corporate expenditures on political activity); Katie Thoennes, Comment, Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States, 28 Hamline L. Rev 203, 213-14 (2004) (describing the substantial amounts of money corporations spend to influence the political process and noting that the largest spenders of money in politics are corporations); see also FRENCH ET AL, supra note 15, at 81 (“Corporations are powerful participants in the political process . . . and although they cannot cast votes, they influence politics far more than most human participants do. Corporations . . . are regularly involved in activities such as lobbying, grass-roots political advocacy, and electioneering.”).

208 Stevenson, supra note 206, at 716 (1974) (citing Hearings on H.R. 60 and Related Bills Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., ser. 92-96, at 296-311, 562-65 (1971)). Enron’s political contributions were believed to boost its successful efforts to eliminate protected energy monopolies. See William W. Bratton, Enron and the Dark Side of Shareholder Value, 76 Tul. L. Rev. 1275, 1278-79 (2002) (describing Enron’s extensive political efforts to end energy monopolies for its own interests). One commentator has argued that corporations use their powerful political influence to exercise “nondecision-making” power, i.e., the power to bury or prevent an important potential issue from appearing on the agenda anywhere in the political arena. Risser, supra note 115, at 25.

critical level, [corporate] contributions that underwrite elections are leverage for enormous political influence.”210 The obvious thrust of corporate political activity is to avoid or soften legal regulation of corporate business.211 It is argued that such corporate conduct and power threaten the integrity of democratic politics and undermine public confidence in democratic ideals.212

Corporate power, seen in this light, poses obstacles to achieving true democratic governance over the conditions of social life. The only countervailing source of power is the state which must protect individual rights from the potentially coercive nature of corporate economic and political control.213 The state and its arm of enforcement, the law, serve to check corporate power and channel it in ways that preserve individual well-being. A natural corollary to this position is that corporations must not be granted the same sorts of fundamental rights that belong to individuals. “[I]f organizations are seen

210 Id.; see also Walter Adams & James W. Brock, Bigness and Social Efficiency: A Case Study of the U.S. Auto Industry, in CORPORATIONS AND SOCIETY, supra note 21, at 219, 233 (noting that big corporations “can manipulate government to validate and legitimize [their] private ends”).

211 The effort appears to be successful, as corporations often have a role in shaping laws that are intended to regulate their business activity. See STONE, supra note 40, at 94-95. “[P]ublic policy necessarily tends to be oriented, especially over the long run, in a direction which is fundamentally in line with the interests of the great corporate enterprises . . . even if the interests of the giants are in conflict with other social goals.” Morton S. Baratz, Corporate Giants and the Power Structure, 9 W. Pol. Q. 406, 413 (1956); see also Galanter, supra note 19, at 1399 (noting that corporations have a “privileged position in American government, enjoying subsidies, solicitude, and deference”).

212 David D. Martin, The Corporation and Antitrust Law Policy: Double Standards, in CORPORATIONS AND SOCIETY, supra note 21, at 193, 214 (warning that concentrated economic corporate power “is as much a threat to democracy as centralization of political governmental powers, if not more so, since the latter follows from the former” and asserting that fascism “is the end result of the trend toward corporativism”); see also Gerald Berk, Corporate Power and Its Discontents, 53 Buff. L. Rev. 1419, 1423 (2006) (describing “critical denaturalizers” who “condemned the corporate person as a cancer in the body politic” because “it created unassailable privilege, corrupted democratic government, and locked the poor into permanent servitude”).

213 See HENRI S. KARIEL, THE DECLINE OF AMERICAN PLURALISM 258 (1961) (noting that because large organizations like corporations “cannot be relied on to protect the individual against repression by his group, the state itself is his sole resort”). “Against large-scale groups, only the state can maintain or create rights for the protection of the individual.” Id. at 259.
as potentially repressive systems of governance, treating them as individuals and granting them the protections, immunities, and liberties of individuals will just enhance their repressive power.”\textsuperscript{214} Therefore, this image of organizational power seeks to impose restraints on the corporate person for the benefit of the public interest. It adopts a more public oriented view of corporate activity and corporate law.

There is a second view of organizations in the political pluralist vision that defines the corporation not as a source of coercive power, but as an essential instrument for promoting individual welfare and societal democracy. Like the political individualist view, the state here is seen as dangerously omnipotent with the potential to threaten individual rights. The state is too abstract an entity to win the loyalty of individual citizens, who are more likely to identify with the diverse groups and associations they form naturally as social beings.\textsuperscript{215} For example, churches, neighborhood groups, voluntary associations, trade unions, political parties, and corporations afford individuals a safe place to form their identities, express their viewpoints, and establish their preferred ways of life.\textsuperscript{216} These intermediate groups serve as buffers between individuals and the government, promoting individual autonomy and shielding citizens from potentially coercive state power.\textsuperscript{217} This conception of groups draws on the image of the medieval

\textsuperscript{214} DAN-COHEN, \textit{supra} note 20, at 176. Some commentators therefore believe that corporations should not have the same rights as individuals to engage in political activity. \textit{See, e.g.}, FRENCH ET AL, \textit{supra} note 15, at 87 (“It seems, in the interests of preserving democracy, however, that society is justified in restricting corporate political activity to some degree, because there is already a bias in our political system in favor of corporate interests and because the integrity of individual participation is worthy of protection.”). A similar result can be reached from a social responsibility standpoint. \textit{See} Robert B. Reich, \textit{The New Meaning of Corporate Social Responsibility}, 40 Cal. Mgmt. Rev. 8, 10 (1998) (concluding that the “meta-social responsibility of the corporation, then, is to respect the political process by staying out of it”).


\textsuperscript{216} \textit{See} Tsuk, \textit{supra} note 203, at 190; \textit{see also} HENRY M. MAGID, ENGLISH POLITICAL PLURALISM: THE PROBLEM OF FREEDOM AND ORGANIZATION 12 (1941) (discussing the view of pluralist John Figgis who believed groups play a vital role in the self-development of individuals). For a discussion of the link between political pluralism and the legal personhood of groups, see generally LEGAL PERSONALITY AND POLITICAL PLURALISM (Leicester C. Webb ed., 1958).

\textsuperscript{217} \textit{See} DAN-COHEN, \textit{supra} note 20, at 177; \textit{cf.} Stephen M. Bainbridge, \textit{Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship}, 82 Cornell L. Rev. 856, 883 (1997) (observing that “religious conservatives [also] place great importance upon
institutions of guilds, townships, and free cities that had powers of autonomous self-direction and served as centers for collective and participatory self-government. These groups empowered individuals to determine the course of their own lives, rather than submitting to the direction of a centralized state that was perceived as “antidemocratic, robbing citizens of meaningful political participation and power.” From this perspective, mediating groups stand between individuals and the state and form an essential means of democratic self-rule.

The concept of mediating institutions has been explored in related terms in the business ethics literature. In political discourse, mediating structures are typically associated with the family, religious organizations, neighborhoods, and voluntary groups. In these groups, individuals interact closely with other members, and can see first hand the effects of their actions. This is empowering because it gives individuals a sense of control and comfort in knowing that they can make a difference in the group. Business ethicists have suggested that corporations today can, and possibly must, serve as mediating institutions in society. To the extent that so many people spend most of their day working in or interacting with corporate organizations, “the corporation

local communities and other mediating institutions as buffers against the encroaching powers of the central state”). For the view that the corporation can serve as a check against the power of government, see Michael Novak, God and Man in the Corporation, 13 Pol’y Rev. 9, 28 (1980). Michael Novak believes “the publicly held business corporation is arguably the most successful, transformative, and future-oriented institution in the modern world. It has been far more open, more creative, and infinitely less destructive than the nation-state, particularly the totalitarian state.” MICHAEL NOVAK, ON CORPORATE GOVERNANCE: THE CORPORATION AS IT OUGHT TO BE 3 (1997).

218 See Hager, supra note 79, at 611-15 (describing medieval institutions and participatory politics).

219 Id. at 611.


represents a value-laden institution that outranks the local community as a focus of loyalty and a medium for self-realization.”

In fact, it has been suggested that the traditional sources of social support such as the family, church, and small town, have declined in our mobile and entrepreneurial society, and corporations have taken their place. It may be unrealistic to envision a large, multinational corporation as a small community of shared values, but corporations may have subgroups within them that can be so characterized. Many people today have such a sense of camaraderie with their work colleagues that it becomes a type of family for them; indeed some individuals may feel closer to their work groups than to their own immediate family members. If corporations, or subparts of them, have become an important form of community, they may be seen as performing an essential mediating function for individuals in society. In this light, corporations should not be regarded with suspicion, but embraced as tools for facilitating individual and societal development.

From this point of view, democratic life depends on supporting associational freedom and allowing individuals to pursue their own goals through various voluntary groups like the corporation. Rather than posing a threat to democracy, organizations such as the corporation are constitutive elements of American society and can serve to promote its flourishing. They provide a means for individuals to define themselves and their way of life, rather than having these decisions made for them by an all-powerful state. This political pluralist vision regards organizations as intrinsically beneficial,

---


223 See DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 289 (1973); SOLOMON, supra note 168, at 147 (arguing that individuals today are “the product of a particularly mobile and entrepreneurial society in which natural groups (notably the extended family or tribe) have been replaced by artificial organizations such as schools and corporations”); Long, supra note 222, at 202 (“[P]eople may be more citizens of the corporations for whom they work than of the local communities in which they reside.”).

224 See Fort, supra note 221, at 153-55 (discussing mediating institutions’ societal importance). But cf. Hager, supra note 79, at 650 (arguing that, for purposes of group free expression rights, corporations are collections of capital, not collections of people, and therefore corporations are very different from trade unions, churches, benevolent societies, and other traditional associational groups that deserve associational freedom rights).

225 See Bainbridge, supra note 217, at 897 (concluding that “it is perfectly plausible to think of the corporation as an intermediary institution standing between the individual and Leviathan” and noting that the corporation can “act as a vital countervailing force against the state”).
and seeks to encourage their growth and autonomy, free from state interference in their affairs. If corporations fit within this framework, they play an important political role in fostering individual development and restraining the power of government.

B. Social Contract Theory

Social contract theory offers an alternative political model for the relationship between corporations and the state. In its most simplistic form, the social contract theory in political philosophy imagines society and the state entering into a contract in which individuals agree to be governed by the state in exchange for the state’s promise to uphold individual rights and refrain from coercive exercises of state power. Consent is the basis of government. The terms of this political contract serve to justify the existence of the state.

