The Theories of Corporate Personhood and Their Three False Choices: Developing a Framework for Corporate Rights

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ABSTRACT

Scholars often use the theories of corporate personhood—aggregation theory, concession theory, and real entity theory—to justify corporate rights through analogy. That is, theories of corporate personhood attempt to explain what rights corporations ought to have based on what kind of person the corporation is like. If corporations are like individual human beings, then corporations should enjoy all the same rights that human beings do. If corporations are like states, then corporations should owe the same obligations that a state owes its citizens. Of course, many scholars have addressed the weaknesses of this kind of analogical reasoning. As Dewey argued long ago in the *Yale Law Journal*, the analogies suggested by the theories of corporate personhood are imperfect. Corporations are different than human beings and states. Perhaps more importantly, however, the theories of corporate personhood do not, on their face, answer what rights individuals ought to have or what obligations a state must undertake. Without these answers, using the theories of corporate personhood to define and delimit the rights of corporations is fruitless. As a result, many scholars favor a functionalist or instrumentalist approach over the theories of corporate personhood. What matters, according to these scholars, is not so much what a corporation is. Instead, what matters is how the ascription of legal rights to corporations impacts human beings, who have indefeasible claims to legal and constitutional rights. The theories of corporate personhood have very little to say about the latter. Rather than reasoning by analogy, as theories of corporate personhood might suggest, a functionalist or instrumentalist

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approach would have us jettison questions about what corporations are and what kinds of persons they look like. Instead, they would have us embrace questions about how corporate legal rights might obstruct or vindicate the rights of human beings.

In this Article, however, I argue that scholars are too quick to reject the utility of using theories of corporate personhood to justify corporate rights. The theories need not be used as analogies. Instead, after appropriate modification, they can be understood as arguments that provide compelling reasons to reject, embrace or modify the legal rights ascribed to corporations. Each responds, in its own way, to the unique challenges and opportunities that corporations present to human freedom. For example, the aggregation theory recognizes that corporations can serve individual autonomy rights in the marketplace. The real entity theory suggests that human freedom is sometimes best vindicated through organized social relations. The concession theory admits that corporate rights at least sometimes violate the equal and conflicting rights of those who interact within and around the corporation.

To make the theories of corporate personhood useful, however, they require some conceptual modification. Namely, they must be cleansed of the misguided ideological and ontological assumptions that ground them. Those assumptions must first be identified and then excised. Accordingly, this Article argues that the theories of corporate personhood present the question of corporate rights as a series of conceptual dichotomies. Ontologically, the theories of corporate personhood categorize corporations as either public or private. Normatively, they force a choice between positive law and morality and between rights and democracy. Specifically, aggregation theory suggests that corporations are private and protected by pre-political natural rights that are antithetical to democratic regulation. The concession theory, on the other hand, suggests that corporations are public and legitimate expressions of sovereign authority that are antithetical to individual rights. Finally, the real entity theory holds that corporations are private entities that supply their own legitimacy that may enforce norms antithetical to both rights and democracy or both.

The Article next explains why these conceptual dichotomies present false choices. Contemporary understandings of constitutional liberal democracy do not divide the world into two distinct ontological spheres. What counts as "public" and what counts as "private" is the conclusion of a normative argument about the proper scope of rights, not an assumption from which arguments about rights begin. Further, constitutional liberal democracy does not outsource its normative authority. It is designed in a way that ensures that citizens never need to choose between transcendental norms and positive law. In fact, liberal constitutional democracy was specifically designed to avoid politicizing our deeply held but inconsistent ethical values. Finally, constitutional liberal democracy holds that rights and democracy aren't antithetical, but co-original:

democratic citizens are meant to help shape their own rights. By participating in the democratic process, citizens play an equal role in creating the rights that they give themselves.

After diagnosing and resolving these conceptual mistakes, I show that theories of corporate personhood provide a useful framework for considering whether corporations merit legal and Constitutional rights. Aggregation theory reminds us that corporate freedoms often serve individual freedoms. Real entity theory reminds us that those freedoms are often enjoyed by human beings as they associate together. Finally, concession theory reminds us that democratic citizens have a right to shape their shared political, social and economic life. Concession theory also counsels that it is democratic citizens themselves, not delicate "philosophies of the subject" or transcendental liberal norms, that must shape their legal and constitutional rights. Thus, the theories of corporate personhood offer a framework for courts and citizens alike as they decide the rights that corporations ought to possess. The Article concludes by offering a balancing test that courts might use to accurately identify, assess, and weigh all the individual rights challenged or vindicated by corporate rights. Even if rights are best constructed by citizens themselves, courts may at least ensure that none of these rights are occluded in judicial analysis.

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I. INTRODUCTION

The U.S. Supreme Court, in *303 Creative LLC v. Elenis*, ascribed First Amendment rights to a business association that sought to evade state laws that might force it to engage in expressions supportive of same-sex marriage.[1] While most scholarly commentary thus far focuses on whether the character of the speech involved merited protection under the Free Speech clause of the First

1. *See 303 Creative LLC et al. v. Elenis et al.*, 600 U.S. 570, 588 (2023).

Amendment,[2] one detail has yet to receive adequate attention: the plaintiff was not Lorie Smith, a human individual holding religious beliefs, but a limited liability company organized under Colorado law.[3] The Court's opinion, written by Justice Gorsuch, offered but one line recognizing the status of this party: "[t]hrough her business, 303 Creative LLC, [Smith] offers website and graphic design, marketing advice. . . ."[4] With a few strokes of the pen, the Court tacitly reverse-pierced the corporate veil and equated a limited-liability commercial legal entity with its human member. The LLC had, the Court implied, no meaningful existence of its own.

Of course, this is not the first time that the Court has effaced the corporate person in its jurisprudence. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[5] the Court likewise ascribed First Amendment religious rights to a corporation organized in Colorado—not that a casual reader would realize this, given that the Court identifies the petitioner as a human baker who "owned and operated" a business."[6] In *Burwell v. Hobby Lobby Stores, Inc*.,[7] Justice Alito's opinion awarded rights under the free exercise clause of the First Amendment[8] to a for-profit corporation on account of the religious beliefs of its human shareholders.[9] And in *Citizens United v. Federal Election Commission*, the Court ascribed free speech protections to Citizens United, a corporation.[10] The Court did so at least in part because of the free speech rights of the corporation's human membership.[11] As the Court in *Citizens United* noted, a corporation's human members should not lose their political speech protections simply because they choose to associate using the corporate form.[12]

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2. Scholarship as well as professional and public news media have also focused on factual irregularities in the plaintiff's standing to sue. *See, e.g*., Melissa Gira Grant*, The Mysterious Case of the Fake Gay Marriage Website, the Real Straight Man, and the Supreme Court*, THE NEW REPUBLIC, June 29, 2023; Martin Pengully, *Woman in anti-LGBTQ+ supreme court case did make wedding site after all, report says,* THE GUARDIAN, July 25, 2023; Mark Joseph Stern, *The Easy-to-Miss Twist That Makes the Supreme Court's New Gay Rights Case So Strange,* SLATE, December 5, 2022; Richard M. Re, *Does the Discourse in 303 Creative Portend a Standing Realignment?* 99 NOTRE DAME L. REV. REFLECTION 67 (2023); J. Denise Diskin and Dallas Aguilera Martinez, *U.S. Supreme Court's Free Speech Decision in 303 Creative – a Return to a Dangerous Past?,* 77 WASH. ST. B. NEWS 48, 50 (Nov. 2023); Alan B. Morrison, *The Court That Does Not Let Standing Stand in its Way,* 92 GEO. WASH. L. REV. ARGUENDO 1, 12-13 (2023).

3. *303 Creative,* 600 U.S. at 594.

4. *Id*. at 579.

5. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018).

6. *Id*. at 626.

7. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014).

8. U.S. CONST. amend. I.

9. *Burwell*, 573 U.S. at 706-07. For a discussion of corporate personhood in the context of this case, *see* Katharine Jackson, *Disaggregating Corpus Christi: The Illiberal Implications of Hobby Lobby's Right to Free Exercise,* 14 FIRST AM. L. REV. 101 (2015) (hereinafter, "Jackson, *Disaggregating*").

10. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 372 (2010) ("[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [the shareholders]").

11. *Id*. at 356.

12. *Id.*

No matter how one feels about the outcome of these momentous decisions, the Court's elision of any distinction between a human being and business entity is not completely senseless. After all, human beings are usually involved in the creation and operation of corporations, limited liability companies, limited liability partnerships, limited liability limited partnerships, and the like. The laws that permit and facilitate their formation help human beings exercise their freedom to live their lives as they choose. The problem is that business organizations are made up of more than just their human components. Laws, promulgated by the state, structure the interactions of the human beings that make up these organizations.[13] It is state statutes, not members' consent, that grant corporate directors their authority.[14] Statutes, not member agreement alone, set forth how collective decisions will be made on the corporation's behalf.[15] In other words, even if the corporation cannot be disentangled from the human beings who live and work around them, the decisions it makes cannot help but be influenced by non-human law.

Indeed, these state-mandated decision-making procedures invariably shape the decisions and judgments made for and on behalf of the corporation. Ordinary human beings can decide for themselves not only *what* they will decide, but *how* they will decide. They can decide based on whim, logical deduction, intuition, empirical inference, feelings, and so on. This is not true of the corporation. Corporate decisions involve votes, external financial reports, special committees, proxy statements, legally supervised minute-taking, notice requirements, and so on.[16] Further, ordinary human beings are permitted to make bad decisions within the limits of public and private law. When corporate decision-makers make bad decisions, however, a specialized business court steps in to hold them to an additional, higher standard.[17] Public and private laws also curate cultures, shared beliefs and values, and collective identities that are not reducible without remainder to individual human beings.[18] Moreover, as Kent Greenfield argues,

13. *E.g.,* ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM 3 (2013); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation,* 107 AM. POL. SCI. REV. 139, 147 (2013); Leo E. Strine, Jr. and Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History,* 91 NOTRE DAME L. REV. 877, 909 (2016) (hereinafter, Strine & Walter, *Originalist or Original*").

14. *E.g*., DEL. CODE ANN. tit. 8, § 141(a) (West 2020).

15. *Id.,* §§ 141-146, 211-233, 241-246; 271-285.

16. See *supra* note 15.

17. *See, e.g*., *Stone v. Ritter*, 911 A.2d 362 (Del. 2006) (explaining that, in addition to facing civil and criminal penalties for violation of federal banking laws, corporate fiduciaries must show their decisions were made in good faith, without reckless indifference to the law or a conscious disregard of a (non-legal) duty to act).

18. For original real entity conceptions of corporate personhood, *see, e.g.,* OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE 130 (1990); JOHN NEVILLE FIGGIS, CHURCHES IN THE MODERN STATE 40-41 (1914); G.D.H. Cole, Neville Figgis & Harold Laski, THE PLURALIST THEORY OF THE STATE 20-21 (Paul Q. Hirst ed., 1989); John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926). For contemporary commentary, *see, e.g*., Susanna K. Ripken, *Corporations are People Too: A Multidimensional Approach to the Corporate Personhood Puzzle,* 15

because norms of corporate decision-making "persistently [put] the interests of shareholders above all other stakeholders, stand[ing] in such contrast to how human beings responsibly behave," corporations "can be called inhuman."[19] As a result, corporations may not be equivalent to human beings in all legally salient respects. Supreme Court justices have occasionally recognized as much. For example, Justice Ginsburg, in her *Hobby Lobby* dissent, argued that the corporation is not its human members, but instead "an artificial being, invisible, intangible and existing only in contemplation of the law."[20] Justice Ginsburg suggests that corporations do not, in fact, merit the same First Amendment protections ascribed to human individuals. Not only do corporations fail to equate to their human membership, but they are also something else altogether: a state franchise. Therefore, according to Justice Ginsburg's logic, corporations enjoy only those rights that the state chooses to give them.[21]

Behind these vastly different conclusions about corporate personhood lurk two distinct theories of corporate personhood.[22] The opinions that favor the ascription of religious liberty replicate the arguments of aggregation theory: corporations are equivalent to their members (literally) and therefore merit the same rights as their human members do. The opinions that weigh against it resuscitate the argument of concession theory: corporations are artificial legal constructs and are therefore, like states, not rights-bearing entities at all. Instead, they have duties to uphold and vindicate the rights of their citizens. Clearly, theories of corporate personhood are still relevant even if corporate law scholars wish it were otherwise. Although legal realists might disavow the relevance of these theories because they are the unwelcome vestiges of legal formalism,[23] the theories continue to work behind-the-scenes as they frame scholars' and jurists'

FORDHAM J. CORP. & FIN. L. 97, 141 (2009) (hereinafter "Ripken, *Corporations are People*"); JANET MCLEAN, SEARCHING FOR THE STATE IN BRITISH LEGAL THOUGHT: COMPETING CONCEPTIONS OF THE PUBLIC SPHERE 71 (2012); DAVID RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE 89 (1997); VICTOR MUÑIZ-FRATICELLI, THE STRUCTURE OF PLURALISM, 21 (2014); JACOB T. LEVY, RATIONALISM, PLURALISM AND FREEDOM (2017).

19. KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 183 (2018).

20. *Burwell*, 573 U.S. at 752 (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819)).

21. *See id*. at 765.

22. *See, e.g*., Jackson, *supra* note 9, at 107, 115; David Millon, *Theories of the Corporation, 1990* DUKE L.J. 201, 205 (1990) (hereinafter, "Millon, *Theories of the Corporation*"); Jean L. Cohen, *Freedom of Religion, Inc.: Whose Sovereignty?,* 44 NETHERLANDS J. OF LEGAL PHIL. 169, 180-182 (2015) (hereinafter, Cohen, *Freedom of Religion, Inc.*"); Greenfield, *supra* note 19, at 11, 19 (arguing that the U.S. Supreme Court equated the corporation with its shareholders for the purposes of ascribing First Amendment rights to the corporation in *Burwell v. Hobby Lobby Stores, Inc.* but equated the corporation to a state creation when refusing to grant First Amendment rights to a corporation in *First National Bank v. Bellotti.*).

23. *See, e.g*., Eric C. Chaffee, *The Origins of Corporate Social Responsibility,* 85 U. CINN. L. REV. 353, 369 (2017); RICHARD SCHRAGGER AND MICAH SCHWARTZMAN, *Some Realism about Corporate Rights, in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 350-351 (Micah Schwartzman et al. eds. 2016); Dewey, *supra* note 18.

legal arguments about the scope of corporate rights.[24] Maintaining a separate legal personality for a corporation, moreover, is useful for both those who wish to hold corporations to account for the harms they commit and those who understand corporations as a legal tool worthy of protection because they help human beings vindicate their liberties.[25] They are therefore worth closer examination.

In this Article, I argue that the theories of corporate personhood should retain their relevance as citizens and courts consider the question of corporate rights. But they must first undergo some modification. This modification is required because the theories of corporate personhood, as commonly deployed, frame the problem of corporate rights as choices to be made amongst a series of problematic conceptual dichotomies. Ontologically, the theories categorize corporations as either public or private. Their rights and duties derive from their quintessentially public or private nature. Normatively, they force a choice between both (1) positive law and morality and (2) between rights and democracy. To illustrate, aggregation theory suggests that corporations are inherently private in nature, protected by pre-political natural rights that are antithetical to and must trump democratic regulation. The concession theory, on the other hand, suggests that corporations are public and legitimate expressions of sovereign authority that at least occasionally conflict with and should trump individual rights. Under this theory, one typically accepts that corporations are public and legitimate expressions of democratic political authority. Finally, the real entity theory usually holds that corporations are private entities that set the terms of their own legitimacy. This theory suggests that corporations are self-determining communities that should have the right to choose to order themselves however they like, notwithstanding our broader political commitments to equality, toleration, and liberty. In sum, the theories require their users to first categorize corporations as either public or private.[26] They then require their users to prioritize either the positive lawmaking of the state or some notion of the good that is external to the legal system—*e.g.*, natural rights, religious tenets, and so on.[27] Finally, because the theories suggest that rights and democracy are antithetical, they demand that their users choose one over the

24. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 576 (1989).

25. Greenfield, *supra* note 19, at 11-12. For an example of how a corporation may press their members' non-economic freedoms, *see NAACP v. Alabama*, 347 U.S. 449 (1958) (allowing a nonprofit membership corporation to assert the Fourth Amendment due process rights of its members).

26. For a history of the intellectual construction of public and private, *see* Ciepley, *supra* note 13, at 9 and Morton J. Horwitz, *The History of the Public/Private Distinction,* 130 U. PENN. L. REV. 1426, 1426 (1982) (hereinafter, "Horwitz, *History*"); Millon, *supra* note 22, at 202. For a discussion of this conceptual distinction, *see* William W. Bratton, *Welfare, Dialectic, and Mediation in Corporate Law,* 2 BERKELEY BUS. L.J. 59, 62 (2005).

27. *See* Cohen, *supra* note 22, at 170-171 (discussing this dichotomy in terms of corporate religious freedoms).

other. How the theories of corporate personhood ascribe corporate rights depends upon how their users navigate these bilateral conflicts.

The problem is that these are all false choices. Contemporary notions of constitutional liberal democracy ("CLD")[28] do not ask us to pick between public and private, higher law and positive law, and democracy and rights. In fact, CLD is designed to avoid them altogether. CLD rejects the ontological division of public and private that these theories present, particularly when they associate the public sphere with an organ-body conception of political sovereignty. This conception of sovereignty equates the "public" with a governing body (*e.g.*, a monarch or a parliament of aristocrats). In turn, "private" is used to describe the governed mass of individual subjects (often understood to carry pre-political liberties). As democracy came to replace the monarchy, the body of the king (or parliament) was swapped with the sovereign "people," whose collective body carried a popular "will" that was thought to be sovereign. Although superficially appealing, CLD rejects this conception of popular sovereignty. Democracies are representative and *constitutional.* Democracy does not amount to swapping the will of the monarch for a fictitious will of the people. In a country of hundreds of millions, there is no such thing as the will of the people—unless one equates democracy with populist demagoguery.[29] Instead, democracy means finding ways to distribute and divide political power as broadly and equally as possible. Each citizen casting their votes and exercising their political rights is part of the sovereign power.

Under CLD, then, a corporation cannot be categorized as public or private because, simply put, there are no inherently public or private spheres that clearly distinguish "the state" and "the subject." Instead, what counts as "public" and "private" is best understood not as ontological categories, but instead as normative *arguments*.[30] What counts as "public" are those things that democratic citizens, using their constitutional democratic lawmaking procedures, have

28. In this Article, I rely on a relatively capacious conception of liberal democracy that should appeal to those following John Rawls, Jürgen Habermas, Rainer Forst, and other contemporary procedural and deliberative conceptions of democracy. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (hereinafter, Rawls, *Political Liberalism*"); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg. Trans., 1996) (hereinafter, "Habermas, *Between Facts and Norms*"); Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach,* 120 ETHICS 711 (2010) (hereinafter, "Forst, *Justification of Human Rights*"). Namely, it should appeal to any who hold that the human being is the figure of moral importance and that this human being holds a foundational set of abstract rights (e.g., liberty and political participation (Habermas); human beings are free, equal in a fair system of cooperation (Rawls); human beings have a fundamental right to justification (Forst)). It will not appeal to those endorsing Schmittian (*see, e.g.* CARL SCHMITT, LEGALITY AND LEGITIMACY 13 (Jeffrey Seitzer trans., Duke U. P. 2004) (1932); ADRIAN VERMUELE, COMMON GOOD CONSTITUTIONALISM (2022)), conceptions of democracy, political pluralism (*see, e.g.,* Muñiz-Fraticelli, *supra* note 18) or political realists who reject foundational notions of human rights (Enzo Rossi and Matt Sleat, *Realism in Normative Political Theory,* 9 PHIL. COMPASS 689 (2014)).

29. *See* Part II (A), *infra*.

30. *See* JEAN L. COHEN, REGULATING INTIMACY: A NEW LEGAL PARADIGM (2001) (hereinafter, "Cohen, *Regulating Intimacy*") (providing an argument about the politicization of the right to privacy and explaining that the right is the construction of democratic publics).

decided are of public concern and therefore open to legal regulation. What counts as "private" are those things that democratic citizens, using their constitutional democratic lawmaking procedures, have decided are of no public concern. They are therefore not open to legal regulation. As a result, whether a corporation is properly "public" or "private" is better understood as a question to be answered, not a premise from which to draw legal conclusions.

Likewise, CLD does not force its citizens to choose between their own positive lawmaking and any transcendental notion of ethical truth. CLD is *liberal* because it holds that legitimating law according to some ethical notion of what is good and right is antithetical to a society committed to diversity and multiculturalism.[31] Believing that law is only legitimate insofar as it adheres to some contestable notion of "the good"—whether couched in terms of natural rights, divine scripture, or otherwise—is a recipe for intolerance, or worse. To illustrate the danger, consider the belief that what is good and right is defined in a specific religious text. When a democratic law conflicts with this religious text, a believer will weigh the value of each and find democracy wanting. How can Congress speak with a voice more compelling than divine commandment? The believer may then do their best to re-write the law. Or, even more alarmingly, they might work to undermine democratic lawmaking procedures altogether, swapping them for procedures more likely to yield divinely sanctioned outcomes. Such an outcome comes at the expense of the deeply held ethical beliefs of everyone who might disagree. The solution that liberalism offers is what John Rawls called an "overlapping consensus,"[32] whereby democratic citizens agree to pass laws that give everyone equal freedom to live their lives as they see fit, subject to the equal rights of everyone else to do the same. Everyone has equal liberty to pursue their own version of the good life, subject to the equal liberty of everyone else to do the same. Thus, CLD advises against ascribing legal rights based on theories of natural rights or some other source of normativity outside the constitutional order. Corporations, under this view, cannot stand upon any inherent, pre-political natural liberty rights or substantive religious commitments to justify their legal and constitutional rights. They must instead demonstrate that their liberties are consistent with the equal liberties of everyone else.

This conclusion points to why the final dichotomy posed by traditional theories of corporate personhood—that between political democracy and self-governing associational rights—is likewise wrong-headed. The reason is that CLD is *democratic*. It is up to democratic citizens themselves to determine the contours of the equal liberty rights that they give to each other. Rawls' overlapping consensus does not come from pure reason, as Emmanual Kant once

31. *Cf.* Vermeule, *supra* note 28.

32. JOHN RAWLS, A THEORY OF JUSTICE 340 (1999) (hereinafter, "Rawls, *Theory of Justice*"); Rawls, *Political Liberalism, supra* note 28, at 134-49.

held, but instead from real-life democratic deliberations amongst free and equal citizens. This is why CLD theorists call rights and democracy "co-original."[33] Citizens exercise their liberty rights when they engage in democratic lawmaking, and democratic lawmaking defines the contours of their liberty rights. Through democratic procedures, citizens play an equal role in shaping the equal rights that they give themselves. As a result, whether a corporation merits legal and constitutional rights is a question that democratic citizens must answer.[34]

Thus, if one is committed to CLD, one cannot commit to any of the theories of corporate personhood as they are usually deployed. But this does not mean that theories of corporate personhood are useless, as functionalist and instrumentalist theories of corporate rights might suggest. Each highlights important values and human interests inherent to constitutional liberal democracy: the ability to arrange one's affairs by one's own lights, to protect against the harmful behavior of others, to encourage enterprise and creativity, and so on. These values and interests can be incorporated into our constitutional practice as rights discourses, where each citizen can make different but legitimate claims about how a polity can properly instantiate the promise of equal liberty for every (human) citizen.[35] Further, when cured of their conceptual missteps, theories of corporate personhood allow us to make predictions about whether and to what extent a claim to corporate rights will be convincing. Namely, it suggests a balancing test. A balancing test would capture the usefulness of aggregation and real entity theories by giving some assurance that corporate autonomy rights actually reflect the freedoms of its human members. But corporate autonomy rights must also be balanced against the equally important interests of corporate outsiders. This balancing captures the usefulness of concession theory, demonstrating that a democratic public has the right to shape the equal rights they give themselves. If courts use this balancing test, they will be less likely to overlook any liberty rights impacted by an ascription of corporate rights.

This Article proceeds as follows. After summarizing the three traditional theories of corporation personhood in Part II, this Article will identify, in Part

33. *E.g.*, Habermas, Between Facts and Norms, *supra* note 28; Rawls, *Political Liberalism,* supra note 28; JÜRGEN HABERMAS, *Struggles for Recognition in the Democratic Constitutional State, in* MULTICULTURALISM 107, 113 (ed. Charles Taylor trans. Shierry Weber Nicholsen, 1994) (hereinafter, "Habermas, *Struggles for Recognition*") ("It is not a matter of public autonomy [democratic lawmaking] supplementing and remaining external to private autonomy [individual rights], but rather of an internal, that is, conceptually necessary connection between them. For in the final analysis, private legal persons cannot even attain the enjoyment of equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding about what interests and criteria are justified and in what respects equal things will be treated equally and unequal things unequally in any particular case.").

34. For discussion of the democratic (and not juridical) construction of rights, *see, e.g.*, Niko Bowie & Daphna Renan, *The Separation of Powers Counter-Revolution,* 133 YALE L.J. (2022); Joseph Fishkin & William E. Forbath, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

35. For an application of a similar framework in relation to antitrust regulation, *see generally* Kate Jackson, *Antitrust and Equal Liberty*, 51 POLITICS & SOC'Y 337 (2023) (hereinafter, Jackson, *Antitrust*").

III, the ontological distinction they often make between public and private and argue that these distinctions arise from an outmoded conception of political sovereignty that no longer holds weight under CLD. Part III concludes by showing that the question of corporate rights is no different in kind from the question of rights generally: both individuals and the groups they form are embedded in the same legal order. Part IV takes up the choice that the traditional theories of corporate personhood make amongst various theories of legitimate authority. Part IV explains that the theories of corporate personhood rely on the existence of some extra-political normative authority. Part IV then explains how this reliance betrays the norms of political liberalism. This Part concludes by proposing modifications to the theories of corporate personhood with the goal of making them more relevant to lawmaking within a constitutional liberal democracy. Part V demonstrates that the theories of corporate personhood force their uses to prioritize either rights or democracy. After describing how rights and democracy are not antithetical, but capable of co-existing, this Part argues that citizens themselves should engage in an open-ended democratic elaboration of the rights they believe corporations should enjoy. The Article concludes by explaining that theories of corporate personhood are best understood not as complete moral theories of rights, but as constitutional frameworks that citizens can use to articulate the rights they give themselves. It further argues that courts wishing to capture all the liberty rights at stake in their analysis of corporate rights can use this balancing test fruitfully. The Article then applies these frameworks to the facts of *303 Creative* and argues that the Court made a mistake when it ascribed rights to the LLC there.

II. THEORIES OF CORPORATE PERSONHOOD

Over the past two centuries of U.S. intellectual history, jurists, activists, and legislators have deployed theories of corporate personhood to explain why corporations are subjects that bear legal rights and duties.[36] Both ontological and prescriptive, these theories purport not only to describe what corporations are, but also to identify the rights and duties that ought to attach to them.[37] They analogize corporations to either individuals or states and imply that corporations

36. Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business,* 63 WASH. & LEE L. REV. 1421, 1423 (2007).

