Excavating the Corporate Person: The Autonomy Rights of Big Business

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Modern political thought has a pretty good handle on the liberty rights of natural persons. But not so the business corporation.¹ Those of a liberal bent often black box it, registering only its impact on distributive justice. Thinkers shading towards the Marxist camp lump it into abstract “capital,” blinking at any moral implications arising from its institutional details: e.g., public share ownership, managerial control, and law’s foundational role. Republicans seek to ameliorate the corporation’s dominating aspects without accounting for the creative and liberating role it might play in contemporary life, and neo-republicans only have a vocabulary suited for intra-corporate, intersubjective domination. This paper means to fill the lacuna, locating the political standing of the corporation vis-à-vis the liberal democratic state by building upon the legal conceptions of corporate personhood invoked by jurists, activists, and legislators over the past century and a half of U.S. intellectual history.

Offered by politically motivated legal scholars as “rationales” for the status of groups as subjects that bear legal rights and duties (Harris, 2007), these legal theories are both ontological and prescriptive. They purport not only to describe what corporations are, but also, given what they are, to suggest the rights and duties that ought to attach to them. The “real entity” concept posits the corporation as a homogenous whole, a species of the primordial social unit: the human community. It therefore suggests that corporations ought to enjoy the same kind of autonomy rights enjoyed by other human communities. The aggregative theory of personhood, at least in its contemporary form, views the corporation as the endogenous outcome of free contracting, i.e. as

¹ Notable counter-examples include corporate legal scholar Lyman Johnson (2012) and political theorists David Ciepley (2013), Turku Isiksel (2015) and David Bowman (1996).
a “nexus of contracts.” Unlike the real entity theory, it finds the group’s connective tissue in consensual association. It therefore implies that affording rights to corporations vindicates the rights of the individual contracting agents that comprise it. The third theory, defining the corporation as a “concession” of the state, or a mere legal fiction, suggests that corporations are creatures of, and are therefore constrained by, the outcome of liberal democratic decision-making. It seems, then, that corporate theory is a natural starting point for thinkers interested in a political theory of corporate autonomy rights. After all, theories of human often rely upon the same kind of fact-value logic.

When invoked only for their ontological and prescriptive functions, however, corporate theory fails to set forth a convincing account of corporate rights vis-à-vis the liberal democratic state. One cannot merely pick the most appealing ontology and move immediately to deduce normative conclusions.\(^2\) The leap from description to prescription is not an easy one. Nor is it straightforward. In particular, when different conceptions of political legitimacy are applied to any given concept of personhood, different normative conclusions obtain. (Dewey 1926) Relatedly, it is important to remember that the norms held by the concept’s user will influence the legal (ontological) theory that she offers. (Millon 1990, 204) Finally, the exploration of the idea of corporate personhood resembles any other foray into intellectual history. Each concept is tethered to “specific moments of strategic deployment;” they are “ideas [offered] as arguments” in discrete historical contexts. (Armitage 2012) They therefore draw attention to contingent historical problems perhaps at the expense of other salient issues. The ontologies suggested by these theories, moreover, are problematic for another reason: they each, in their own way, tend to elide the possibility of intra-group domination.

\(^2\) Cf. Horowitz (cited by Millon at 241).
Despite the analytical labyrinth, each conception of corporate personhood is nevertheless worth exploring for its critical potential. Though often couched in terms of ontology and prescription, the theories are also used to excavate problematic practices and to offer a framework for the principled critique of those practices. All three thus provide a “critical perspective toward corporate doctrine,” uncovering significant interests and values that law and politics have been found to ignore at certain points of time and place. (Millon, 1990, p. 204; Horwitz M. J., 1992, p. 72)

When their strengths and weaknesses are considered together in historical context, the three theories suggest a new framework for thinking about the political rights of corporations. Specifically, each theory of personhood approaches a conception of intra-corporate procedural democracy that both vindicates collective and individual rights. This account allows us to respect the autonomy of corporate groups while at the same time constraining both their internal governance and their external political clout. Stated simply, a regulation of self-regulation is needed.

The Concession Theory of Corporate Personhood

The concession theory of corporate personhood involves two distinct arguments. The first, and oldest, argument hails from ancient Roman law and posits that the corporate entity is but a “fiction,” with no substantial physical or social reality. Akin to the Hobbesian idea that no “people” exists without the state (Kalyvas 2006, 585), it is an empirical concept that proposes that a corporation’s physical composition is nothing more than the sum of its individual (human) parts. Under the fiction theory, the implication is that something “extra” must be added artificially by the law in order to deduce some rights or obligations not otherwise available if one were to consider only these individual human parts and their own unique legal personalities.
Sometimes, the “extra” is the assignment of a contrived legal personality, or collective volition, capable of acting in a legally cognizable manner. (Freund 2000 (1897), 11) For Kelsen, it is the legally imposed system of norms that organize and regulate mutual individual conduct within the legally defined corporation. (Kelsen, 1945, p. 98) These norms will identify decision-makers and allocate duties amongst otherwise unrelated individuals.