When applied to corporations, the social contract concept can be used to justify corporations’ existence and to delineate corporate activities that society deems acceptable. The two parties to the theoretical contract are corporations on the one hand and society on the other. Society allows corporations to have certain privileges, such as legal personhood, in exchange for enhancing the welfare of society by satisfying consumer and worker interests. Corporations agree to be efficient producers of goods and services and to avoid abuses of power that harm society, e.g., destroying the

---

226 See David Schneiderman, Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century, 48 U. Toronto L.J. 521, 529 (1998) (describing the views of pluralist Harold Laski, who “attack[ed] the all-absorptive state and promot[ed] the inherent worthiness of group associations”); Tsuk, supra note 201, at 192 (noting that pluralists Berle and Means “feared that an overuse of government regulation could eliminate potential benefits of corporate power” and instead wanted to “encourage the development of diverse collective institutions to promote various experiences and actions”); see also DAN-COHEN, supra note 20, at 177 (noting that the pluralist’s concern is for “the autonomy of voluntary associations and their relative immunity from state interference in their internal affairs”).


228 See DONALDSON, supra note 91, at 43-49 (discussing the terms of the social contract between corporations and society).
environment, mistreating employees, or corrupting the political process. Because society sanctions the corporation to operate in a given community, society is entitled to demand that the corporation’s actions benefit, rather than damage, the community. When a corporation does not live up to the reasonable expectations created by the social contract, the corporation has violated its commitments and the state is no longer obligated to give the corporation its privileged status.

The normative thrust of this theory is that corporations have certain obligations that go beyond the economic interests of their shareholders. Corporations are citizens in the community who have made a contract not only with their shareholders, but also with society as a whole, and therefore corporations are obliged to uphold the broader interests of society. These implications are clearly controversial and underlie the broader debate over the purposes of corporations in society.

Although the social contract theory is not universally accepted, some argue that it does explain why the law has a tendency to show deference to the corporation: “There is a sense that government and corporations are on a similar footing, insofar as both are based on consent. . . . Indeed, in some respects the corporation may enjoy a greater

229 Id. at 51-52. At a minimum, corporations must “avoid deception or fraud, . . . show respect for their workers as human beings, and . . . avoid any practice that systematically worsens the situation of a given group in society.” Id. at 53. Thus, corporations take on certain social responsibilities that are not confined to maximizing profits for their shareholders. See id. at 54-56.

230 There are certain obvious ties here to the corporate concession theory for the legal personhood of corporations. Corporations are seen as concessions of the state with only the powers that the state sees fit to grant. See discussion of the concession theory supra notes 33-37 and accompanying text. The social contract arguably runs between three parties: “The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts. The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.” 2 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 492 (7th ed. 1913).

231 See Thomas L. Hazen, The Corporate Persona, Contract (and Market) Failure, and Moral Values, 69 N.C. L. Rev. 273, 311 (1991) (describing a bargaining model between the state and the corporation via its shareholders). “[A]s part of the bargain with the state that gives the shareholders [certain] benefits, the shareholders (and in turn the corporation) must recognize that they are responsible members of the community. As such, the contract can be said to include obligations to constituencies other than the shareholders.” Id.

232 See supra note 193 and accompanying text (citing sources in the corporate social responsibility debate).
presumptive legitimacy than the state, for the corporation can be seen as a more local and voluntary unit of governance.”

The theory can be particularly appealing to those who prefer to characterize the nature of corporate activity in contractual terms. In this way, social contract theory provides its own contribution to the political analysis of the corporate person.

C. Comments

As the differing political theories and philosophies suggest, the role of the corporate person in our political system is open to different interpretations depending on one’s normative vision of the ideal political state. One strand of political pluralism views corporations as sources of oppressive power that must be curbed by the state. Another strand reverses these positions and seeks to protect corporations from coercive state interference so that individual autonomy can be preserved. The social contract model sees corporations and the state as equal partners in a consensual arrangement that strives to benefit both parties. The common thread in all these theories is a recognition that corporations are socially and politically significant. They have the power to affect society in dramatic ways.

---

233 Liam S. O’Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 Geo. Wash. L. Rev 201, 252 (2006). While it has its detractors, social contract theory has been considered “a major contribution to the analysis of modern business corporations” because its “emphasis on the obligations of corporations provides an important insight into the scope of corporate moral responsibility.” WERHANE, supra note 48, at 46.

234 Laurence Tribe aptly describes the tension between these views:

Recapitulated here is an ancient paradox of liberalism: to destroy the authority of intermediate communities and groups in the name of freeing their members from domination destroys the only buffer between the individual and the state, and risks enslaving the individual to the state’s potential tyranny. But the paradox is also a dilemma: submerging persons in the intermediate communities and groups that seek dominion over their lives creates the risk that individuals will remain at the mercy of hierarchical and subjugating social structures.


235 As Adolf Berle and Gardiner Means observed: “[A] giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The[se] organizations . . . have passed far beyond the realm of private enterprise – they have become more nearly social
To acknowledge that corporations are social and political institutions naturally complicates our understanding of the role of the corporate person vis-à-vis the state and individuals in society. The stakes become much higher. Some have maintained that the struggle over corporate personhood is no less than a part of the larger struggle over the future of American democracy.236 Because we can so vigorously disagree on our prescriptions for achieving the ideal democratic society, our views of the corporate person’s role in that endeavor will always be contentious and controversial.

Each of the various theories of the corporation’s social and political role reflects a different dimension of the corporate person when viewed through that particular prism. Each viewpoint is informative because each carries an element of truth in its observation. The large corporation indisputably is a source of tremendous political and social power. But so is the government. Both can wield that power coercively. Our task then is to balance these collective centers of power in ways that do not inhibit the productive activities of both. The law can be used as a mediating force to direct and articulate that balancing process.237 However, that balance must constantly be readjusted as our society and our corporations evolve and grow. The role of corporations is not static, but may change as we play out our ongoing experiment in democracy and work out our societal vision for the good and prosperous life.

The desire to reach that good and prosperous life ties into one dimension of the corporate person that is not often discussed in mainstream academia: the spiritual aspect of corporations. This element can seem trivial and almost nonsensical to many who would prefer to focus on the more traditional disciplines of economics or politics when analyzing corporate activity.238 However, this Article attempts to present a broader array

236 See Hager, supra note 79, at 639.


238 See Michael Naughton, The Corporation as a Community of Work: Understanding the Firm Within the Catholic Social Tradition, 4 Ave Maria L. Rev. 33, 39 (2006) (describing but disagreeing with the “general impression within the West . . . that religion and theology at best have no relevance for corporate life, and at worst tend to foster incompetence and inefficiency”). Those who do discuss corporations in spiritual terms often appear to feel the need to defend their subject matter. They argue that we should consider all relevant voices in a discussion over the purpose of corporations, whether they are religious or secular. See Helen Alford & Michael J.
of disciplinary perspectives on the corporate person. The following section discusses the views of commentators who believe certain spiritual elements are part of the corporate person too.

VI. SPIRITUAL DIMENSION OF THE CORPORATE PERSON

In addition to the legal, economic, social, and political roles that corporations play in society, some scholars argue that the corporate person also has theological significance. The corporation is viewed principally as an instrument for the spiritual flourishing of human beings and the common good of society. Corporations are means to pursue the worthiest of ends, ends that are higher than themselves and the pursuit of profit. They can become the locus of activities that ultimately serve the ends of justice, liberality, and charity.

A. The Spiritual Identity and Purpose of the Corporation

Modern American theologian, Michael Novak, assigns a full spiritual identity to

Naughton, Beyond the Shareholder Model of the Firm: Working Toward the Common Good of a Business, in RETHINKING THE PURPOSE OF BUSINESS: INTERDISCIPLINARY ESSAYS FROM THE CATHOLIC SOCIAL TRADITION 27, 44 n.4 (S. A. Cortright & Michael J. Naughton eds., 2002). They believe that intellectual positions based on religious sources can stand or fall on their own merits and should not be rejected on the basis of whether one accepts or rejects the particular religious tradition: “[O]ne would not avoid reading Karl Marx or Frederick Taylor simply because one is not a Marxist or a Taylorist. The Catholic social tradition, with its communal orientation, provides an understanding of organizational purpose that is a serious alternative to that of classical or revised liberalism, and on that basis alone deserves consideration.” Id.

239 While there may be other religious traditions that have strong views of the nature and role of corporations in American society, Catholic Social Thought (CST) appears to have played a dominant role in the legal academic writing on the subject in the United States. See, e.g., Stephen M. Bainbridge, Catholic Social Thought and the Corporation, 1 J. Cath. Soc. Thought 595 (2004); Jean-Yves Calvez & Michael J. Naughton, Catholic Social Teaching and the Purpose of the Business Organization: A Developing Tradition, in RETHINKING THE PURPOSE OF BUSINESS, supra note 238, at 3; Scott Fitzgibbon, “True Human Community”: Catholic Social Thought, Aristotelian Ethics, and the Moral Order of the Business Community, 45 St. Louis U. L.J. 1243 (2001); Mark A. Sargent, Competing Visions of the Corporation in Catholic Social Thought, 1 J. Cath. Soc. Thought 561 (2004). Therefore, this Article will focus primarily on the views of CST subscribers.
the corporation, describing it as an “incarnation of God’s presence in this world.” According to his philosophy, the creative and innovative aspects of corporations, the ability of corporations to increase human wealth and thereby combat poverty, the communal environment the corporate workplace provides for people to work out their identities and salvation – all testify to the good and beneficial nature of corporations, and together they offer a type of “metaphor for grace, a kind of insight into God’s ways in history.” The corporation is seen as a moral institution with the capacity to be a channel of grace for the world if given the freedom to thrive and maximize profits. In contrast, the state is a source of coercive power that must be curbed in order to preserve a free and virtuous society. It follows that corporations should be allowed to operate without state interference or the burdens of complying with communitarian notions of corporate social responsibility. While this view of corporations has been widely criticized, even by those within the same religious tradition, many commentators do agree that the corporation has a role in helping human beings achieve the good and virtuous life.

In particular, corporations are regarded as instruments serving natural, human ends, as well as supernatural, spiritual ends. From an Aristotelian perspective, human beings are not intended merely to live, to stay alive, or to survive, but they are intended to “live well,” to flourish, and to live for the highest and noblest things. Corporations


241 Id. at 49. Michael Novak articulates seven signs of grace in the corporation: creativity, liberty, birth and mortality, the social motive, the social character, insight (the primary capital), and the rise of liberty and election. Id. at 43-49. He argues that “[b]usiness is a noble Christian vocation, a work of social justice, and the single greatest institutional hope of the poor of the world.” Michael Novak, A Philosophy of Economics, 1 U. St. Thomas L.J. 791, 791 (2004).