37. William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History,* 41 STAN. L. REV. 1471, 1491 (1989) (hereinafter, "Bratton, *New Economic Theory*"); Dewey, *supra* note 18, at 657 (courts justify their decisions "by appealing to some prior properties of the antecedent non-legal 'natural person'"), 658 (courts and popular opinions hold that "before anything can be a jural person it must intrinsically possess certain properties, the existence of which is necessary to constitute anything a person"); Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992) (hereinafter, "Horwitz, *Transformation*"); David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA: AN ONLINE J. OF LEG. PERSP. 39, 40-41 (2001) (hereinafter, "Millon, *Ambiguous Significance*").

deserve roughly the same rights and owe the same duties as they do. Critiquing these theories of corporate personhood for their indeterminacy[38] and for their historical particularity, scholars refer to them as "ideas [offered] as arguments"[39] in discrete and perhaps irrelevant historical contexts. After all, neither the rights ascribed to individual human beings nor the responsibilities ascribed to the state have remained unchanged over the past several centuries. Rights are more universal and more capacious in their substance.[40] States are more democratic and bound by an ever-growing elaboration of constitutional law.[41] Corporations are different creatures now than when there were during colonial imperialism and the age of industrialization.[42] Even if it is true that corporations were successfully analogized to states or individuals in the past, the same might not hold now. Nevertheless, theories of corporate personhood continue to have purchase amongst legal scholars, jurists, and political actors as debates about the appropriate contours of corporate rights continue.[43] This Article turns next to summarizing the three theories of corporate personhood.

A. The Concession Theory

The concession theory of corporate personhood involves two distinct arguments. The first argument, an ontological one, hails from ancient Roman

38. Dewey, *supra* note 18, at 667-669 (aggregation theory and concession theory can be used to justify both the expansion or restriction of corporate power, and "[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends."); *cf.* Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory,* 88 W. VA. L. REV. 173, 176 (1985) (hereinafter, "Horwitz, *Santa Clara*") (each "tilts" towards a set of prescriptive conclusions).

39. David Armitage, *What's the Big Idea? Intellectual History and the Longe Durée,* 38 HIST. OF EUROPEAN IDEAS 493, 496 (2012).

40. *See*, *e.g.*, GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION 1, 38; 147-48 (2009); NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY 38 (Richard Bellamy trans., 1987); JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL THEORY (1994) (theorizing the creation of rights through social movements); Seyla Benhabib, *Democratic Iterations, in* ANOTHER COSMOPOLITANISM 50-55 (2006) (hereinafter, "Benhabib, *Democratic Iterations*"); (providing a useful illustration by way of the elaboration of the meaning of religious liberty in France following the head scarf controversy); Ernest A. Young, *The Constitution Outside the Constitution,* 117 YALE L.J. 408, 412, 424 (2007) (democratic publics codify many important rights through statutory law); James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,* 65 MOD. L. REV. 204, 207 (2002) (rights are not indefeasible principles so much as "mode[s] of problematization" calling for democratic negotiation and discourse"). For a discussion of this democratic constructivist accounts of rights in relation to administrative law, *see* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 16 (2019).

41. *Id*.

42. For a stimulating critical history of the corporation, *see generally* JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013) and ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE (1982).

43. *See, e.g.*, *Citizens United,* 558 U.S. at 342-43 (applying an associational or aggregation theory); *Hobby Lobby Stores*, 573 U.S. at 706-707 (likewise deploying aggregation concepts); *Masterpiece Cakeshop,* 584 U.S. at *9; *303 Creative*, 600 U.S. at 631 (ascribing to business enterprise "human" First Amendment rights to speech and religion); Peter J. Henning, *Treating Corporations as People,* N.Y. TIMES, May 26, 2015; Adam Winkler, *'Corporations are People' Is Built on an Incredible 19th-Century Lie,* THE ATLANTIC, March 5, 2018; Lydia Millet, *If Corporations are People, Then Animals Should Be Too,* THE NEW REPUBLIC, May 2, 2024.

law[44] and posits that the corporate entity is nothing but a fiction with no substantial physical or social reality.[45] Akin to the Hobbesian idea that no "people" exist without the state—only the multitude[46]—the concession theory of corporate personhood proposes that a corporation is nothing more than the sum of its individual (human) members. To create a unique corporate "person" distinguishable from these human members, the law must add something extra. This something extra is the assignment of a contrived, state-created legal personality that enables it to act in a legally cognizable manner with both its members and outsiders.[47] Though the corporation is not a human person, it is legible as a legal person that carries its own unique legal rights and duties.

The concession theory's second argument is more normative. It holds that this artificially ascribed legal personality is a form of delegated political power conceded by the state to the corporation.[48] When the corporation is given the legal right to act on its own behalf, its internal leaders, the members who make decisions for and on behalf of the corporation, are simultaneously empowered. Stated more simply, one authoritative decision-maker (the state) authorizes another decision-maker (the corporate leadership) to make decisions on others' behalf.

To illustrate, imagine that a legislature empowers the North India Company to own property and to run trade through a colony. The North India Company's directors and officers will make decisions about this property and how to run trade, and they will do so on behalf of the corporation and its membership. German legal theorist Hans Kelsen's framework illustrates this relation between the corporation and state as a "relation between two legal orders, a total and a partial legal order . . . To be more specific, it is a case of delegation."[49] An ascription of personhood to a corporation resembles a delegation of political power particularly when corporate leaders begin to issue commands to their subordinates. Namely, to ensure their decisions are carried out, directors and officers may give instructions to their agents and employees and enforce those instructions with some kind of penalty. Jean Bodin, a French theorist writing in the 16th century, perhaps had something like this in mind when he argued that corporations gained "a right of legitimate community under the sovereign power

44. *See, e.g.,* Maximilian Koessler, *The Person in Imagination or Persona Ficta of the Corporation*, 9 LA. L. REV. 435, 438 (1949); Barkan, *supra* note 42, at 23.

45. Dewey, *supra* note 18, at 665; Millon, *Theories of the Corporation*, *supra* note 22, at 206; William W. Bratton, *Nexus of Contracts Corporation: A Critical Appraisal,* 74 CORNELL L. REV. 407, 433 (1989) (hereinafter, "Bratton, *Nexus of Contracts*").

46. Andreas Kalyvas, *The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory*, 32 PHIL. AND SOCIAL CRIT. 573, 585 (2006); THOMAS HOBBES, LEVIATHAN 227 (C.B. MacPherson ed., Penguin Books (1985).

47. ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS 11 (1897).

48. Bratton, *New Economic Theory, supra* note 37, at 1475 (also arguing that a "strong version attributes the corporation's very existence to state sponsorship. A weaker version sets up state permission as a regulatory prerequisite to doing business.").

49. HANS KELSON, GENERAL THEORY OF LAW AND THE STATE 96 (1945).

[where] the word legitimate conveys the authority of the sovereign, without whose permission there is no [corporation]."[50]

Combining the ontological and normative arguments of the concession theory of corporate personhood thus holds that the corporation only exists if or when the state takes affirmative steps to create it. Accordingly, the concession theory suggests that corporate law is a kind of public law[51] and that the corporation, and by extension, the corporate person, only has the rights that the government explicitly grants it.[52] Moreover, because the corporation is a kind of state franchise, concession theory suggests that corporations should be subject to the same legal and constitutional restraints and the same duties demanded of legitimate political power.[53] If states cannot pass just any law they like, corporations also should not be able to do whatever they like.

Concession theory is often wielded as a polemic against corporate power.[54] In the Founding Era, lawmakers, recalling horror stories of monopolies past, invoked concession theory as they sought to regulate corporate charters in the hopes of limiting the influence of early American corporations.[55] Thomas Jefferson, for example, aimed to "crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."[56] Jefferson's concern mirrored that of Thomas Hobbes, who, in 1651, likewise worried that corporations might threaten the sovereign prerogative of the state.[57] This line of thought is also discernible in Chief Justice Marshall's 1819 opinion in *Trustees of Dartmouth College v. Woodward*:[58]

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50. JEAN BODIN, LEX SIX LIVRES DE LA REPUBLIQUE 122, 178 (1576).

51. Millon, *Theories of the Corporation*, *supra* note 22, at 211.

52. Strine, Jr. & Walter, *supra* note 13, at 881.

53. Ciepley, *supra* note 13, at 138, 151-152 (also arguing that, unfortunately, coopted by private actors in pursuit of private profit).

54. *See* Millon, *Theories of the Corporation, supra* note 22, at 207-211; PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 26 n.9 (1993); Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1142 (2012).

55. *See* Ian Speir, *Corporations, Their Original Understanding, and the Problem of Power*, 10 GEO J.L. & PUB. POL'Y 115, 155 (2012); Millon, *supra* note 22, at 209; Eric Hilt, *Early American Corporations and the State, in* CORPORATIONS AND AMERICAN DEMOCRACY 37 (2017); Margaret M. Blair and Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy, in* CORPORATIONS AND AMERICAN DEMOCRACY 245 (citing Adam Smith's 1776 WEALTH OF NATIONS), 248 (discussing personhood in the antebellum period) (2017) (hereinafter, "Blair & Pollman, *Supreme Court*").

56. Strine, Jr. & Walter, *supra* note 13, at 894 (quoting Letter to George Logan (Nov. 12, 1816) *in* 12 THE WORKS OF THOMAS JEFFERSON 42, 44 (Paul Leicester Ford ed., 1905)); *see also* Hilt, *supra* note 55, at 38.

57. *See* Hobbes, *supra* note 46, at 155.

58. *See Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819).

> 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.[59]

Notably, Marshall took care to note that the corporation "does not share in the civil government of the country, *unless that be the purpose for which it was created*. Its immortality no more confers on it political power, or a political character, than a natural person."[60]

Empirically, the concession theory of corporate personhood fits Founding Era corporate practice. Corporate charters, by capping a corporation's life and capital assets, delimiting a corporation's board members, and specifying a corporation's particular purpose, indeed appeared to birth very particular forms of synthetic group life. Concession theory retained popularity beyond the Founding Era, even as the corporation's assigned public purposes were watered down to furthering the general welfare by contributing to economic growth.[61] Angell and Ames, publishers of a treatise on corporation law in 1861, defined the corporation in a way that reflects this idea. They defined the corporation as a "body, created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of individuals who compose it, and is, for certain purposes, considered as a natural person."[62]

Concession theory has been used by both critics and supporters of corporate power and influence.[63] Recalling the historical role of incorporation in the creation of local government, progressive writers suspicious of corporate power remind their audience that the corporation need not, and thus perhaps should not, be understood as a private actor protected by the walls liberalism erects between state and society.[64] These progressive writers point to the fact that legislatures once granted corporate charters only for special public purposes like building infrastructure and providing public utilities.[65] They argue that corporations were public entities that ought to serve the common interest and that the state, as the corporation's sovereign, was responsible to ensure that the corporation fulfilled

59. *Id*. at 636.

60. *Id*. (emphasis added).

61. *See* Millon, *supra* note 22, at 207; *see also* Hager, *supra* note 24, at 638.

62. JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (8th ed. 1866).

63. *See, e.g.* BLUMBERG, *supra* note 54, at 26 note 9; Johnson, *supra* note 54, at 1142.

64. *See generally* Ciepley, *supra* note 13. Barkan argues that England used corporations to exercise its police power beginning In the 17th century, delegating to corporations authority over "the direct management of much of daily life," using them to "manage hospitals, schools, philanthropy, and imperial trade. . . ." Barkan, *supra* note 42, at 29.

65. *See* WILLIAM G. ROY, SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA 16, 58 (1997); BLUMBERG, *supra* note 54. at 6; Bratton, *New Economic Theory*, *supra* note 37, at 1484; William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation, in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (2017) (hereinafter, "Novak, *Public Utility*").

its role.[66] To this day, U.S. Supreme Court justices dissenting from an award of Constitutional rights to corporations emphasize the corporation's governmental provenance.[67] On the other hand, supporters of corporate power cite corporate law's democratic provenance as lending it legitimacy.[68] They argue that legislatures rationally permit corporate freedom in the name of utility and growth.[69]

B. The Aggregation Theory

The aggregation theory of the corporation, like the concession theory, conceptualizes the corporation as a "fiction" without any independent social existence. Unlike the concession theory, however, it does not locate the origin of its artificial life with the state. Instead, it finds the origin of a corporation's life in the free association of individuals who "aggregate" themselves into a joint enterprise.[70] The aggregation theory suggests that the corporation merits protection not because of a delegation of power from the state, but because its component parts, the individual members, possess rights.[71] State more simply, enforcing corporate rights is the same as enforcing the individual rights of its human members.

The aggregation theory of corporate personhood came to replace the concession theory because the latter had become less helpful given legal, ideological, and economic change. During 19th-century industrialization, judges were searching for an idea of corporate legal personhood that could ground the legal residency of increasingly itinerant business activity. As markets nationalized, so too did business corporations. Federal and state courts confronted with claims against foreign corporations needed to identify a corporate body fixed in time and space. This was necessary for a court to

66. *See* Millon, *supra* note 22, at 202, 207.

67. *Burwell*, 573 U.S. at 739-772 (Ginsburg, J., dissenting and Breyer, J., dissenting); *Citizens United*, 558 U.S. at 428 (Stevens, J. and Ginsburg, J., dissenting in part and concurring in part).

68. *See* Bratton, *New Economic Theory*, *supra* note 37, at 1487.

69. *See* JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 14-22 (early 19th century legislators insisted that corporate status could only arise from an affirmative act by the state, but legislators freely granted them in order to encourage economic expansion and fulfill the ambitions of businessmen) (1970); Hager, *supra* note 24, at 586 (concession theory benefitted corporations because it gave them a reason to avoid tort liability); Trachtenberg, *supra* note 42, at 30 (corporations understood as "a government-sponsored clearance of an obstruction to investment and economic growth"); Barkan, *supra* note 42, at 75; Roy, *supra* note 65, at 51.

70. *See* Roberto J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMP. L. REV. 1, 14 (2012); *see also*, *e.g.,* Blair & Pollman, *supra* note 55, at 285; Adam Winkler, Citizens United, *Personhood, and the Corporation In Politics, in* CORPORATIONS AND AMERICAN DEMOCRACY 359 (2017) (hereinafter, "Winkler, *Citizens United*").

71. *See* Winkler, *supra* note 70, at 361 ("In numerous corporate rights cases, especially with those relating to political rights, the justices have conceptualized the corporation not as a person, akin to a natural human being, but as an association, akin to a voluntary membership group.").

determine whether they had jurisdictional authority to hear particular claims[72] and, if so, which state's laws ought to apply. The concession theory was unhelpful because it implied that out-of-state corporations had no legal existence unless and until the foreign state recognized the corporation as a legal actor.[73] As a result, the concession theory had the potential to deprive an out-of-state victim of tortious corporate actions of their day in court.[74]

Certain ideological changes also favored the move to aggregation theory. Importantly, liberal legal theorists "[tried] to create a sharp distinction between public and private law."[75] Because aggregation theory defined the corporation as voluntary association of individual property owners, it allowed corporations to claim the protections of the private sphere.[76] It suggested that corporations were not state delegations of power, but simply a variety of partnership. As private actors, corporations could eschew the public duties ascribed to state actors. Instead, it could claim rights against the interference of state actors. This conceptual reversal was aided by a transformational change in corporate law. Public skepticism of mounting state power, suspicion of state-sanctioned monopoly, and condemnation of corruption led to the elimination of the government's special chartering of corporations.[77] Indeed, by the mid-nineteenth century, the special charter was seen to unfairly favor elite interests. Yet state legislatures, perhaps fearful of throwing the economic baby out with the anti-democratic bathwater, did not eliminate the corporation entirely. Instead, their populist response was to universalize the availability of the corporate form.[78] Consequently, special charters were replaced by general incorporation statutes. Moreover, when states replaced special chartering with general incorporation laws, they ceased using charters to impose substantive regulations on corporate activity.[79] Because the state no longer shaped the direction and purpose of corporations through special charters, the state's role in creating the corporation became less obvious. [80]

72. *See* Harris, *supra* note 36, at 42; *see also Bank of United States. v. Deveaux et al.,* 9 U.S. 61, 91 (1809) (*overruled by Louisville, Cincinnati & Charleston R. Co. v. Letson*, 43 U.S. 497, 552 (1844); later aff'd by *Marshall v. Baltimore & Ohio R. Co.*, 57 U.S. 314 (1853) (holding diversity jurisdiction appropriate because corporate members were citizens of a different state, even though some sued through a corporation that had no legal capacity but for what was granted by legal charter).

73. *See* W. N. Hohfeld, T*he Individual Liability of Stockholders and the Conflict of Laws*, 10 COLUM. L. REV. 283, 300 (1910) (discussing *Bank of Augusta v. Earle* 38 U.S. 519 (1839)).

74. Hager, *supra* note 24 at 587-592 (fiction theory allowed corporations to escape tort and criminal liability); *see generally* Ciepley, *supra* note 13 (providing a brief intellectual history of the public/private divide).

75. Horwitz, *History, supra* note 26, at 1425.

76. *See* Millon, *supra* note 22, at 202; Strine, Jr. & Walter, *supra* note 13, at 920.

77. Johnson, *supra* note 48, at 1146; Margaret 77, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1700 (2015) (hereinafter, "Blair & Pollman, *Derivative Nature*").

78. *See* Barkan, *supra* note 42, at 45-46; Roy, *supra* note 65, at 52; Millon, *Theories of the Corporation*, *supra* note 22, at 202; Trachtenberg, *supra* note 42, at 83.

79. *See* Millon, *supra* note 22, at 202.

80. *See* Johnson, *supra* note 54, at 1138-39.

Economic changes, often powered by changes in the law, likewise drove the introduction of aggregation theory. By the late nineteenth and early twentieth centuries, corporations outgrew their role as providers of public utilities and transportation infrastructure and instead turned to the U.S. manufacturing sector.[81] Bare bones, widely available general incorporation statutes enabled individuals to organize and self-order a corporation upon the filing of simple forms and the payment of modest fees.[82] The introduction of permissive general incorporation statutes[83] helped drive the phenomenal growth of corporate industry. Importantly, this growth did not appear like something that could have been created by legislation.[84] Instead, the flourishing corporate industry of the nineteenth and early twentieth centuries was widely understood to be the product of cooperative, voluntary action of individual incorporators—the kind celebrated as a uniquely American achievement.[85]

The switch from concession theory to aggregation theory was memorialized by Victor Morawetz, who, in his 1882 treatise, defined the "private corporation [as] an association formed by mutual agreement of the individuals composing it."[86] Justice Field of the U.S. Supreme Court was a notorious proponent of the aggregation theory, invoking it in several important opinions in order to protect corporate contract and property interests in the name of individual rights.[87] Setting aside the question of its theoretical coherence, the courts' embrace of aggregation theory was a pragmatic turn consistent with a newly instrumentalized conception of judicial decision-making that was tailored to facilitate a growing industrial republic.[88]

The influence of this first incarnation of the aggregation theory endured until the 1930s. Structural economic changes stretched beyond credibility the analogy, suggested by aggregation theory, between corporations and property-based partnerships.[89] Corporations grew and split into different functional divisions.

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81. *See* Roy, *supra* note 65, at 51.

82. *See* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation,* 34 J. CORP. L. 99, 106 (2008).

83. *See* Millon, *Theories of the Corporation*, *supra* note 22, at 202.

84. *See* VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 11 (1882); Blair & Pollman, *Derivative Nature*, *supra* note 77 at 1689-1695 (arguing that the U.S. Supreme Court justified ascribing rights under the Fourteenth Amendment to corporations because of the clearly ascertainable underlying property rights of corporate members).

85. *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, 72 (2005).

86. Harris, *supra* note 36, at 1468 (citing Morawetz, *supra* note 84, at 11).

87. Blair & Pollman, *Derivative Nature, supra* note 77, at 1695, 1705; Blumberg, *supra* note 54, at 28; Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 4 WIS. L. REV. 999, 1017 (2010); Strine, Jr. & Walter, *supra* note 13, at 915 (Field was also socially connected to the "Big Four" railroad barons involved in these cases: Leland Stanford, Collis Potter Huntington, Charles Crocker and Mark Hopkins).

88. *See* Horwitz, *Transformation, supra* note 37, at 36-37.

89. *See* Colombo, *supra* note 70, at 14; Blair & Pollman, *Supreme Court, supra* note 55, at 268; Blair & Pollman, *Derivative Nature, supra* note 77, at 1705.

Holding companies controlled diversified subsidiaries. Their employees crossed state borders and even oceans. And the corporation itself came to take on an identity (or brand) entirely distinct from its human membership.[90] Meanwhile, the idea of the corporation as protected private individual property came to be seen as offering corporations too much rhetorical protection just as their influence in society was seen as increasingly oversized and pernicious.[91] Lawmakers and judges alike became less willing to attribute indelible property rights to corporations, which would render the regulation of negative business externalities more difficult.[92] As a result, the aggregation theory yielded for a time to the real entity conception of corporate personhood, discussed in the next section.[93]

The aggregation theory made a comeback in the 1970s as the U.S. faced increasing international economic competition and recession. This more recent incarnation of the aggregation theory is perhaps most notoriously articulated by Alchian & Demsetz in their seminal 1972 article *Production, Information Costs, and Economic Organization* in the American Economic Review,[94] as donning "the garb of neoclassical economics."[95] Rather than describing the corporation as an assemblage of property owners akin to a partnership,[96] the new aggregation theory, known also as the "nexus-of-contracts" theory, defined the corporation as a set of relations amongst managers, shareholders, and other stakeholders that do not differ meaningfully from individuals engaging in ordinary market contracting.[97]

Functionalist[98] in its logic, the nexus-of-contract theory asks how individual stakeholders and shareholders could rationally agree to participate in economic activity using the corporate legal form. Inspired by Ronald Coase's legendary 1937 essay,[99] the contractual "transaction costs" theory of the firm argues that employees and other firm participants rationally and explicitly agree to hierarchical management given the uncertainty that renders contracts incomplete. The idea is that since no one firm participant can predict the future perfectly, it is rational for some participants to abide by the authority of another

90. Ripken*, supra* note 18, at 115.

91. Avi-Yonah, *supra* note 87, at 1017.

92. Horwitz, *Transformation*, *supra* note 37, at 104-105.

93. Millon, *Theories of the Corporation, supra* note 22, at 203.

94. Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 778 (1972) (describing the firm as a central contracting party amongst the "team" of human beings contributing to its output).

95. Millon, *Theories of the Corporation, supra* note 22, at 203.

96. Horwitz, *Transformation*, *supra* note 37, at 90 (citing Morawetz, *supra* note 84).

97. Bratton, *New Economic Theory, supra* note 37, at 1478.

98. By functionalist, I mean that these theories explain causes by their consequences. *See, e.g.*, Jon Elster, *The Case for Methodological Individualism*, 11 THEORY & SOC'Y 453, 45I4 (1982) (defining and illustrating the "invisible hand" paradigm, where social phenomena are explained by the beneficial function that they serve, *i.e.*, explaining their causes with their consequences).

99. Ronald Coase, *The Nature of The Firm,* 4 ECONOMICA 386, 390-392 (1937).

when it comes time to dealing with unanticipated events. A related version of the nexus-of-contract theory explains that parties who make specific, special investments in an ongoing business relationship will likewise agree to an authoritarian governance structure.[100] Each party can credibly extort the other by threatening to withdraw from the relationship. A withdrawal would leave the other party in the lurch, her pockets emptied after making specific and non-transferable investments in the relationship. To avoid such an outcome, the asset-specificity theory posits that the parties are likely to agree to subsume the partnership under the control of a single authority.[101]

Though the new nexus-of-contract version of the aggregation theory comes in many varieties, the most familiar versions posit that corporate shareholders bargain for residual control rights while delegating most day-to-day decision-making power to managerial agents.[102] Resulting in a contemporary "shareholder primacy" understanding of governance reminiscent of the first-generation aggregative version of the aggregation theory, these nexus-of-contract models hold that shareholders, as principals, monitor and discipline directors, their "managing agents," who otherwise have incentives to self-serve and underperform. Other nexus-of-contract models, though, favor non-shareholder stakeholders. Margaret Blair and Lynn Stout's "team theory," for example, understands directors as dictatorial agents hired to protect the specific (contractual) investments of employees, creditors, long-time customers, partners, and shareholders.[103]

Like its earlier iteration, the nexus-of-contracts model supported a libertarian ideological and political agenda amongst lawyers, lawmakers, and judges.[104] Namely, the nexus-of-contracts model of the aggregation theory was used to delegitimize both the managerialist model of the firm and government regulation. If corporations are the result of free contracting, they are an expression of economic liberty. Further, since they are efficient, they serve public welfare.[105] What's more, the theory offered up the corporate takeover

100. *See* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law,* 85 VA. L. REV. 247, 265-76 (1999).

101. *Id*. at 271-73 (citing Raghuram Rajan and Luigi Zingales, *Power in the Theory of a Firm,* 113 Q.J. ECON. 387, 392 (1998)).

102. *See* Martin Petrin, *A Balancing Approach to Corporate Rights and Duties, in* UNDERSTANDING THE MODERN COMPANY (Martin Petrin & Barnali Choudhury eds. 2018).

103. Blair & Stout, *supra* note 100, at 266.

104. The influence of these contractual models extended beyond academic economic circles. Most notoriously, Circuit Court Judge Frank Easterbrook translated them into legal discourse in his 1991 monograph, *The Economic Structure of Corporate Law*, jointly authored by the University of Chicago law professor Daniel Fischel. Judges routinely cite contractual theories when resolving disputes between shareholders and company executives. *See, e.g., Haft v. Haft*, 671 A.2d 413, 421 (Del. Ch. 1995); *Bird v. Lida, Inc*., 681 A.2d 399, 402-403 (Del. Ch. 1996); *Quadrant Structured Products Co., Ltd. v. Vertin et al*., 115 A.3d 535, 550 (Del. Ch. 2015); *In re EZCorp, Inc. Consulting Agreement Deriv. Litig*., 2016 Del. Ch. LEXIS 14 *3-4 (C.A. No. 9962-VCL).

105. P. Vasudev, *Law, Economics and Beyond: A Case for Retheorizing the Business Corporation*, 55 MCGILL L.J. 911 (2010); Bratton & Wachter, *supra* note 82, at 145.

market as a proxy to waning product market competition.[106] Nexus-of-contracts models predicted that savvy profit-hunting investors would pick and choose market "winners" and "losers" when the competitors themselves no longer had to compete with each other.[107] The nexus-of-contracts models thus predicted that firms would strive to innovate and economize to appease stockholders, even if these actions was no longer necessary to survive ordinary competition. The result of the nexus-of-contract models was a new intellectual emphasis on capital markets as the primary drivers of economic growth.

C. The Real Entity Theory

The real entity theory of corporate personhood defines the corporation as "a real and natural entity whose existence is prior to and separate from the state."[108] Eschewing the hyper-individualistic assumptions of aggregation theory, it is closely associated with early twentieth century British and American political pluralists like Harold Laski and G.D.H Cole.[109]

Real entity theory posits that corporations are not made by the state, but rather are made by the natural, voluntaristic action and associative instincts of human beings.[110] Unlike aggregation theory, however, real entity theory holds that whole is something more than the sum of its parts. Corporations "exist by some inward living force, with powers of self-development like a person . . . [with] a real claim to a mind or will of her own." They are not merely aggregations of individuals made whole by the "fiction" of interpersonal contracts.[111] They are, instead, persons in their own right, with their own moral and legal standing. According to real entity theorists, the corporate personality is a sociological fact[112] that was first attributed to U.S. business corporations by legal scholar Ernst Freund in the late nineteenth century.[113] Real entity theory embraced continental European ideas about the "spiritual reality of group life."[114] Many respected scholars admit the logical purchase of this idea, despite its metaphysical flourishes.[115] For example, analytical political philosophers Philip Pettit and Christian List, perhaps picking up on Freund's early

106. *See* Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 387-388 (1970) (arguing that efficient capital markets are "consistent" with firm efficiency).

107. Bratton & Wachter, *supra* note 82, at 145.

108. Horwitz, *Transformation, supra* note 37, at 101.

109. Cole, Figgis & Laski, *supra* note 18, at 17 (summarizing their views with Otto von Gierke's *Genossenschaft* real entity theory), 165 (Laski's pluralism with regard to associations); Runciman, *supra* note 18, at 37 (addressing Gierke's real entity theory and political pluralism); 178-79 (same for Laski); 93-94 (same for Maitland); 168-69 (same for Cole).