The second argument is more explicitly evaluative. It holds that this something “extra,” in whatever configuration, is a form of delegated political power conceded by the state to the corporation, and, through the corporation, to individuals holding established leadership roles within it. (Bratton 1989; 1475; Kelsen 2007, 100) These delegated powers permit it, through its human agents, to operate as a sub-state governance organ that serves explicitly public purposes. Jean Bodin, for example, argued that corporations gained “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].” (Bodin 1986, 178)

Meshing the two arguments together, the concession theory of corporate personhood suggests that corporate law, and therefore the corporate person, is a kind of public law. (Millon 1990, 211) It is therefore subject to whatever desiderata of political legitimacy is applicable to any other kind of public law.

**Concession Theory’s Historical Strategic Deployments**

Concession theory was typically wielded as a polemic against corporate power, usually in arguments stating that the state’s role in conferring legal rights, duties, and a certain amount of self-governing autonomy carried reformist implications. (Parkinson 1993, 26) The shape that
these implications took, however, derived from the underlying theory of political legitimacy to which the speaker committed herself.

In the founding era, legislatures employed the concession theory to justify their tinkering with corporate charters in the hopes of limiting the power and influence of early American business. It also helped to ensure that it served narrowly tailored public purposes. (Speir, 2012, p. 155; Millon, 1990, p. 209; Strine, Jr. & Walter, 2016, p. 895) The underlying sensibility was libertarian, suspicious of corporations because of their historical association with state-sanctioned monopoly and privilege. (Blumberg 1993, 6) Chief Justice Marshall articulated the concession theory’s most notorious early version in his 1819 Trustees of Dartmouth College v. Woodward\(^3\) opinion. It is a definition still recited today, usually by judges and scholars looking to walk back corporate powers:

> 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, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.

(Id. at 636) Notably, Marshall took care to note that the the corporation “does not share in the civil government of the country, *unless that be the purpose for which it was created.*” (Id.) (emphasis mine). In an 1888 case before the New York Court of Appeals, a judge noted that “[i]n the granting of charters the legislature is presumed to have had in view the public interest; and public policy is…concerned in the restriction of corporations within chartered limits.” (Avi-Yonah 2010) In other words, corporations were state organs and, as state organs, should be subject to checks, balances, and limitations.

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\(^3\) 17 U.S. 518 (1819); *see also* Angell & Ames, 1861, p. 1.
Use of the theory eroded in the third quarter of the 19th century (Horwitz, 1992; Harris, 2007). The introduction of general incorporation statutes, the decline in the state’s use of its chartering authority to impose substantive regulations on corporate activity (Millon 1990, 202), and the growth of American (corporate) industry camouflaged the state’s visible hand. (L. Johnson 2012, 1138-39) And the “steady incorporation of institutionalized rationality” into working life appeared as something altogether alien to Americans, and certainly not something created by legislative scriveners housed in state capitols. (Trachtenberg 1982, 65) Corporations no longer appeared as arms of the state, but instead as independent economic agents.

Nevertheless, concession theory continues to pop up during periods of public suspicion of these agents’ growing social, political, and economic influence. (Blumberg, 1993, Ch. 2 n. 9; Johnson, 2012, p. 1142) Contemporary arguments, in contrast to the founding era, are populist. They state that power is legitimate only in so far as it vindicates democratically formed intentions. Proponents then argue that the corporation, whose own capacities and authority are a delegation of political power, must therefore, as the state’s associational conscripts, fulfill the public purposes the democratic legislator chooses to ascribe to it. (A. Singer 2017) For example, Dalia Tsuk, in her illuminating historical treatment of the corporation during the New Deal era, describes the political processes by which corporations assumed responsibility for the provision of public goods like employment benefits and social insurance. (Tsuk 2005) Justice Ginsberg, in *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014), used the theory to reinforce her argument that the government ought to be able to compel the corporation to provide comprehensive health insurance despite Hobby Lobby’s assertion of conflicting religious beliefs. The flip side is, of course, that the corporation may not legitimately fulfill any purposes *not* explicitly ascribed to it. (*E.g.*, Millon, 1990, p. 202; Dodd, 1932, p. 1155)
Others, analogizing corporate power to political power rather than explicitly tying the two together, evaluate the legitimacy of corporate actions according to notions of republican liberty and democratic accountability. For example, Nadel, adding his voice to a pro-consumer political movement of the 1970s, argued that because corporations function like “private governments” they should therefore be subject to the same accountability constraints as public government. (Nadel 1976) More recently, concession theory lurks behind the various “stakeholder” models of corporate governance. Here, business and legal scholars argue that the legitimacy of the corporate form derives from how well it serves the quasi-public interests of those involved with the corporation. (Gould 2002, 6; Moriarty 2014, 821) Stakeholder models respond to what critics understood as corporate boards’ increasingly destructive pro-finance practices. The thought was that they might provide an anecdote to the short-termist mentality within corporate leadership that was seen to focus neurotically on short-term share price fluctuations.