242 See NOVAK, supra note 240, at 31-34. “[T]he prevailing moral threat in our era may not be the power of the corporations but the growing power and irresponsibility of the state.” Id. at 34. In contrast, the corporation is “a useful instrument of social justice, a mediating institution between isolated individuals and the omnipotent state.” Id. at 3.

243 See, e.g., Sargent, supra note 239, at 577-81, 588-92. Mark Sargent believes “Novak’s theology is more than a little wobbly” and that his anti-communitarian and pro-capitalist arguments are “exactly backwards.” Id. at 577, 581.

244 See Schall, supra note 28, at 112. “Aristotle’s central ethical concept is a unified, all-embracing notion of ‘happiness’ (or, more accurately, eudaimonia, perhaps better translated as ‘flourishing’ or ‘doing well.’).” SOLOMON, supra note 168, at 105. See ARISTOTLE,
provide human beings with the means to flourish by giving them the time and resources to focus on endeavors beyond merely surviving. “[I]f everyone were required to feed, clothe, and otherwise provide for himself and his family . . . with the sole use of his own means and enterprise, . . . each person would spend all of his time merely surviving,” rather than having the freedom to seek a more enriching existence. Corporations serve society by providing essential goods and services that meet the real material needs of consumers. By doing so, they free human beings to engage themselves in the process of achieving the good life. Individuals can focus on developing virtues within themselves and molding a more virtuous society. Corporations that function properly can help make society more just and thus contribute to the common good. The common good of the community is the sum of all those social conditions that support the full development of human personality and facilitate the fulfillment of each person’s life.

The corporate person also contributes to the common good of its members. The organizational common good is “the promotion of all the goods necessary for integral human development in the organization . . . .” It “encompasses everything that is conducive to the human flourishing of each person” in the group. Business is


Schall, supra note 28, at 110.

Cf. Naughton, supra note 238, at 40 (proposing a “theology of institutions” model of the corporation in which the corporation acts “as a servant to the larger society in such a way that people grow and develop”) (citing Robert K. Greenleaf, The Need for a Theology of Institutions, in SEEKER AND SERVANT: REFLECTIONS ON RELIGIOUS LEADERSHIP 191 (Anne T. Fraker & Larry C. Spears eds., 1996)).

See Domenech Mele, Not Only Stakeholder Interests: The Firm Oriented Toward the Common Good, in RETHINKING THE PURPOSE OF BUSINESS, supra note 238, at 190, 198.


Alford & Naughton, supra note 238, at 38; see also id. at 29 (arguing that “a business does have its own common good” while simultaneously being “responsible to the common good of the wider human community”).

Mele, supra note 247, at 194. Mele identifies three essential elements of the common good: (1) respect for people and their rights, so that they can realize their vocation; (2) social well-being and
considered a community of persons who are forged together by their work and who relate to one another in interdependent ways. Under this view, human beings are inherently social and depend on their social environment to help shape their moral personality. One’s personal identity and meaning is created and defined by one’s interaction with others. For example, a man’s identity as a father, son, manager, mentor, and company softball team player is inextricably linked to his relationships with others. The community in which he is embedded plays an essential role in defining who he is. As a community of individuals, the corporation at its best provides a moral environment where individuals can interact and become fully human. If the corporation shows concern for its employees by giving them satisfying work, a voice in the manner of doing their work, the opportunity to fellowship and form friendships, and a fair share of group development; and (3) stability and security within a just order, i.e. social peace. Id. at 195.

251 See Gerald J. Russello, Catholic Social Thought and the Large Multinational Corporation, 46 J. Cath. Leg. Stud. 107, 124 (2007) (discussing the concept of “solidarity,” which recognizes “that by nature man is a social being, and that people express the fullness of personality only in and through communities that recognize this social dimension”); Sargent, supra note 239, at 565 (explaining that a key concept of Catholic Social Thought is “an understanding of the human person as essentially social”); see also Scruton, supra note 69, at 257 (arguing that “something vital is missing from the natural person who is without the experience of membership – something necessary to his perfection. Lacking it, your attitude to the world and to others is one of ‘diminished responsibility’, while your personal relations become defeasible, rescindable, and renegotiable in the interests of gain.”).

252 See Robert G. Kennedy, The Virtue of Solidarity and the Purpose of the Firm, in RETHINKING THE PURPOSE OF BUSINESS, supra note 238, at 48, 53 (suggesting that “a human person permanently detached from a community can never be fully human”); see also Fort, supra note 39, at 267 (asserting that our human biological structure requires that we live in communities and there is where we develop our identities and learn our moral obligations).

253 See SOLOMON, supra note 168, at 146-48 (discussing the Aristotelian view of man’s social nature and asserting that “we find our identities and our meanings only within communities, and for most of us that means at work in a company or an institution”); see also Fort, supra note 221, at 152 (discussing sociologist Robert Nisbet’s views of human social needs and suggesting that social interaction is required “to create a person’s very identity”); Phillips, supra note 90, at 443 (“To a greater or lesser extent . . . people are what they are because of their social relations.”).

254 The point is often made that we are “first of all members of families and groups in which we learn to identify ourselves in terms of our positions and our roles, in conjunction with and in comparison and contrast with others.” SOLOMON, supra note 168, at 79.
the rewards of the organization’s successes, then it supports the dignity and fulfillment of its members as human beings.\textsuperscript{255} The corporation that treats its members as ends in themselves, not merely as means, allows them to realize their greatest potential and supports their flourishing.

Such a corporate community is where individual members can learn and exercise spiritual virtues. The concept of corporations as mediating institutions reappears in this context. The classic mediating institutions are typically associated with the family, church, and voluntary associations.\textsuperscript{256} These are the centers where people learn certain virtues, such as love, patience, respect, kindness, justice, courage, and loyalty. In our modern world, however, the traditional mediating institutions may be giving way to the work environment as the place where virtues will have to be developed. “Work consumes too much time for one to think that virtuous habits are only cultivated in some separate cultural sphere and then brought to the corporation. If the corporation is rightly ordered, it will be a place where the habit of justice [among others] is developed.”\textsuperscript{257} Subscribers of this view believe the work environment carries extremely important spiritual significance for individuals: “For many of us, the two most important institutions in our lives are our families and the organizations for which we work. . . . [T]hey are often the two places where we will save or lose our souls.”\textsuperscript{258} The corporation

\textsuperscript{255} See Kennedy, supra note 248, at 29-31. This viewpoint places a special value on human labor. The “best work is not necessarily the work with the best pay. It is the work that most completely draws out the potential of the worker and develops him as a human person . . . .” Kennedy, supra note 252, at 55.

\textsuperscript{256} See Fort, supra note 221, at 150; see also supra notes 220-24 and accompanying text discussing mediating institutions in the political pluralist context.

\textsuperscript{257} Long, supra note 23, at 98; see also Fort, supra note 39, at 264 (“Given that we spend a large percentage of our waking hours working, it is only logical that our moral identities are formed not only in families and churches, but at work as well.”). Timothy Fort argues that because “much of a person’s conscious life will be involved with work, . . . there is a need to remake corporations into mediating structures themselves.” Fort, supra note 221, at 150-51. He describes Harvard economist Juliet Schor’s work which shows that prior to capitalism, people worked far fewer hours and had much more leisure time than they do today. See id. at 151 (citing JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1991)).

\textsuperscript{258} Naughton, supra note 238, at 40-41; see also NOVAK, supra note 240, at 47 (“For many millions of religious persons the daily milieu in which they work out their salvation is the communal, corporate world of the workplace.”).
thus holds a valuable function as a modern day mediating institution where spiritual and ethical virtues can be fostered.

The normative goal of this spiritual approach to corporations is not the maximization of profits, but the flourishing of all members of the organization and the common good of the community. Profit-making is considered only a “foundational” or “instrumental” good, which is subordinate to “excellent” or “inherent” goods like human development, moral self-possession, and community. Instrumental goods are important, and in fact, necessary for achieving excellent goods. However, instrumental goods should not be pursued for their own sake because to do so improperly makes an end out of a means. Profit-making as an instrumental good is essential because if the corporation does not create sufficient profits, it has no hope of survival and no possibility of contributing to the common good of its members or society. Even so, profits should be viewed only as an indication, or a byproduct, of a well functioning firm. They are a measure of its success in operating its business in the appropriate manner. To the extent a corporation is concerned solely with profits as the exclusive objective of its business, it operates out of a truncated view of the purpose of the organization and fails to fulfill its role as a site where excellent goods can be pursued.

________________________

259 See Alford & Naughton, supra note 238, at 35-36 (discussing the distinction between instrumental, or foundational, goods and excellent, or inherent, goods).

260 See Charles Handy, What’s a Business For?, Harv. Bus. Rev., Dec. 2002, at 49, 51. Charles Handy views this as a moral issue: “To mistake the means for the end is to be turned in on oneself, which Saint Augustine called one of the greatest sins.” Handy does not speak explicitly in terms of “instrumental” or “excellent” goods, but effectively makes the same point: “We need to eat to live; food is a necessary condition of life. But if we lived mainly to eat, making food a sufficient or sole purpose of life, we would become gross.” Id. In relating this to the profit motive, he argues that “[t]he purpose of a business . . . is not to make a profit, full stop. It is to make a profit so that the business can do something more or better. That ‘something’ becomes the real justification for the business.” Id.

261 See Alford & Naughton, supra note 238, at 37. The argument is that “profitability and efficiency are worthy goals because their realization is foundational to the development of the business as a whole. Nevertheless, the pursuit of foundational goods alone does not constitute a meaningful purpose for the firm . . . precisely because such foundational goods are not big enough to provide meaning to the human spirit.” Id. at 38.

262 See Kennedy, supra note 248, at 25.

263 See Alford & Naughton, supra note 238, at 38; see also Kennedy, supra note 252, at 59
as an end in itself is considered a vice that “contributes to the spiritual emptiness of a materialistic culture and undermines the common good.” The corporation must strive to maintain the proper ordering of instrumental and excellent goods in order for the corporation to serve its spiritually meaningful purpose.

Therefore, according to this view, corporations must be dedicated to supporting the values that bring about the development of all persons and society. As a matter of corporate social responsibility, this means that, among other things, corporations should be concerned with protecting the environment, producing quality products that are safe, treating their employees well, preventing global labor abuses, and avoiding cooperation with oppressive government regimes. Corporations should take into account the impact of their decisions on others and try act in ways that benefit, rather than harm, the community. Some commentators believe the law should be designed to ensure corporate social responsibility and impose on the corporate person “a legally-constituted social conscience,” even if it means shareholder profits may not always be maximized. Others disagree, arguing that the state should have no role in enforcing mandatory codes

---

264 Sargent, supra note 239, at 566. Mark Sargent acknowledges that the communitarian vision of the corporation breaks sharply with the shareholder wealth maximization norm that prevails in current economic theory and legal doctrine. Id. at 570. Under the communitarian model, the profit maximization norm is thought to blind corporate managers from pursuing more excellent goods. See HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION 47 (2001) (“By elevating shareholder wealth to the status of the ultimate good, the shareholder model in effect erects a ‘tyranny of foundational goods,’ inhibiting managers from considering more excellent goods except as instruments to increase profits.”).