110. Cole, Figgis & Laski, *supra* note 18, at 47-8.

111. *Id*. at 40; *see also* Ripken, *Corporations are People*, *supra* note 18, at 113-114; McLean, *supra* note 18, at 71.

112. Ripken, *Corporations are People, supra* note 18, at 112.

113. Freund, *supra* note 47, at 37-8.

114. Bratton, *New Economic Theory, supra* note 37, at 1490; Hager, *supra* note 24, at 584.

115. *See, e.g.,* Muñiz-Fraticelli, *supra* note 18 at 21.

"representative" theory of corporate will formation, argued that one can identify an independent, performative concept of corporate agency. Pettit & List explain that corporations express a corporate "will" distinguishable from the individual wills of the members when their members undertake intra-group discourse under fixed decision-making procedures and norms.[116] Philosophers like Carole Rovane,[117] as well as contemporary political pluralists Vernon van Dyke[118] and Muñiz-Fraticelli,[119] likewise argue in favor of a real, though performative, conception of corporate "will."

The real entity theory does not just offer a unique ontology of the corporation. It also makes a normative argument. Namely, real entity theory suggests that corporations possess their own authority over their membership.[120] To explain, the corporate personality sufficiently resembles the personality of a natural human being to merit human autonomy rights.[121] Enforcing a corporate autonomy right means that, at least sometimes, it must be enforced against the corporation's own membership and against corporate outsiders. Consider a corporation that enters into a contract. If the corporation's contract right is enforced, it may very well be over the objections of dissenting corporate members. Consequently, corporate decisions are not only protected from state interference. They also serve as enforceable commands to members. In fact, a corporation's authority over its corporate members, under real entity theory, might be crucial to the meaning of the corporate community itself.[122] Particularly regarding religious bodies, being a part of a community may mean accepting that community's internal authority. A member that rejects the authority may be expelled from the community.[123]

Under real entity theory, the state serves a diminished role. The state does not delegate political authority, as suggested under concession theory. Nor is it tasked to enforce individual rights, as suggested by the liberal and libertarian assumptions of aggregation theory. Instead, the state is itself a corporate group, a species of the same genus as the corporation and can claim no more moral or legal authority than can a corporation.[124] In other words, the state itself is a

116. CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 59 (2011).

117. Carol Rovane, *Group Agency and Individualism,* 79 ERKENNIS 663 (2014) (providing a theory of group intention); Cohen, *Freedom of Religion, Inc., supra* note 22, at 185.

118. Vernon van Dyke, *Collective Entities and Moral Rights,* 44 J. OF POLITICS 21 (1982).

119. Muñiz-Fraticelli, *supra* note 18, at 23.

120. Cohen, *Freedom of Religion, Inc., supra* note 22, at 189; Muñiz-Fraticelli, *supra* note 18, at 20.

121. Muñiz-Fraticelli, *supra* note 18, at 199.

122. *See* Cohen, *Freedom of Religion, Inc., supra* note 22, at 197.

123. *Id.* at 185-86.

124. *See, e.g.*, CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO (2007); Runciman, *supra* note 18, at 17, 263-265; McLean, *supra* note 18, at 72. Political pluralism posit that the constituent units of the state are not individuals, but instead self-governing groups that generate their own unique legal orders. *See supra* note 120; Cole, Figgis & Laski, *supra* note 18, at 2; Frederick W. Maitland, *Moral Personality and Legal Personality, in* COLLECTED PAPERS (H. Fischer ed. 1911).

corporation with a mind of its own, *i.e*., the "popular will," and its standing as a moral and legal person is the same as the standing of the corporate person. The real entity theory consequently suggests that the most appropriate form of government is not liberal democracy, but political pluralism and corporatism. Political pluralists reject the idea that the state serves as the lone legitimate authority in society.[125] They argue instead that many associations possess legitimate authority, perhaps even an authority with a normatively better claim to people's loyalties than the state's. For some political pluralists, the state's function is merely to act as an umpire that negotiates conflicts amongst corporate groups.[126] This is a medievalist idea, reminiscent of the German *Standestaadt*. It invokes notions associated with the Investiture Crisis of the eleventh century,[127] when both the King and Church asserted overlapping but plenary power over their subjects.

Critics of political pluralism, however, worry that corporations will govern themselves in a way that violates their members' political and civic freedoms. To explain, a corporate person, like a human person, will exercise its freedom in pursuit of some "ethical" or "comprehensive" good. It might, for example, choose to follow religious tenets.[128] This choice will guide and constrain corporate members because a decision made on behalf of the whole will bind its parts, *i.e*., its members. Further, the choice may have the force of law, given that the corporation's religious decisions might be enforced by courts—perhaps against corporate members themselves. As a result, critics fear that the real entity theory of corporate personhood opens the door to self-governing communities that reject principles of liberal justice and democracy.[129] Critics' fears were realized in *Burwell v. Hobby Lobby Stores Inc*., where a controlling shareholder's religious beliefs regarding contraception were enforced over the objections of employees. Finally, if the state carries no more moral, legal or political authority than the corporation (it is a species of the same genus as the corporation), then dissenting members harmed by the corporation's decisions will have no appeal. They cannot claim, for example, that their own Constitutional rights trump the corporation's right to self-determination since Constitutional rights do not have a higher standing than do corporate rights.[130]

125. *See* Muñiz-Fraticelli, *supra* note 18, at 18.

126. *See* Kukathas, *supra* note 124, at 212-213.

127. Cohen, *Freedom of Religion, Inc., supra* note 22, at 192.

128. *Id.*

129. *See* Muñiz-Fraticelli, *supra* note 18, at 39-40 (comparing multiculturalism and pluralism and emphasizing that the latter accommodates different and illiberal (religious) sources of authority); Kukathas, *supra* note 124, at 124-125 (addressing critics who attack pluralism on the basis of pluralism's accommodation of the illiberal values within groups, Kukathas argues that they over-value Eurocentric understandings of "autonomy").

130. Cohen, *Freedom of Religion, Inc., supra* note 22, at 170 ("the point [of deploying real entity theory in the context of corporate religious rights] is to challenge the supremacy and comprehensive scope of 'monistic' state sovereignty"); Schragger & Schwartzman, *supra* note 23, at 350-51.

Despite this important critique, the real entity theory captures some important realities that concession theory and aggregation theory occlude. By the time the real entity theory entered the intellectual milieu, it was already recognized that burgeoning corporate capitalism was no simple construction of the state.[131] Rather, it was understood that private economic behavior and technological innovation had a significant part to play.[132] Moreover, as the corporation was used primarily for a source of private gain, it lost the appearance of serving the public purposes supposed by concession theory.[133] At the same time, aggregation theory was inadequate to describe the business corporation. The same "steady incorporation of institutionalized rationality"[134] made it hard to argue that the corporation was the result of easily identifiable individual initiative. In other words, corporations were too opaque, arcane and sprawling to be compared credibly to simple partnerships.[135] Specifically, state corporate laws began to authorize holding companies, *i.e*., corporate ownership of other corporations, and the ensuing merger boom not only allowed business to avoid "ruinous competition" during recession, but also to shed their identities as the entrepreneurial projects of founding investors.[136] The exponential growth of public share ownership, where corporate equity was held by a diverse, dispersed and often disinterested group, laid to rest the idea that a corporation could be analogized to a property partnership among equally engaged business associates.[137] At the same time, early twentieth-century organizational economists like Thorsten Veblen and John R. Commons rejected the severe methodological individualism of neoclassical theory and developed a more socially embedded account of market behavior.[138] The "visible hand," in Alfred Chandler's language,[139] of professional, bureaucratic managerial direction in a corporation replaced the "invisible hand" of the market. Corporations, moreover,

131. *See* Roy, *supra* note 65, at 3-4; SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT 78-79 (1996) (arguing that the reverse appeared to be true: corporations controlled the state and political actors).

132. *See* Blumberg, *supra* note 54, at 28; ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 49 (1977) (arguing that the size and organization of corporations was limited by technology); Spencer Thompson, *Bringing Society Back into the Theory of the Firm: The Adaptation of the Mondragon Cooperative Model in Valenci and Beyond,* 70-74 (July 10, 2015) (Ph.D. Dissertation, Cambridge University)(available at https://respository.cam.ac.uk/handle/1810/248892).

133. *See* Johnson, *supra* note 54, at 1138-39.

134. Trachtenberg, *supra* note 42, at 65.

135. *Id*. at 82-84.

136. *See* Blair & Pollman, *Derivative Nature, supra* note 77, at 1707.

137. *E.g*., Krannich, *supra* note 85, at 74; Herbert Hovencamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1600 (1988).

138. Daniel Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes*, 11 L. & HIST. REV. 59, 63 (1993); Bratton & Wachter, *supra* note 82, at 107 (noting that Adolf Berle's corporate theory was the mirror image of the industrial pluralism of Commons, who viewed the state as the enforcer of bargains entered into by self-constituted groups representing diverse economic interests).

139. Chandler, *supra* note 132.

intentionally established social identities distinct from their investors, managers and founders as they poured resources into corporate branding.[140] With their phenomenal growth in size, complexity, and bureaucratization, corporations seemed to be more than the mere sum of their parts, more than the boilerplate statutes of general incorporation, more than simple partnerships, and certainly more than the property of their owners.[141]

Real entity theory also responded to ideological changes. Concession theory was felt to be normatively inadequate by left-leaning scholars who were dubious of the state's willingness to regulate capital and set limits on corporate misbehavior.[142] Even if the state proved amenable to regulating corporations, progressive scholars, pragmatists who eschewed moral absolutes, were suspicious of the state's ability to arbitrate social conflict in an impartial manner.[143] These scholars would rather have parties work out their disputes for themselves.[144] Meanwhile, concession theory carried the stain of totalitarianism because it implied that the state could do whatever it liked with industry.[145] At the same time, according to left-leaning advocates, aggregation theory effaced the reality of corporate capitalism. The corporation was not a nexus of free contracting, but a self-governing entity whose methods of governance were often exploitative.

As a result, left-leaning scholars and jurists turned to real entity theory. Liberals embraced real entity theory because it helps distribute political, legal and moral authority throughout society. This diversification of authority not only allows communities to shape their own destinies, but also limits state power.[146] Progressive scholars also invoked the real entity theory to support the view that industrial labor organizations should have autonomy rights.[147] Furthermore, by claiming the existence of corporate communities that transcend the contractual relations of investors, real entity theorists could make normative arguments incorporating the interests of a wide array of stakeholders like workers, taxpayers, and the local community.[148]

Other left-leaning scholars argued that if a corporation was sufficiently human to merit autonomy rights, it should, like any other citizen, be required to

140. Blair & Pollman, *Derivative Nature, supra* note 77, at 1710.

141. Bratton, *Nexus of Contracts, supra* note 45, at 213; Roy, *supra* note 65 at 47; Johnson, *supra* note 54, at 1154.

142. Hager, *supra* note 24, at 638.

143. Horwitz, *History, supra* note 26, at 1427; Richard Posner, *Legal Pragmatism,* 35 METAPHILOSOPHY 147 (2004).

144. Ernst, *supra* note 128, at 60.

145. Horwitz, *History, supra* note 26, at 427.

146. Muñiz-Fraticelli, *supra* note 18, at 22, 43.

147. Ernst, *supra n*ote 138, at 60; E. Merrick Dodd, *For Whom are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145 (1932); Hager, *supra* note 24, at 583.

148. Johnson, *supra* note 54, at 1156-1157 (arguing that real entity theory is consistent with capacious corporate regulation); Hager, *supra* note 24, at 581, 584-585 (noting, for example, that Laski used real entity theory to argue in favor of a syndicalist unionism).

exercise that autonomy in a civically responsible manner.[149] In 1932, two law professors, E. Merrick Dodd and Adolph Berle, famously clashed over this very issue.[150] Dodd insisted that managers could be trusted to direct the "real corporate body" in the public interest because of the (human) emotional appeal and prestige of public service.[151] Berle, on the other hand, was not quite so sanguine about the corporation's capacity for civic virtue. Joining a cadre of legal realists fed up with the severe *laissez-faire* attitudes of the late nineteenth and early twentieth centuries,[152] Berle instead insisted that the federal government should use the hammer of law and economic planning to keep business attuned to the public good.[153] Berle and Dodd argued that the growing political and economic power of corporations, at least in the hands of unaccountable management, merited regulation and restraint.[154] When advising President Franklin D. Roosevelt in connection with the development of New Deal economic policies, Berle invoked corporatist ideas to support state regulation of otherwise freewheeling business interests.[155] Checking freewheeling business interests could not be accomplished by tinkering with corporate charters, whose reach was limited to the "internal life" of the entity. Instead, the state should instead focus on "exogenous" regulation[156] that supplemented the restraints that market competition placed on corporate behavior.[157] Finally, real entity theory allowed corporations to be held accountable for the harms they cause.[158] Unlike the concession and aggregation theories, which hold the corporate person to be a "fiction," the real entity theory permits the allocating blame to a corporation for its antisocial behavior, even when the antisocial behavior cannot be directly traced to the actions of the corporation's individual members.[159] Thus, the real entity theory's presence is seen within U.S. case law attributing criminal and civil liability to corporations—

149. Millon, *Theories of the Corporation*, *supra* note 22, at 203; Bratton & Wachter, *supra* note 82, at 123 (discussing Dodd along with other "business commonwealth corporatists" like General Electric's president, Gerald Swope, and its chair, Owen D. Young).

150. Adolf A. Berle, *Corporate Powers as Powers in Trust,* 44 HARV. L. REV. 1049 (1931); Dodd, *supra* note 147; Adolf A. Berle, *For Whom are Corporate Managers Trustees: A Note,* 45 HARV. L. REV. 1365 (1932).

151. Dodd, *supra* note 147 at 1153-54, 1160-61.

152. Horwitz, *supra* note 26, at 1426; Hager, *supra* note 24, at 179.

153. Bratton & Wachter, *supra* note 82, at 131.

154. Dahlia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought,* 30 L. & SOC. INQ'Y 179, 181 (2005).

155. Bratton & Wachter, *supra* note 82, at 112.

156. Johnson, *supra* note 54, at 1147, 1158; Hurst, *supra* note 69, at 162.

157. Tsuk, supra note 154, at 192; Bratton & Wachter, *supra* note 82, at 130.

158. Hager, *supra n*ote 24, at 585, 604-607.

159. *Id.* at 587, 608-609 (noting that Laski argued that traditional tort law, dependent on individualist conceptions of negligence, would not capture corporate harm). For an analytical discussion of corporate collective responsibility, *see, e.g.,* PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984).

liability that, by its nature, is contingent upon the corporate person possessing the requisite *mens rea*, or mental state.[160]

Real entity theory also appealed to those holding right-leaning ideologies. For some, the corporation, as an autonomous, 'real' entity, merited just as much protection as the human individual.[161] The real entity theory thus legitimized an anti-regulatory conception of corporate law that protected the growth of big business.[162] Accordingly, the real entity theory appears in judicial opinions favoring business interests, including *Hale v. Henkel,*[163] a 1906 U.S. Supreme Court opinion affording the corporation rights under the Fourth Amendment.[164] The real entity theory also appeals to those favoring a strong version of religious liberty that protect the right of religious communities to govern themselves, even in ways that violate liberal democratic values and generally applicable lawmaking.[165] Political theorists and legal scholars[166] have identified the real entity theory lurking behind the Supreme Court's ascription of religious free exercise rights to business in *Burwell v. Hobby Lobby* and speech rights in *Citizens United v. Federal Election Commission*.[167] Their arguments maintain that the Court would not exempt religious organizations from general lawmaking unless it first understood them as real entities possessing their own unique claim to autonomy—just as John Neville Figgis, an early 20th-century pluralist, did.[168]

160. Petrin, *supra* note 102 at 242; Hager, *supra* note 26 at 587-592.

161. Hager, *supra* note 24, at 580-581; Millon, *Ambiguous Significance, supra* note 37, at 46; Millon, *Theories of the Corporation, supra* note. 22, at 213; *see* List & Pettit, *supra* note 116, at 180.

162. Millon, *Theories of the Corporation, supra* note 22, at 241; Hager, *supra n*ot 24, at 580.

163. *Hale v. Henkel*, 201 U.S. 43 (1906).

164. Harris, *supra* note 36, at 48.

165. Michael McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1, 5 (1985) (arguing that First Amendment freedoms should include the accommodation of religious practice, understood as institutional self-governance rights, even if it includes special exemptions from general lawmaking)*;* Michael McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV 685 (1991) (arguing for the freedom of "churches" in their own right to govern themselves as they see fit without government interference, even if such self-governance involves, *e.g*., the use of proscribed drugs); Douglas Laycock, *Church Autonomy Revisited,* 7 GEO. J. L. & PUB. POL'Y 253 (2008); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373 (1981).

166. *See* Cohen, *Freedom of Religion, Inc., supra* note 22, at 186 ("[A] *particular political theological version of* [the real entity] theory pertaining to the corporate religious is doing the work regarding the unique deference to church autonomy in *Hosanna-Tabor,* and to the integralist religious claims of the controlling stockholders in *Hobby Lobby.*"); Jackson, *Disaggregating, supra* note 9, at 404.

167. Cohen, *Freedom of Religion, Inc., supra* note 22, at 186; Avi-Yonah, *supra* note 87, at 1033; Seamus O'Melinn, *Neither Contract Nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 226 (2006) ("the law had turned the corporation into a polity with power over its own affairs . . . One effect of the majority rule was to turn religious corporation into a true polity, relieving the courts of the onerous and perhaps unconstitutional business of ensuring the trustees' fidelity to religious doctrine.").

168. A famous early example of the use of real entity theory to justify church autonomy rights against the state Is provided by Figgis, *supra* note 18.

The real entity theory fell out of favor after the 1930s. First, it suffered from some devastating philosophical attacks.[169] Accused of metaphysical mystification, the theory's romantic flourishes fell out of favor with hard-nosed empirical philosophers, methodological individualists, and jurists.[170] Meanwhile, the aggregation theory, with its focus on the individual, proved more compatible with the sensitivities of those fearing the prospect of totalitarian corporatism among the U.S. academy.[171] The aggregation theory also worked well with theories of interest group pluralism that were used to study U.S. politics.[172] Finally, the real entity theory became disfavored after it became clear that it could be wielded for a variety of conflicting political purposes.[173]

III. FALSE CHOICE I: BETWEEN PUBLIC AND PRIVATE

In sum, scholars, jurists, and activists have deployed the three theories of corporate personhood to justify corporate rights and duties. The concession theory holds, roughly, that the corporation is a creature of the state, and the state can shape the corporation however it likes: it can circumscribe its liberties, define its purposes, and interfere with its internal decision-making procedures. Aggregation theory holds that the corporation is the creature of individuals exercising their individual rights, and the state should respect those rights. Real entity theory, in turn, holds that the corporation can govern itself freely because the corporation has its own independent claim to authority. Whether and to what extent the theories are convincing seems to depend upon historical context and one's preferred political ideology.

In the remainder of this Article, I will show that all three theories are, to a certain extent, convincing. Each contributes to a conversation of utmost importance to constitutional liberal democracies: the deliberation undertaken by citizens as they determine for themselves the rights that ought to be ascribed to the business corporation. But before the theories can serve this crucial function, they require some amendment. Namely, these theories are built around wrongheaded ontological and normative choices that must be excised. The first of the choices is presented in the next Part.

169. For a discussion of the normative inconsistencies and political inconveniences of political pluralism generally, *see generally* Runciman, *supra* note 18.

170. List & Pettit, *supra* note 116, at 9; Muñiz-Fraticelli*, supra* note 18, at 204 (citing a letter from Oliver Wendell Holmes to Laski).

171. Tsuk, *supra* note 154, at 182; Horwitz, *History*, *supra* note 26, at 1427.

172. Tsuk, *supra* note 154, at 182; see generally ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES (1967) (for a formative pluralist account of democracy).

173. Dewey, *supra* note 18, at 669 ("Each theory has been used to serve the same ends, and each has been used to serve opposing ends."); Hager, *supra* note 24, at 635; Chaffee, *supra* note 23, at 369.

A. Public Spheres, Private Spheres, and their Early Modern Ontology

John Dewey, in a seminal *Yale Law Journal* article,[174] urged scholars to relinquish their pursuit of a "definite metaphysical conception regarding the nature of"[175] the corporate person. The conception "ultimately derived from theology."[176] Whether approached from an aggregation, concession or real entity model, it is impossible to pin down the definition sufficiently. As a result, the ontologies suggested by the theories of corporate personhood cannot provide the stable ground to construct a corporate autonomy right. After all, "the history of western culture shows a chameleon-like change"[177] in our understanding of what a human person is and what rights a human person should have. Whether couched in terms of agency, sentience, the capacity to suffer, or otherwise, our political history is littered with the bodies—both conceptual and real—of those deemed insufficiently 'human' to merit the protections of legal personhood. As a result, any comparison between corporations and human beings involves chasing an ever-moving goalpost. A corporation may, or may not, share the requisite characteristics with human individuals—depending on which human characteristics are deemed legally salient at any given point in time. For example, if moral responsibility is ascribed based upon a human being's subjective intentions, then corporations cannot face moral blame. Corporations do not have subjective intentions. In contrast, if moral responsibility is based upon a human being's capacity for rational agency, then perhaps corporations can be held at fault. Corporations do exhibit a kind of collective agency. Consequently, Dewey argued, theories of corporate personhood are too easily gamed by lawyers with particular policy agendas.[178]

But Dewey's argument is not the only ontological critique that can be levied against theories of corporate personhood. Our understandings about which "human" characteristics justify rights are not the only understandings that have changed over the centuries. Our understanding of the state has changed too. Today, we give different answers to question about the state's purpose and role than we did centuries ago.

Yet theories of corporate personhood continue to present a choice based upon outdated understandings of both the person and the state. Namely, they present a choice between public and private: the corporation is either part of the state (public) or part of society (private). Each confronts the other like a hostile nation. The division of human experience into these ontological categories—or "spheres"—arises from an early modern conception of sovereignty that should no longer take up any space in our imaginations. Once this conception is updated,

174. Dewey, *supra* note 18.
175. *Id.* at 660.
176. *Id.*at 664.
177. *Id.* at 658.
178. *Id.* at 665.

the categories evaporate. What remains of the theories of corporate personhood sounds in a purely normative register: whether legal rights to corporate personhood should be ascribed depends upon the important human values and interests the legal rights might protect.

1. Sovereignty, the State, and the Public-Private Distinction

Theories of corporate personhood usually presume an antiquated conception of state sovereignty. The conception juxtaposes a powerful state agent against a governed mass of subjects who hold an array of pre-political rights—rights that exist before any government arises, perhaps in a state of nature. The theories presume that the state is an agent or 'body' claiming what Jean Bodin set forth in the sixteenth century: supreme, absolute, indivisible and perpetual power.[179] They then divide the ontological world between the state, on the one hand, and those over whom it rules, on the other.[180] Finding themselves forced to slot the corporation into one of these two categories, theorists then scope for evidence of its "public" or its "private" credentials. But there should be some discomfort with this bilateral taxonomy. The everyday operations of an independently managed Alphabet, Inc. are only awkwardly characterized as manifestations of state authority. At the same time, given its capacious social, economic and political influence, Alphabet, Inc. cannot be fairly characterized as an exercise of private individual liberty. Its legal genome, in the form of limited liability, asset lock-in, and the like, caution against such straightforward categorization. Thus, theorists and jurists understandably deploy hedging language to describe the corporation. They locate it somewhere in between the ruler and the ruled: "franchise government;"[181] "neither public nor private";[182] "quasi-public;"[183] "intermediate groups;"[184] and "private government."[185] Theorists then proceed to argue for or against corporate rights by analogy,[186] according to whether certain instances of corporate behavior seem to take on state-like or private characteristics. But, given the variation of corporate size, power, and wealth, it is difficult to "[separate] out those corporations with government-like power from those without it."[187]

179. *See* Bodin, *supra* note 50, at 122.

180. *Id.* at 214-15.

181. Ciepley, *supra* note 13, at 140.

182. *Id*.

183. *Citizens United,* 558 U.S. at 427 (Stevens, J., dissenting).

184. Levy, *supra* note 18, at 1.

185. ELIZABETH ANDERSON, PRIVATE GOVERNMENT 41-44 (2017).

186. *See* Hélène Landemore & Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy,* 44 Pol. Theory 56 (2016); Nien-He Hsieh, *Should Business Have Human Rights Obligations?,* 14 J. HUM. RTS. 218 (2015); Bratton, *New Economic Theory, supra* note 37, at 1497; Ripken, *Corporations are People, supra* note 18, at 142; and Abraham Singer, *The Corporation as a Relational Entity,* 47 POLITY 328, 341 (2017) (hereinafter, "Singer, *Relational Entity*").

187. ADAM WINKLER, WE THE CORPORATIONS 271 (2018) (hereinafter, "Winkler, *We the Corporations*"). Note, however, that the wielding of power is not the only characteristic that states may or may not be shared with corporations. States may, for example, claim to govern with legitimacy and

Consider, for example, a monopsony employer providing the sole supply of employment in a community. This employer will possess significant leverage over employees as it directs their activities. Compare this monopsonist with a solo proprietorship who employs only a handful of individuals that can easily find an alternative job if their employer treats them badly. The former, the monopsonist, shares more characteristics with a state than the latter, the sole proprietorship. Employees experience their directions as sovereign commands, not offers to renegotiate a contract. Now consider a mid-size firm that controls a significant, but not the majority, portion of the employment market. It enjoys more leverage over employees enjoyed by the sole proprietorship, but less than by the monopsonist. Whether this employer should be treated like a state or like a private party is unclear. While analogies undoubtedly provide traction[188] into the problem of corporate rights, they leave the corporation in conceptual purgatory. When a corporation exhibits characteristics of both the state and the individual, these analogies leave little principled guidance when it comes to ascribing or limiting corporate liberty. For example, when a corporation attempts to practice religion by promulgating workplace rules that incorporate religious doctrine, it is at the same time exercising private liberty rights *and* acting like a governing institution over subjects who may dissent. Applying any analogical reasoning to the problem requires an arbitrary choice between the corporation's public and private credentials.

Fortunately, a better ontology is available for the state, the individual, and the corporation. The conception of sovereignty and the state subtending the public/private distinction has been given an update. Namely, the contemporary understanding of constitutional liberal democracy does not make neat distinctions between ruler and ruled. Thus, it is no longer necessary to classify the corporation amongst the two. Once we have a handle on contemporary notions of the state and sovereignty, not only will the corporate theories of personhood become more tractable, they will also become less contradictory.

justice; provide for their citizens' welfare; protect citizens' liberties; ensure national security and defense, and so on. As a result, this rough sort of analogical reasoning between corporations and states cannot help but lead to indeterminate conclusions and therefore leave space for unstated ideological assumptions to do a lot of the intellectual work.

188. For example, analogies force their users to clarify the variables they are comparing. "Power" over employees/citizens could be parsed as, for example: an ability of the subject/employee to exit or shape the commands given; the number of resources at the disposal of the state/corporation under conditions of scarcity; the ideological influence yielded by the state/corporation, *etc*. For a discussion of power and its different dimensions, *see generally* STEPHEN LUKES, POWER: A RADICAL VIEW (2d ed. 2005); GUIDO PARIETTI, ON THE CONCEPT OF POWER: POSSIBILITY, NECESSITY, POLITICS (2022).