Concession theory’s old libertarian strain has not disappeared completely. By identifying corporate power with state power – which is, almost by definition, suspect to such thinkers – libertarians draw in sharp relief the potential threats posed by business to individual liberties. As an illustration, in Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), Justice Rehnquist opined that the economic advantages afforded to the corporation by virtue of statutory benefits like limited liability and perpetual life should not be exploited in such a way as to impair the exercise of the political speech rights of ordinary citizens. (Id., 658-59) An oversized, economically-motivated corporate voice supercharged by the benefits of state-created privileges, in other words, would drown out individual voices. Libertarians even cite the ‘public purpose’ of concession theory as they argue in favor of corporate freedom in order to enhance the general
welfare by allowing them to contribute to economic growth. (Millon, 1990, p. 207; Hager, 1989, p. 638)

**Ontological Weaknesses**

Once a theory of political legitimacy is settled upon, it seems that concession theory might offer some clear-cut solutions for the political theorist interested in the contours of corporate rights. It might, for example, satisfy republicans by offering a rubric for the contestation of corporate power. And undoubtedly, concession theory correctly hones in on the inescapable fact of law as a normative institution that orients and directs human behavior (Deakin 2012, 348, Orts 2013, Roy 1997) Unfortunately, though, things aren’t that simple. The ontology it presents slides past a detail that liberals find absolutely indispensable: the individual. Similarly offending communitarians, it elides the role played by the corporate group in shaping and constituting the identities of its members. Shelving the corporate collectivity in the fiction section, concession theory presents a particularly inimical challenge to a liberal polity dedicated to an autonomous civil and economic society. Accordingly, if used like an anthropological explanation of human rights, the theory yields an unsatisfying account of corporate autonomy. Indeed, its incompleteness makes it painfully obvious that the theory was never used as an objective theory of corporate rights. It was instead wielded as a critical cudgel during times of waxing corporate influence.

First, by drawing attention to the state’s role in creating the corporation and by insisting on the corporation’s fictitiousness, concession theory discounts the involvement of individual initiative, preference, and labor in corporate practice. But the wide and easy availability of incorporation, by virtue of the ubiquitous adoption of general incorporation statutes, suggests that other causes are at work, too. (Orts, 2014, p. 32; Bratton 1989, 1485-86; Krannich 2005, 75;
Hurst 1970, 32) If the state is a corporate parent, it is certainly an inattentive one. As a result, the theory denies the corporation the possibility of enjoying any associative autonomy rights that might be derived from, but are not reducible to, such individual-level characteristics. (Margalit and Raz 1990) Instead, the theory implies that if a (corporate) group is to have any rights at all, it must wait upon the state to grant them. Second, if the entity has no social reality, it becomes difficult to attribute to it any responsibility for collective wrongdoing unless and until the state writes liability into law. (Blumberg, 1993, p. 5 (citing Coke and Blackstone); Pettit P., 2007) And so one is left with the possibility that no one can be held to account – or be made, justly, to rectify the ensuing damage.

Further, just as Kelsen’s theory of citizenship attaches only to individual acts that are legible to law, the concession theory counts as “corporate” only those actions performed by those actors identified in corporate statutes. It thus elides much of the sociological reality of human beings as they relate with other human beings. It will therefore turn a blind eye to uncodified heteronomy within the corporation. Individuals, by virtue of their “exogenous” capabilities – in terms of wealth, charisma, and the like – can assume authoritarian leadership roles within the corporation that the law does not recognize and, therefore, cannot address. One notorious example immediately comes to mind. In law, it is the board of directors that enjoy original, undelegated power to govern the corporation. (8 Del. C. § 141(a)) But in reality, it is the Chief Executive Officer – an employee of the board – that usually rules. (Vasudev 2010, 929) She is, indeed, an extremely powerful “undocumented” worker.

In addition, concession theory’s ontology does not properly account for the very real corporate cultures and practices that shape individual identities and structure individual 4

4 These sociological objections to concession theory mirror those launched by Schmitt against Kelsen’s theory of the state. (Seitzer & Thornhill, 2008, p. 13)
freedoms. (Colombo, 2012; Kateb, 1998, p. 48) As far as concession theory is concerned, corporations, as purely legal constructs, do not exhibit any of the experiential effects often investigated by theories of recognition and misrecognition. One might also wonder what could have possibly motivated Marcuse’s One Dimensional Man, since the corporation, as a fiction, would not be capable of sustaining oppressive cultures of instrumentality and consumerism. So too those scholars who blame the failures of corporate culture for the 2008 financial crisis. (Thakor 2016, Guiso, Sapienza and Zingales 2015)

Concession Theory’s Normative Weaknesses

Even setting aside the theory’s ontological weaknesses, the “delegation” part of concession theory presents further normative problems. First, simply by recognizing the corporation in toto as a legal person, the theory empowers official intra-corporate leadership at the expense of others’ rights and liberties. It is a delegation, in other words, that can create political inequality.