265 See Sargent, supra note 239, at 567; see also Kennedy, supra note 252, at 59 (arguing that corporations should have “a firm commitment to the common good and a determination to consider the impact of [their] decisions on others, especially employees and the poor”).

266 See Kennedy, supra note 248, at 31 (arguing that businesses must always avoid actions that would harm the community); Long, supra note 23, at 98 (“At the least, the corporation should not produce vice.”).

267 Sargent, supra note 239, at 568.
of honorable or trustworthy corporate behavior. Ultimately, most agree that when it comes to the spiritual elements of the corporate person, the ideal vision of the corporation is one that fosters human flourishing, protects rather than undermines human dignity, and “brings us closer to God’s kingdom.” It is the means and method by which this ideal can be reached that is the subject of debate.

In contrast, some scholars who hold the same religious views believe corporations have grown so powerful and immoral that they cannot be redeemed, and no amount of idealizing will change this fact: “Though there has been much discussion about making corporations moral or socially responsible, their legal DNA prevents them from acting like humans and having the chance to act in moral ways.” Therefore, the argument goes, the legal personhood of corporations should be abolished so that business people will be obliged to assume personal and social responsibility for their own business actions. The hope is that the abolition of corporations will allow businesses to evolve in ways that will be more accountable to the common good. While this view may seem drastic, it has gained increasing support outside of religious circles in the wake of the corporate frauds and scandals that have occurred in the last decade.

268 See Bainbridge, supra note 217, at 893; see also id. at 897 (relying in part on some of Michael Novak’s statements to argue that “minimizing state regulation of corporate governance is essential to the preservation of a free, yet virtuous society”).

269 Naughton, supra note 238, at 72.


271 See id. at 109.

272 See id. at 129.

273 Galvanized by the corporate misconduct underlying the collapse of companies like Enron, a growing movement of organized activist groups, not associated with any particular religion, seeks passionately to eliminate the personhood of corporations in our legal system. They see their cause as similar to that of the abolitionists who worked to end the institution of slavery: “Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.” Molly Morgan & Jan Edwards, Abolish Corporate Personhood, 59 Guild Prac. 209, 214 (2002). Many of these activist groups effectively use the Internet to communicate their message to a worldwide audience. Their websites are often quite comprehensive, linking the reader to numerous books, articles, and sources relating to corporate personhood and its effects on society and the law. See, for example, the websites of the groups ReclaimDemocracy (www.reclaindemocracy.org); Program on Corporations, Law & Democracy (www.poclad.org); Citizens Intent on Reforming Corporate Accountability (www.firstuucolumbus.org); Women’s
B. Comments

Attributing spiritual significance to the corporation creates an ideal vision of what the corporation is and how it should function. The language that is used to speak of corporations in this context is moralistic and philosophical. It seeks to criticize but also to inspire. It seems to share much in common with the stakeholder model of the corporation which views all corporate constituents as having a stake in or a claim on the corporation. Each group has a right not to be treated as a means to an end, but as an integral part of the corporation in which all have an interest. The stakeholder model requires that all stakeholders’ interests must be considered, balanced, and preserved to the greatest extent possible in every action that the corporation takes.

Although the spiritual view of corporations possesses similarities with the stakeholder model, the spiritual approach adds a different element to the analysis of corporations. Rather than viewing the corporation as a collection of various group interests, each of which has a right to be protected, the spiritual approach hesitates to use the terminology of “interests” at all because it reflects a selfish and self-centered orientation toward life. Instead, the spiritual model values the common good of all. “It has an ethical foundation that both the shareholder and the stakeholder models lack: it is founded not on what each group wants for itself, but on what is normatively good for that group and for others.” Those who see the corporation in spiritual terms place primary

---


275 See Freeman, supra note 24, at 56.

276 James Gordley, Virtue and the Ethics of Profit Seeking, in RETHINKING THE PURPOSE OF BUSINESS, supra note 238, at 65, 78.
importance on cultivating spiritual virtues, human flourishing, and the common good of the corporation’s members and society. There is a deeper sense that corporations can and should be “just” and “virtuous” entities.277

As much as advocates of the spiritual model may wish that their views be judged on their intellectual merits regardless of one’s religious beliefs,278 it may be difficult for those who do not share the same faith to accept their vision. Critics may feel that discussions of the spiritual element of corporations amount to sermonizing and moral exhortation without a close connection to the real world of business. Proponents of the spiritual model recognize this as an issue and seek to transform their vision into more concrete and practical terms.279

For my purposes, the fact that corporations can be viewed from a spiritual perspective attests to the complexity of the corporate person. The spiritual approach reveals yet another dimension of the corporation, opening up another lens through which it can be analyzed and ultimately judged or praised. Whether or not one agrees with the teachings of the spiritual view, one can acknowledge that it reflects how pervasively the corporation has captured the minds of not only legal scholars, historians, philosophers, political theorists, sociologists, and psychologists, but also religious thinkers. The corporate person is too important a subject to elude the critical examination of even its possible spiritual dimension and purpose.

In stark contrast to the ideas associated with the spiritual model of corporations, the economic theory of corporations repudiates the belief that corporations can or should have any purpose beyond acting as a contractual center for economic exchanges. The following section describes the neoclassical economic approach to the firm. The economic model of the corporation has been extremely successful in shaping the way the legal academy regards corporations in modern society. It draws upon a methodological individualist conception of human beings that is radically different from the social

277 See Sargent, supra note 239, at 571 n.21 (describing the views of Monsignor John A. Ryan).

278 See supra note 238 and accompanying text.

279 See Sargent, supra note 239, at 592 (acknowledging that “[t]here remains an element of the platitudinous about the CST communitarian vision that needs to be transformed into something more concrete”). Mark Sargent suggests that “[t]here is a great need for theoretical imagination and practical ingenuity” to overcome the difficulties of implementing the goals of the spiritual model in corporate law. Id. Otherwise, the spiritual approach will be nothing other than “a challenging, but ultimately irrelevant set of religious reflections on business organization and behavior.” Id.
conception of human beings so central to the spiritual approach.

VII. ECONOMIC THEORY OF THE CORPORATION

A. Nexus of Contracts Model

The economic paradigm of the corporation relies on a contract metaphor that is rooted in neoclassical economic theory. Under this paradigm, the corporation is merely a fiction that serves as a nexus of contracts among the firm’s various individual participants.280 These “contracts” are not true contracts as defined by law, but the economist’s notion of contracts as reciprocal arrangements involving mutual expectations between parties.281 The human parties are also defined according to the economist’s notion of rational self-interested actors who freely contract according to their own utility calculations.282 The corporation is the center of a mass of contracts between shareholders, managers, employees, creditors, suppliers, and others who come together, as the result of market forces, to gain the benefit of their bargains with each other.

From this perspective, no independent, real corporate entity exists. The idea of a separate corporate person is just a convenient fiction. The corporate entity itself has no precise boundaries, and “it makes little or no sense to try to distinguish between those things which are ‘inside’ the firm . . . from those things that are ‘outside’ of it.”283 As a

280 The “nexus of contracts” terminology first appeared in 1976. See Jensen & Meckling, supra note 25, at 311. There were important previous and subsequent contributions to the economic literature on this concept of the firm. See, e.g., Armen A. Alchian & Harold Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777 (1972); Steven N.S. Cheung, The Contractual Nature of the Firm, 26 J. L. & Econ. 1 (1983); Eugene F. Fama & Michael C. Jensen, Separation of Ownership and Control, 26 J.L. & Econ. 301 (1983).


282 See Phillips, supra note 90, at 439 (observing that under the nexus of contracts theory, the component human beings “are not flesh-and-blood people, but the utility-maximizing rational actors of economic theory”); see also Bratton, supra note 26, at 462 (arguing that the economic theory of the corporation “depends on rational economic actors denuded of significant human characteristics”). This has been the source of some criticism of the theory because it arguably fails to accommodate human beings in their full variety and complexity. See Phillips, supra note 33, at 1111.

283 Jensen & Meckling, supra note 25, at 311; see also Oliver Hart, An Economist’s Perspective on the Theory of the Firm, 89 Colum. L. Rev. 1757, 1764 (1989). Some scholars believe it is better
result, the concept of the distinct corporate person tends to disappear.284

Ownership of the firm also disappears as a meaningful concept.285 Since the organization decomposes into a group of identifiable participants who negotiate an equilibrium position among themselves, no one class of participants, not even the shareholder class, has a right to regard itself as the owner of the corporation.286 The shareholders are just one of the various suppliers of inputs whose rights are determined by the many interrelated contracts making up the corporation.287 That said, the managers are considered the agents of the shareholder principals who agree to bear the residual risk if the firm is not successful.288 In return, the managers’ role is to act in ways that

to use the term “contractual theory” than “nexus of contracts” because the latter might imply “the corporation exists as an entity apart from the contracts among its participants.” Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 Wash. L. Rev. 1, 3 n.1 (1990). They argue there is no conceptual justification for reifying the mass of interrelated contractual relationships that compose the corporation. Id.

284 William T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 Cardozo L. Rev. 261, 265 (1992) (noting that under the contract model, “the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract”); Bratton, supra note 26, at 420; see also Margaret M. Blair & Lynn A. Stout, Specific Investment: Explaining Anomalies in Corporate Law, 31 J. Corp. L. 719, 739 (2006) (criticizing the nexus of contracts model because it fails to tell us exactly where the corporation ends and the rest of the world begins).

285 Eugene F. Fama, Agency Problems and the Theory of the Firm, 88 J. Pol. Econ. 288, 289-90 (1980) (“In this ‘nexus of contracts’ perspective, ownership of the firm is an irrelevant concept.”); see also Bratton, supra note 26, at 420 (“Ownership becomes as irrelevant a concept as the firm entity. The ‘firm’ represents a mere series of contracts joining inputs to produce outputs.”); Lynne L. Dallas, Two Models of Corporate Governance: Beyond Berle & Means, 22 U. Mich. J.L. Ref. 19, 23 (1988) (noting that ownership of the firm does not exist under this model “because no one can own a ‘nexus.’”).