2. The Corporate Two-Body Problem: Rule vs. Ruled

For much of modern Western history, sovereignty, understood as the right to rule over a specific jurisdiction or territory,[189] was thought to be held by a specific body. The person of the monarch, or a particular body of legislators, held sovereignty: the absolute right to rule.[190] Thomas Hobbes, for example, famously imagined a state of nature full of individual human beings forming a covenant to authorize and relinquish their natural liberties to a "Mortall God,"[191] *i.e.,* the modern state. This "Mortall God" is represented (or re-presented) in the human bodies of the King or legislature—much in the way board of directors represents the will of the corporation while also remaining flesh-and-blood human beings.[192] Jean Bodin, another familiar example, understood sovereignty to rest with a King answerable only to divine authority.[193] This body (understood collectively or in the singular) would rule over subjects, another separate ontological phenomenon. As traced by intellectual historians Richard Bourke and Quentin Skinner,[194] while the state organs that were thought to possess sovereignty transformed over the modern age, political thought preserved the ontological gap between the body of ruler and the ruled.[195] In particular, democratization complicated the picture. "We the People," as the popular sovereign, was set up as something different from, and often antithetical to, "the government," which itself enjoyed authority over citizen subjects. As intellectual historian Richard Tuck argues, from British Levellers to American

189. Jean L. Cohen, *Sovereignty, the Corporate Religious, and Jurisdictional/Political Pluralism,* 18 THEO. INQ. L. 547 (2017) (hereinafter, "Cohen, *Sovereignty"*); DIETER GRIMM, SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL CONCEPT 5, 21 (trans. Belinda Cooper 2015) (also arguing that the concept has changed over history, location, and context).

190. Cohen, *supra* note 189, at 14.

191. Hobbes, *supra* note 46, at 114.

192. *See generally* ERNST KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (1957) (giving the history of the "twinning" of the King as a human being and as the state); F.W. MAITLAND, STATE TRUST AND CORPORATION 35 (ed. David Runciman & Magnus Ryan) (providing an amusing description of the "corporation sole," a legal device that allowed the monarch to act both as a public officer and a private citizen); EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 18-19 (1988) List & Pettit, *supra* note 116, at 175 (arguing that Hobbes' performative conception of personhood allowed a multitude of individuals to be represented by a single spokesperson, such that both are thereby 'made one person') (quoting Hobbes, *supra* note 46, at 109). *See also* Quentin Skinner, *Hobbes and the Purely Artificial Person of the State,* 7 J. POL. PHIL. 1 (1999) (explaining the corporate conception of the state as both human and corporate person). Daphne Renan makes a singular argument about the President's two bodies, one representing the flesh-and-blood human citizen and the other a political office. Daphne Renan, *The President's Two Bodies,* 120 COLUM. L. REV. 1119 (2020).

193. JEAN BODIN, ON SOVEREIGNTY: FOUR CHAPTERS FROM THE SIX BOOKS OF THE COMMONWEALTH 4 (ed. and trans. Julian H. Franklin, 1992) (hereinafter, "Bodin, *On Sovereignty*"); Grimm, *supra* note 189 at 20.

194. *See* Richard Bourke, *Introduction, in* POPULAR SOVEREIGNTY IN HISTORICAL PERSPECTIVE 1 (Quentin Skinner ed. 2017). For a general history of changes in the conception of sovereignty, *see* Grimm, *supra* note 189.

195. For excellent discussion of the historical development and elaboration of the "gap" between government and "the people*," see generally* Morgan, *supra* note 192;MARGARAT CANOVAN, THE PEOPLE (2005).

revolutionaries, the idea of the sovereign "people" was often invented precisely to offer an authority that would compete with that of the government in power (the Kind-in-Parliament).[196] Thus, "the people" had rights against a government permanently tempted to trample all over them. The takeaway for the corporation is that it was either part of the governing body or the governed society. It is either part of the state and the sovereign power or part of the people courageously asserting their rights against state intrusion. Up to and through the American revolution, it was considered a part of the former.[197] Indeed, the British colonization of the Americas often took the form of corporations.[198]

After the democratic revolutions, however, this bilateral ontology began to break down. Communitarians (Habermas' term) imagined "the people" not only replacing the king as sovereign, but also governing themselves as subjects. Communitarians thereby created an identity between ruler and ruled. Rousseau's *volunté générale,* or general will, serves as a model for this kind of thinking: each individual remains as free as she was before entering into political society so long as she herself, along with each and every other person, exercises sovereign power together in consensus.[199] The Baron de Montesquieu likewise defined republican government as "that in which the people as a body, or only a part of the people, have sovereign power [*la souveraine puissance*].'"[200] Carl Schmitt, who provided intellectual support for Nazi Germany,[201] also identified the ruler with the ruled—although with some alarming and socially homogenizing implications.[202] Similarly, populists in the 19th century critiqued government officers and state laws precisely because they betrayed the imagined will of the sovereign people.[203] Indeed, many mainstream populist thinkers sometimes understand constitutionalism, judicial review, and liberal rights as illegitimate constraints on the people's sovereign power.[204] The upshot for the corporation is

196. RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY 249 (2016) (conceptually separating sovereignty (popular) from government was a precondition of modern representative democracy).

197. *See* Part II(A), *supra* (discussing concession theory).

198. David Ciepley, *Is the U.S. Government A Corporation? The Corporate Origins of Modern Constitutionalism,* 111 AM. POL. SCI. REV. 418, 419 (2017).

199. Jean Jacques Rousseau*, Of the Social Contract*, *in* THE SOCIAL CONTRACT AND OTHER POLITICAL WRITINGS 39, 49-50 (1997).

200. Tuck, *supra* note 196, at 124 (quoting MONTESQUIEU, THE SPIRIT OF THE LAWS 10 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone, eds. and trans., 1989).

201. *See, e.g*., Bill Scheuerman, *Carl Schmitt and the Nazis,* 23 GERMAN POL. & SOC'Y 71 (1991).

202. *See* CARL SCHMITT, CRISIS OF PARLIAMENTARY DEMOCRACY 28-32 (Ellen Kennedy ed. 1988); CARL SCHMITT, CONSTITUTIONAL THEORY 257-264 (trans. J. Seitzer, 1928). Roughly, the logic is this: if the people share a single identifiable preference or interest, then there cannot be diversity amongst them. As a result, those who think and act differently are not a part of the people. It is then necessary to excise dissenters from the polity in order to preserve democracy.

203. Canovan, *supra* note 195, at 75.

204. One example is former President Trump's calling for the possible "termination" of the constitution. Kristin Holmes, *Trump calls for the termination of the Constitution in Trust Social Post,* CNN.COM, December 4, 2022. According to one report, 74% of Americans support Trump's idea of being a "Dictator for a Day." Tim Dickenson, *Let Trump Be Dictator for a Day, 74 Percent of Republicans Say,*

that the corporation was public, but because anything public was subject to democratic control, the corporation was too.[205] This kind of logic supports the fascist or communist merging of political and economic power, where state control of industry is justified by, *inter alia*, the state's (ostensible) support from the relevant *demos*.[206]

Of course, there are flaws in the equation of ruled with ruler. The 'people' cannot govern. The entire population of a diverse community cannot be present within governing institutions.[207] Nor would that population ever likely find a unanimous general will, no matter how constrained and qualified their public reasoning.[208] As a result, old gap between governed and governor remains, even when the governor might be staffed by democratically elected representatives and even when political authority limited, divided, and separated by constitutional norms.[209] In other words, the analytical merger between ruler and ruled attempted by the democratic revolutions did not eradicate heteronomy between the government and the governed.[210] Some (body) would wield public power, and the rest would be subject to its rules.

Given that the democratic revolutions failed to eradicate the public/private distinction, the question of the corporation's public or private credentials remained. Liberalism provided an alternative to the alarming authoritarian implications of slotting the corporation in the "public" half of the dichotomy.[211] Liberalism understands ruled subjects, those resting in the second half of the public-private divide, as a disaggregated, atomized and abstract multitude

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ROLLING STONE, February 7, 2024. Similar populist erosions of the rule of law, the power of courts, and constitutionalism can be observed in, *e.g*., Hungary and Israel. Andrew Arato, *How We Got Here? Transition Failures, their Causes, and the Populist Interest in the Constitution,* 45 PHIL. & SOC. CRI. 1106 (2019).

205. *E.g*., William J. Novak, *Legal Origins of the Modern American State, in* LOOKING BACK AT LAW'S CENTURY 249, 253 (Austin Sarat et al. eds., 2002) (hereinafter, "Novak*, Legal Origins*") (addressing early 20th century critiques of obstructive laissez-faire legal systems.).

206. For a historical discussion of the political economy of fascist Nazi Germany, *see* FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 1933-1944 (2009)*; see also* ADAM TOOZE, THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY (2008)*;see also* ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY 89 (1986) (hereinafter, "Dahl, *Preface*") ("[A] desirable economic order would disperse power, not concentrate it.").

207. *See, e.g*., Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 9-10 (2022); Bryan Garsten, *Representative Government and Popular Sovereignty, in* POLITICAL REPRESENTATION39 (Ian Shapiro, Elizabeth Jean Wood and Alexander S. Kirshner eds. 2009); DAVID RUNCIMAN AND MONICA BRITO-VIEIRA, REPRESENTATION 95-96 (2008); Lisa Disch, *Towards a Mobilization Conception of Democratic Representation,* 105 AM. POL. SCI. REV. 100, 101 (2011).

208. *E.g*., Katharine Jackson, *Administration as Democratic Trustee Representation,* 29 LEG. THEORY 314, 318-19 (2023) (hereinafter, Jackson, *Administration*). For a seminal argument on this issue, *see* V.O. KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY (1961).

209. Morgan, *supra* note 192, at 53.

210. Grimm, *supra* note 210, at 31, 105; Canovan, *supra* note 195, at 29.

211. For a discussion of the history of liberalism as a reaction to the fear of an overreaching state, particularly given modern warfare technology, *see Judith Shklar, The Liberalism of Fear, In* LIBERALISM AND THE MORAL LIFE 21, (Nancy L. Rosenblum ed. 1989).

carrying pre-political rights.[212] In many instances, these pre-political rights included rights to property and contract that could be asserted against public authority.[213] When modified to fit a constitutional state, for example, Kant's categorical imperative distributed equal (male) rights to hold property, to hospitality, and the like.[214] If a corporation is defined as a voluntary association of individual property-holders, it fits comfortably into the sphere of private action insulated from the state, operated by individuals carrying individual rights.

As intimated in the previous paragraphs, the theories of corporate personhood are typically understood in conjunction with the bilateral public/private distinction created by organ-body conceptions of sovereignty. Concession theory imagines the corporation as the associational conscript or "franchise"[215] of the state, a delegation of power made by a ruling body holding sovereignty. The corporation, accordingly, falls within the public half of the public-private divide. The corporation, under concession theory, is a state-controlled legal personality[216] or a kind of "public law"[217] that governs individuals just like an organ-body sovereign state rules over its legal subjects. Revolutionary-era American jurists employed such a conception when they sought to limit corporate prerogatives. "Jeffersonians," observes Adam Winkler, "were populists—opponents of corporate power who sought to limit corporate rights in the name of the people."[218] They identified the corporation with an overbearing and unrepresentative colonial government, and they identified themselves as under-represented citizens denied political liberties.[219] As a result, the corporation-as-state-conscript had to be constrained in the same way any ruler must be constrained. Indeed, even after the Revolution, because "all government was the people's" even as "the people had withdrawn from government altogether,"[220] critics of the corporation appealed to the "sleeping"[221] popular sovereign—the same one that insisted on its inalienable

212. Ciepley, *supra* note 13, at 139-140.

213. Barkan, *supra* note 42, at 50.

214. *See generally* B. SHARON BYRD & JOACHIM HRUSCHKA, KANT'S *DOCTRINE OF RIGHT*: A COMMENTARY (2010) for a summary of Kant's understanding of rights.

215. Ciepley, *supra* note 13, at 140.

216. Freund, *supra* note 47, at 11.

217. Millon, *Theories of the Corporation, supra* note 22, at 211.

218. Winkler, *We the Corporations, supra* note 187, at 36.

219. Speir, *supra* note 55, at 155; Millon, *Theories of the Corporation, supra* note 22, at 209; Strine, Jr. & Walter, *supra* note 13, at 895 (citing Jefferson among others); Blumberg, *supra* note 54, at 6; Barkan, *supra* note 42, at 45; THOMAS PAINE, DISSERTATIONS ON GOVERNMENT (1786) ("If corporate Bodies are, after their incorporation, to be annually dependent on an Assembly for the continuance of their Charter, the citizens, which compose those corporations, are not free. The Government holds an authority and influence over them, in a manner different from what it does over other citizens, and by this means destroys that equality of freedom, which is the bulwark of the Republic and the Constitution.") (available at https://www.thomaspaine.org/works/essays/american-politics-and-government/dissertations-on-government.html).

220. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 517 (1975).

221. *See* Tuck, *supra* note 196, at 198-99.

rights against the government—to constrain corporate legal rights. States' rights advocate Justice Rehnquist, in *Austin v. Michigan State Chamber of Commerce*,[222] made a similar move when he argued against corporate speech rights. Since the corporation is a state conscript, and since the people control the state, the people, through state lawmaking, have the right to control the corporation.[223] The 19th century Jacksonian populists similarly contended that "[w]hatever power is given to a corporation, is just so much power taken away from the State, in derogation of the original power of the mass of the community."[224] Overweening corporations, as creations of a state, must also be controlled by the people.[225]

Concession theorists, emphasizing the democratic credentials of the sovereign state, did not worry overmuch if corporate regulation might wrongfully trample individual rights. Accepting the Rousseauian merger between sovereign and subject, contemporary concession theorists presume that democratic lawmaking approaches popular consensus. Since rights-carrying subjects created and consented to the law, they have no occasion to object to the laws that constrain corporate action. Thus, contemporary concession theorists deal suspiciously with any attempts to impose constitutional restraints upon corporate regulation. Indeed, such constitutional shackles would prevent democratic citizens from asserting their collective political liberty.[226] Accordingly, they would embrace Justice Ginsburg's dissenting argument in *Burwell v. Hobby Lobby Stores, Inc.*[227]: that Congress has the authority to delimit the powers and protections afforded to business corporations in the public interest.

Unsurprisingly, those denying the Rousseauian merger of ruler and ruled reject this move. Critics of contemporary concession theory understandably accuse it of authoritarian tendencies.[228] It elides any normative questions that arise once one admits that the sovereign and subject are not always identical and that citizens do not always consent to the laws that govern them. Even if the state is sovereign, this surely does not mean it can do anything it likes—at least not in a polity purporting to be liberal and constitutional.

Picking up on this elision, aggregation theory therefore catalogues the corporation not as a state but as a rights-bearing subject.[229] Pointing out the

222. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

223. *Id*. at 658-59.

224. Winkler, *We the Corporations, supra* note 187, at 91 (citing the delegates at the 1837-38 Pennsylvania constitutional convention).

225. Barkan, *supra* note 42, at 47-48.

226. JOHN PARKINSON, CORPORATE POWER AND RESPONSIBILITY: ISSUES IN THE THEORY OF COMPANY LAW 26 (1993); Singer, *Relational Entity, supra* note 186, at 335.

227. 573 U.S. at 651-52 (2014) (Ginsburg, J., dissenting).

228. Orts, *supra* note 13, at 21.

229. *See* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 THE J. OF AM HIST. 970

obvious private individual involvement in building and maintaining business corporations,[230] some even argue that incorporators and corporate participants can construct a corporate-like entity by relying exclusively on private contractual law, not corporate law.[231] The corporation is merely the outcome of individuals exercising their pre-political individual liberties to contract, to own property, and to associate amongst each other. Therefore, aggregation theorists cannot help but conceive of the state as a foreign entity tempted to run roughshod over private associational and economic life.[232] Thus, when Justice Stephen Field awarded substantive due process protections to corporations in order to protect shareholder property,[233] he was openly hostile to "populist" government regulation of the economy.[234] A corporation, described as a "nexus of contracts," does not "differ 'in the slightest degree from ordinary market contracting'" that, like any contract, deserves the protections afforded to the private sphere.

Real entity theorists, like aggregation theorists, also perceive the gap between ruler and ruled as large and irreconcilable. Under real entity theory, however, the unit of analysis is not the individual, but instead the group. According to this perspective the corporation is "a real and natural entity whose existence is prior to and separate from the state."[235] Human association is just as natural as the individual propensity to "truck and barter."[236] It is a pre-political "subject"[237] to which the law later ascribes rights. It also mirrors the Schmittian idea that democracy presupposes the prior existence of the "nation" or *demos*.[238] Stated more simply, the people (and the popular will) come first and the state comes second—both temporally and normatively. The corporation, like the nation, is a "real" entity that has something like a will even before a constitution is ratified,

(1975); Horwitz, *History, supra* note 26, at 1425; Krannich, *supra* note 85, at 72; Ciepley, *supra* note 13, at 146-47; Barkan, *supra* note 42, at 74.

230. *See* Michael C. Jensen & William H. Meckling. *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J OF FIN. ECON. 305 (1976).

231. *See* R. HESSEN, IN DEFENSE OF THE CORPORATION 18 (1979) (arguing that contract can be used to replicate entity status, perpetual duration, limited liability for both debts and torts); Parkinson, *supra* note 183, at 27; *cf*., *e.g*., Ciepley, *supra* note 153, at 143.

232. *See* Colombo, *supra* note 70, at 6-7; Vasudev, *supra* note 105, at 923; Bratton & Wachter, *supra* note 82, at 145; Susan Konzelmann *et al*., *Governance, Regulation and Financial Market Instability,* 34 CAM. J. ECON. 929 (2010).

233. *County of San Mateo v. Southern Pacific R. Co.,* 13 F. 722, 757 (C.C.D. Cal. 1882); *Cnty. of Santa Clara v. Southern. Pac. R. Co.,* 18 F. 385, 404 (C.C.D. Cal. 1883), *aff'd* 118 U.S. 394 (1886) (implying that Fourteenth Amendment protections can be ascribed to corporations). Note, however, that the idea that the U.S. Supreme Court granted Fourteenth Amendment protections to corporations may arise from a two-sentence annotation from the bench attributed to the Chief Justice by a reporter. *See* John D. Gordan, III, *The* San Mateo *and* Santa Clara *Railroad Tax Cases (1882-1886) from the Trenches,* 31 W. LEGAL HIST. 23, 24 (2020).

234. Winkler, *We the Corporations, supra* note 187, at 146-54.

235. Horwitz, *Transformation, supra* note 37, at 101.

236. *See* ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776)

237. *See* Dewey, *supra* note 10, at 659-61.

238. Ernst-Wolfgang Böckenförde, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, 10 CANADIAN J. OF L. & JURIS. 5, 10 (1997).

a first election is held, and the first corporate law is promulgated. It is an entity whose members are (or should be) characterized by homogeneity, and who can, perhaps, be represented by some charismatic leader purporting to identify with and speak for all. This equation with the will of its official spokesperson, explained by the idea that corporations are entities both (1) comprised of like-thinking, interest-sharing individuals while (2) existing as bodies in their own right, resonates with the managerialist conceptions of real entity theory that flourished during the Post-War period.[239]

Unlike liberal aggregation theorists, however, real entity theorists invoke a political pluralist understanding of sovereignty.[240] They juxtapose against the state not individuals carrying individual rights, but instead corporate bodies carrying indefeasible rights to self-determination. They then reject any attempt to subsume these entities under a higher political authority, including those enforcing liberal constitutional values, perhaps preferring instead an archipelago[241] of separate self-governing bodies.[242] For example, real entity theorists often emphasize the fact that corporations carry their own unique cultures and value systems.[243] If a state—another human association —has a right to rule its constituents, then corporations should have the same right.

The public/private ontology erected by these conceptions of sovereignty leads to irreconcilable theories of corporate personhood. Concession theory situates the corporation as ruler, pitting legitimate state power against wayward legal subjects. Aggregation and real entity theory classify the corporation as ruled, countering what they understand as illegitimate state action with superordinate pre-political claims to liberty and self-determination. However, when corporations can claim *both* governmental provenance and private credentials, when they vindicate *both* public interests and private rights, those interested in corporate autonomy rights are left with a conceptual mess in their

239. *See* Ripken, *supra* note 18, at 115-116; Bratton, *New Economic Theory, supra* note 37, at 1476.

240. *See generally*, Laski, Cole, Figgis & Maitland, *supra* note 18; Cohen, *Freedom of Religion, Inc*., *supra* note 22.

241. Kukathas, *supra* note 124, at 19.

242. *Id*., 19-20; Cohen, *Freedom of Religion, Inc*. *supra* note 22, at 171-172.

243. *See* Colombo, *supra* note 70, at 44 (going so far as to offer a theory of the corporation as a "Tocquevillian" association with "distinct cultures – even values."); George Kateb, *The Value of Association, in* FREEDOM OF ASSOCIATION 35, 48 (Amy Gumann ed. 1998); P. Ewick, *In the Belly of the Beast: Rethinking rights, Persons and Organizations,* 13 L & SOC. INQ. 175 (1988) (business cultures can also have salutary effects); JOYCE ROTHSCHILD AND J. ALLEN WHITT, THE COOPERATIVE WORKPLACE: POTENTIALS AND DILEMMAS OF ORGANIZATIONAL DEMOCRACY AND PARTICIPATION 54-55 (1986) (describing the social controls exploited by employers; EDWARD S. GREENBERG, WORKPLACE DEMOCRACY 114 (1986) (providing an empirical study of, inter alia, whether workplace democracy encourages psychological and ideological change amongst the workforce); Ripken, *supra* note 18, at 133; ISABELLE FERRERAS, FIRMS AS POLITICAL ENTITIES 83-84 (2017).

laps. Neither wholly public nor purely private, but a bit of both, corporations can only be located awkwardly in a bifurcated social reality.[244]

3. Contemporary Conceptions of Sovereignty

However, such categorization is unnecessary. The conception of constitutional liberal democracy embraced by contemporary political theory blows up this bilateral public/private framework. There is also no need to discover an entirely new "quasi-public" ontological category to accommodate the corporation. Although the concept of popular sovereignty designates the ascription of the highest legitimate source of authority to "the people," CLD does not understand "the people" as an empirical reality that can be juxtaposed against a dissenting minority of individuals carrying superordinate, pre-political rights. Rather, the idea of popular sovereignty is not ontological. It is ideological and normative, akin to a legal fiction. It serves as a motivating principle of behavior and a critical normative standard.[245] It challenges its users to ask: if there were such a thing as a popular sovereign, what kind of decision-making procedures would we deploy? It is therefore a concept that encourages citizens and their representatives to act and think inclusively. Moreover, if the sovereign is popular, everyone should have some equal role to play in lawmaking because each has an equal claim to be part of the fictional popular sovereign. For example, everyone should enjoy an equal right to vote and participate in politics. Therefore, the question of sovereignty for CLD does not involve locating the absolute right to rule in in any specific entity at all.[246] Accordingly, the corporation need not be categorized as either part of the public sphere or the private sphere.

To explain, contemporary conceptions of democratic sovereignty acknowledge that the "people," without constituting law, are only "a disorganized multitude, that is, a fragmented conglomeration of disparate individuals lacking unity and legal content."[247] Given its size and diversity, the population cannot function as a principal capable of directing its governmental

244. Ciepley, *supra* note 13, at 140; Walt & Schwartzman, *Morality, Ontology, and Corporate Rights,* 11 L. & ETHICS OF HUM. RTS 1, 5-6 (2017) (discussing how even F.W. Maitland prevaricated on the ontology of corporations, wobbling between the real entity theory and the fiction theory).

245. Katharine Jackson, *All the Sovereign's Agents.* 30 WM. & MARY. BILL RTS. J. 777, 789 (2022) (hereinafter, "Jackson, *Sovereign's Agents*") (citing Jürgen Habermas, *Three Normative Models of Democracy,* 1 CONSTELLATIONS 1, 9-10 (1994)); DANIEL LEE, POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT 14-15 (2016); Nadia Urbinati, *Continuity and Rupture: The Power of Judgment in Democratic Representation,* 12 CONSTELLATIONS 194, 212-214 (2005) (hereinafter, "Urbinati, *Continuity*"); Canovan, *supra* note 195, at 36; CLAUDE LEFORT, DEMOCRACY AND POLITICAL THEORY 13-14 (David Macy trans., 1988)).

246. Jackson, *Sovereign's Agents, supra* note 245 at 789.

247. Kalyvas, *supra* note 46, at 586; *see also* Thomas Hobbes, Leviathan 227-28 (C.B. MacPherson ed., 1985).

agent.[248] Political science has repeatedly confirmed that citizens do not possess clear, identifiable policy preferences that can be aggregated into a coherent collective will.[249] Instead, constitutional rules, such as those establishing elections, facilitating public debate, and instituting legislative bodies enable citizens to engage in the game of collective decision-making together.[250] As Stephen Holmes captures the concept, "[w]hen a constituent assembly establishes a decision procedure, rather than restricting a preexisting will [of the sovereign "people"], it actually creates a framework in which the nation can for the first time have a will."[251] In turn, a democratic constitution is comprehensive—but not in the sense of regulating the minutiae of everyday life. It is comprehensive, rather, in the sense that no other kinds of collective decision-making will enjoy the same kind of legitimacy and authority.[252]

Accordingly, the idea of sovereignty within constitutional liberal democracy indicates not the will of a ruling body, but instead the outcome of decision-making under constitutional procedures. The policy output of the liberal democratic constitutional state is the product of law and private initiative alike. The state, for its part, is not an anthropomorphized body wielding legitimate power, but a legal order sharing some affinity with Kant's Rechtstaadt[253] or Kelson's "system of legal norms."[254] To the extent that it exists at all, the sovereign "people" is constituted and re-constituted immanently and continuously through citizens' political participation within state's constitutional framework—a framework that is itself subject to emendation based on constitutional principles.[255] Individual citizens contribute to popular sovereignty as they participate in elections, seek judicial review of government action, contribute to public deliberation on proposed lawmaking, and even when they sue each other in court. Indeed, contemporary popular sovereignty is performative; it does not lurk within a stable collective agent as an identifiable "will" or "voice."

248. *See* Walters, *supra* note 207, at 9-10; DAVID RUNCIMAN & MONICA BRITO VIEIRA, REPRESENTATION 95-96 (2008); Key, *supra* note 208, at 9-10 (1961).

249. Lisa Disch, *The End of Representative Politics? in* THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION (Lisa Disch et al. eds. 2019). *See also, e.g.,* Cynthia R. Farina*, False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 378–81 (2010) (summarizing research holding that voters often lack accurate understandings of candidate policy positions); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129-43 (1990).

250. JEREMY WALDRON, LAW & DISAGREEMENT 277 (1999).

251. STEPHEN HOLMES, PASSION AND CONSTRAINT 164 (1995).

252. Cohen, *Freedom of Religion, Inc., supra* note 22, at 193.

253. *See, e.g*., *Immanuel Kant, The Metaphysics of Morals*, in KANT: POLITICAL WRITINGS 136-143 (H.B. Nisbet trans., Hans Reiss ed. 1971) (explaining the relationship between right, derived from the categorical imperative, and law as implemented and executed by a constitutional state).

254. Kelsen, *supra* note 49, at 124-126, 181-192.

255. *See* Webber, *supra* note 40, at 13, 30, 44 (2009).

Of course, the U.S. Constitution ascribes the right to rule to "We the People."[256] It is also true that representatives of the people that, by exercising constituent power, create a constitution which establishes, delimits, constrains and defines governmental powers and responsibilities.[257] However, this does not mean that the popular sovereign can govern as if it were a single person or a homogeneous body with an identifiable intention. Rather, the idea of popular sovereignty functions as a regulatory principle meant to depersonalize and distribute public power as office-holders go about the business of ruling.[258] The idea of popular sovereignty counsels government officials to remain accountable and responsive to popular complaints, seeking citizens' inclusion rather than exclusion from public offices and decision-making.[259] Specifically, all lawmaking must occur under conditions such that all citizens can understand themselves to be, even if indirectly, equal participants in the creation of the laws that govern them.[260] This means that voting rights should be universal; access to agenda-setting should be distributed equally; opportunities to engage in public debate should be facilitated, *etc*. Stated more intuitively, if there *could* be such a thing as a popular sovereign, it would be an entity that included all on equal terms when it makes its decisions.