Second, it forbids the corporate group, in true Hobbesian form, any a priori rights that might protect it and those interests. But conditioning the existence of rights on a political determination by the state flies in the face of group rights discourse. It therefore “conflicts with a contemporary viewpoint that accords basic respect to individual human rights, including positive freedoms of association and negative freedoms against arbitrary dispossession.” (Orts, 2013, p. 21) If a democracy is permitted to grant or rescind rights, those rights are not rights in a meaningful sense, but merely instances of formal legal privileges. And they are privileges that may very well be distributed unequally. (Barry 2002)

More alarmingly, the delegation prong of concession theory harkens to failed historical attempts at bureaucratic socialism. For if the state controls the levers of corporate legitimacy, it
controls the corporation. It therefore controls the economy. But one might now view as axiomatic the argument that “...a desirable economic order would disperse power, not concentrate it.” (Dahl 1985, 89) The problem with concession theory is thus perhaps not so much that it denies original rights to groups, but that it cedes too much power to the state. (Orts 2013, 21)

Concession Theory’s Critical Potentials

Given these weaknesses, concession theory fails to provide a convincing anthropological account of the corporation’s moral and political rights. Moreover, and despite its recent progressive deployments, it is beyond the pale in this day in age to suggest that an actor so ubiquitously understood as ‘private’ (Bowman 1996) derives its legitimacy at the mercy of the state. But one need not consign concession theory to the historical dustbin. It offers critical potentials that remain relevant to contemporary liberal democracy, particularly when considered in light of an acceptable theory of liberal democratic political legitimacy. After all, it was offered in response to real historical problems – problems that still register today.

First, as intimated above in the discussion regarding its libertarian potentials, the concession theory suggests that both the corporate phenomenon, and the state, ought to operate within a single moral framework. (E.g., Kelsen, 2007; Bockenforde, 1991, pp. 57-8) Recall that the concession theory posits that the corporation may only wield power legitimately if that power is delegated by the state. But if state power also ought to be exercised legitimately, whatever moral standards are used to establish the state’s legitimacy will likewise apply to and within a corporation. It therefore can accommodate liberals committed to universalism. We see this kind of analysis at work in concession theories that analogize state and corporate power. For example, R. Edward Freeman, a leading advocate of stakeholder theory, invokes a universalist Kantian
ethic as he argues in favor of contractarian workplace democracy because “stakeholder groups [have] a right not to be treated as a means to some end.” (Freeman 2002, 47) Simon Deakin, a legal scholar, invokes a universalistic property right while Thomas Donaldson and Lee E. Preston, business academics, apply notions of distributive justice. (Deakin, 2012; Donaldson & Preston, 1995; Mansell, 2013, p. 55)

In addition, the idea of the public interest embedded in concession theory’s genealogy suggests that whatever rights are afforded to the corporation, they ought also to take into account the equal rights and liberties of corporate outsiders and the public at large. Concession theory acknowledges that democratic citizens enjoy political rights to govern their collective lives together, including those parts of their lives that touch on economic concerns. In turn, taking their interests into account requires contending with the sometimes outsized social and economic effects the corporate person may have. Such an accounting may therefore entail regulation above and beyond what is appropriate for individual human beings.

Indeed, concession theory’s critical potential has been successfully used to protect individual liberties and alleviate corporate domination. The stakeholder models described above inspired legislators in many states to amend their corporate codes to permit incorporators to form a “B” (“benefit”) corporation which, unlike their more mainstream counterparts, grant corporate directors explicit permission to pursue socially responsible projects. Similarly, in the hostile takeover period of the 1980s, state court judges, claiming that company officials owe fiduciary duties to diverse corporate constituencies, allowed corporations to fend off unwanted overtures from institutional investors who “threaten[ed] corporate purposes.” Paramount Communications, Inc. v. QVC Network, Inc. 5 Moreover, the notion that companies ought to be responsive to the

5 637 A.2d 34 (Del. 1994).
broader public drove recent modifications to Federal financial reporting guidelines. Following suit, a significant number of politically motivated institutional investors formed self-regulatory bodies that encourage corporations to engage in environmentally sustainable and socially responsible business practices. Furthermore, popular opinion has been coalescing around the idea that the corporation does not exist merely to earn profits for shareholders. In business periodicals, equity investors of the “activist” variety are maligned as short-termist, myopic, outsourcing, and greedy. Company insiders, on the other hand, make “real” products in the “real economy,” innovate, and create jobs and value for the public. (Cohn 2015, Irwin 2016, Lattman 2013, Olson 2016, Semuels 2016, Lopez 2016, Plender 2015, Denning 2014) Even Laurence D. Fink, Chair and CEO of notable hedge fund Blackrock, regularly issues public letters supporting pro-stakeholder business practices.

The Aggregate Theory of Corporate Personhood

The aggregation theory of the corporation, like the concession theory, understands the corporation as a “fiction” without any independent social existence. Unlike the concession theory, it does not locate the origin of its artificial life with the state. It finds it instead in the free agreements made between individuals who aggregate themselves into joint enterprise. (Colombo, 2015, Irwin 2016, Lattman 2013, Olson 2016, Semuels 2016, Lopez 2016, Plender 2015, Denning 2014) Even Laurence D. Fink, Chair and CEO of notable hedge fund Blackrock, regularly issues public letters supporting pro-stakeholder business practices.