287 See Millon, supra note 11, at 229; see also Bratton, supra note 26, at 420 (“Equity capital, the traditional situs of ownership, devolves into one of many types of inputs . . . . ”).

288 See Blair & Stout, supra note 284, at 725 (describing the views of Frank Easterbrook and Daniel Fischel, who argue that even though the “nexus” may not have an owner, it is still
maximize shareholder interests. The risks that managers will fail to do so generates agency costs that must be constrained by internal and external market forces if the corporation is to produce gains for all of its constituent parties and ultimately for the shareholders as residual claimants.\(^{289}\)

According to the nexus of contracts model, the corporation springs up naturally and spontaneously as a product of private, voluntary actions by people who are free to contract in their own self-interest.\(^{290}\) The corporation is not a metaphysical entity with its own ontological standing, nor is its existence a privilege bestowed by the state. It is a private undertaking by individual citizens. The nexus of contracts model constitutes a modern variant of the aggregate theory of corporate personhood in which the corporation is nothing more than the collection of individual human beings who choose to group together to conduct their business in corporate form.\(^{291}\)

correctly useful to treat the managers as agents of the shareholders who contract to be the firm’s residual claimants); see generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

\(^{289}\) See William T. Allen, Contracts and Communities in Corporation Law, 50 Wash. & Lee. L. Rev. 1395, 1400 (1993) (describing agency costs and the shareholders’ position as principals who bear the residual risk).

\(^{290}\) See Bratton, supra note 26, at 451.

\(^{291}\) See discussion of aggregate theory supra Part II.B. In this sense, the foundational concepts of the nexus of contracts model are not necessarily novel. Although the nexus of contracts theory is regarded as a modern-day economics-based theory, early 20\(^{th}\) Century thinkers about the corporate form also made use of contractual concepts when discussing corporate personhood. For example, in 1911, W.M. Geldart’s discussion of the legal personality of corporations utilized language that, in hindsight, resonates with the nexus of contracts model:

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

Geldart, supra note 67, at 97-98; see also Bratton, supra note 26, at 408 n.3 (asserting that many of the component notions of the nexus of contracts theory were present during the 17\(^{th}\) and 18\(^{th}\) Centuries and therefore are not “modern” concepts).
This model of the corporation is based on a methodological individualist conception of human beings and their behavior. Under this view, the basic unit of analysis for any economic, political, or legal theory is always the atomistic individual, never the group.292 The premise is that “society is constituted of autonomous, equal, units, namely separate individuals, and that such individuals are more important, ultimately, than any larger constituent group.”293 We are each first of all individuals who then enter into various agreements with each other in society.294 Individuals are ontologically prior to corporations, which, as fictions, have significance only because of

292 See Horwitz, supra note 40, at 181; Thomas A. Smith, The Use and Abuse of Corporate Personality, 2 Stan. Agora 69, 71 (2001) (describing methodological individualism as “the idea that the only real entities to be studied in social science are human individuals and that everything can ultimately be explained in terms of their behavior”). According to Roger Scruton, the emphasis on the individual is found in political philosophies based in natural law: “Natural-law theory tends to employ an abstract (as we should say Kantian, or Rawlsian) conception of the individual agent, who is presented as the sole possessor of rights and duties” which are derived “from his faculty of choice, and with the benefit of no institution.” Scruton, supra note 69, at 260-61. For an account of methodological individualism, see STEVEN LUKES, INDIVIDUALISM 110-22 (1973).

293 ALAN MACFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM 5 (1978); see also May Brodbeck, Methodological Individualisms: Definition and Reduction, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 280 (May Brodbeck ed., 1968) (discussing methodological individualism); J.W.N. Watkins, Methodological Individualism and Social Tendencies, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES, supra, at 269, 270-71 (“Every complex social situation, institution, or event is the result of a particular configuration of individuals. . . . [W]e shall not have arrived at rock-bottom explanations of such large-scale phenomena until we have deduced an account of them from statements about the dispositions, beliefs, resources, and inter-relations of individuals.”).

294 See SOLOMON, supra note 168, at 77. The formation of society itself can be seen as the product of voluntary arrangements, as described by social contract theory. See id.; Ruskola, supra note 197, at 1622 (“In our legal culture, contract constitutes the dominant paradigm of private ordering which is then projected onto the public sphere as a hypothetical ‘social contract.’”); see also DONALDSON, supra note 91, at 39-41 (discussing social contract theory as contemplated by Hobbes, Locke, and Rousseau). Thomas Donaldson notes that under the social contract theory as expressed by Hobbes and Locke, civil society is formed by agreement of its citizens in order to avoid undesirable outcomes. DONALDSON, supra note 91, at 39. Elizabeth Wolgast criticizes this social contract concept and the atomistic vision associated with liberal individualism. She characterizes it as “a vision whose independent, competitive creatures have only their protective self-interest as a motive to form a community at all.” WOLGAST, supra note 97, at 147.
the freely contracted arrangements of their human constituents. Corporations are nothing but ensembles of individuals, apart from whom corporations would never exist and corporate actions would never occur. Human beings are seen as rational actors who are legitimately driven by their own self-interests and who seek to maximize their preferences. This individualist view is linked to classical liberalism, focusing on individual freedom, rather than utilitarian social maximization. The individualist conception is appealing because of its emphasis on autonomy, self-realization, and

295 See Scruton, supra note 69, at 254 (describing the “ontological priority” thesis that we can have human beings without corporations, but no corporations without human beings); see also McMahon, supra note 99, at 541 (discussing the ontological status of organizations and describing “ontological individualism” which denies the existence of social objects distinct from the individuals who comprise them).

296 Gunther Teubner notes that economic models like the nexus of contracts theory, which adhere strictly to methodological individualism, make it problematic to accept the collective identity of organizations today. Gunther Teubner, Enterprise Corporatism: New Industrial Policy and the “Essence” of the Legal Person, 36 Am. J. Comp. L. 130, 131-32 (1988); see also WERHANE, supra note 48, at 39 (arguing that the corporation “is an eliminatable subject because without persons, corporate ‘actions’ literally could not occur”); McMahon, supra note 99, at 541 (describing the methodological individualist view that “all social phenomena can be explained adequately by explaining the behavior of the individuals involved in them”).

297 See Fitzgibbon, supra note 239, at 1252; see also Bratton, supra note 26, at 429 (observing that under the nexus of contracts model, “[c]ooperation becomes a means to the end of productivity” and “[n]o other values exist in group economic life other than self-interested rationality.”).

298 See J. William Callison, Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded, 26 J. Corp. L. 951, 975 (2001); see also Bratton, supra note 26, at 451 (“This conception unequivocally favors individual values. Communitarian norms disappear since they serve neither as instruments for productivity nor as appropriate ethical responses in the market-like world envisioned.”). The liberal individualism that underlies the nexus of contracts model has links to F.A. Hayek’s political theory which envisions the creation of spontaneous social orders when individuals are free to make their own market choices and contracts. All of society benefits when individuals are afforded such autonomy without state interference. See DONALDSON, supra note 91, at 70 (discussing Hayek’s philosophy); Bratton, supra note 26, at 440 (same). Hayek and Sir Karl Popper are considered the founding fathers of methodological individualism. See Gunther Teubner, How the Law Thinks: Toward a Constructivist Epistemology of Law, 23 Law & Soc’y Rev. 727, 731 (1989).
responsibility, as well as its deep commitment to humanism. It presumes that people are and should be free to make their own choices about how to live their lives and achieve their goals.

Normatively speaking, the nexus of contracts theory not only describes corporations as the center of interrelated contracts between freely contracting individuals, but also asserts that corporations should be permitted to function freely in that way. The private individuals who voluntarily enter into these contracts should be given wide discretion to order their affairs in whatever manner they choose. The role of the law should be limited to providing a set of non-mandatory default rules that the parties can change by voluntary agreement if they desire. These default rules should be enabling rules that reflect the terms the parties, as rational, informed actors, would have bargained for hypothetically if they could have done so in a costless setting.

---

299 It has been suggested that many in the contemporary legal academy are drawn to liberal individualism, and therefore drawn to the nexus of contracts model because of its intrinsic liberal underpinnings. See Bratton, supra note 26, at 407; see also David Millon, Communitarians, Contractarians, and the Crisis in Corporate Law, 50 Wash. & Lee L. Rev 1373, 1388 n.43 (1993) (expressing concern that most elite law school professors “appear to be more or less wedded to the political value judgments that underlie the neoclassical economic approach (i.e., contractarian) to corporate law”).

300 See Gordon, supra note 281, at 1550.

301 See Butler & Ribstein, supra note 283, at 7-8. In this liberal model, the most important laws are those that protect private property rights and enforce contracts. See Allen, supra note 289, at 1396. The greatest legal value, according to this view, is human liberty, and the greatest evil is oppression by the state. Id.; see also Callison, supra note 298, at 977 (“[L]iberalism values rules which permit people to live their own lives based on their own preferences, structure their relationships with others, and define their duties to them by means of consent. Contract is a critical focus [because] it is through contract that autonomous individuals define their relationships with others.”).

302 See Lucian A. Bebchuck, Foreword: The Debate on Contractual Freedom in Corporate Law, 89 Colum. L. Rev. 1395, 1396-97 (1989) (describing the view that “corporations should largely be free to opt out of corporate law rules” and that those rules should “facilitate the private contracting process by providing a set of nonmandatory ‘standard-form’ provisions”); Fred S. McChesney, Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg, 89 Colum. L. Rev. 1530, 1537-38 (1989) (“Any standard-form term supplied by the law must be an option that parties can use if they want, but which they are free to contract around if they prefer.”); see also EASTERBROOK & FISCHEL, supra note 288, at 15; Larry E. Ribstein, The Mandatory Nature of the ALI Code, 61 Geo. Wash. L. Rev. 984, 989-91 (1993).
freely contract around these rules and set the terms of their own interactions as they see fit. There should be no government policing of their relationships and contracts; rather, the state should yield to freedom of contract principles. The corporation is viewed as a private entity for the benefit of private parties.

From this standpoint, corporations should be free to do what they do best, generate profits for shareholders. Under the “shareholder primacy” or “profit maximization” principle, the interests of other constituencies must be incidental or subordinate to the corporation’s primary concern for maximizing shareholder wealth. Non-shareholder constituents can all contract for their own protections. It follows then

---

303 See EASTERBROOK & FISCHEL, supra note 288, at 15 (“The normative thesis . . . is that corporate law should contain the terms people would have negotiated, were the costs of negotiating at arm’s length for every contingency sufficiently low.”); Gordon, supra note 281, at 1550-51 (describing the “normative contractarianism” principle that “the content of corporate law . . . should ideally be the results that typical parties to the contract comprising the corporation would have reached if bargaining were costless”); see also Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 89-91 (1989) (discussing the use of the concept of what the parties “would have wanted” to fill gaps in incomplete contracts).