At the same time, the idea of popular sovereignty counsels citizens and their representatives to adopt a public-minded cognitive orientation.[261] It advises them to avoid exercising their political rights in their individual self-interest alone. Instead, they must at least couch their arguments in terms of equality and the common interest or otherwise allow their interests to be modified to account for the equally important interests of others.[262] More intuitively, if there *was* such a thing as a popular sovereign, it would think and act in such a way that accounted for the interests, rights, and preferences of everyone since everyone can claim to be a part of the popular sovereign. The popular sovereign, if there were such a thing, would possess interests that are traceable and shareable by everyone. This means that citizens should consider not just their personal interests and that lawmakers should not just consider the immediate interests of their specific

256. U.S. CONST. Pmbl. *See also, e.g*., Cohen, *Freedom of Religion, Inc., supra* note 22, at 202 (in liberal democratic constitutional polities, sovereignty is ascribed to 'the people' as the highest and final legitimate public authority).

257. Before the constitution, there is only power; legality and normativity, when it comes to laws, comes only from this source. If the state is the exclusive source of law, its founding cannot be a legal act; its founding creates the right to make law in the first place. Grimm, *supra* note 189, at 44 (citing Carré de Malberg); *see also* Kalyvas, *supra* note 46, at 578.

258. Lee, *supra* note 245, at 14; Cohen, *Freedom of Religion, Inc., supra* note 22, at 567; *see* Habermas, *Three Normative Models, supra* note 245, at 9-10 (1994).

259. Jackson, *Sovereign's Agents, supra* note 246, at 789.

260. *Id*.; Cohen, *Freedom of Religion, Inc., supra* note 22, at 569; Grimm, *supra* note 189, at 73-74; Seyla Benhabib, *Claiming Rights Across Borders,* 103 AM. POL. SCI. REV. 691, 693 (2009); Webber, *supra* note 40, at 19-20.

261. Nadia Urbinati, *Continuity, supra* note 245, at 214.

262. *See id.*

constituencies. Instead, they should focus on those interests shared by all—or at least by most.[263]

Like the aggregation and real entity theories of corporate personhood, contemporary notions of political sovereignty acknowledge that there will always be a "gap" between government office holders and subjects. Not everyone can hold office at once, even though everyone may be involved in political decision-making—whether through elections, petitions and even through administrative notice-and-comment rulemaking under the Administrative Procedure Act.[264] Consequently, contemporary political theory acknowledges the possibility of heteronomy in political life.[265] But this gap between ruler and ruled is not something to be eliminated, as concession theorists might have it. It is to be cherished and preserved. Attempts to close it can lead to some alarming outcomes. "The abstract idea," notes political theorist Bryan Garsten, of a sovereign people [tends] to become concrete in the form of demagogues claiming to rule in the name of the people."[266] Attempts to establish or claim a mimetic identity between the representative and the represented is not the realization of democracy. It is instead, as political theorist Fred Ankersmit argues, an invitation to tyranny.[267] Closing the conceptual gap between ruler and ruled, pretending they are one and the same, forecloses public contestation, effaces social difference, and gives politicians an excuse to engage in a "relentless and unchecked pursuit of their particular vision of the good."[268] The fiction of popular sovereignty, if taken literally, therefore puts us "in the business of electing dictators who can rule by decree while hiding behind 'the will of the people.'"[269] As Anya Bernstein and Glen Staszewski note, the idea of the people as a unified whole with an undifferentiated will enables exclusionary identity politics while lending leaders the ability to claim legitimacy by fiat.[270] The idea that an entire people can be accurately represented is, simply, a lie. "[L]ike all such political lies," observes political theorists Monica Brito Vieira and David

263. This publicly-oriented cognitive orientation is illustrated through forms of political representation modeled after trusteeship, most famously articulated by Edmund Burke. For a discussion of an updated model of trustee representation, *see* Jackson, *Administration, supra* note 208. I do not mean to argue here, however, that there is a readily ascertainable "public interest" or "common good" that exists independently of the democratic process and that might, for example, be applied as an objective standard by a court. Instead, the idea of the public interest here is a political concept, its (provisional, contestable) substantive content to be worked out through the democratic process.

264. 5 U.S.C. § 553.

265. Lefort, *supra* note 245, at 13-14.

266. Garsten, *supra* note 207, at 99.

267. F.R. ANKERSMIT, AESTHETIC POLITICS: POLITICAL PHILOSOPHY BEYOND FACT AND VALUE 104 (1996).

268. JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 11 (2018).

269. *Id.*

270. Anya Berstein and Glen Staszewski, *Judicial Populism,* 106 MINN. L. REV. 283, 284 (2021).

Runciman, it [can] be maintained not only at the cost of truth but of blood as well."[271]

On the other hand, the gap between ruler and ruled should not be fortified to the point of invulnerability. If the boundary between government and citizen remains porous, if the government can at least sometimes make a credible claim to represent some of the views of at least some majorities at specific times, it is possible for democratic publics to force their government to respond to changing opinions, cultures, and mores. This is why, for example, representative democracies were able to expand the franchise beyond White male property holders. If citizens understand that although their government cannot include everyone, it can at least include more of them, they can always demand better representation. No political official can shut their doors to their complaints because she cannot claim to speak for "the people." "The people" does not exist. Instead, the political official must admit that those making demands for change have a credible claim to recognition and respect.[272] The place of power, in the terms used by French philosopher Claude Lefort, should remain an empty one—or at least one with a revolving door.[273]

In sum, there is nothing—no body, no person, no group—that is inherently public in nature. There is nothing—no body, no person, no group—that is inherently private in nature. Instead, there are only individual citizens working together, within constitutional decision-making procedures, to help create the laws that bind them and individual citizens interacting with each other through the legal order that they create. Many of those laws will address their economic lives—including the laws that establish, protect, and facilitate the business corporation.

Indeed, the closest thing to a "private sphere" that CLD can offer is the legal ordering of individual conduct. Every contract, every exercise of a property right occurs in the shadow of the law. As Dewey noted, "there are some things, bodies singular and corporate, which clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them." For many progressive legal scholars,[274] markets are not a pre-political, real-life state of nature that must be secured against government incursion. Political action, not any inherent human nature to truck and barter,

271. Runciman & Vieira, *supra* note 248, at 43.

272. Jackson, *Sovereign's Agents*, *supra* note 245, at 789.

273. Lefort, *supra* note 245, at 13-14.

274. One group of such scholars are those participating in the "Law & Political Economy" school of thought recently originating out of Yale Law School. *See, e.g.,* David Singh Grewal, Amy Kapczynski, and Jedidiah Britton-Purdy, *Law and Political Economy: Toward a Manifesto,* THE LPE BLOG (Nov. 6, 2017) (holding that the LPE community sees law as central to the creation of economic inequality, climate change, and other crises).

constitute markets.[275] The government, not private initiative, creates and maintains the economic institutions, funds the technologies, appropriates the territory, and educates the individuals necessary for economic activity.[276] Further, significant legal scholarship attributes to law the existence and form of markets themselves. David Grewal writes, for example, "[c]apitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law."[277] Katharina Pistor[278] demonstrates several elements of this legal ordering. According to Pistor, the law codes, and therefore creates capital by ascribing features like priority, universality, durability, and convertibility. Sanjukta Paul[279] demonstrates how the law's allocation of coordination rights produces bargaining power differentials between capital, labor and small business. When it comes to business organizations, law plays an obvious, existential role.[280] Without corporate law, corporations would not be as big, as long-lived, and as influential as they are today.[281]

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275. *See, e.g.,* Fred Block, *Political Choice and the Multiple 'Logics' of Capital*, 15 TH. & SOC'Y 175, 180 (1986) ("[W]hat we generally call 'the economy' is always the produce of a combination of state action and the logic of individual or institutional economic actors . . . In this [Polanyian] view, government policies – including redistributive social policies – are not superstructures [a notion associated with Marxism] built on top of some economic base. Rather, they are constitute of the capitalist economy – without them, there would be no functioning capitalist society."); Jedidiah Britton-Purdy *et al.*, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis,* 129 YALE L.J. 1784, 1796 (2020) (arguing that law helps create and maintain oppression); Steven Klein, *Fictitious Freedom: A Polanyian Critique of the Republican Revival,* 61 AM. J. POL. SCI. 852, 857 (2017) (hereinafter, "Klein, *Fictitious Freedom*") (describing Karl Polanyi's argument that state action to commodify land, labor and money not only constitutes markets, but also ensures that markets will inevitably create domination); David Singh Grewal, *The Legal Constitution of Capitalism, in* AFTER PIKETTY 471 (2017) (arguing that law constitutes capitalist markets).

276. *See* MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE (2013) (demonstrating the breadth and depth of government start-up funding for, *e.g.*, pharmaceuticals and technology industries) and STEPHEN S. COHEN & J. BRADFORD DELONG, CONCRETE ECONOMICS: THE HAMILTONIAN APPROACH TO ECONOMIC GROWTH AND POLICY (2016) (providing a history of government leadership and funding in establishing and maintaining U.S. industry and markets).

277. David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 628, 652 (2014).

278. *See* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (2019) (providing an argument that economic life is created using a handful of legal techniques including, *e.g.*, priority, durability, universality and convertibility).

279. Sanjukta Paul, *Antitrust As Allocator of Coordination Rights*, 67 U.C.L.A. L. REV. 378, 380 (2020) (hereinafter, "Paul, *Antitrust*").

280. ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 8-9, 141-143 (2009) (describing how the legal disaggregation of property rights allowed for the creation of public corporations and explaining this process in detail with regard to stock ownership); *see also* Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Associations*, 23 ANN. REV. SOC. 479, 507 (1997) (providing a sociological analysis of how law facilitates, constitutes and regulates corporate organizations and observing that "Law and, more broadly, legal environments create, constrain, shape, enable, define and empower organizations.").

281. *See, e.g.*, Pistor, *supra* note 278, at 47-48 (arguing that state's willingness to back the private coding of assets in law, and not only property rights in the narrow sense, but also the legal privilege of durability – in the form of asset-shielding devices that lock in past gains and protect assets from most liabilities – constitutes corporations, which cannot be formed by private contract alone); Ciepley, *supra* note 13, at 145 (addressing the "inescapable fact" that "corporations rely on government to override the normal market rules of property and liability and reordain which assets bond which creditors."); Strine & Walter, *Originalist or Original, supra* note 13, at 909-911 (providing a history of changes to corporate law that facilitated their growth); Orts, *supra* note 13, at 38 (each explaining the role that law plays in

When describing what corporations are, classifying corporations as either public or private is therefore inaccurate. Nor are corporations special creatures, bizarre "quasi-public"[282] Frankenstein monsters assembled with chunks of law and hunks of individual, or "franchise governments"[283] that exist on an ontological plane all their own. All human beings within liberal constitutional democracies interact with each other within, with, and around law that confers powers, liabilities, disabilities, immunities, and privileges.[284] Thus, in a way, we are all "franchise governments." To illustrate, every person holding a property right can, with the assistance of the state, command others regarding the use of and interference with her property. All of us, including corporate stakeholders, self-order using contracts. What distinguishes the corporation is not its ontology. Rather, it is the particular laws that address corporations alone, and the differential impact they have on the rights and liberties of everyone else. To be sure, that law may betray liberal constitutional democratic commitments. But the corporation is not thereby rendered an alien species.

Instead, an institutionalist account serves better to describe what corporations are. Eric Orts'[285] institutionalist theory characterizes the corporation as a social institution framed not only by public law, but also by internal rulemaking that is itself regulated by public law. Meanwhile, individuals participate in the firm and order themselves according to the state's regulation of their self-regulation. According to Orts, "[g]overnance of firms refers to the operation of both (1) voluntary internally imposed rules created by founding documents and other agreements . . . and (2) externally imposed legal rules (such as the requirement that a large public corporation must have a board of directors)."[286] These rules even protect, among other things, some corporate-level social goods: "intangible

facilitating the growth of business corporations); *cf.* Hessen, *supra* note 231; FRANK EASTERBROOK, THE ECONOMIC NATURE OF CORPORATE LAW (1996) (arguing that corporate law amounts to 'off-the-rack' contractual terms that could be reproduced by private parties and that laws emerge because they are efficient wealth-maximizers). The idea that law shapes reality (deployed in this Article), rather than reality shaping law, is contested by Marxist and law and economics scholars alike. *See, e.g.,* Anna Piekarska, *Challenging the Rule of Law Universalism: Why Marxist Legal Thought Still Matters,* 34 L. & CRITIQUE 269, 274 (2023) (arguing that the idea of the rule of law is shaped by economic power relations); HUGH COLLINS, THE MARXIST APPROACH TO LAW 17-34 (1984) (describing the Marxist view of law is that law is an instrument of class repression); Edelmen & Suchman, *supra* note 280, at 480 ("To Marx, each historical epoch generated distinctive legal forms that simultaneously reflected and reproduced that epoch's fundamental organization of production"); Orts, *supra* note 13, at 486 ("[M]aterialist researchers have reversed the causal arrow, to explore the ways in which organizational behavior may shape [corporations'] legal environment . . . ").

282. *Citizens United*, 558 U.S. at 427 (Stevens J., concurring in part and dissenting in part).

283. Ciepley, *supra* note 13, at 139-140, 151-152.

284. *See generally* Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights,* 63 AM. J. JURIS. 295 (2018) (providing a summary and analysis of the Hohfeldian classification of legal rights and duties identified).

285. Orts, *supra* note 13, at 14-16 (defining and outlining the argument of the institutionalist theory). Orts' argument mirrors many the aspects of Hans Kelsen's description of the corporation as a legal ordering within a broader public legal ordering. *See* Kelsen *supra* note 49, at 98 (defining the corporation as a system of legal norms).

286. *Id*. at 45.

institutional assets" like firm reputation and branding.[287] Thus, individuals order their social world collectively, both within and without the corporation, through norm-making procedures both at the corporate and the state level.

B. Public and Private: A Normative, not an Ontological, Division

If there is no hard ontological border between the state and the market, does it make sense to speak of "public" and "private" at all? Yes. Within CLD, the boundary between public and private, between state and civil society, is not an ontological one. It is, rather, a normative one. When citizens claim that a certain activity is private, they are making an argument that it *should* escape legal oversight because doing so preserves something important to human well-being. When citizens claim that a certain activity is public, they are really making an argument that it should be subject to legal regulation because doing so protects something important to human well-being.[288] To illustrate, families, religious organizations and commercial enterprises do not merit protection from state interference because there is something essentially private about their nature. They merit protection because protecting them serves important values, *e.g.*, the individual expectation of privacy in their intimate relationships, religious exercise free from government oversight, the ability to pursue meaningful work, and so on. When intimate partners, victims of church abuse, and exploited workers argue that families, workplaces and religious organizations are public, they do not do so because there is something essentially public about their nature. Rather, subjecting them to legal oversight protects important values, *e.g.*, protection from harm, equal dignity, and non-discrimination. To illustrate, consider a private religious school. Its supporters might argue that the school is private because imposing national educational standards would contravene the deeply held religious doctrine of the students and their families. Opponents might argue that the schools are public because avoiding national educational standards might leave students ill-equipped to support themselves outside an insulated religious community.

Of course, the normative boundary between private and public engenders political debate and controversy.[289] The personal becomes political as citizens politicize autonomy rights that they view as exploitative or domineering. They may demand state protection from others' violations of what they understand to be their rights to equal dignity, political standing, and material goods. Women seek more equitable family laws; workers seek a level playing field with bosses;

287. *Id*. at 76-77.

288. *See* Cohen, *Regulating Intimacy, supra* note 30 (providing an argument that private rights are politicized and re-imagined when the enforcement of private rights leads to the violation of other rights. One important theme of Cohen's work is the gendered nature of privacy rights: when privacy rights are not challenged, they tend to benefit men with leadership positions over intimate communities: the family, the church, and so on.)

289. *Id.*

and minorities seek anti-discrimination measures against their employers. Husbands, bosses, and employers will respond, and thus "private" liberty rights become a matter of political contest. Most of our rights-talk, from free speech to bodily autonomy, involves not whether a certain activity or entity *is* essentially private in nature, but whether it *should* be left to individual self-determination alone. Hence, the private-public divide is inherently a normative one.

As a result, whether a corporation is "public" or private" is the conclusion of a moral argument, not an empirical premise from which normative arguments about corporate rights begin. When we argue that a corporation is "public," often what we really mean to say is that they create conditions that undermine values we hold dear. They pollute the air and water; they exploit their workforce and customers; they create financial crises. When we argue that a corporation is "private," what we really mean to say is that we use corporations to pursue values that we hold dear. Corporations allow us to make a living, enjoy products that bring ease to our lives, enable us to save for retirement, and give us meaningful activities to pursue.

C. The Remains of the Corporate Person

As explained above, contemporary notions of democratic sovereignty do not permit a division of the world into public and private spheres. In any event, the corporation is a creature of both law and individual initiative and human sociality. Disentangling these independent variables sufficiently to characterize corporations as either primarily private or primarily public is a fool's errand. Once assumptions about the essentially public or private nature of corporations are excised from the theories of corporate personhood, they point to the important human values to which the law can attend. Aggregation theory, for instance, highlights the individual autonomy rights that the corporate enterprise serves. Because of the corporation, entrepreneurs, workers and investors can take charge of their material circumstances. Concession theory, on the other hand, highlights the harms that corporations can inflict on human safety, comfort, and well-being. As a result, the state should perhaps step in to intervene. Real entity theory, for its part, demonstrates that the workplace provides community and meaning. The law, as a result, should facilitate the development of these communities insofar as they contribute to human flourishing. Stated differently, corporations do not merit rights because they are private. They are granted rights because doing so is something that human citizens have decided is useful.

In contrast, when scholars and jurists apply theories of corporate personhood without first jettisoning these problematic public/private ontologies, they cannot help but draw problematic conclusions. "Private" corporations deserve the sympathy of judges who must protect them from the interfering ambitions of lawmakers and regulators. "Public" corporations, in contrast, are the tools of lawmakers who can use them to accomplish whatever purposes they like, no

matter the impact on individual freedom. In fact, many scholars convincingly argue that the theories of corporate personhood were deployed not to describe and explain corporate rights in good faith, but instead as part of ideological projects aimed at changing the scope and content of corporate legal rights.[290] When deployed with their ontologies intact, the theories of corporate personhood are rhetoric, not reason.

This does not mean, however, that theories of corporate personhood have nothing to contribute to this normative question. Concession theory's attention to the corporation's legal provenance helps us to identify those legal norms and procedures that orient and manage the relationships between individual corporate participants with both each other and those in the broader polity. It makes us pay attention to the knock-on effects of corporate behavior and the impact they may have on the rights and liberties of everyone else. Aggregation theory, for its part, cautions that we pay special attention to the experience and behavior of individuals within this legal order. When we protect a corporation with a legal right, we may be protecting individual rights and interests. Meanwhile, real entity theory focuses on the relation between corporate associations and others within civil society. It recognizes that people can and do form their own ethically meaningful communities, that they are social, and that their social existence is

290. Many theories of corporate personhood - especially second-generation aggregation theories - shape, and were intended to shape, corporate practice. *See, e.g.,* MARC ALLEN EISNER 25 (2011) (explaining how economic theories of the corporation became embedded in regulatory policy); MICHAEL USEEM, EXECUTIVE DEFENSE: SHAREHOLDER POWER AND CORPORATE REORGANIZATION 1993 (using case studies and interviews, the book argues that shifts in corporate organization and purpose were driven by institutional investors that used new economic theories of the corporation to justify their growing influence); Konzelmann *et al*., *supra* note 232 (arguing that changes in economic theory helped cause the 2008 financial crisis); Millon, *Theories of the Corporation, supra* note 22, at 203 (the aggregation theory was used to legitimate "newly emergent big business"), 204 ("At any point in time, particular theories of the corporation are perceived to justify particular legal rules or, at a more general level, a particular approach to regulation of business activity"); Colombo, *supra* note 70, at 7 (arguing that understandings of the corporation should change in order to justify corporate speech rights); Vasudev, *supra* note 105 (arguing that the economic theories of the business corporation "play an important role in shaping corporate governance"); Bratton & Wachter, *supra* note 82, at 144-145 (describing the influence of economic thinking on corporate governance norms amongst investors and directors); Harris, *supra* note 86 (discussing how real entity theory traveled from Germany to the United States as a bid to strengthen local self-government and subject trade unions to tort liability); Steve Fortin et al., *Incentive Alignment Through Performance-Focused Shareholder Proposals on Management Compensation,* 10 J. CONTEMP. ACCOUNT. & ECON 130 (2014) (an example of the use of corporate theory to influence policymaking in the securities regulation context); Leo E. Strine Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America,* 119 HARV. L. REV. 1759 (2007) (hereinafter, "Strine, *Corporate Republic*") (offering a response and critique to reforms proposed by Prof. Lucian Bebchuk based upon economic theories of corporate personhood); Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance,* 97 NW. U. L. REV. 547 (2003) (arguing that the concession theory was wielded by pro-management interests in order to shield executives and directors from shareholder liability). Politicians sometimes use a concession-theory-adjacent "stakeholder" model to argue for changes in chartering and governance. *See* Elizabeth *Warren, Companies Shouldn't Be Accountable Only to Shareholders,* THE WALL ST. J. (August 14, 2018) (making aforementioned argument).

relevant to individual freedom.[291] Constitutional liberal democracies regularly protect groups with autonomy rights because they provide goods that human beings can only enjoy in community together.[292]

An example may be helpful. In a recent, but by no means exceptional, case, *Prairie Capital III, L.P. v. Double E Holding Corp.*,[293] the Delaware Court of Chancery explored the question of corporate ontology and found only the normative ordering of individual and associative actions that carry the potential to harm others. Specifically, the Court considered whether corporate officers who committed a fraud in the course of their official duties could be held personally liable for that fraud or whether it should be ascribed to the corporate 'person' that they represented. The Court's answer: both. The corporation, as a metaphysical entity, must rely on its legally recognized human agents to speak and act on its behalf.[294] Meanwhile, individual rights-holders both within and without the corporation rely upon democratically promulgated corporate law both to enable the self-ordering of their private business affairs and shield them from corporate agents' frauds and mismanagement. Accordingly, the corporation itself must assume responsibility for the torts of its leaders. Without their legally-conferred powers, corporate participants could not act as a group with associative freedoms. But the public, at the same time, should receive an extra layer of protection from individuals committing fraud. Human corporate officers should not be able to hide behind the corporate veil when they commit torts; otherwise, limited liability would prove too much of a temptation for bad behavior. Thus, the corporate "person," in *Prairie Capital III*, was not a real entity, a mere aggregation of individuals, or a concession of governing power from the state. It was, rather, human beings acting under normative ordering subtended by constitutional democratic lawmaking meant to protect and vindicate individual rights and liberties.

III. FALSE CHOICE II: BETWEEN HIGHER LAW AND LEGAL LEGITIMACY

To summarize, theories of corporate personhood rely upon a public/private ontology that should be abandoned. Instead, the appropriate questions sound in a normative register: *should* we protect corporations with rights because doing

291. *See*, *e.g.*, MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 63-64 (1986) (demonstrating that associational rights are derived from individual rights); SHELDON LEADER, FREEDOM OF ASSOCIATION (1992); Will Kymlicka, *Liberalism, Community and Future Twenty-Five Years On*, 44 TWO HOMELANDS 67 (2016); ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION (2014); *cf.* BRIAN BARRY, CULTURE AND EQUALITY (2002) (arguing against group rights as fundamentally illiberal and violating the promise of legal equality).

292. *See, e.g.*, Jackson, *Antitrust, supra* note 35, at 344 (citing Ruth H. Bloch & Naomi Lamoreaux, *Voluntary Associations, Corporate Rights, and the State, in* ORGANIZATIONS, CIVIL SOCIETY, AND THE ROOTS OF DEVELOPMENT (Lamoreaux & Wallis eds., 2017); Avishai Margalit & Jospeh Raz, *National Self-Determination*, 87 J. OF PHIL. 439, 450 (1990): CECILE LABORDE, LIBERALISM'S RELIGION (2017).

293. *Prairie Capital III, L.P. v. Double E Holding Corp.*,132 A.3d 35, 60 (Del. Ch. 2015).

294. *Id.* at 59.

so serves important values? In answering these kinds of questions, it is tempting to reach to a preferred theory of corporate personhood for normative criteria. Unfortunately, theories of corporate personhood fumble here as well. Recall that the theories of corporate personhood ascribe rights to corporations through two distinct steps: (1) defining and analogizing the corporation, and then (2) applying the appropriate norm. The theories of corporate personhood do not just suffer from a two-body problem, an erroneous division of human life into two constituent elements as they engage with the first step. They also incorporate inconsistent and anachronistic sources of moral authority as they go about the second step, deriving normative prescriptions from their social ontology. As a result, another troublesome conceptual dichotomy arises: between positive law and higher law, perfectionist ethical values speciously posing as universal truths.[295] As a result, theories of corporate personhood often pit irreconcilable understandings of truth and justice against each other—whether it is metaphysical notions of "the People," natural law and pre-political rights, religious understandings of the good, or something else entirely. But when the prescriptive portions of personhood theory are given a contemporary update, one that internalizes rather than outsources political legitimacy, their arguments can be fruitfully synthesized.

A. The Corporation's Outsourced Political Authority

Sovereignty has never been invested without question. It is invariably accompanied by an argument that explains why sovereign power is morally and ethically legitimate. This argument typically refers to some higher, extra-political, extra-legal source of authority, *legibus solutus*: in the West, typically God, an imaginary "will of the People," God-given natural rights, or the "higher" liberal tradition "supposedly operating somewhere outside of and above politics" that prioritizes "private right and enforced constitutional limitations" while denigrating the real-life laws made my real-life people.[296] Although the political and legal sovereign occupied the apex of state offices, another authority perched even higher. In the early modern period, for example, Bodin argued that sovereignty, unlike tyranny, "subject to the laws of God and of nature."[297] Thus, even if a king's sovereignty was juridically absolute and legally unaccountable within the state, "it remained a morally subordinate power, "answerable for its conduct to the [divine] moral law."[298] The king's divine mandate, for example,

295. By "perfectionist," I mean to indicate those values that are held to be good in an objective sense, notwithstanding any diversity in cultural and religious norms. A perfectionist ethical good is good no matter whether real-life human beings hold them to be good. For a good primer on perfectionism in moral and political philosophy, *see* Steven Wall, *Perfectionism in Moral and Political Philosophy,* STAN. ENCY. PHIL. (December 15, 2017).

296. WILLIAM NOVAK, NEW DEMOCRACY 13-15 (2022) (hereinafter, Novak, *New Democracy*).

297. Bodin, *Sovereignty, supra* note 193, at 10.

298. Bourke, *supra* note 194, at 4 (citing Bodin 1576, 211).

was invoked by dissidents when they attempted to limit the power of non-divine government officials or critique some of the king's less divine behavior.[299] At other times, usually during periods of conflict, political actors claimed "the sleeping [popular] sovereign"[300] as their source of legitimate authority, referring an unspeaking people hiding behind the theater of real-world politics, a sovereign that might awake from time to time to correct the government.[301] Because it was thought to possess inalienable, natural rights superordinate to the king,[302] dissidents could invoke this specter's obscured authority to demand that political leaders respect these rights or else face rebellion.[303] For example, in Revolutionary Era America, partisans drew on the conception of popular sovereignty developed during the English Civil War,[304] whereby the monarch

299. Morgan, *supra* note 192, at 17 (the "fiction [of the divine mandate of kings] was sustained in England as an instrument that gave to the many a measure of control over the man to whom the fiction seemed to subject them so absolutely."), 20 ("Indeed, the attribution of divinity to the king had probably always been motivated in some measure by the desire to limit him to actions becoming a god."); 24 ("What is . . . remarkable is that [the Commons] were able to turn the subjection of subjects and the exaltation of the king into a means of limiting his authority. By placing the king's rectitude, wisdom, and authority on the plane of divinity the Commons denied the possibility of any other mortal sharing in these royal attributes: in particular they denied the possibility of the king's transferring them to any subject.").