8 E.g., the Sustainability Accounting Standards Board, the Global Reporting Initiative; the Climate Disclosure Standards Board, and the International Integrated Reporting Counsel.
and they do not wait upon the state to legitimate their collective interests. They merit protection, rather, because such protection also protects the rights of each participating individual.

Aggregation Theory’s Historical Strategic Deployments

Typically invoked to protect the corporation from perceived overweening government ‘interference,’ the prescriptive upshot of aggregate theory, like concession theory, depends on the theory of political legitimacy subtending its usage. Partisans making reference to aggregation theory invoke two competing theories of political legitimacy to justify corporate freedom: (1) libertarian, with its emphasis on contract and property rights; (2) utilitarian, or consequentialist, and associated with legal pragmatism (Posner 2004, 150).

The aggregation theory first appeared during the Jacksonian era, (Bratton 1989, 1485; Blumberg 1993, 22) and persisted through the late nineteenth century as “legal thinkers [tried] to create a sharp distinction between public and private law.” (M. J. Horwitz 1982, 1425) Public skepticism towards the growing power of a consolidating government, monopoly, and corruption preceded the eventual elimination of the special chartering of corporations. (Barkan, 2013; Johnson, 2012, p. 1146; Blair & Pollman, 2015, p. 1700) Yet states, fearful of throwing the economic baby out with the anti-democratic bathwater, did not eliminate the corporation entirely. Instead, they democratized the availability of the corporate form. (Roy, 1997; Millon, 1990, p. 202) And so they replaced specifically tailored charters with general incorporation statutes, forsaking their authority to impose substantive regulations on corporate activity through the chartering process. Camouflaging the state’s previously visible hand (L. Johnson 2012, 1138-39), these bare bones, widely available statutes enabled individuals to organize and self-order a corporation upon the filing of simple forms and the payment of modest fees. (Bratton and
Wachter 2008, 106). As a result, by the late 19th and early 20th centuries, corporations outgrew their role as providers of public utilities and infrastructure and began colonizing U.S. manufacturing. (Roy 1997) The phenomenal growth of corporate industry did not seem like something that could have been created by legislative scriveners. (Morawetz, 1882, p. 11; Blair & Pollman, 2015) Instead, it seemed more like the product of the cooperative, voluntary, and creative action of individual incorporators – the kind of action celebrated by Tocqueville as a uniquely American proclivity.

At the same time, practically-minded judges were hunting for an idea of corporate personhood that could ground the legal residency of increasingly itinerant business. In particular, federal courts facing issues of diversity jurisdiction and state courts confronted with claims against foreign corporations needed to lay their fingers on actual bodies that could be located in time and space. (Harris, 2007, p. 42; Bank of U.S. v. Deveaux10) The concession theory was unhelpful; it implied that out-of-state corporate transactions had no legal existence unless and until the foreign state recognized the corporation as a legal actor. (Hohfeld 1910, 300). As a result, reliance on the concession theory might deprive a day in court to the out-of-state victims of harmful corporate actions.

Consequently, the concession theory required a conceptual replacement. It came in the form of aggregation theory. Thus we see Victor Morawetz, in his 1882 treatise, reinforce what he understood to be the prevailing view that “[a] private corporation is an association formed by mutual agreement of the individuals composing it.” But because of a new, laissez-faire libertarian consensus, this individaulized ontology took a decidedly pro-business turn. Never were workers or consumers considered amongst the individauls “composing” the corporation.

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Indeed, the first aggregation theories appeared during the infamous *Lochner*\(^{11}\) Era of U.S. Supreme Court jurisprudence, when the Court awarded to the corporation substantive due process rights under the Fifth and Fourteenth Amendments. During the time, “substantive due process” meant precisely an inalienable right to private property. (\textit{Bloomer v. McQuewan} (1852))\(^{12}\) By defining the corporation as nothing but the aggregation of such private property, the Court could thus shield the corporation from government regulation. (Dahl 1985, 63) Justice Field of the U.S. Supreme Court was a particularly assiduous proponent, invoking the theory in several important opinions in order to protect business interests.\(^{13}\) (Blair & Pollman, 2015, p. 1695) The corporation was also protected under the 4\(^{th}\) and 14\(^{th}\) Amendments against unreasonable search and seizure (\textit{Hale v. Henkel})\(^{14}\) and discriminatory tax treatment (\textit{County of San Mateo v. Southern Pacific Railroad Co.} \(^{15}\) Aggregation theory thus helped draw a hard line between public and private, cementing the corporate home address in civil society, not the state. (M. J. Horwitz 1982)

The influence of this libertarian incarnation endured until the 1930s. But it reappeared, rejuvenated, in the 1970s as the U.S. faced increasing international economic competition, mobile capital flows, and recession. This more recent manifestation, most notoriously articulated by Alchian & Demsetz in their seminal 1972 article “Production, Information Costs, and Economic Organization” in the American Economic Review, donned “the garb of neoclassical economics.” (Millon, 1990, p. 203) Rather than describing the corporation as a partnership of property owners, the new aggregation theory, known familiarly as “nexus-of-contracts” theory,