304 The shareholder primacy principle is widely accepted as a dominant theme of corporate law. See Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. Corp. L. 637, 646-47 (2006). A famous judicial articulation of the shareholder primacy principle is found in Dodge v. Ford Motor Co. “A business corporation is organized and carried on primarily for the profit of the stockholders.” 170 N.W. 668, 684 (Mich. 1919). Some have argued that market jurisdictions worldwide have all arrived at, or are in the process of converging toward, the same standard model of shareholder primacy because of its merits. See Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 439 (2001). But see Adam Winkler, Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History, 67 Law & Contemp. Probs. 109, 112 (2004) (arguing that “[f]ree market principles and shareholder primacy have not won the day; they exist in corporate law alongside the many other areas of the law of business that do interfere with the free market . . . in the interests of corporate stakeholders”). Other commentators argue that the shareholder primacy principle is a fallacy and that arguments in support of it are flawed. See, e.g., Ian B. Lee, Efficiency and Ethics in the Debate about Shareholder Primacy, 31 Del. J. Corp. L. 533, 533 (2006) (setting out to explain “why corporate law does not and should not unqualifiedly endorse shareholder primacy”); Lynn A. Stout, Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 S. Cal. L. Rev. 1189, 1190 (2002) (arguing that “some of the most frequently raised arguments for shareholder primacy . . . are, as a positive matter, inaccurate, incorrect, and unpersuasive”).

that corporations should not be saddled with legal, social, or moral responsibilities to non-shareholder constituents. In fact, according to the nexus of contracts model, it makes little sense to talk about social, moral or ethical duties of corporations at all. Because the corporation is only “a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit, . . . [it] is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.” 306 Only the individuals themselves have social responsibilities and ethical or moral obligations.307 When the corporation maximizes profits, it fulfills all of its so-called social and moral obligations.308 By maximizing profits, which creates wealth for the entire economy and promotes efficient resource allocation, the corporation ultimately benefits all of its constituencies and society as a whole.309 The more profits a company makes, the more those profits can


307 The nexus of contracts theory does not accommodate the concepts of corporate moral agency or personhood. It is an economic theory that understandably speaks in economic terms, not in the language of moral philosophy. Yet, the theory can be used to affirm the conclusions of those who argue against the moral responsibility of corporations from a moral philosophy standpoint. See discussion of philosophical arguments rejecting corporate moral personhood supra Part III.A.

308 Milton Friedman famously argued that “there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . .” MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962). Some commentators argue that wealth maximization itself can be the most direct route to achieving a variety of moral ends. See, e.g., Stephen M. Bainbridge, Law and Economics: An Apologia, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208, 210-12 (Michael W. McConnell et al. eds., 2001).

309 See Michael E. DeBow & Dwight R. Lee, Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation, 18 Del. J. Corp. L. 393, 416-19 (1993); see also Leo E. Strine, The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There any There There?, 75 S. Cal. L. Rev. 1169, 1170 (2002) (describing the belief that “a stockholder-focused approach will, in the long run, generate the greatest benefit for corporate employees and the societies in which corporations operate”). Christopher Stone refers to this as the “polestar” argument because its emphasis on shareholder primacy is not based on
feed back into the system, providing jobs for workers, goods and services for consumers, prosperity for communities, and strong capital markets for the continuous economic growth of society.\textsuperscript{310} Thus, the corporation’s main purpose should be to increase the returns to its shareholders, and the law should be structured so as not to distract corporations from that goal.

\textbf{B. Comments}

Although the nexus of contracts theory is the dominant legal academic paradigm of the corporation and corporate law,\textsuperscript{311} it is certainly not without its critics.\textsuperscript{312} Some argue that the theory assumes perfect, complete, discrete, and purposive contracting by supposing obligations to the shareholders per se, but on the belief that shareholder primacy “chart[s] a straight course toward what is best for the society as a whole.” STONE, supra note 40, at 85.

\textsuperscript{310} See EASTERBROOK & FISCHEL, supra note 288, at 38; see also Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Organization, 149 U. Pa. L. Rev. 2063, 2065 (2001) (describing the utilitarian basis for the shareholder wealth maximization norm).

\textsuperscript{311} See Allen, supra note 289, at 1400 (characterizing the nexus of contracts theory as the “dominant legal academic view”); Winkler, supra note 304, at 122 (describing the nexus of contracts model as a framework “so successful that it can be fairly said to dominate the field of corporate law scholarship”).

\textsuperscript{312} See, e.g., Victor Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 Colum. L. Rev. 1403 (1985); Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 Mich. L. Rev. 1 (2004); Charles M.A. Clark, Competing Visions: Equity and Efficiency in the Firm, in RETHINKING THE PURPOSE OF BUSINESS, supra note 238, at 81; Melvin A. Eisenberg, The Conception That The Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L. 819 (1999); Lyman Johnson, Individual and Collective Sovereignty in the Corporate Enterprise, 92 Colum. L. Rev. 2215 (1992); Alan Wolfe, The Modern Corporation: Private Agent or Public Actor?, 50 Wash. & Lee L. Rev. 1673 (1993). See generally PROGRESSIVE CORPORATE LAW, supra note 193. Many critics nonetheless acknowledge the significant contribution the contractual paradigm has made to corporate law. See, e.g., Hazen, supra note 231, at 318 (“I am not suggesting that adherents to a law and economics analysis have not made significant contributions. Indeed, economic analysis must play a significant role in shaping our corporate law.”); Johnson, supra, at 2217 (arguing that even though “economics has not, will not, and should not, capture corporate law,” the law of corporations “has forever been changed (and bettered)” by the infusion of the economic model of the firm).
rational economic actors, but, in the real world, contracts can and often do fail due to the bounded rationality and intrinsic limits on the problem-solving abilities of human parties.\textsuperscript{313} Others believe the theory fails to acknowledge that private contracting and economic markets operate against a backdrop of public law, and that the state is always a non-neutral party to the corporate contract.\textsuperscript{314} Still others speculate on a deeper level that the acceptance of neoclassical economic theory with its emphasis on the pursuit of self-interest and profit maximization is, in part, responsible for such societal harms as the failure of Enron and other corporate catastrophes.\textsuperscript{315}

What seems to bother most of the critics of the nexus of contracts theory is that it is incomplete. It offers too narrow a focus, too simplistic a response to the question, what is a corporation? Although the theory has descriptive and normative force, it still seems to present, for many observers, an impoverished way of explaining much of what goes on in corporate life on a daily basis.\textsuperscript{316} It does not give significance to the social, moral, and

\textsuperscript{313} See Bratton, \textit{supra} note 26, at 448-49; Bratton, \textit{supra} note 237, at 183-84.

\textsuperscript{314} See Kent Greenfield, \textit{From Metaphor to Reality in Corporate Law}, 2 Stan. Agora 59, 63 (2001) (“Even the so-called laissez-faire marketplace is shot through with government, and even the most basic common law entitlements are functions of legal rules.”); Hazen, \textit{supra} note 231, at 281 (“The current contractarian view, however, disregards the fact that the sovereign is a party to [the] corporate contract.”); Thomas W. Joo, \textit{The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence}, 79 Wash. U. L.Q. 1, 64-65 (2001) (“In reality, the market operates against a complex background of legal rules. The fact that these rules resist private ordering adds force to the . . . argument that the state cannot remain neutral with respect to the allocation of entitlements.”).

\textsuperscript{315} See Cynthia A. Williams, \textit{A Tale of Two Trajectories}, 75 Fordham L. Rev. 1629, 1649-50 (2006). There is deep concern that the concept of social and moral obligation is undermined by the law and economics theories currently taught in law schools. \textit{Id.} at 1659; \textit{see also} James Boyd White, \textit{How Should We Talk About Corporations? The Languages of Economics and of Citizenship}, 94 Yale L.J. 1416, 1423 (1985) (arguing that the economic model of wealth underlying the nexus of contracts theory does not account for the true value to the world of wealth that is not reducible to contract exchanges: “open spaces; clean air; good health; an educated population engaged in fulfilling work and leisure; the sense that we all have a stake in the quality of our common life, which alone can make streets safe and clean; and so on. That form of social and cultural wealth is the most valuable kind for all of us . . .”).

\textsuperscript{316} Many commentators argue that the contractarian view of the corporation does not account for real world practice.

People working together in the business do not help each other, work out problems together, grow in competence through shared experience and so on because they have
political aspects of the corporate person. Ultimately, the fundamental dissatisfaction that
many people have with the economic model is that it provides a “thin view of a much
more complicated reality.”317

This complaint, however, can be lodged against any one of the personhood
theories of the corporation discussed in this Article. By itself, no one theory of the
corporate person can adequately and comprehensively explain the nature, role, and
purpose of the corporation. The corporation is at once an economic institution, a political
force, a social entity, a legal actor, a potential moral agent, and more. Thus, the
personhood of corporations is necessarily multi-dimensional. Each theory looks at the
corporation from a different angle, and each highlights a different side of the entity. The
economic nexus of contracts theory of the corporation is an especially useful tool because
it focuses our attention on critical aspects of the corporation. But it is only one tool, and
there are many others.

Those who favor the economic theory of the corporation believe no other theory
of the firm presents a credible alternative to the unitary nexus of contracts model. That
belief may have some validity, but it misses the point to some degree. It assumes we
prefer to have a single theory that can explain and predict corporate behavior. If we must
choose one or the other, the argument goes, the nexus of contracts model is “better” than
all others. I am not convinced such a choice needs to be made. Why do we have to have
a single, unitary theory of the corporate person? Is it really necessary to say that at
bottom the corporation is essentially a nexus of contracts, or essentially a legal fiction, or
especially a social institution, or essentially anything? In my view, the multi-
dimensional nature of the corporate person defies unitary classification. As the next
section argues, the corporation is an extremely complex entity, and, if we are to
understand its nature and purpose in our world, we must be open to seeing it from many
different vantage points.