300. *See* Tuck, *supra* note 196, at 135-136 (comparing Rousseau's idea that the sovereign people would appear only intermittently to issue correctives to its "agents," the actual government, to Thomas Jefferson's idea that the U.S. Constitution should be re-constituted every 17 years), 249-252 (arguing that the idea of the sleeping popular sovereign, differentiated from real-life government, generated a conception of democracy that differentiates ordinary legislation from higher, constitutional lawmaking and notes that this conceptual schematic does not exist in the United Kingdom. According to Tuck, what was new about the U.S. Constitution "was the idea not of writing fundamental laws – for legislators had always done that – but of handing the authority to write the laws to an institution that might put in only fleeting appearances and be already forgotten during [252] the actual political activity of a community."); accord, Canovan, *supra* note 195 at 28 (arguing that *The Federalist* endorsed a constitution that allowed people "to be active and present in a government that belonged to them," while holding that "they were still outside, behind and above their government."); Morgan, *supra* note 192, at 24 (Members of the House of Commons, when acting to protect common citizens' private property and jury trial rights against the crown in the 17th century, took advantage of "a certain majesty in humanity itself that could be placed in the scales against the divinity of the king." Morgan goes on to argue that Members of the House of Commons were obliged to speak in terms of universal rights – notwithstanding their noble status – because claiming rights in less-than-universal terms would be no match for a monarch claiming to be god's lieutenant.).

301. *See* Canovan, *supra* note 195 at 17 (arguing that those who accepted the right of subjects to resist government "though to recourse to the people as an emergency measure, rather than as a continuous exercise of popular oversight, still less as popular government."), 21 (in the period between the British Civil War and the American Revolution, theorists of political resistance, including moderate Whigs, believed that "[t]he people are always there in reserve as the collective recipient of power when ordinary government has failed."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 404-405 (Peter Laslett ed. 1999) (contemplating revolution if "illegal Acts have extended to the Majority of the People"), 414-415 ("For when the People are made miserable, and find themselves *exposed to the ill usage of Arbitrary Power*, cry up their Governours . . . let them be Sacred and Divide, descended or authoriz'd from Heaven . . . [415] *The People generally ill treated*, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them . . . ") (italics in original).

302. *See* Canovan, *supra* note 195, at 21 (moderate Whigs and other proponents of political resistance believed that when government becomes subject to legitimate political resistance, power should "return[] to the collective people so that they could restore the status quo and vindicate their original rights (whether thought of as the 'rights of Englishmen', as 'natural rights,' or as a conflation of the two.").

303. Grimm, *supra* note 189, at 30; Canovan, *supra* note 195, at 17.

304. Canovan, *supra* note 195, at 20.

and parliament, limited by natural law, stood for "the people" as the ultimate source of political authority.[305] Meanwhile, "the people" retained their natural rights, rights which they understood to emanate from a higher (divine) moral law.[306] Revolutionary colonists rejected English rule because they were seen not as part of the sovereign people, but rather as mere assets appended to the empire.[307] After the democratic revolutions, the outside source of authority often remained with "the people."[308] The difference was that actual members of the public could now occasionally assert, via elections, their pre-political natural rights on their own behalf in a popular government.[309] "The people" did not just legitimize government. Actual people would also help control the business of governing. But, as political theorist Margaret Canovan argues, "the gap between the government and the sovereign people was still there," leaving "room for appeals to the people against the people's government . . . "[310] Regardless of the changing sources of legitimacy (God, "the people," or God-given natural rights), whether a government could claim legitimate rule would depend upon how well it fulfilled these objective criteria of state legitimacy. Government action, including the Constitution itself, was judged according to how well it aligned with these pre-political notions of justice, natural rights, the will of "the people" or, indeed, religious moral authority. The state's positive laws would be measured by its critics against the values espoused by higher law.[311]

Theories of corporate personhood often employ these pre-political, transcendental conceptions of higher law and legitimacy. When they move from ontology to prescription, they apply the standards of an outsourced moral order to assess the positive laws addressing the corporation. Concession theory counts on a voluntaristic concept of "the people," an imaginative body, to justify or restrain state intervention over associational life. It is the "sovereign people," through the state, that command the corporation to serve its assigned public purposes. It is the "sovereign people" that delegates legitimate political power to corporate officers.[312] As Jean Bodin argued, "every corporation or college, is a lawfull communitie or consociation under a soveraigne power. Where the word Lawfull imposeth the authoritie of the soveraigne, without whose permission

305. Morgan, *supra* note 192, at 49.

306. Canovan, *supra* note 195, at 21.

307. ERIC NELSON, THE ROYALIST REVOLUTION 191 (2017); Bourke, *supra* note 194, at 10.

308. Canovan, *supra* note 195, at 28-29 ("[E]ven where the government was the people's government [29] rather than the king's government, the gap between the government and the sovereign people was still there. This left room for appeals to the people against the people's government; and while these happened routinely during elections they could never be exhausted by the process of voting.").

309. Canovan, *supra* note 195, at 27.

310. *Id*. at 29.

311. Schragger & Schwartzman, *supra* note 23, at 353.

312. Bratton, *Nexus of Contracts, supra* note 45, at 1475.

there can be no college. . . ."[313] And if someone believes that the law-on-the-books deviates from "sovereign people's"/"the sovereign's" purpose, then she will deem it illegitimate.

Aggregation theory often leans on pre-political natural rights discourse to delegitimize the interference of positive law with corporate affairs.[314] Especially apparent during Lochner-era[315] ascriptions of corporate legal rights and protections, theories of natural property rights, couched as "vested" or "unenumerated" rights[316] protecting Lockean "fruits of labor,"[317] subtended awards of Fourth, Fifth and Fourteenth Amendment protections to corporations.[318] Later, when nexus-of-contracts theories became *en vogue*, some theorists (namely, economists) presumed without justification that shareholder property rights should be protected.[319] Other varieties rely on extra-legal justifications like material efficiency and social welfare.[320] Some merge the two in the liberal rights-utility synthesis,[321] justifying corporate rights with reference to both economic liberty and efficiency. For example, contractualist understandings of the firm show that the corporation, because of its transaction cost efficiencies, does a better job cashing out individual economic freedoms than spot markets.[322] More recently, Supreme Court Justice Antonin Scalia, in his concurring *Citizens United* opinion,[323] made an appeal to pre-political understandings of liberty rights to justify an originalist interpretation of corporate speech rights.[324]

313. JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE 365 (1606) (available online at https://archive.org/details/sixbookesofcommo00bodi/page/365/mode/1up); *see* Muñiz-Fraticelli, *supra* note 18, at 106, for a rendering in more contemporary English ("a right of legitimate community under the sovereign power [where] the word legitimate conveys the authority of the sovereign, without whose permission there is no [corporation]").

314. Millon, *Ambiguous Significance, supra* note 37, at 953; Barkan, *supra* note 42, at 72.

315. *Lochner v. New York*, 198 US 45 (1905).

316. *Bloomer v. McQuewan*, 55 U.S. 539, 553 (1852); Winkler, *supra* note 187 at 159; Novak, *Legal Origins*, *supra* note 205, at 255; Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 457-64 (1909).

317. *Slaughterhouse Cases,* 83 U.S. 36, 90 (1873) (Field, J., dissenting).

318. Dahl, *Preface*, *supra* note 206, at 72-73.

319. Bainbridge, *supra* note 290, at 564; Orts, *supra* note 13, at 28.

320. Barkan, *supra* note 42, at 38.

321. *See* IAN SHAPIRO, DEMOCRATIC JUSTICE 145-148 (1999) (providing a brief intellectual history of the synthesis of rights and utility in Western thought and arguing that it still applies today); *see generally* ADAM SMITH, AN INQUIRY IN THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776) (arguing that human beings' natural liberty to truck and barter leads to, and has over history led to, the creation of social wealth).

322. *See*, *e.g.*, ABRAHAM SINGER, THE FORM OF THE FIRM 85 (2018) (hereinafter, "Singer, *Form*") (outlining the "spontaneous," free-ordering behind the contractualist theories); Alchian & Demsetz, *supra* note 94, at 777 (firms are the result of free contracts continuously renegotiated).

323. *Citizens United*, 558 U.S. at 385-93 (Scalia, J., concurring).

324. Winkler, *We the Corporations, supra* note 187, at 352-354 (describing Justice Scalia's free-market and originalist ideology); Strine & Walter, *Originalist or Original*, *supra* note 13, at 886 (arguing that Justice Scalia, while purportedly undertaking an originalist and textualist analysis, surreptitiously ascribed First Amendment liberty rights to corporations).

Real entity theory, a variety of political pluralism, claims that corporations generate their own unique sources of legitimate authority.[325] They rightly point out, along with liberal individualists, that there can be no agreement on the good.[326] They depart from liberals, however, when they argue that there consequently can be no single acceptable or shareable source of political authority. Many do not accept the possibility that the state could entrench in its legal order any kind of Rawlsian overlapping consensus.[327] They accordingly hold that each corporation may choose its own higher authority, its own source of legitimacy, because it should be free to govern itself as it likes.[328] Other real entity theorists, analogizing the corporation to human beings, ascribe to the corporation the same basic autonomy rights held by those human beings—rights and liberties perhaps subtended by natural rights.[329] If an individual human being can decide which religion she wants to rule her life, so can a corporation. One important difference, of course, is that a human being exercising an individual right to free exercise only decides for herself. A corporation, as a collective body, decides on behalf its members. As even political theorist Jacob Levy—a proponent of corporate autonomy[330]—observes, "[i]nstitutions that permit group members to associate, incorporate, self-govern, and live their lives as they wish generate a surplus of group or group-leader power that leaves dissidents less free than they should be."[331]

B. Keeping Morality In-House: Contemporary Notions of Law and Legitimacy

Thus, each theory of corporate personhood often justifies corporate rights not because they are ascribed by positive lawmaking, but because they are demanded by some higher ethical, legal, or political authority. Corporations, according to the theories of corporate personhood, deserve positive legal rights protections because these rights are consistent with, *e.g.,* natural right or divine authority. When positive legal rights fail to protect or regulate the corporation according to these outsourced standards of legitimacy, the law itself can be said to be illegitimate. This way of thinking about authority and corporate rights, however, is inconsistent with constitutional liberal democracy.

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325. *See supra,* Section II (C).

326. See Levy, *supra* note 18, at 2 (arguing that political pluralism overlaps with ethical relativism); Kukathas, *supra* note 124, at 3-4 (outlining the thesis of the book, which argues that irreconcilable ethical diversity justifies a political regime of self-governing non-state associations).

327. *See* Levy, *supra* note 18, at 51-55 (arguing that pure "congruence" between the internal rulemaking of groups and liberal democratic constitutional norms is contractor and illiberal); Kukathas, *supra* note 124, at 212-213 (arguing the state should serve as a political "umpire" between groups with competing ethical values).

328. *See supra,* Section II (C).

329. Millon, *Theories of the Corporation, supra* note 22, at 241 (citing Horwitz); Harris, *supra* note 36, at 48; Dan-Cohen, *supra* note 291, at 58.

330. Levy, *supra* note 18, at 28.

331. *Id*. at 34.

CLD does not rely on outsourced moral authority for its legitimacy. Instead, its legitimacy relies on norms that are internal to the political and legal system. Whether explained as a Rawlsian "overlapping consensus,"[332] a Habermasean "co-orginiality" of rights and democratic law,[333] or the democratic positivism of H.L.A. Hart,[334] liberal democracies try their very best to keep their moral justifications in-house. Reaching towards extra-legal, extra-political sources of normative authority betrays fundamental liberal principles: that each should be free to live her life according to her own choices, consistent with the equal freedom of others to do them same.[335] It also betrays democratic principles: that the laws should be framed by the people bound to them—not dictated by external sources like, *e.g.*, scripture, religious leaders, perfectionist notions of utility, and so on.[336] Stated more simply, citizens decide for themselves, according to their own reasons, which laws should govern them by participating in democracy. As a result, when citizens confront the question, "under what conditions do we grant rights to a corporation?," they cannot rely solely on controversial ethical arguments that their fellow citizens may reasonably contest. Instead, they have to come up with reasons for ascribing a corporate right that will convince a majority of their compatriots.

To explain, Weber diagnosed early in the 20th century the great problem of modernity: the public's lack of confidence in any outside source of moral authority like religion.[337] Disenchanted and secularized, the state could not rely on scripture or church officials to justify their power. At the same time, the public found that they could find no consensus on questions about the good life, ultimate ethical truth, values, and so on. Contemporary liberalism therefore quarantines

332. Rawls, *Political Liberalism*, *supra* note 28, at 134 (rights amount to an "overlapping consensus" of diverse but reasonable "comprehensive" ethical doctrines).

333. Habermas, Between Facts and Norms, *supra* note 28, at 94 ("[T]he morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereignty"), 100 ("the idea of human rights and the principle of popular sovereignty . . . *mutually* interpret one another"), 101 ("In Rousseau . . . .the procedurally correct exercise of popular sovereignty simultaneously secures the substance of Kant's original human right."), 104 ("the . . . internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law [i.e., real-life negotiations of a 'social contract' amongst citizens] can be legally institutionalized.").

334. H.L.A. Hart, *Definition and Theory in Jurisprudence, in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 21-48 (1983).

335. *See, e.g.,* Immanuel Kant, *The Metaphysics of Morals, in* KANT: POLITICAL WRITINGS (H.S. Reiss ed., H.B. Nisbet trans.,1991); Isaiah Berlin*, Two Concepts of Liberty, in* LIBERTY 166 (2002); Rawls, *Theory of Justice*, *supra* note 32; Habermas, *Between Facts and Norms*, *supra* note 28 (each offering a conception of this principle, from deontological to increasingly constructivist); *see also, e.g.*, Habermas, *Struggles for Recognition, supra* note 33, at 122-123 (describing the difference between ethics and morality in the context of multicultural rights).

336. *E.g.*, Forst, *Justification of Human Rights,* at 719-20.

337. *See, e.g.*, *Michael W. Hughey, The Idea of Secularization In the Works of Max Weber: A Theoretical Outline*, 2 QUAL. SOCIOLOGY 85 (1979); *The Dialectics of Religious Rationalization and Secularization: Max Weber and Ernst Bloch,* 31 CRIT. SOCIOLOGY 115 (2005); Charles H.T. Lesch, *Democratic Solidarity In a Secular Age? Habermas and the 'Linguistification of the Sacred,* 91 J. POL. 832 (219).

such questions, holding instead that the only legitimacy a governing authority can claim derives from an empirical 'overlapping consensus' regarding the norms according to which diverse people can arrange their collective life peaceably together.[338] Indeed, as legal historian William Novak observes, the transformation of the American state during the turn of the 20th century witnessed a "[consolidation] around new positive and political conceptions of sovereignty."[339] This is not to argue that citizens must relinquish their own conceptions of the good life, nor their own ethical and religious commitments. In fact, it is expected that they will assert arguments based upon those deeply held beliefs in public debate.[340] The point is that the legitimacy of authority does not depend upon the substantive correctness of their arguments, but instead upon their popular success. Justice does not originate top-down, bestowed from on-high. Instead, citizens construct justice from the bottom-up using the political process. It manifests in the rights that they make through constitutional procedures, blending together the fact of positive law with the normative force of popular approval given under fair conditions.[341]

Accordingly, in CLD, rights do not have any metaphysical origin. They are not ascribed to an entity, whether individual or corporate, because it possesses some morally salient empirical quality like "rationality" or "agency."[342] Nor do they derive from natural or divine provenance.[343] No longer can we reach to superordinate natural law theories, even those incorporated into social contract models, to critique and justify the rights the state gives to citizens.[344] Rather, rights are legal and political, "fit[ting] into a wider social practice that answers to substantive moral and political ideals" embedded in public discourse.[345] Beginning as abstract concepts,[346] individuals articulate their rights within discrete, historical democratic polities whose institutions are oriented towards cashing out the promise of equal liberty as they themselves understand it.[347] Rights are the result of social movements that emerge within civil society and are codified within the law after citizens and their representatives undertake

338. Waldron *supra* note 250, at 244-45.

339. Novak, *Legal Origins*, *supra* note 205, at 268-69.

340. Waldron, *supra* note 250, at 244.

341. *Id*.

342. *Cf.* Dan-Cohen, *supra* note 291, at 58.

343. *Id*.

344. Grimm, *supra* note 189, at 30.

345. W. Hussain, *Pluralistic Functionalism about Corporate Agency, in* THE MORAL RESPONSIBILITY OF FIRMS 66, 67 (E.W. Orts and N.C. Smith eds., 2017).

346. *E.g.*, Webber, *supra* note 40, at 1; *see also* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 297-297 (1st ed. 1951) (rights begin as an abstract "right to have rights").

347. *See, e.g.*, Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty,* 103 AM. POL. SCI. REV. 691, 697 (2009) (explaining how real-life citizens contextualize abstract human rights in their political discourse, permitting a range of variation).

democratic discourse under constitutional procedures.[348] Thus, since the secularization of the modern West, all rights individuals can claim against state action must either be already codified within constitutional or regular law, or asserted through a constitutionally-arranged political process that leads to such codification. For there can be no extra-constitutional mode of exercising public power or lawmaking, nor any extra-constitutional values that bind this public power.[349]

C. Breaking Up the Partnership between Theories of Corporate Personhood and Transcendental Thought

As a result, the theories of corporate personhood, when they rely on outsourced moral and ethical authority, cannot be determinative of corporate rights in liberal constitutional democracy. Aggregation theory cannot rely on pre-political natural rights to circumvent the constitutional process. Concession theory likewise cannot sail on the wings provided by some imaginary "will of the people" to justify overweening government intervention. Real entity theory similarly cannot count on the corporation's human-like rational qualities, nor its own internal normative order, to justify any original right to autonomy without first facing the obstacles of democratic approval. Rather, the theories' normative prescriptions and rationalizations must be abandoned unless they can be successfully incorporated into actual constitutional practices. In other words, they must successfully articulate colorable claims under existing law. If their claims are new or controversial, they must win the assent of other democratic citizens who must then codify them.

There is a way, fortunately, to expunge transcendental values from the theories of corporate personhood. As explained briefly below, the theories still provide useful guidance even without their metaphysical normative baggage.

1. Modifying Concession Theory

Concession theory cannot be used to justify the ascription or limitation of corporate rights based upon some pre-political notion of popular sovereignty. Instead, it is better understood as a restatement of the desiderata of legitimate lawmaking under CLD. To explain, although democratic publics enjoy significant discretion to grant legal rights and duties, they cannot do so in any way they please—at least not in a constitutional liberal democracy. Before lawmakers can ascribe rights and duties to a corporation, they must first win through the decision-making procedures outlined in the Constitution: elections,

348. *See* Cohen & Arato, *supra* note 40 (theorizing the creation of rights through social movements); Young, *supra* note 40, at 412, 424 (arguing that many important rights are codified via statutory law); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 99-119, 160-87 (1998) (describing the extra-constitutional creation of the Reconstruction amendments).

349. Grimm, *supra* note 189, at 68.

legislative debate, bicameralism, and presentment. They must recognize and address the rights elaborated in the Bill of Rights and the Fourteenth Amendment. They must, at least under certain theories of democratic lawmaking, justify these grants in terms that are general, reciprocal, and reflexive.[350] This means, as concession theorists often assert, the legal rights of corporations may not undermine the public interest. But public interest cannot be understood as the voluntaristic will of the sleeping popular sovereign, the "people" as highest authority. No one, not even elected representatives, can override others' rights by invoking this mythical[351] authority. Nor can it be understood as some objectively identifiable common good held by an ontologically unified "people." Although CLDs legislate in the "public interest," the meaning of the public and its interest is determined through the political and lawmaking process.[352] It is understood, stated differently, as the *outcome* of citizens' efforts to elaborate their equal rights and protect their interests under their constitutional framework, including through legislative processes.[353] The "public will" ascribing and limiting corporate rights must itself pass constitutional muster.

2. Modifying Aggregation Theory

Aggregation theory also requires modification. It cannot rely on natural rights to justify corporate rights. However, to the extent that it can serve as an argument for associational liberty, aggregation theory can be made consistent with CLD. The freedom of association already enjoys Constitutional protection.[354] In its quintessentially liberal form, freedom of association holds that what citizens may do alone, they may also do together. Associational liberty can also be described as a kind of anti-discrimination principle, preventing the state from barring individuals from enjoying the same freedoms together that

350. *See, e.g.*, Forst, *supra* note 336 at 719 (outlining the relationship between the three concepts, arguing that, roughly, rights must apply to everyone (universality) and be justified (reciprocal) and actually justifiable (reflexive) to everyone).

351. *See* Robert Dahl, *The Myth of the Presidential Mandate*, 105 POL. SCI. QUAR. 355 (1990) (hereinafter, "Dahl, *Myth*") (providing an example and a critique of the use of a fictional "popular mandate" by newly elected presidents in order to justify their sweeping policy agendas).

352. Jackson, *Administration, supra* note 208, at 333-334.

353. *See, e.g.*, Webber, *supra* note 40, at 147 (arguing that the legislature is where citizens participate in the "law-making that continues the constitutional project of reconciling the principles of political legitimacy through the limitation of rights").

354. U.S. Const. Am. 1; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-618 (1984) (Brennan, J.) ("Our decisions have referred to constitutionally protected 'freedom of association' in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must [618] be secured against undue intrusion by the State. . . . In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion."). For a discussion of how associational freedoms can be applied, and has been applied by the U.S. Supreme Court, to corporations, *see* Jackson, *Antitrust, supra* note 35, at 344-45.

they can enjoy alone, unless good reasons exist to treat the group differently.[355] It is therefore a derivative freedom, reliant upon other individual liberties exercised in the context of association.[356] For example, Justice Scalia, in his concurring *Citizens United* opinion, observed that "activities are not stripped of First Amendment protections simply because they are carried out under the banner of an artificial legal entity."[357] Likewise, general incorporation statutes usually permit corporations to carry out "any *lawful* business" already permitted to human individuals.[358] Another significant notion of associational freedom is instrumental, claimed only because it helps members achieve a particular goal. Members claim it because they seek to exercise their individual liberty as they work together to achieve a shared end. As illustration, corporate legal rights to personhood, property, and contract are necessary before individuals can function collectively as an economic actor capable of generating sufficient income to compensate everyone.[359]

This liberty, particularly in the context of business enterprise, is often asserted against the claims of corporate outsiders, including those claiming to speak in the public interest, who argue that corporate actions violate their own liberties. Proponents of corporate rights may therefore make colorable claims that such rights help vindicate their economic freedoms. But they must do so in a way that respects the equal rights and liberties of others. Constitutional liberal democracy is committed not just to liberty. It is committed to equal liberty. Accordingly, the rights of everyone else must also be taken into account. These include, but are certainly not limited to, the positive rights of consumers to access necessary goods like housing, education, and healthcare. They may also include, for example, the rights of citizens to enjoy equal political liberties, the rights of workers against exploitation and domination, the rights of small producers to participate in the market, the rights of cultural or religious minorities to equal standing in the public square, and so on.

3. Modifying Real Entity Theory

Unlike concession and aggregation theories, it is more difficult to modify real entity theory to comport with contemporary understandings of the state's claim to authority. Real entity theory would grant independent moral and political standing to the corporation as such. Under real entity theory, the corporation, as a real person, enjoys *sui generis* liberty rights. The corporation,

355. Leader, *supra* note 281, at 25, 45; *Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882)); Jackson, *Antitrust, supra* note 35, at 345.

356. *E.g.*, Dan-Cohen, *supra* note 291, at 66.

357. *Citizens United*, 558 U.S. at 390 (Scalia, J., concurring).

358. *E.g.*, Millon, *Theory of the Corporation, supra* note 22, at 208.

359. Winkler, *We the Corporations, supra* note 187, at 47; Orts, *supra* note 13, at 73; *see* Jackson, *Antitrust, supra* note 35, at 346 (arguing that these corporate rights are easiest to justify under a liberal regime).

as a "real" entity, can decide to act and to govern itself as it likes—just as an individual might under CLD terms. But lending groups the same kind of legal, moral and political standing as human individuals violates CLD's commitment to normative individualism,[360] the idea that rights arise from and protect the freedoms of individual human beings. This commitment to the individual is inherent to the concept of constitutional democracy itself.[361]

To explain, under CLD, laws must be justified and justifiable to human beings.[362] It is individual human beings, not groups, who enjoy a "right to have rights"[363] and to participate in the elaboration of the rights they give themselves.[364] The laws of CLD, for example, do not need to be justified or made justifiable to inanimate objects. Individuals, not lakes or trees, engage in the discussion, compromise, and dialogue that lead to consensus regarding their collective norms, including the legal rights they ascribe not only to each other, but to non-human entities likes lakes and trees and even a university's fund-raising apparatus.[365] The same holds for groups, including cultural communities and political associations. Even a right to national self-determination, under CLD, is parsed in terms of how ascribing decision-making autonomy to a political organization vindicates *individual* human freedom and well-being.[366]

360. List and Pettit, *supra* note 116, at 170.

361. Habermas, *Struggles for Recognition, supra* note 33, at 107 (groups rights are "a question of protecting . . . individual legal persons, even if the integrity of the individual – in law not less than in morality – depends on relations of mutual recognition [of cultures and group identities] remaining intact."); *id*., 109 (notwithstanding strong arguments for collective rights, the "modern conception of freedom" possesses an "individualistic core").

362. *E.g*., RAINER FORST, THE RIGHT TO JUSTIFICATION 19 (trans. Jeffrey Flynn 2007) (hereinafter, "Forst, *Right to Justification*") (rights must be justified to "the community of all human beings as moral persons"); Habermas *Struggles for Recognition, supra* note 33, at 113.

363. *E.g*., Arendt, *supra* note 346, at 267; Alison Kesby, *the Right to have Rights as a 'Place In the World, in* THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 13 (2012).

364. *See, e.g*., Forst, *Right to Justification, supra* note 360, at 21(individuals have "a fundamental *right to justification*, and a corresponding unconditional *duty to justify* morally relevant actions") (emphasis in original).

365. Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty,* 103 AM. POL. SCI. REV. 691, 699 (2009) (hereinafter, "Benhabib, *Rights Across Borders"*); List & Pettit, *supra* note 116, at 181; *see also* Eric Orts & Amy Sepinwall, *Privacy and Organizational Persons,* 99 MINN. L. REV. 2275, 2291-2292 (2015) (explaining that corporate rights are ascribed to non-human objects because doing so serves human beings in one way or another, even if those human beings are not typically known to be "members" of that object).

366. *See, e.g.,* Margalit & Raz, *supra* note 292, at 444 (a right to national self-determination requires a connection between "the prosperity of the group with concern for the well-being of individuals. This tie between the individual and the collective is at the heart of the case for self-determination."); Yael Tamir, *The Right to National Self-Determination,* 58 SOC. RESEARCH 665, 571 ("[i]n contemporary political discourse, the right of individuals to determine their government remains a basic tenet of both liberal and nationalist doctrines"), 574 (even the concept of a "nation" is explained in individual, not cultural/group terms*, i.e.,* that "a nation is a group of individuals who feel themselves linked by special ties because of their mutual relations, which are further enhanced through their sharing in the same history, traditions, and culture."), 576 ("[t]he endurance of nations . . . .depends upon the presence of a national consciousness, on the will of individuals to determine themselves as members of the nation and to actively associate their common future") (1991).

Accordingly, every corporate right must be "derivative,"[367] in that the corporate legal right is dependent upon the rights and interests of individual human beings. Human beings ascribe group rights, in other words, because doing so serves their welfare, their interests, and their freedoms in one way or another. Eric Orts and Amy Sepinwall argue, for instance, that citizens may give rights to speech to a public media company not because they care about the speech rights of the company's shareholders, but because doing so enables everyone to fully exercise their rights to participate in democratic decision-making.[368] They do not (or should not) give groups rights because groups have a moral importance independent of the good they do for human beings.