\(^{12}\) 55 U.S. (14 How.) 539, 553.
\(^{13}\) He was also socially connected to the “Big Four” railroad barons involved in these cases: Leland Stanford, Collis Potter Huntington, Charles Crocker and Mark Hopkins.
\(^{14}\) 201 U.S. 43 (1906).
\(^{15}\) 13 F. 722 (C.C.D. Cal. 1882).
defined the corporation as a set of relations amongst managers, shareholders, and other stakeholders. These relations, moreover, are no different than ordinary market contracting. (Bratton 1989, 1478) Inspired by Ronald Coase’s legendary 1937 essay, the contractual “transaction costs” theory of the firm argues that employees and other firm participants rationally agree to hierarchical management given the uncertainty that renders contracts incomplete. The idea is that since neither party can predict the future perfectly, one will agree to abide by the authority of another when it comes time to dealing with unanticipated events. The most popular versions posit that corporate shareholders bargain for residual control rights while delegating most day-to-day decision-making power to managerial agents. Resulting in a contemporary “shareholder primacy” understanding of governance reminiscent of the first-generation aggregative views, these models hold that shareholders monitor and discipline directors, their “managing agents,” who otherwise have incentives to self-serve and underperform.

Underpinning most of its deployments is a functionalist version of Adam Smith’s liberal rights-utility synthesis. Though their origins lay in the sincere desire of academic economists to explain and predict corporate formation and behavior, (Colombo 2012, p. 7) the nexus-of-contracts theories deligitimized what was understood within academica to be inefficient managerialist business models and government interference. Freedom of contract was making a comeback throughout intellectual thought, and this new theory of corporate personhood would help corporations get on the deregulatory train. (Id.; Vasudev, 2010; Bratton & Wachter, 2008, p. 145) Partisans hoped to show that because the corporation is the creation of free individual contracting, it ought to be protected from state incursions. (Hessen 1979) The libertarian potential of these contractual models soon extended beyond academic economic circles (Sciulli 2001), translated into legal discourse most notoriously by Circuit Court Judge Frank Easterbrook
in his 1991 monograph, *The Economic Structure of Corporate Law*, jointly authored by the University of Chicago law professor Daniel Fischel. In many circles, corporate rights have come exactly to mean shareholder rights.

Indeed, in the hands of many of its proponents, the nexus-of-contracts theory is a critical tool rather than an explanatory model. They wielded it to substantial effect. The leadership of a burgeoning number of U.S. companies embraces the corporate “shareholder value” business model, a model buttressed by nexus-of-contracts theories. (Bratton & Wachter, 2008; Bainbridge, 2003) Activist institutionalist shareholders likewise preach and practice shareholder primacy as they wage proxy campaigns to align internal corporate governance institutions according their pecuniary preferences. (Stout L. A., 2007, p. 800; Strine, Jr., 2007, p. 1773)) Harvard Law professor Lucian Bebchuk, to take one notorious example, invokes a principle-agent model to argue for increased shareholder participation in corporate decisions about executive pay and political spending. The movement was so successful that many blame it for the 2008 financial crisis. (Strine, Jr. 2007, Dallas 2012) To explain, the principal-agent model recommends that managers align their economic incentives with shareholders in order to mitigate agency costs. This counsel resulted in outrageously outsized incentive-based executive compensation schemes. It also brought a change in corporate culture, orienting action towards short-term improvements in quarterly financial statements. (Lazonick 2013) The upshot, according to some scholars, was risky business practices designed to increase short-term share prices at the expense of long-term value creation. (L. A. Stout 2007) It is also blamed for, among other things, the accounting fraud scandals of Enron and Worldcom in the late 1990s. (Strine, Jr. 2007) Others charge it with encouraging the kind of cost-cutting that leads to offshoring of both jobs and intellectual property. (Lazonick 2013)
In response, a left-libertarian strain developed. These models, explicitly favoring non-shareholder stakeholders, would protect the contract rights of workers and consumers as well as shareholders. Notably, Margaret Blair and Lynn Stout’s (1999) “team theory” understands directors as dictatorial agents hired to protect the specific (contractual) investments of employees, creditors, long-time customers and partners as well as investors. Protecting corporate autonomy would mean protecting the autonomy rights of each of these variegated corporate members.

Not all who invoke the new generation of aggregation theory, however, are radically libertarian. Though denying any state involvement in the creation of the corporation (Jensen and Meckling 1982), they will nonetheless argue that the law might serve a legitimate purpose by providing efficiency-enhancing tools that facilitate individual contract rights. (Millon 1990, 230) For example, Easterbrook & Fischel (1991) argue that corporate law should provide “off-the-rack” terms that incorporators would have bargained for anyway under ideal conditions. They also make much hay of liberalism’s rights-utility synthesis, arguing that the corporate “outcome” not only expresses individual liberty, but also maximizes social wealth creation.