---

317 Kennedy, supra note 248, at 24.
VIII. MULTI-DIMENSIONAL MODEL OF THE CORPORATE PERSON

As we have seen, the corporate person is more than merely a legal actor. Moral philosophy has suggested the possibility that corporations are in fact moral persons with the moral responsibility to act in ways that are just and right, and to conduct their business activities in accordance with moral norms that go beyond what the law requires. Organization theory highlights the sociological and psychological dimensions of organizational behavior, demonstrating that the corporate person can have its own character and culture, through which it not only exerts considerable influence over its internal members, but also maintains a certain image and an identifiable presence in society. Political theory and philosophy shed a different light on the corporate person. The lighting in one political pluralist setting casts the corporate person in the role of a mediating institution, serving as a buffer between the individual and the coercive power of the state. The corporation is viewed as a voluntary group association that empowers individuals and promotes democratic self-government. However, the lighting in a contrasting pluralist setting reveals a corporate person who wields just as much power as the state. This political power can pose a threat to democracy if left unchecked, so the state must serve as a countervailing force to protect individuals from corporate power. Religious thinkers focus on an entirely different aspect of the corporate person and see it as a center for the spiritual flourishing of its members and society. By cultivating virtues and the common good in a manner that is unique to the corporate person, the corporation takes on theological significance. Economic theory emphasizes the contractual exchanges that are so critical to corporate activity; the corporation resembles a marketplace where individuals draw mutual benefits through their bargains with each other.

318 See discussion of legal theories of the corporate person supra Part II. Even as a legal actor, the corporation can be characterized in different forms, e.g., a real and separate entity, or an aggregate of all of its individual human members, or a purely artificial creature of the state. See id.

319 See discussion of the moral dimensions of the corporate person supra Part III.

320 See discussion of the organizational, sociological, and psychological dimensions of the corporate person supra Part IV.

321 See discussion of the political dimensions of the corporate person supra Part V.

322 See discussion of the spiritual aspects of the corporate person supra Part VI.

323 See discussion of the economic theory of the corporate person supra Part VII.
Adopting a multi-dimensional model of the corporation means that we stop seeking to accept or devise a single theory of the corporation that utilizes only one way of viewing corporate activity. All of the different theories of the corporation reveal different dimensions of the corporate person. The goal should not be to oppose them against each other as if one might ultimately triumph over the other, but for each to inform and challenge the others in a perpetual search for the truth. When the various academic disciplines are combined, they capture a picture of the corporation that is a composite of all the various images. By simultaneously using these different modes of comprehending the corporation, we move closer to discovering what the corporate person actually is and how we as natural persons are to relate to it.

The philosophy of human personhood is illuminating in this context. Philosophers have concluded that there really is no such thing as the concept of the human person. This is because we want the concept of personhood to fill so many different functions, but the variety of functions that the concept of a person performs cannot plausibly be combined in a single theory. “At most, one might settle for a


325 See Rorty, supra note 324, at 35. Rorty describes no less than seven important functions that the concept of the person fulfills. See id. at 22-35; see also Margaret J. Radin, The Colin Ruagh Thomas O’Fallon Memorial Lecture on Reconsidering Personhood, 74 Or. L. Rev. 423, 424 (1995) (describing different perspectives on personhood); Margaret J. Radin, Property and Personhood, 34 Stan. L. Rev. 957, 962-65 (1982) (discussing several different philosophical theories of personhood). The concept of the person is tied to, but distinguishable from, the concepts of the self and of the human being. See David Wiggins, The Person as Object of Science, as Subject of Experience, and as Locus of Value, in PERSONS AND PERSONALITY, supra note 30, at 56, 57; see also TILL VIERKANT, IS THE SELF REAL?: AN INVESTIGATION INTO THE PHILOSOPHICAL CONCEPT OF ‘SELF’ BETWEEN COGNITIVE SCIENCE AND SOCIAL CONSTRUCTION (2003) (discussing the concept of the self from multiple academic perspectives). The concept of the person is elusive because it depends in part on one’s cultural environment and use of language. Philosophers have noted that different societies, with their respective cultures and systems of law, religion, customs, social structures, and mentality, view personhood and selfhood in contrasting ways. See, e.g., Rom Harre, Persons and Selves, in PERSONS AND PERSONALITY, supra note 30, at 99, 99-110; Marcel Mauss, A Category of the Human Mind: The Notion of Person; The Notion of Self, in THE CATEGORY OF THE PERSON: ANTHROPOLOGY, PHILOSOPHY, HISTORY 1, 1-25
heterogeneous class, defined by a disjunction of heterogeneous conditions.”\textsuperscript{326} Even if we could find a common denominator underlying all the different theories of human personhood, it would be so general that it would not be very helpful. As a result, we must conclude that “there is no such thing as the concept of personhood, that there are only highly regionalized functions that seem, erroneously, to be subsumable in a structured concept.”\textsuperscript{327} A man can be seen and spoken of as occupying different identities for different functions: he is a shrewd businessman, a conscientious neighbor, a patriotic citizen, a Christian believer, an affectionate husband, a strict father, and an amateur triathlete. These are all aspects of the same person. Even so, the corporate person can be seen as performing different functions depending on what or whom it is in relation to, and these are all aspects of one and the same entity. Just as there is no way of connecting the biological, philosophical, moral, political, social, spiritual, and legal notions of human persons in one all-encompassing theory, we find it equally difficult to compose a single theory that accounts for all the myriad ways in which the corporate person is perceived.

One might argue, however, that the human person is far more complicated a subject than the corporation, which is simply a human creation designed to perform only limited and defined functions. From this view, while it may be impossible to settle on a single theory of the concept of the human person, it is surely feasible to construct a unitary theory of the corporate person, given the more simplistic nature of the corporate entity. This argument is not convincing. If human beings are so complex that they defy easy classification into one concept of the person, the corporation is even more so as it is made up of complex human beings plus their ever shifting interrelationships with each other. The collective actions and goals of human persons create another layer of complexity and identity that makes it much more difficult to classify the corporate person.

The concept of the corporate person depends on a mass of legal and non-legal considerations: philosophical, moral, metaphysical, political, historical, sociological, psychological, theological, and economic. The corporation as viewed from one of these schools of thought is not the same corporation as viewed from the others. Of course, there is always the fear that combining academic disciplines will serve only to jumble disconnected terms together and muddle the picture. Joining concepts of the person from different disciplines with completely different meanings may be unhelpful if it causes

\textsuperscript{326} Rorty, supra note 324, at 35.

\textsuperscript{327} Id. at 38.

greater confusion when these terms and concepts conflict. Nonetheless, it is worth the risk because it gives us a more accurate view of a complicated reality. The “neat division of labor [among academic disciplines] was never intended to suggest the neat division of reality.” By narrowly limiting ourselves to certain disciplinary viewpoints, we face a danger far greater than a muddled picture. We risk losing our ability to view reality in all of its fullness and to describe it in accurate terms: “Increasingly, it seems, academics expect reality to conform to our own discipline’s necessarily limited models, rather than trying to synthesize knowledge among disciplines to bring the models closer to reality. This is a variation of the problem: when you have but a hammer, [you think] everything’s a nail.”

We have already seen that the various theories of the corporate person exist in tension with each other. The consequences of relying more on one theory than another can be great because each one supports its own normative political or social philosophy. The deep dichotomies between viewpoints reveal conflicting ideals. For example, theories driven by a methodological individualist outlook tend to see the corporation as an aggregate of individuals and place importance on protecting the rights of those individuals. The nexus of contracts theory falls into this category. By the same token, theories that emphasize methodological individualism conclude that corporate responsibility ultimately boils down to the responsibility of individual members alone. Moral philosophical theories that deny any corporate moral personhood reflect this view.

In contrast, theories that see humans as inherently social beings who naturally form groups tend to see the corporation as a separate entity with its own group identity. Political pluralist theories endorse this concept and give corporations an important role in promoting democracy and protecting individuals from the power of the state. At the same time, accepting the corporation as a distinct entity induces the belief that the corporation itself is responsible for certain behaviors. Theories in organizational behavior and business ethics subscribe to this idea when they hold corporations responsible for corporate cultures that influence the actions of individual members.

In all of these examples, determining which model is appropriate depends on whether one prefers to see human beings as atomistic individuals or as inherently social

328 See Christopher D. Stone, *From a Language Perspective*, 90 Yale L.J. 1149, 1159 (1981) (noting the dangers of distortion of meaning when terms from other academic disciplines are imported into discussions of the law).


330 *Id.* (emphasis added).
animals. That dichotomy undoubtedly produces conflict, but it is not ultimately irresolvable. We might be inclined to say that human beings, with their complex nature, fit both paradigms to some degree, and therefore, corporations as even more complex entities, have many of the properties described by the different theories in similarly varying degrees.

I do not argue that the simultaneous juxtaposition of all of the theories of corporate personhood will be without contention and controversy. There will be, as there always has been, discord among the contrasting normative implications of the various theories. But the more complete a picture we have of the subject of debate, the more informed the debate will be. In my mind, there is no one “right” or “best” description of the corporate person for all purposes and for all time. The corporation is a constantly evolving entity that shapes and is shaped by society’s shifting views of the nature of corporate life. Who is to say that the dichotomies and conflicts embedded in current theories of the corporate person will always exist? Our circumstances, our economy, our political structures, our laws, our belief systems, and our culture can change and, with them, our view of corporations. The corporate person is malleable, rather than fixed, and its role in our society is, in part, a product of our own constantly changing moral, legal, philosophical, and political imagination.

What does all of this mean for the law? Just as corporations evolve and our theories of corporations change, the law must develop in a continuously dynamic way. The law is not fixed, nor should it be. As many jurists have noted, the genius of the law is that it “is not simply a deductive exercise” or “an inevitable working out of anything,” but rather, it is “a living organism, ever growing and expanding to meet the problems and needs of changing social and economic conditions.” As we formulate

331 It may, in fact, turn out that the different theories of the corporation constitute answers to different questions or may be tools for different tasks. Cf. HARTMAN, supra note 164, at 112 n.9 (citing EDWIN M. HARTMAN, CONCEPTUAL FOUNDATIONS OF ORGANIZATIONAL THEORY (1988)). All of the theories might legitimately be used at different times for different purposes.

332 Allen, supra note 284, at 278. Chancellor Allen concludes that the law of corporations must be “worked out, not deduced, [and] [i]n this process, efficiency concerns, ideology, and interest group politics will commingle with history . . . to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more.” Id. at 281. Many commentators agree that the law does not deduce or discover legal concepts. Instead, it makes the rules that then help shape economic reality. See Warren J. Samuels, The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language, in CORPORATIONS AND SOCIETY, supra note 21, at 113, 126.

333 Russick v. Hicks, 85 F. Supp. 281, 285-86 (W.D. Mich. 1949). This is the view that many
laws that regulate corporate activity, we must remain flexible and adaptable as various theories of corporations bring different issues to light. The law, in order to balance the private rights of individuals with the legitimate public concerns of society, should be sensitive to the multi-dimensional nature of the corporate person and the different ways in which it can be viewed.