Furthermore, ascribing *sui generis* legal, political, and moral rights to corporations may lead to the violation of their human members' rights. When corporations act and speak for themselves, they, like any individual human being, will often do so because their decision-makers hold certain values to be important. For example, a religious leader will make decisions on behalf of a religious corporation based upon religious tenets. The directors and executives of a business corporation will decide based upon notions of profit maximization and efficiency. The problem is that corporations, because they are groups, necessarily speak and act on behalf of their human members—human members who might object.[369] When corporations (through their internal leadership) make decisions, they force their members to acquiesce to limitations on their freedoms. The leader of a religious corporation may, for example, decide that the religious corporation will not do business with LGBTQ+ individuals. Members of the corporation, to remain members of the corporation, will be likewise bound. Further, the religious corporation, because it carries its own rights, might be able to enforce its decision on its members through the courts. Members may thus find themselves abiding by corporate decisions even over their objections and even though the state could never force a similar decision on its citizens. Stated more simply, ascribing *sui generis* rights to corporations gives them the "*unique* prerogatives of autonomy,"[370] *i.e.*, permission to become their own governments; they make decisions that bind their members with the force of law.[371]

367. Dan-Cohen, *supra* note 291, at 58.

368. Orts & Sepinwall, *supra* note 365, at 2291.

369. *See* Elizabeth Pollman, *Corporate Personhood and Limited Sovereignty,* 74 VAND. L. REV. 1728, 1730 (2021) (arguing that corporations enjoy a "limited form of sovereignty in the sense of authority and autonomy – they have, to a degree, discretion over their internal governance and protectible interests in their property" while also observing that this sovereignty had been "tightly limited." The robust autonomy right anticipated by real entity theory would not permit this kind of limitation.)

370. Cohen, *Freedom of Religion, Inc., supra* note 22, at 169 (emphasis in original).

371. *See id*. at 170-171 (calling the ascription of such unique autonomy rights a "shift from justice [rights] to jurisdiction" that "thereby enchanc[e] and shield . . . religious communities' prerogatives in law-making from civil oversight").

Thus, the "governance, decision-making authority, and control"[372] of corporations, if protected with an autonomy right, challenge fundamental liberal values. These corporate governments, unlike liberal democratic governments, may have no commitment to toleration, freedom of expression, and religious liberty. Instead, they may identify scripture or some other transcendental value as the source of their authority. Some real-life examples demonstrate the danger of ascribing *sui generis* legal rights to corporations. For example, the Boy Scouts successfully demanded a right to exclude members of the LGBTQ+ community because it (a corporation) enjoys religious freedom.[373] The Catholic Church (a corporation), in *Fulton v. City of Philadelphia*, demanded a right to avoid placing children for adoption with LGBTQ+ couples.[374] In *303 Creative, LLC v. Elenis*, a limited liability company demanded it be excluded from a law requiring it to serve gay couples.[375] In each case, a business organization successfully claimed an exemption from laws requiring citizens to respect the equal liberties of others. They each made their decisions based upon their understanding of what their religion requires and claimed that their decisions were protected by Constitutional autonomy rights under the First Amendment. Yet their decisions, unlike a personal decision made by a human individual, will bind many others: corporate employees, customers, investors, and other stakeholders subject to the corporation's decision-making. If enough corporations, when exercising their *sui generis* autonomy rights, subscribe to illiberal principles, they might begin to pose a threat to liberal democracy itself.[376] Citizens might find themselves having to navigate a society full of private corporate governments that openly embrace illiberal values. Given corporate resources, corporate leaders might be able to functionally replicate political authority in a way that violates our understanding of individual liberty.

Nevertheless, the real entity theory of corporate personhood does carry an important lesson. It demonstrates that associations can nurture collective goods like culture, religion, and community. These collective goods serve human beings, and they are goods that human beings cannot create and enjoy in isolation. As a result, human beings may decide to protect these goods with legal

372. Orts, *supra* note 13, at 36; *see also* Muniz-Fraticelli 2014, *supra* note 18, at 161-180 (arguing that non-state associations can and should be able to claim authority over their members).

373. *See Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that private organizations can expel members enjoying protected status like sexual orientation when expulsion improves the association's ability to "advocate public or private viewpoints" – *i.e*., the group's First Amendment autonomy rights).

374. *See Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (holding that the City of Philadelphia could not refuse to contract with the Catholic Church to provide adoption services, even though the Church refused to place children with LGBTQ+ couples, because doing so would violate the organization's free exercise rights under the First Amendment).

375. *303 Creative, LLC v. Elenis,* 600 U.S. at 580.

376. Cohen, *Freedom of Religion, Inc., supra* note 22, at 171 (the legal self-governance rights ascribed to corporations by the U.S. Supreme Court ("undermin[e] rather than [serve as a] paradigm of liberal rights" and "threaten . . . the achievements of democratic constitutionalism").

rights. CLD's moral individualism need not amount to empirical individualism; CLD does not expect us to live like lonely hermits.[377] Democratic citizens, without sacrificing this moral individualism, can accept that community, culture and organized religion are salient to their well-being, their sense of self, and their individual liberties.[378] They can also accept that some goods are created and enjoyed in an irreducibly social way. A violinist's experience playing alone is different from her experience playing with a full orchestra, for example. They might also realize that business organizations are where human beings find meaning, purpose, and community. Susannah Ripken observes, for example, that "to the extent that so many people spend most of their day working in or interacting with corporate organizations, the corporation represents a value-laden institution that outranks the local community as a focus of loyalty and a medium for self-realization."[379] Likewise, sociologists find that people enjoy goods of autonomy, community, and self-respect in the workplace.[380] They can pursue creative opportunities that would be unavailable to them acting alone. As a result, citizens might agree to protect these collective goods, each of which is good for human individuals, with corporate rights. To illustrate, an orchestra, to effectively provide value to its members and to its audience, must be able to contract with performance venues, hire conductors and musicians, and own personal property. As a result, citizens might allow an orchestra to incorporate and exercise property and contract rights as a single legal person. Protecting an association with a right to own property, to contract and sue on its own behalf, to engage in speech, and to practice religion will therefore help human beings flourish. Without these legal rights, it would be more difficult for human beings to access these goods.

Of course, ascribing any kind of autonomy right to a corporation carries the risk that decision-makers will make choices that run afoul of its human members' own liberties. A corporation is a group, not an individual; any choice it makes will be felt as a command by corporate members. A board of directors, for instance, might decide to enforce an employment contract in a way that violates an employee's right to free speech. Democratic citizens and their courts will have to grapple with a tradeoff: to prioritize the corporate right to contract or to prioritize the employee's right to speech. Corporations may have an easier time justifying their autonomy rights to citizens if directors can first give some

377. Tamir, *supra* note 366, at 171.

378. *See, e.g.,* Charles Taylor, *The Politics of Recognition, in* MULTICULTURALISM 25, 32 (describing how personal identities are formed in dialogue with intimate and public others), 59 ("Where the nature of the good requires that it be sought in common, this is the reason for its being a matter of public policy" and "rights") (ed. Amy Gutmann 1994); Habermas, *Struggles for Recognition, supra* note 33 at 113 ("Persons, and legal persons as well, become individualized only through a process of socialization"); Kateb, *supra* note 243 at 38-39 (describing valuable human experiences provided only by and through association, including, *e.g.*, camaraderie, self-confirmation, and joy of creativity).

379. Ripken, *supra* note 18, at 146.

380. Rothschild and Whitt, *supra* note 243, at 54-55; *see also* Ferreras, *supra* note 243, at 83-84.

assurances that the exercise of such rights will not run afoul of competing liberty claims. For example, corporate directors might avoid making decisions that would frustrate members' liberty rights. They do not have to enforce contracts in a way that represses workers' political liberties. Or directors might include more members in their decision-making, making it more likely that their choices will align with how members would like to exercise their own liberties. Before spending corporate money on a political campaign, for instance, directors can poll shareholders directly. The state, for its part, can help avoid conflicts between corporate rights and individual rights by, for instance, demanding that corporations incorporate stakeholder voices in decision-making and avoid imposing policies that violate fundamental liberties.

D. Corporate Personhood, Better Understood

Once transcendental values are extracted from the three theories of corporate personhood, they no longer demand that their users choose among irreconcilable theories of political authority. Nor do they require their users to measure positive law against perfectionist ideas of the good. Instead, the theories identify the human rights that corporate rights place at stake. Namely, they identify the kinds of human rights that corporate rights may serve. They also identify the human rights that corporate rights might offend. They set up, in other words, battlefronts as citizens deliberate about the scope of the rights they give themselves. Some citizens will argue that corporate legal rights protect their own rights to pursue joint economic activity. Others might argue that regulating corporations protects their right to contraceptive healthcare,[381] to clean drinking water, to unpolluted air, and to labor under fair conditions. Lawmakers must weigh and balance these competing claims,

As it turns out, this is indeed how the U.S. Courts have often understood claims related to corporate legal rights. When it ascribes liberty and property rights to corporations, the U.S. Supreme Court typically does so derivatively and on behalf of the individual right claims of identifiable corporate members.[382] When the Court circumscribes corporate rights, it does so in the name of the equal rights and liberties of corporate members and outsiders who are protected by a challenge statute or regulation. And when courts permit corporate participants to order themselves according to norms different than those set forth

381. *See* Brigitte Amiri, *5 Things Women Should Know about the Hobby Lobby Decision,* ACLU (July 2, 2014) (explaining the scope of contraction coverage under the Affordable Care Act following the *Burwell v. Hobby Lobby* opinion).

382. Ruth H. Bloch & Naomi R. Lamoreaux, *Corporations and the Fourteenth Amendment, in* CORPORATIONS AND AMERICAN DEMOCRACY 287 (Lamoreaux & Novak eds. 2017) ("The extent that [the U.S. Supreme Court] extended constitutional protections to corporations [in the late 19th Century], they did so with the specific aim of safeguarding the property of the corporations' human owners."); Maitland, *supra* note 192, at 115; Winkler, *We the Corporations, supra* note 187, at 37; *see generally* Blair & Pollman, *Derivative Nature, supra* note 77 (providing a history of courts ascribing corporate rights based on their "derivative" nature, *i.e.*, deriving them from individual rights).

by the state, they take care to check that the equal rights and liberties of others do not unfairly suffer by insisting on regulating their self-regulation according to constitutional principles.

For example, in *Santa Clara v. Southern Pacific Railroad Co.*[383] and *The Railroad Tax Cases,*[384] Justice Field, riding circuit, determined that California's property tax on railroad companies violated Constitutional equal protection principles because it applied to some, but not all, property owners. According to legal historians Ruth Bloch and Naomi Lamoreaux, Field was not concerned with the Constitutional rights of the corporation as such, but instead with "the rights of the human persons who bore the burden of the unequal tax."[385] In *Citizens United*, as Adam Winkler explains, the Court did not hold that the corporation merited First Amendment Protections of its own accord. Instead, the human beings who "make up the corporation . . . clearly have constitutional rights."[386] According to Winkler, the Court understood the corporation as a "voluntary membership association"[387] that could claim associational freedoms of the kind outlined above. At the same time, the Court refused to ascribe autonomy rights to the corporation when doing so unduly infringed upon the competing rights of others. For instance, in *Austin v. Michigan Chamber of Commerce,*[388] the Court agreed to impose restrictions on corporate campaign spending because, amongst other reasons, the spending would diminish the political rights of ordinary voters. In *Roberts v. U.S. Jaycees*,[389] the Court ordered the U.S. Jaycees—a membership corporation—to admit women into its ranks in order to protects purported members' right against discrimination. It balanced the relatively diminished value of the U.S. Jaycees' expressive freedom as a large organization against the compelling state interest against gender discrimination. Finally, the Delaware Courts routinely regulate corporations' self-governance in the interest of the rights of stockholders. For instance, in a hostile merger case studied by many law students,[390] the Court imposed upon boards of directors a more burdensome decision-making procedure—best undertaken by a committee of outside independent directors.[391] Its reasoning was straightforward: during a hostile tender offer, there is an "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its

383. *Santa Clara v. Southern Pacific Railroad Co*., 18 F. 385 (1883).

384. *The Railroad Tax Cases*, 13 F.722 (1882).

385. Bloch & Lamoreaux, *supra* note 382, at 291.

386. Adam Winkler, Citizens United, *supra* note 70, at 361.

387. *Id*.

388. *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 659 (1990) (Marshall, J.) (noting that corporations can use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace") (internal quotation omitted).

389. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984) (Brennan, J.).

390. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

391. *Id*. at 954.

shareholders."[392] In other words, while Delaware Courts generally respect directors' authority to manage the company's affairs according to directors' own business judgment, they do not always do so—particularly when there is a heightened risk of the violation of shareholders' interests.

V. FALSE CHOICE III: BETWEEN DEMOCRACY AND RIGHTS, A CO-ADVENTURE

Commonly, those who use the theories of corporate personhood commit one final conceptual mistake. In Sections II, III and IV, this Article argued that the theories of corporate personhood, when relieved of their metaphysical and transcendental baggage, are best understood as conflicting rights discourses. They set up good reasons to ascribe corporate rights—and good reasons to circumscribe them to protect the rights of others. Nevertheless, when many users of corporate personhood consider the battlefront formed between those who claim corporate rights and those who claim rights against the corporation, they do not see an opportunity for negotiation and compromise. Instead, they see only a zero-sum choice. The choice is to favor either democracy or rights—but never both. When legislation attempts to circumscribe corporate autonomy, the theories of corporate personhood shoehorn the user into either prioritizing democratic lawmaking or the rights of the corporation. Namely, a user can prioritize rights by endorsing aggregation or real entity theory. Or they can prioritize democracy by endorsing concession theory. In Ronald Dworkin's colorful language, either corporate rights "trump"[393] lawmaking or they do not. Indeed, the history of corporate rights, according to Adam Winkler, tracks the battle between the "populists" who favor democratic regulation and the "corporationalists" who prefer economic freedom.[394]

Happily, CLD does not require choosing between the two. The conflict between rights and democracy is old, and it has long outstayed its welcome in corporate rights discourse.[395] To put it succinctly, citizens construct their own rights through the democratic process. Given the array of positive laws that already ascribe rights to corporations, abandoning the false choice between rights and democracy should at least seem plausible. The Delaware General Assembly,

392. *Id*.

393. *See generally* Ronald Dworkin, *Rights as Trumps, in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed. 1984).

394. Winkler, *We the Corporations, supra* note 187, at 35 (describing the Hamiltonians in favor of corporate rights as "corporationalists" and the Jeffersonians who disfavored such rights the "populists." Winkler argues that "[t]he competing views of Hamiltonian corporationalists and Jeffersonian populists would set the terms of debate over constitution protections for business for much of the next two centuries.").

395. *See, e.g*., Webber, *supra* note 40, at 31 (calling the supposed conflict between an original founding constitutional document and democratic legislation a "myth" that "idealizes the constitution" and lionizes the "vision of the founders" while placing the fate of rights exclusively within the hands of the judiciary. Webber goes on to argue (*id*. at 35) that though political legitimacy depends equally on both a founding document and ordinary legislation, any reconciliation will be tentative and unstable.).

for example, has promulgated a detailed code[396] that sets forth legal powers[397] enjoyed by any enterprise incorporated within the State of Delaware. In *Burwell v. Hobby Lobby*,[398] the right to religious liberty claimed by a corporation was based in large part on statute: the Religious Freedom Restoration Act.[399] Thus, on many occasions, the rights claimed by corporations and the laws passed by democratic publics coincide—*e.g.*, the right to hold property, to hire employees and managers, and to enter into contracts.[400]

But the armistice between democracy and corporate rights has even deeper philosophical foundations. In CLD, rights are not trump cards that can be played against positive law. Instead, citizens construct the equal rights that they give themselves through the democratic lawmaking process. As intimated above, rights and democracy are co-original. Using their political rights (*e.g.,* to speak, to petition, to vote), citizens engage in the democratic lawmaking that elaborates and instantiates not only those same rights, but also their civil rights to participate fully in society. This conclusion obtains for several reasons. First, by logical necessity, a liberal system of rights *requires* some kind of political authority. Second, this political authority, within a CLD, is the democratic lawmaking process. The logic of the democratic construction of rights, finally, is amply demonstrated by the history of civil rights reform within the United States. This argument is set forth in a bit more detail below.

A. Rights Require Political Authority

At since Immanuel Kant argued, using his Categorical Imperative, that all rights were necessarily *equal* rights—else no one could rationally argue that a right should be universal one shared by all[401]—Western political thought has recognized the important role played by the state in securing human liberty. Unless some authority exists that can guarantee equal liberty for all, no one can trust that their liberty is fully secure. Those with superior resources will inevitably trample on the freedoms of those without the wherewithal to protect themselves. The Cold War liberal theorist Isaiah Berlin observed, for example, that "freedom for the pike is death for the minnows."[402] Ascribing rights to powerful actors often results, according to Berlin, in the domination of the weak

396. 8 Del. C. §§ 101 *et seq*.

397. 8 Del. C. § 122 (including: a right to perpetual life; to sue and be sued; to transfer and own property; to enter into contracts; to adopt self-governance rules (bylaws); and otherwise "[t]ransact any lawful business.").

398. Burwell, 573 U.S. 682.

399. *Id*. at 688 (citing 42 U.S.C. § 2000bb (2006), which was understood to overrule previous U.S. Supreme Court doctrine on the Free Exercise Clause of the First Amendment. Andrew E. Garfield*: Achieving a Sensible Balance*, 114 COLUM. L. REV. SIDEBAR 1, 22 (2014)).

400. *See* 8 Del. C. §141(a) (granting to the board of directors authority to manage the affairs of the corporation, including the hiring of executives).

401. *See generally* Kant, *supra* note 335.

402. Berlin*, supra* note 335, at 171.

by the strong. And the state, through courts deploying concepts like "proportionality," "rational basis," and "compelling state interest,"[403] is the referee that assumes responsibility for ensuring the rights enjoyed by politically influential citizens, often vindicated through general legislation, do not trample on the rights of ordinary citizens.

The need for a political authority to enforce equal rights arises not just because political, social and economic power is distributed unevenly throughout society. It also arises because the rights of one may conflict with the equally compelling rights of another. Consider two neighbors, Homer and Ned, equally endowed with social and material resources. Homer would like to use his backyard to grill salmon steaks, creating an odor that is obnoxious to Ned. Ned, for his part, would like to use his backyard to sit on a lounge chair and relax with a book. Each has an equally compelling—and competing—property right claim to use his backyard as he sees fit. Some authority must step in to resolve the conflict, hopefully in an impartial manner that secures for both as much liberty as possible. As legal philosopher Jeremy Waldron puts it,

> [b]ecause the exercise of one person's liberty may conflict with and thus limit" the liberty of another, the proper extent of the right is determined by making adjustments in what is allowed to each so that the final scheme is secured for all at the highest level of individual liberty consistent with equality.404 Without an authoritative umpire making these adjustments, the dispute may devolve into violence and leave less freedom for all involved.[405]

Furthermore, the under-determinate nature of rights themselves drives the need for a political authority. The sparse language contained in the Bill of Rights is one important example. Everyone might agree that everyone enjoys an equal right to free speech. But citizens will disagree vehemently about how this right should be applied and interpreted in specific situations. According to constitutional scholar Grégoire Webber, constitutional rights like the right to free speech are "incompletely theorized agreements on a general principle" that are "proposed and adopted without resolving the great moral-political debates alive in the community."[406] This openness serves as an invitation for authorities "to engage in the task of completing the constitutional edifice,"[407] or fleshing out the details of the right and how it will apply in concrete circumstances.

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403. Webber, *supra* note 40, at 63.

404. Waldron, *supra* note 250, at 236.

405. Even John Locke, in his *Second Treatise*, argued that a government was necessary to enforce the natural right to property because individuals cannot be impartial judges over their own rights conflicts. Locke, *supra* note 301, at 275-76 ("It is unreasonable for Men to be Judges in their own Cases [that allege that someone has violated their natural rights], that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed [276] Government to restrain the partiality and violence of Men.").

406. Webber, *supra* note 40 at 1, 53.

407. *Id.* at 54.

B. The Janus Face of Rights and Democracy

Accordingly, any system of rights requires political authority. In a CLD, however, not just any form of authority will do. No philosopher king, uniquely able to reason according to (ostensibly) universally correct principles, resolves rights conflicts.[408] Nor is the elaboration of the contours of citizens' rights left solely within the hands of judges and lawyers.[409] Instead, democratic citizens, through the lawmaking process, provide significant input.[410]

As explained in Section III (B), *supra*, CLD keeps its normativity in-house. Citizens cannot rely on, for example, divinely-granted natural rights to justify their preferred legal arrangements. Nor can they cite theocratic values to justify the authority of their rulers. Instead, citizens must seek the assent of their fellow citizens. In a democracy, which aims to give power (*kratos*) to the people (*dêmos*), citizens must play an equal role in creating the rules that bind them all. These rules include the creation and elaboration of their rights. If political authority must be democratic, and if political authority is required to instantiate a system of equal rights, it follows that the democratic process is required to instantiate a system of equal rights.

Philosopher Jürgen Habermas provides one important articulation of this argument. Put roughly, the democratic process creates rights; they are the outcome of public deliberations that percolate into formal lawmaking.[411] At the same time, the rights that citizens give themselves through this democratic process ensures that future citizens can likewise engage in the democratic process.[412] In turn, the democratic process further elaborates upon and introduces new rights. Seyla Benhabib, one of Habermas' influential students, calls this

408. *Id*. at 37.

409. *See* Winkler, *We the Corporations, supra* note 187, at 356 (explaining that Chief Justice John Roberts, around the time of his confirmation, espoused a philosophy of case-by-case judicial modesty in order to leave politics to the political branches); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893) (arguing in favor a strong presumption that legislation passes constitutional muster). More recently, Ryan D. Doerfler and Samuel Moyn have argued in favor of reforms that would disempower what they understand to be a Court that is too willing to usurp citizens' rights to construct their own rights. *See* Ryan D. Doerfler & Sameul Moyn, *Democratizing the Supreme Court,* 109 CALIF. L. REV. 1703 (2021). *See* Nikolas Bowie & Daphna Renan, *The Supreme Court is Not Supposed to Have This Much Power,* THE ATLANTIC (June 8, 2022) (arguing that the Court has historically worked against legislative attempts to secure citizens' equal rights, including the right to vote, and that, as a result, reform is urgently necessary).

410. *See infra,* the next few paragraphs and their accompanying footnotes.

411. *See generally* Habermas, *Between Facts and Norms*, *supra* note 28; *see also generally, e.*g., Forst, *supra* note 28, at 712; Christina Lafont, *Religion and the Public Sphere: Remarks on Habermas's Conception of Public Deliberation in Postsecular Societies,* 14 CONSTELLATIONS 239 (2007); Seyla Benhabib, *Democratic Iterations, supra* n.42; WILLIAM REHG, INSIGHT AND SOLIDARITY: A STUDY IN THE DISCOURSE ETHICS OF JURGEN HABERMAS (1994). For an excellent primer on Jurgen Habermas, his philosophy, and his early critics, *see* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES (Michael Rosenfeld and Andrew Arato eds., 1998). For an excellent study of how social media, "fake" news, and other informational disfigurements impact the democratic construction of rights, *see* Simone Chambers, *Truth, Deliberative Democracy, and the Virtues of Accuracy: Is Fake News Destroying the Public Sphere?* 69 POL. STUD. 147 (2021).

412. *Supra* note 411.

feedback loop a "democratic iteration" that yields variation amongst the rights of different democratic publics.[413] According to Rainer Forst, another influential student, the rights that democratic publics construct for themselves amount to *equal* rights because they are general, reflexive, and reciprocal: citizens justify new rights because they are generally applicable—rights cannot be granted to some but not to others—and explained in terms that all their fellow citizens can accept.[414] Jean Cohen and Andrew Arato put this rights-making process in concrete terms, explaining that rights are the result of participatory social movements that, using the tools of electoral politics, hold democracies to account for betraying their promise to provide liberty to everyone equally.[415] Legal historian William Novak, turning his attention to the U.S. case following the Civil War, argues that popular progressive social movements drove not only the creation of new social rights, but also a transformation in the state itself.[416] Thus, rights serve not only as a prerequisite of democratic practice, securing the political liberties required for democratic lawmaking.[417] They are also an outcome of that very same democratic practice.

The rights that democratic citizens give themselves are both positive and negative: social rights to access something necessary for human flourishing and the classical liberal rights against interference from others.[418] Citizens demand legal powers, material goods, and other resources that allow them to exercise

413. Benhabib, *Democratic Iterations, supra* note 40, at 50-55.

414. Forst, *the Justification of Human Rights, supra* note 28, at 712.

415. *See generally* Cohen & Arato, *supra* note 40.

416. *See generally* Novak, *New Democracy, supra* note 296. Similarly, Italian political theorist Norberto Bobbio observes "[a]ll states which have become more democratic have simultaneously become more bureaucratic" as more citizens demand more from their government. Bobbio, *supra* note 40, at 38.

417. Waldron, *supra* note 250, at 283 ("The idea of democracy is not incompatible with the idea of individual rights. On the contrary, there cannot be a democracy unless individuals possess and regularly exercise . . . 'the right of rights' – the right to participate in the making of the laws . . . individual rights (even those not directly implicated in the democratic ideal) are based on the respect for individual moral agency that democracy itself involves."); *see also, e.g.*, JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 117-118 (Thomas Burger & Frederick Lawrence trans., 1991) (arguing that the private freedoms of individuals created the conditions under which the state could be ruled through "popular opinion," which enjoyed authority "not at all from force, only to a small extent from habit and custom, [but] really from insight and argument") (discussing Kant); Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty,* 41 POL. TH. 359 (2013) (arguing that, under the procedural conception of democracy, "equal political liberty is the most important good for which democracy should strive" and that this liberty "entails protecting civil, political, and basic social rights with the aim of ensuring a meaningful equal participation.").

418. *See* Berlin, *supra* note 335, at 178-79, for a notorious and uncharitable definition of positive liberty. For a foundational idealist definition that preceded Berlin's, *see* Thomas Hill Green, *Liberal Legislation and Freedom of Contract*, in THE LIBERTY READER 21 (David Miller ed., 2006). Positive liberties are associated with the expansion of the so-called welfare state (*see* Habermas, *Transformation,* supra note 412, at 224-25), understood as the state's fulfillment of its obligation to ensure that citizens possess the social and material resources to direct their own lives and, ultimately, to equalize "the basic structure of social relationships" and "transform entrenched structures of social domination through participatory welfare politics." STEVEN KLEIN, THE WORK OF POLITICS 2-3 (2020) (hereinafter, "Klein, *Work*"). For a description of how U.S. political thought incorporated the ideas of English and German ideas of positive liberty, *see* Novak, *New Democracy, supra* note 296, at 77-83.

their freedoms to live life as they choose themselves.[419] As French philosopher Claude Lefort argues, the "negative formula 'which does no harm' is indissociable from the positive 'being able to do everything.'"[420] To illustrate, combined with negative freedom of contract to work where one chooses, there is a positive right to a minimum wage and guaranteed free public education. Each positive right not only increases one's choice in work, but also makes those choices more meaningful. In turn, the positive and negative rights do not target state action alone. When they elaborate on their rights, citizens pay attention not just to the actions of state officials. They likewise notice when their fellow citizens violate their rights to free speech, to exercise religion, and so on. Citizens also target those whose outsized capacity to exercise liberty rights becomes a threat to equal liberty.[421] Associational rights, in particular, are notorious for creating inequalities in the distribution of liberties.[422] School segregation, to take one example, while justifiable in terms of associational freedom, yielded grave political and material inequalities as all-white private schools began proliferating after *Brown v. Board of Education*.[423]

Of course, citizens commonly disagree about the content and scope of the rights they want to give themselves. If a minority disagrees with a right codified by the legislature, the minority will be tempted to argue that its own conception of rights should trump the legislation. But, in a CLD, the appropriate response is to recognize that only a majoritarian decision-making rule respects each citizen as an equally valuable participant in the rights-making process—particularly when it *their* rights at stake.[424] If all rights are equal rights, including the right to participate in democracy, then everyone's vote should count equally—even if the result will disappoint many. According to Waldron, "[p]rinciples of authority such as participatory majoritarianism are principles for governing social decision-making in circumstances where some members of the society think that rights require one thing and other members of the society think that rights require something else."[425] As Waldron elaborates,

> [e]ach of us . . . must face the prospect that the values *he* takes seriously, the priorities *he* has, the principles to which *he* has a strong attachment, may not be the values, priorities, and principles held by the voter in the next booth. We can try if we like to suppress these disagreements, to denigrate the other's views as selfish or irrational and exclude them as far as possible from our politics. But . . . we can hardly

419. *E.g.*, Lefort, *supra* note 245 at 23; Novak, *Legal Origins, supra* note 205, at 249-50; Klein, *Work, supra* note 418, at 4.