This unapologetically utilitarian, pragmatic justification of corporate rights is part and parcel of many second generation theories that purport to set out the conditions under which business enterprise maximizes utility and minimizes transactions costs. Corporate autonomy is thus justified in the name of maximizing social welfare – full stop. Such justifications can be observed in the written opinions of judges overseeing litigation amongst corporate directors and shareholders. Corporate law scholars and lawmakers came to believe that only by untethering the corporation from the state in a background of free competition could the public purpose of
growth and abundance be achieved.\textsuperscript{16} Thus, Milton Friedman once famously opined that “the social responsibility of business is to make a profit.” Routinely, for example, the Delaware Court of Chancery affords wide discretion to corporate chiefs in the management of corporate affairs because relying on their “business judgment,” rather than on the judgment of the judiciary or the law, yields superior economic outcomes. (\textit{E.g., In re Goldman Sachs Group, Inc. S’holder Litig.}, 2011 Del. Ch. LEXIS 151, *2 (C.A. No. 5215-VCG)) What’s more, it offered up the corporate takeover market as a proxy for waning product market competition. (Fama 1970) Nexus-of-contracts theory 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. (Bratton and Wachter 2008, 145) Firms would therefore strive to innovate and economize to appease stockholders, even if such was no longer necessary to survive ordinary competition. The result was a new intellectual emphasis on capital markets as the primary drivers of economic growth.

\textbf{Ontological Weaknesses}

Like concession theory, once a theory of political legitimacy is settled upon, aggregation theory appears to provide a solid foundation for thinking about corporate autonomy rights. Liberals of both the left and right will appreciate its potential for protecting individual associative freedoms. The ontology offered by aggregation theory, however, suffers from several weaknesses. As a result, aggregation theory likewise serves as a dubious candidate for a fact-norm evaluation of corporate autonomy rights. If anything, it is even more partial and partisan than concession theory.

\textsuperscript{16} To illustrate, the State of Delaware, on a public website, states that the broadly enabling structure of its corporate law “helps entrepreneurs, corporate managers, and stockholders create wealth through the corporate form.” http://corplaw.delaware.gov/eng/statute.shtml
The Role of Law

Aggregation theories were offered during episodes of intellectual history that explicitly and self-consciously sought to reject state interference in the economy. (Konzelmann et al., 2010) Accordingly, it is no surprise that they glossed over the role of law in shaping the corporate phenomenon. This glossing, however, challenges common sense understandings of reality.

There are, of course, the usual objections stemming from the work of Polyani. Arguably, no commercial activity whatsoever can exist without reliable norms solidifying trust and managing expectations amongst economic actors. (Bruland and Mowery 2014, loc. 2576) Moreover, government has managed capitalism for centuries. (Mazzucato 2013, Cohen and DeLong 2016) But the law plays an even bigger role in distinctively corporate activity: an existential one. (Berle and Means 1932, 141) This should come as no surprise, either. According to sociologist William Roy, the state intervened to cultivate the corporation precisely because regular contracting proved insufficient to accomplish big industrial goals. Specifically, “governments created the corporate form to do things that rational businessmen would not do because they were too risky, too expensive, too unprofitable, or too public, that is, to perform tasks that would not have gotten done if left to the efficient operation of markets.” (Roy 1997, 41)

For starters, it is likely impossible to create a corporation through contract alone. (Ciepley, 2013; Orts, 2013) Without corporate law, corporations could not deal with “third parties,” like tort victims, who never had an opportunity to contractually consent to the corporate structure. By law, furthermore, the corporate charter – the corporation’s governing document – can be modified without everyone’s contractual consent. (Strine, Jr. & Walter, 2016, p. 909) It is
therefore perhaps more accurate to describe the charter not as a contract but instead as a state mandated “corporate constitution,” supplemented by common law equitable principles. (Bottomley, 2007; Blumberg, 1993, p. 30) A shareholder, furthermore, has very little physical existence except in contemplation of law. She holds no tangible thing – not even, in this technological age, paper certificate of stock ownership. She claims, rather, an assembly of legal rights. (Pistor, 2013; Orts, 2013, p. 26) Without the codification and enforcement of these legal rights, it is difficult to imagine a shareholder successfully claiming any role in corporate practice whatsoever. And some corporations have no existence at all outside of the law: shell companies used in complex financial transactions come to mind. (Orts, 38)

The theory’s failure to adequately acknowledge the role of law in the constitution and evolution of the corporation is normatively problematic. For it means a failure to acknowledge that the liberal democratic state might play a legitimate role when it comes to demarcating the contours of corporate autonomy rights. Even a libertarian would allow the state to intervene to protect equal basic liberties by, for example, enforcing criminal laws. Taken seriously, many iterations of the aggregation theory nevertheless seem to deny government even this restricted function.