Some may object to this approach because the inevitable clash of theories can make the construction of law difficult and can lead to inconsistencies. Indeed, some commentators bemoan the fact that the body of law with respect to corporate legal personhood often seems incoherent and contradictory. There is a sense that judicial use of corporate legal personhood theories results in post-hoc rationalizations for chosen outcomes and legal reasoning that is purely result-oriented. The competing theories of the corporation contribute to the indeterminacy of the law, and this is perceived as being arbitrary and unjustified. Some commentators imply that we should adopt a single, coherent theory of the corporate person that, when methodically applied, will produce

---

334 Most commentators find this to be especially true in the constitutional law arena. See, e.g., Michael D. Rivard, Comment, Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species, 39 UCLA L. Rev. 1425, 1466 (1992) (asserting that “the law of corporate personhood conflicts with itself: corporations are entitled to some liberty rights but not others, and the Court has offered no clear guidelines to support these distinctions”).

335 See, e.g., Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction, 114 Harv. L. Rev. 1745, 1754 (2001) (noting that “the various theories of the person that American courts can deploy permit virtually any result” raising the question whether “corporate personhood jurisprudence is purely result oriented”); see also Kranich, supra note 60, at 103 (arguing that the metaphors of corporate theory “are conclusory and serve as a mere justification rather than a method of analysis”); Rivard, supra note 334, at 1451 (arguing that “the theories of personhood used by the Court are merely post hoc rationalizations supporting purely pragmatic results”).

336 John Dewey criticized the fact that there seemed to be no clear-cut logical or practical line between the different theories of personhood, and he argued that “[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends.” Dewey, supra note 5, at 669.
clear and consistent rules of law.  

The problem with this viewpoint is that it misperceives both the value of indeterminacy in the law and the advantage of having multi-dimensional theories of the corporation. The law retains power and legitimacy precisely because it does not emphatically state: “the corporation is X.” The conflicting themes that underlie the theories of the corporation – real entity v. aggregate, contract v. concession, individualism v. sociality, public v. private, shareholder primacy v. common good – all exist in constant opposition. They produce contradictory visions of corporate life. However, the “tendency toward contradiction should be accepted, not feared. . . . The contradictions are wholesome. Studying and reflecting on their interplay in the law enhances our positive and normative understanding.”

The corporate person is a complex entity that incorporates all of these contradictory concepts. It cannot, nor should it, be reduced to a single simplistic theoretical framework that would necessarily be incomplete. A multi-dimensional approach might make for inconsistent law, but it recognizes the reality of the extraordinary and multi-faceted nature of the corporation. “The flaws of inconsistency are far less serious than those of unreality.”

Indeterminacy is built into the law to allow for selective application of different theories of the corporate person, depending on the situation and the issues to be decided. Because the corporation is a bundle of contrasting and coinciding concepts, corporate law must mediate between the various conceptual viewpoints. When a problem occurs that raises two valid but inconsistent normative demands, mediation is required, and choosing

---

337 See, e.g., David Graver, Comment, Personal Bodies: A Corporeal Theory of Corporate Personhood, 6 U. Chi. L. Sch. Roundtable 235, 237 (1999) (arguing that “the extent to which corporations have a right to constitutional protections cannot be established without a theory of corporate personhood”); Note, supra note 335, at 1759 (“The doctrinal discord in the law of the person results largely from the lack of a coherent theory of the person.”).


339 Bratton, supra note 26, at 464-65.

340 Wolfe, supra note 312, at 1676. Clear, simple rules of law that are fixed and consistent may offer predictability and stability, but they can also stifle innovation, collaborative problem solving, beneficial negotiations, wealth-maximizing trades, and the operation of multiple forces to resolve socio-legal problems. I am indebted to Tony Arnold for emphasizing this important point. See, e.g., Craig Anthony (Tony) Arnold, Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake, 4 Wyo. L. Rev. 1, 34-39 (2004) (arguing that the role of environmental law is to upset the status quo and thereby encourage negotiation, innovation, and flexible problem solving).
between the two is ultimately a matter of judgment. Here is where the law benefits from drawing upon a multi-dimensional view of the corporation. This Article recommends that corporate law adopt a broader, more flexible totality of the circumstances approach to legal decision-making and problem-solving. By considering the descriptive and normative components of different theories of the corporate person at once, the law can hold a richer, more informed conception of the corporation. Equipped with this broader perspective, the legal decisionmaker is able to render a judgment of high quality, rather than a judgment that reflects only a narrow set of concerns. To aim to adopt a clear-cut, unitary theory of the corporation is to close oneself off to the possibility of drawing on the insights of different theories even as they compete. Thus, the indeterminacy of the law should not be regarded as theoretical failure, but as the beneficial result of a more open-ended approach to corporate personhood.

As theorists, we often strive for coherence and consistency, but perhaps we need to find a way to be more comfortable with ambiguity and conflict. The different spheres of corporate personhood each have a measure of legitimacy. Although they highlight separate aspects of the corporation and even conflict at times, they work together in tandem to give us a more accurate picture of the corporation and its role in society. If we want to deepen our understanding of the corporation, we must be willing to analyze it from diverse viewpoints. We might all benefit from moving toward a multi-dimensional view of the corporate person, rather than insisting on the formulation and acceptance of a single theory that will describe the nature of corporations consistently in all circumstances. We should adopt a more nuanced, multi-faceted, and perhaps “messier” model of the corporation, and we should do so, not with a sigh of resignation or defeat in that we could not compose a more streamlined and tidy theory of the corporation, but with a comfortable sense of satisfaction in knowing that the complex nature of corporations deserves no less than a multi-dimensional definition of the corporate person.

**IX. CONCLUSION**

The large corporation in modern society is a phenomenal entity. As a human creation, it has changed our world, and it has changed us. Some of these changes have been for the better. Others have been for the worse. Nonetheless, it is hard to imagine a world today without the corporation. In our industrialized economy, we demand and are

---

341 See Bratton, supra note 237, at 214. “The great normative decisions in corporate law occur at these meditative junctures.” Id.

342 See id. This may lead to privileging different concepts at different points, but this is the nature of mediation. See Bratton, supra note 26, at 465.
given a wide array of products, most of which are technologically and logistically impossible to bring to market without the resources and expertise of large corporate entities. Absent the diversity of goods and services provided by corporations in our current society, our quality of life would not be what it is. Our medications and health care would be less advanced, our houses, appliances, and utilities would be more primitive, we would probably travel less, know less about the world, and live less sophisticated lives. At the same time, we would probably have fewer environmental disasters, less resource degradation, and lower levels of occupational hazards.

The place of corporations in our society and in our law has always been deeply ambiguous. Corporations have been called the “angels and devils” of our economy and politics. We fear their bigness, their power, and complexity. “Yet we also plainly want bigness. We feel that we need it; above all, we irresistibly patronize it.” Perhaps it is this deep and intractable dissonance that explains why “our law and our society [has] been schizophrenic on the subject of corporation law for a long time.” We want the corporation to fill multiple roles and serve many different purposes simultaneously. We see in it a creature that is capable of acting in and through several planes at once, which makes it difficult to define it in a coherent and comprehensive way.

The corporation is, of course, a fictional legal person with the capacity and standing to do the things that legal actors are entitled to do. To define the corporation as only a legal person, however, is to overlook the many other personas of the corporation that cannot be described in legal terms. As this Article has demonstrated, the corporation can also be spoken of in language that is derived from philosophy, moral theory, political science, sociology, psychology, organizational theory, theology, and economic theory. This list is not exhaustive. The corporation is a unique entity that can be studied under multiple disciplines, each revealing a different and significant aspect of the corporation’s personality.

Commentators have lamented that there is no one answer to the “endlessly fascinating but inevitably indeterminate question of corporate personhood.” The fact


344 Id. at 157; see also Samuels & Miller, supra note 35, at 4 (“We thus appear to want things both ways: we know, at least intuitively, about the power of business and fear it; at the same time, few wish to forgo the bounty that corporate enterprise provides.”).

345 Allen, supra note 284, at 264.

346 Millon, supra note 57, at 58; see also Callison, supra note 298, at 978; Krannich, supra note 60, at 90.
that there is no single overarching theory or correct description of the corporate person has long been viewed as a problem that continually defies resolution. But maybe the true problem lies only in our perspective. I am reminded of an anecdote about a musician who is praised for solving a problem he never knew he had:

Once when I was playing for a musician, he complimented me on the way I played a particular passage. He told me how well I handled a certain modulation and added, “You don’t realize in what a remarkable way you have solved this problem!”

I must say, I was thunderstruck! In the first place, I was not even aware that there was a modulation. (That shows how much I know about music! I never think in terms of modulations. I do not deny that they exist; I just don’t think about them.) In the second place, I was totally unaware of any problem let alone solving one! The whole idea of “problem solving,” especially in music, strikes me as so weird! Not only weird, but most disharmonious and destructive. Is that how you think of life, as a series of problems to be solved? No wonder you don’t enjoy living more than you do!

To compliment a musician, or any other artist, on having “solved problems” is to me absolutely analogous to complimenting the waves of the ocean for solving such a complex system of partial differential equations. Of course the ocean does its “waving” in accordance with these differential equations, but it hardly solves them. I do not claim to know whether the ocean is or is not a conscious being, but if the ocean does think (which wouldn’t surprise me), the one thing I’m sure the ocean does not think about is differential equations.

Perhaps I am allergic to the word “problem.” If so, I am grateful for this allergy. Some of you will say I am only quibbling about words. This is not so. It is ideas that count, not words. And I believe that one who feels he is “solving problems” lives very differently from one who does not feel this way. I believe my objection to the notion of “problem” is due to my deep conviction that the moment one labels something as a “problem,” that’s when the real problem starts.347

Lawyers and legal academics naturally tend to see things as problems that need to be fixed, as issues that need resolution. We think in terms of crises and dilemmas for which we seek to find solutions and closure. In the context of corporate personhood, we

347 RAYMOND M. SMULLYAN, THIS BOOK NEEDS NO TITLE: A BUDGET OF LIVING PARADOXES 79-80 (1980).
have been prone to characterize the lack of a simple all-encompassing theory as a problem requiring the proposal of ever grander models of the corporation in an attempt to solve the problem once and for all. Perhaps, however, the problem lies not in the inability to construct such an overarching theory but in characterizing that inability as a problem in the first place. Maybe what we need to do is widen our myopic focus on the nature of the corporate person and get used to speaking about corporations in more open, multi-dimensional terms. In doing so, we might find that our biggest problem has been our tacit disappointment over the failure to compose that elusive all-embracing theory, when what we have is actually far better: the opportunity to draw upon multiple interdisciplinary theories at once to see the corporate person in all of its complexity, even when those theories sometimes conflict or raise more questions than they answer.