420. Lefort, *supra* note 245, at 32.

421. *E.g.,* Webber, *supra* note 40, at 23.

422. For a convincing discussion of the threat to equality posed by ascribing rights to groups and associations, *see* Barry, *supra* note 291.

423. *Brown v. Board of Education*, 347 U.S. 483 (1954). For a discussion of scholarly research into the proliferation of all-white private schools after *Brown*, *see* Jennifer Berry Hawes, *These Researchers Study the Legacy of the Segregation Academies They Grew Up Around,* PROPUBLICA (June 25, 2024).

424. Waldron, *supra* note 250, at 247, 250.

425. *Id*. at 248.

> do this in the name of *rights,* if it is part of the idea of rights that a right-bearer is to be respected as a separate moral agent with his own sense of justice. If, on the other hand, we resolve to treat each other's views with respect, if we do not seek to hide the fact of our differences or to suppress dissent, then we have no choice but to adopt [democratic] procedures for settling political disagreements. . . .[426]

Stated prosaically, citizens must get to the hard work of convincing other citizens that they've just violated a right worth protecting. Anything else invites a tyranny of the minority to trump the majority.

Fortunately for disappointed minorities, the rights constructed by citizens in a CLD always remain contingent, contestable, and open-ended.[427] Whatever resolution may temporarily arrive in Congress or the courts, and whatever reasons legislators or judges offer to justify that resolution, uncertainty about both future factual circumstances and citizens' values precludes any final answer about what rights mean and how they apply. The identity, scope and scale of rights always remain within the grasp of democratic citizens.[428] According to intellectual historian James Tully, the abstract rights that the democratic process concretizes are not indefeasible principles so much as "modes of problemitisation" calling for continual democratic negotiation and discourse.[429] Indeed, the perpetual openness of the question of rights preserves democratic practice; to settle on the truth about such things means that democratic citizens are no longer making the decisions—the truth is.[430] Our permanent disagreement over our rights is the fuel that motors democracy itself.

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426. *Id*. at 303-304.

427. *See* NADIA URBINATI, DEMOCRACY DISFIGURED 88 (2014) (hereinafter, "Urbinati, *Disfigured*") (Democratic procedures presume permanent reviewability, on which individual liberty to participate freely in the process of making and changing laws and policies rests.").

428. Webber, *supra* note 40, at 7, 38.

429. James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy,* 65 MOD. L. REV. 204. 207 (2002).

430. *See* Urbinati, *Disfigured*, *supra* note 427, at 6-7 (2014) (explaining that claims that a certain opinion is the truth harms democracy and, amongst other things, encourages the proliferation of judicial and other non-political authorities). To explain, Urbinati observes that "once *episteme* enters the domain of politics, the possibility that political equality gets questioned is in the air because the criterion of competence is intrinsically inegalitarian." *Id*. at 83. In other words, those best equipped to find and apply the trust (like judges) will usurp the authority to make laws. For instance, Urbinati argues that "[f]rom Plato to the contemporary theorists of epistemic democracy, 'most lovers of truth [have found] democratic elections rather hard to stomach.'" *Id*. at 85. This "epistemic paradigm," *i.e*., the notion that the law should reflect the "true" contents of rights notwithstanding the judgment popular public opinion, "locates the criterion for judging what is good or correct outside the political process, which plays one might say an auxiliary function, not authoritative." *Id*. at 86; Novak*, New Democracy*, *supra* note 296, at 13 (arguing that "[w]ithin conventional liberal constitutional interpretation, judges are still too frequently portrayed not as officers and agents of the state but as something akin to disinterested, apolitical, and neutral umpires just calling balls and strikes, protecting private rights and private interests from the illiberal interferences of an inherently coercive government." He argues that this usurpation of lawmaking power results from a belief that there is a "higher law" whose truth transcends politics. *Id*.

C. Demonstration

While these arguments are abstract, they apply quite clearly to the history of civil rights. Most obviously, U.S. citizens (and their political representatives) created for themselves Constitutional rights through the Bill of Rights and, later, through the Reconstruction Amendments. But the rights that citizens give themselves are not just codified in higher, constitutional law. They also arise through statute. The Civil Rights Act of 1875,[431] for instance, guaranteed a right against racial discrimination in public accommodations. Although later struck down by a hostile U.S. Supreme Court,[432] citizens tried again a century later when they passed the Civil Rights Act of 1964[433] and the Civil Rights Act of 1968.[434] Statutory rights against discrimination also include, for example, the Civil Rights Act of 1866 ("Section 1981"); the Age Discrimination in Employment Act[435]; the Americans with Disabilities Act[436]; the Equal Pay Act[437]; the Pregnancy Discrimination Act[438]; and the Genetic Information Nondiscrimination Act.[439] Citizens, thus, are not passive actors when it comes to asserting their rights against employers and owners of public accommodations—powerful actors who would otherwise prefer to use their autonomy rights to discriminate based on gender, religion, national origin, pregnancy, race, disability, and so on.

The rights that citizens give and define for themselves in the face of rights conflicts do not just address discrimination. They also address the harms created by corporate misbehavior. During the centralization of state capacity in the late 19th century,[440] citizens and their elected representatives began to constrain the corporation's burgeoning power to interfere with individuals' daily lives.[441] In the late 19th century, for instance, newly created state commissions started receiving petitions and hearing complaints from citizens outraged by extortionate and discriminatory railroad pricing that thwarted their ability to participate fully

431. 18 Stat. 335-337 (1875).
432. The Civil Rights Cases, 109 U.S. 3 (1883).
433. 78 Stat. 241 (1964).
434. 82 Stat. 73 (1968).
435. 29 U.S.C. §§ 62 *et seq*. (1968).
436. 42 U.S. C. §§ 12101 *et seq*. (1990).
437. 77 Stat. 56 (1963).
438. 92 Stat. 2077 (1978).
439. 122 Stat. 881 (2008).
440. Novak, *Legal Origins*, *supra* note 205, at 264.
441. Strine, Jr. & Walter, *supra* note 13, at 881; Novak, *New Democracy, supra* note 296, at 9 ("The prior between the Civil War and the New Deal did witness major transformations in liberalism and law. It also saw dramatic changes in bureaucracy, central authority, administrative hierarchies, and the expansion of officialdom."), 108 ("lawyers, economists, legislators, and democratic reformers pieced together a new regime of modern business regulation."). Novak notes that some Americans contemporaneously described this centralization and expansion of state power as the result of expanding popular control that sought to subject business to government oversight. *Id*. at 9-10.

in the economy.[442] The public's demand for railroad reform was so pressing that it was "at the very center of the [Illinois] state constitutional convention of 1869-70."[443] Out of this convention arose a new right: railroads must be "free to all persons for the transportation of their persons and their property," guaranteed by government price controls.[444] Ten states later replicated Illinois' constitutional reforms.[445] In another example, the public uproar following the 1906 publication of Upton Sinclair's novel, *The Jungle,*[446] led to Congress' creation of a new federal agency given the task of policing food and cosmetics to protect consumers' right to safety.[447] Meanwhile, the antitrust laws that directly constrained the power and wealth of corporations were offered by members of Congress who believed that monopoly created unacceptable obstacles to ordinary citizens' right to participate fully in the economy.[448] Often, the claims supporting administrative intervention were couched in the language of rights. Sanjukta Paul, in an important article on the history of antitrust regulation, notes that early social movements against the monopoly power of business were "very concretely about agrarian working people's *moral* claim to their daily bread."[449] Thus, when corporations exercised their autonomy in ways harmful to citizens' rights, the citizens and their elected representatives fought back, securing their rights through legislation and regulation.[450]

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442. Novak, *New Democracy,* supra note 296*,* at 126-27.

443. *Id*. at 128.

444. *Id*.

445. *Id*. at 129. The movement to regulate railroads culminated with the establishment of the Interstate Commerce Commission, the oldest and perhaps the most powerful of the federal regulatory agencies, and its Constitutional endorsement by the U.S. Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1876). *Id*. at 136-139.

446. UPTON SINCLAIR, THE JUNGLE (1906).

447. The Pure Food and Drug Act (also known as the Wiley Act), 34 Stat. 768 (1907). For a history of the book, the popular movement surrounding it and in which it was embedded, and its impact on federal food and safety legislation, *see, e.g.,* Arlene F. Kantor, *Upton Sinclair and the Pure Food and Drugs Act of 1906,* 66 AM. J. PUB. HEALTH 1202 (1976); JAMES HARVEY YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 (2014).

448. David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1226, 1232 (1987); Harlan M. Blake and William K. Jones, *In Defense of Antitrust,* 65 COLUM. L. REV. 377, 384 (1965); Louis B. Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37, 46 (1955) 46; 51 Cong. Rec. 15867 (1914) (testimony of Senator Reed: "We wrote It Into our creed, that all men were created free and equal, and that all are entitled to life, liberty, and the pursuit of happiness . . . So we began enacting legislation calculated to produce a condition which would leave open for all men, big and little, the opportunity to engage In the affairs of life.").

449. Sanjukta Paul*, Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 188 (2021) (emphasis added). For an argument that explicitly ties together popular demand for antitrust reform with a demand for equal (positive) economic rights, *see generally* Jackson, *Antitrust, supra* note 35. For an argument that consumer protection regulation should also reflect a positive-liberty friendly moral (rights based) standard, *see* Luke Herrine, 34 LOY. CONS. L. REV. 240 (2022).

450. For a wonderfully detailed and convincing argument that the American public engaged in constitution-making, notwithstanding the use of ordinary lawmaking tools, as it pursued a "democracy-of-opportunity" tradition that combatted oligarchy and promoted a broad distribution of wealth and political power in the face of corporate power, *see* JOSEPH FISHKIN AND WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

The democratic construction of rights is also apparent in the more mundane, day-to-day operation of business corporations. Corporate law, to take one example, balances the statutory rights of managers to govern the company[451] against those of the corporate stakeholders who remain vulnerable to their fiduciaries' frauds and mismanagement.[452] At the same time, the National Labor Relations Act,[453] the Occupational Safety and Health Act[454] and the Fair Labor Standards Act[455] protect the liberty and economic rights of employees against corporate managers who might deploy their superior bargaining power to force wages to untenable levels, create exploitative and unsafe work conditions, and constrain speech and privacy rights.

In a constitutional liberal democracy, all rights are legal rights—whether codified as constitutional higher law or in ordinary lawmaking. They are, further, the outcome of political struggle taking place on a democratic battlefield according to constitutionalized rules of procedure.

D. Co-originality and Corporate Personhood

Accordingly, the theories of corporate personhood should not force a decision between democracy and rights. Though vulgar libertarians might insist that the two are mutually incompatible, the co-originality argument described above demonstrates otherwise. Democratic attempts to regulate the corporation are part and parcel of the same rights-making process as are democratic attempts to protect their autonomy. As a result, when considering the merits of the aggregation and real entity theories, one is not deciding that rights trump democratic lawmaking. In turn, when considering the merits of concession theory, one is not resigning oneself to a society without rights. Instead, it is through the democratic lawmaking process that citizens create their own rights. These laws, in turn, help citizens continue their participation in democratic lawmaking.

Once we recognize that the theories of corporate personhood do not require a choice between democracy and rights, we can also recognize them as distinct arguments about the various conflicting rights claims at stake. For instance, corporate stakeholders seeking to escape democratic regulation might, citing aggregation theory, argue that their property, associational and other liberty

451. 8 Del. C. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . ").

452. *E.g.*, 9 Del. C. §§ 144 (governing directors making self-interested decisions), 145 (disallowing indemnification for misbehavior undertaken in bad faith); 211 (requiring annual director elections); 220 (requiring informational transparency upon proper request).

453. 29 U.S.C. §§ 151-169, 49 Stat. 449 (1935) (The "Wagner Act") (a right to unionize, to bargain collectively, to strike, to file allegations of unfair labor practices against employers).

454. 29 U.S.C. §§ 651 et seq., 84 Stat. 1590 (1970).

455. 29 U.S.C. §§ 203 et seq., 52 Stat. 1060 (1938) (creating a minimum wage, overtime requirements, prohibiting the employment of minors in certain instances).

rights require state non-interference. Proponents of corporate autonomy rights might also lean on real entity theory, arguing that the cultures and traditions of the community are best protected by allowing the corporation to self-govern. Opponents to corporate rights, on the other hand, might cite concession theory to argue that regulation serves the equally important liberty interests of others. Opponents might also cite aggregation theory, insofar as the exercise of a corporate right would violate the liberties of corporate insiders subject to the corporations' internal rulemaking.

To illustrate, *Burwell v. Hobby Lobby*, *Inc*.[456] involved the arbitration of shareholders' collective religious and property rights against employees' conflicting rights to healthcare under the Affordable Care Act.[457] The Court argued, consistent with real entity theory, in favor of the shareholders: shareholders' religious liberty should applied to the corporate person (group) as a whole because the group's religious autonomy "often furthers individual religious freedom as well."[458] Consistent with aggregation theory, Justice Alito noted that "[w]hen rights, constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [the people, including shareholders, officers, and employees, who are associated with a corporation]."[459] Meanwhile, employees and the public conscripted concession theory in an argument that the shareholders' rights, if enforced without limitation, would unfairly undermine female workers' positive liberty rights to bodily autonomy and healthcare[460] as well as their liberty to freely choose the religious tenets to which they subscribe.[461] Justice Ginsburg, in her dissent, also enlisted aggregation theory when she observed that Hobby Lobby and Conestoga, both for-profit companies, involved no "community of believers"

456. *Burwell v. Hobby Lobby*, *Inc.*, 573 U.S. 682 (2014).

457. 42 U.S.C. §300gg-13(a)(4).

458. *Burwell v. Hobby Lobby*, *Inc*., 573 U.S. at 709 (Alito, J.) (internal quotation omitted).

459. *Burwell v. Hobby Lobby*, *Inc*., 573 U.S. at 706-707 (Alito, J.).

460. *See* Frederick Mark Gedicks & Andrew Koppelman*, Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 57-59 (2014) (identifying the real health, safety, and economic interests at stake for employees – interests ignored by the majority opinion); Garfield, *supra* note 399, at 1, 4, 16 (the societal interests in "women's healthcare and gender equality" in the workplace are strong enough that they should have prevailed); *Hobby Lobby*, 572 U.S. at 771 (Ginsburg, J., dissenting) (expressing dismay that the Court disregarding the "disadvantages that religion-based opt-outs impose on others" who "do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or depends of persons those corporations employ."). Notably, Justice Ginsburg pointed out, citing *Planned Parenthood v. Casey*, that the contraceptive coverage at issue was relevant to women's rights "to participate equally in the economic and social life of the Nation." *Id*. at 741 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992). In her dissent, Justice Ginsburg also conscripted concession theory to argue that for-profit corporations were not "persons" eligible for free exercise protections under RFRA (*id*. at 751-52) and notes that holding them as such "persons" would lead to a proliferation of for-profit entities "seek[ing] religion-based exemptions from regulations [e.g., those intended to protect women's equal liberties] they deem offensive to their faith." *Id*. at 757.

461. Garfield, *supra n*ote 399, at 24 ("the [contraceptive] mandate controversy [involved in *Hobby Lobby*] is more Taliban than Torquemada. It has more to do with religious employers foisting their religion on female employees than with government foisting its secular values on religious employes.")

sharing "religious values,"[462] but instead were comprised of "persons of diverse beliefs."[463] As a result, it was inappropriate for the Court to derive a corporate Free Exercise right on these members' individual religious liberties.[464]

Theories of corporate personhood, at least when considered together, thus set up the problematic rather well. They give us clues about the rights that different citizens might claim in circumstances that involve corporate actions. The theories do not, unfortunately, tell how to resolve it. In a constitutional democracy, that answer is left for citizens and their representatives to answer for themselves.

V. CONCLUSION: A BALANCING TEST FOR CORPORATE RIGHTS

As typically invoked, theories of corporate personhood force the analysis of corporate rights into at least three misleading dualisms: sovereign vs. subject, higher law vs. positive law, and democracy vs. rights. "The history of public law," observes legal scholar Darrell Miller, "is one of desperate attempts to shoehorn the business corporation into an older set of legal models, often with incongruous results."[465] A more contemporary understanding of political legitimacy, however, denies these dichotomies. First, constitutional liberal democracy makes no distinction between inherently public and private spheres and, therefore, erects no impermeable legal guardrails to police their boundaries. As a result, the corporation cannot be understood as either inherently public or quintessentially private. Any duties and rights believed to attach automatically to public and private actors cannot, therefore, be applied to corporations. Second, CLD avoids providing contestable answers to ethical questions. CLD quarantines them from politics altogether, leaving it up to each individual to decide for themselves what values will drive their choices. Instead, CLD finds its normative authority within the constitutional political process itself. Accordingly, CLD rebuffs corporate personhood's reliance on pre-political rights or popular sovereignty to settle permanently the question of corporate rights. Finally, CLD accepts the democratic construction of rights. It therefore rejects the false choice between democratic regulation and individual rights and instead invites citizens to deliberate about the kinds of rights corporations ought to receive.

The solution presented by liberal constitutional democracy to rights is thus a problematization and a decision-making framework. It promises no clear and durable answers. Instead, it provides an agenda for citizens as they go about the

462. *Burwell v. Hobby Lobby*, *Inc.*, 573 U.S. at 756 (Ginsburg, J., dissenting).

463. *Id*. at 754.

464. *Id*. For a critique of the Court's too-quick ascription of religious Identity to Hobby Lobby, *see* Gwendolyn Gordon, *Who Speaks the Culture of the Corporation?*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2016).

465. Darrell A. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights,* 86 N.Y.U. L. REV. 887, 952 (2011).

hard work of elaborating the rights that they give themselves. Specifically, citizens will present their rights claims in an ontologically open and changing world as they react, in real time, to phenomena that they believe interferes with their liberty as they themselves understand it. In turn, other citizens may make their own conflicting but reason-based rights claims. But rather than picking sides by accepting one conception of rights over the other, CLD instead seeks to mediate the conflict through fair and impartial procedures committed to notions of political equality. It is, in fact, the resolution of conflicting rights claims through these procedures that motors political discourse itself. As a result, the question of corporate rights is best left to democratic lawmaking bodies—not the courts. We should be wary of shutting down the debate over corporate rights by appealing to higher moral and empirical truths, including those proffered by any unmodified theories of corporate personhood.

But this does not mean that, *pace* Dewey, we must abandon theories of corporate personhood altogether. When properly modified, they provide a common framework for citizens to use as they undertake the hard work of elaborating their rights when it comes to business organizations. As David Millon explains, the theories are best understood as critical discourses used to assess the legitimacy of both real-life corporate behavior and the legal doctrine that governs it.[466] The theories identify phenomena that citizens find relevant to the enjoyment of their rights. The theories articulate reasons why we should reject or ascribe rights in a certain way. And the theories are successful insofar as they have helped us identify and come to agreement on the values that legal rights ought to protect.

The theories can, moreover, provide courts with a coherent, rational framework as they determine citizens' conflicting rights claims. The theories of corporate personhood, when modified as argued above, set up useful guideposts as judges untangle the scope of corporate autonomy in specific circumstances. Namely, they help courts identify and isolate the specific liberty interests at stake and suggest that these interests, if conflicting, should be carefully balanced. Aggregation theory prompts judges to concentrate on the rights of corporate insiders: the shareholders and other corporate stakeholders whose own liberties will be impacted by the ascription of a corporate right. Importantly, these rights include those of internal corporate dissenters: those who, notwithstanding their objections, are nevertheless governed by the decisions taken by corporate leadership. Real entity theory prompts judges to consider whether any community valuable to human flourishing might be protected by a corporate right. Concession theory prompts judges to take seriously the rights that legislators and regulators seek to protect when they attempt to constrain corporate liberty.

466. Millon, *Theories of the Corporation, supra* note 22, at 204.

Notably, aggregation theory reminds courts that many diverse individuals involve themselves with a business corporation. These individuals may not always agree about how corporate rights should be exercised. Given the separation-of-ownership-from-ownership and "forced capitalism"[467] that characterizes institutionalized pension investing, ascribing religious and speech rights to corporations may do very little to vindicate the individual rights claims of shareholders.[468] Furthermore, the mechanisms of corporate democracy,[469] as they are actually implemented, may prove insufficient to ensure that an exercise of a corporate autonomy right actually reflects the freedoms of shareholders on whose individual rights the corporate right often derives. Indeed, a board's decision to exercise a corporate right might actively *obstruct* the rights of these individuals—just as they did in Hobby Lobby.[470] Aggregation theory therefore encourages courts to examine closely both the makeup of the corporation's membership and its decision-making procedures to avoid the erasure of important rights in any judicial analysis. For example, courts can assess members' opportunity to exit the company[471] if they object to how directors decide to exercise a speech or religious right. Courts might also determine whether the decision to exercise a right was put before shareholders for a vote—and whether the outcome of the vote governed how the right was exercised.

467. Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Manager and Labor In a More Rational System of Corporate Governance,* 33 J. CORP. L. 1, 4 (2007).

468. Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding 'We the People's' Ability to Constrain Our Corporate Creations,* 51 HARV. CIV. RTS-CIV. LIB. L. REV. 423, 444 (2016).

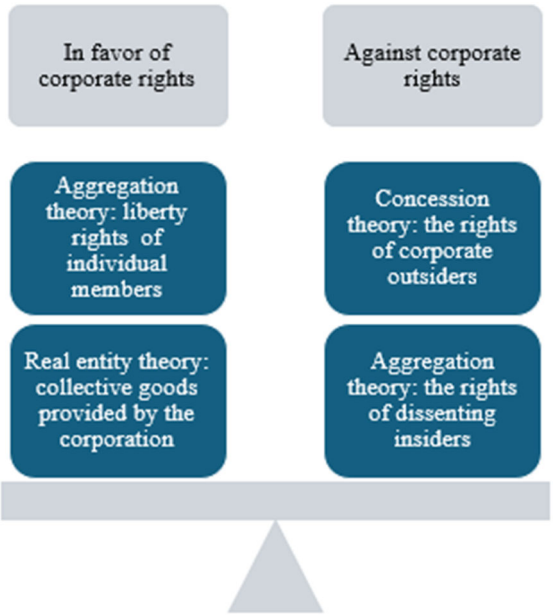
469. *Id*. at 445 ("stockholder democracy provides little restraint on management's political spending . . . "); Citizens United, 558 U.S. at 477 (Stevens, J., concurring) ("In practice, however, many corporate lawyers will tell you that 'these rights [of shareholder democracy] are so limited as to be almost nonexistent, given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule.") (internal citation omitted).

470. *Supra*, note 460 (discussing the liberty rights of women negatively impacted by the corporation's religious liberty).

471. Many believe that markets already provide sufficient exit opportunity. This presumes that markets are sufficiently competitive on the salient variable. If a pensioner objects to investing her retirement savings in a company because of its political lobbying, she must have an exit opportunity that includes investment in a company that does not lobby in the same way. Miller, *supra* note 465, at 945.

What theories of corporate personhood offer, in other words, is a detailed balancing test. On one side, citizens and courts alike must weigh the importance of corporate activity to individual liberties. Relevant to this analysis is how many members will benefit—and how many might not. If ascribing a right to free speech and religious exercise to a corporation serves only a handful of people, the justification for the right is accordingly weak. On the other hand, if ascribing a right to own property and contract serves many, the right is accordingly strong. Included in the assessment are not only the goods that members enjoy individually, but also those that they cannot enjoy except together in community. On the other side, citizens must weigh whether and to what extent an ascription of a corporate right might run up against the rights and liberties of corporate outsiders. If ascribing a corporate right to religious exercise runs afoul of citizens' rights to engage in society free from discrimination, the justification for the corporate right diminishes. To illustrate:

Applying this balancing test to the facts of the case that began this Article,



303 Creative, we should be hesitant to award this LLC First Amendment protections. Weighing in favor of a corporate right is the special importance of First Amendment rights to American citizens.[472] Also weighing in its favor is the fact that Ms. Smith is the LLC's only member and employee.[473] As a result, if the LLC exercises a liberty right, it is unlikely to violate the liberty rights of any

472. *See 303 Creative, LLC v. Elenis,* 600 U.S. at 584-86 (Gorsuch, J.) (giving a charitable history of the protections given by the Court to expressive associations).

473. *Id*. at 579 (Gorsuch, J.).

potential dissenting members. But because the LLC's only member is an individual human being, she is already protected by her own religious liberty rights. It is not clear whether she requires the additional protection an LLC right might provide. Weighing against the LLC's right, moreover, is the fact that the LLC is not primarily a religious organization. It is not a church, a temple, or a mosque. It is, instead, a for-profit commercial enterprise.[474] The LLC, if protected with rights, does not foster the collective good of any specific religious community. Accordingly, the insights brought by real entity theory weigh against the ascription of religious rights. There is no community operating through the LLC—and therefore no community good—to protect. Also weighing against the right are the rights and liberties the LGBTQ+ community, codified in the Colorado Anti-Discrimination Act,[475] to be full participants in the marketplace. Allowing businesses to opt-out of anti-discrimination legislation raises the specter of second-class citizenship, Jim Crow, and apartheid—outcomes that the American public has decidedly rejected time and time again.[476]

To achieve the balancing of rights suggested by the theories of corporate personhood, once divested of their metaphysical, ontological, and antidemocratic defects, courts must take democratic legislation seriously. This legislation, as this Article has demonstrated, is part of democratic citizens' attempts to create the rights they give themselves. Of course, the Roberts Court, as currently comprised, seems unlikely to do so. Time and time again it has favored corporate autonomy over the rights protected by legislation and regulation, *e.g.*, the rights of tenants,[477] workers,[478] voters,[479] and even student borrowers.[480] As a result, it may very well be necessary, as its critics suggest, to strip the Court of some of its jurisdiction[481] or give Congress the power to override its determinations.[482] The theories of corporate personhood, properly understood, certainly endow these reforms with additional intellectual ballast.

474. *See id*. (describing the LLC's business as offering "website and graphic design, marketing advice, and social media management services," including "services seeking websites for their weddings.").

475. Colo. Rev. Stat. § 24-34-601(2)(1).

476. *See, e.g.*, the federal antidiscrimination statutes cited *supra,* note 433-439.

477. *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Services, 594 U.S. 758 (2021).

478. *See* Hobby Lobby, 573 U.S. 682 (2014).

479. *See* Citizens United, 558 U.S. 310 (2010).

480. *See* Biden v. Nebraska, 600 U.S. 477 (2023).

481. *See* Doerfler & Moyn, *supra* note 409, at 22-24 (describing and predicting the impact of jurisdiction-stripping proposals).

482. *Id*. at 24-25.