**Hierarchy and Authority**

Aggregation theory does not just fumble its ontology when it comes recognizing the role of law. Its functionalist character assumes away the existence of illiberal hierarchies within the corporation. By presuming that the corporation exists because its structure must necessarily be efficient, and by defining efficiency as the outcome of freely negotiated bilateral contracts, the theory forswears the possibility that any one actor might enjoy a position of non-consensual command-and-control. (A. Singer 2017) As observed by noted corporate law scholar William
Bratton (1989, 1480), the theories hypothesize that “[t]he firm springs out of contracts in all of these markets [labor, securities, management] Since the contracts are bilateral, management power and corporate hierarchy, as previously conceived, disappear.”

Of course, the conditions required for these market-clearing outcomes rarely hold. (Anderson 2017) As a result, even if the theories are analytically sound, they serve, at best, as unreliable evidence for the lack of internal power inequalities. They circumvent the possibility that actually existing corporate contracts might not reflect voluntary consent, but instead coercive bargaining conditions. (Orts 2013, 26) Aggregative theories also gloss over the relative distribution of risk amongst corporate constituencies. Shapiro (1999) observes that while stockholders can diversify their investment portfolios as a prophylactic against domination, workers cannot. Moreover, stockholders may liquidate their investments in fluid capital markets with a tap of a button. Workers do not enjoy this kind of liquidity, as for them exit involves a generous menu of costs. Finally, even “bargained for” unequal governance rights can themselves generate unfair contracts in the future. A control right can be exploited in later contracting iterations amongst parties not involved in the initial contracting round.

Other varieties of the aggregation theory likewise elide the problem of authority. They do not do so by distributing it equally amongst formally equal contractual partners. Rather, they make the existence of legitimate authority an assumption that braces their theory-building. The first generation aggregation theory baldly presents as self-evident truth that shareholders are corporate “owners.” (Bainbridge 2003, 564) Similarly, the principle-agent models of the second-generation variety unthinkingly presume from the start that shareholders are principles of the firm and that managers and employees are their agents. (Bainbridge 2003, 566) But the matter of shareholder ownership is not something that can be undiplomatically buried in mathematical
assumption. (Roy 1997, 162) By law, shareholders are not owners. (Orts, 2013, p. 82) According to corporate statute, no one owns a company. (8 Del. C. § 102(a)(4); Deakin, 2012, p. 356) Rather, they own financial instruments that entitle them to certain rights that only occasionally reflect those rights typically associated with ownership. Moreover, as pointed out at least as early as 1932 in Berle & Means’ celebrated treatise, share ownership does not look anything like a property right. It does not include, for example, any of the responsibilities associated with property. Nor may shareholders control the corporation or its assets in day-to-day business operations. Rather, it is the board of directors de jure, (8 Del. C. § 151(a)) and hired executives de facto, that control the business. (Roy 1997, 51) Regardless, unless the law identifies something as property, whether or not that thing amounts to property is a normative conclusion, not an empirical description. For example, we might say an apple is John’s property (the conclusion) because he received it in fair exchange or because doing so increases overall economic efficiency (the normative justification). The idea that the corporation is an assembly of shareholder property, accordingly, is actually a normative conclusion. It argues that the ontology ought to be arranged in such a way. (Roy, 1997, p. 162; Strine, Jr. & Walter, 2016, p. 932)

As a result, many respected scholars set aside aggregation models entirely when it comes to describing intra-corporate relations. Vining, for example, “observes that attributes of ‘power’ and ‘authority’” are involved. (Orts 2013, 36) Others alternatively couch corporate decision-making in explicitly political terms. (Mitchell 1992, Cyert and March 1963)

Any failure to register possible conditions of heteronomy within the corporation may yield a corporate autonomy right that does not so much vindicate the rights of individuals as empower those that hold positions of authority and domination. Specifically, corporate leaders may wield their power in a manner that violates, without consent, important individual liberty
rights of the corporation’s other members. To illustrate, if a corporation enjoys a right to political speech, a CEO may decide to exercise that right by donating funds to a favored political candidate. Another corporate member may find that candidate obnoxious but, given inequalities in bargaining power, has no choice but to see corporate funds flow regardless. (Strine, Jr. & Walter, 2015, pp. 342, 366; Abood v. Detroit Board of Education\textsuperscript{17})

The issue is not merely the result of undemocratic internal corporate decision-making, though certainly such exacerbates the problem. Barring member unanimity regarding the corporate right claimed, even corporate democracy would yield results obnoxious to individual rights. For there is no reason why tyrannies of majority and minority would not arise just as often in a corporation as they do in an explicitly political association. (Jackson 2015) Collective decisions, even corporate ones, can be dominating and arbitrary.

The Group Level of Analysis

With aggregation theory, a familiar criticism can be repeated: conceiving the corporate collectivity as a sociological fiction denies the reality of community and group life. Unlike concession theory, though, the aggregative account screens out the observation that the corporation is a constituted collectivity pursuing a collective purpose, a purpose whose content will change as internal rules, procedures, and membership change. (Bottomley 2007, 30) It therefore fails to account for the fact that the corporation may pursue purposes that do not necessarily correspond to those of their individual members. (Ewick 1988) Contemporary corporate law scholars Margaret Blair and Elizabeth Pollman acknowledge that while perhaps at one time corporations pressed interests derivable from the simple aggregation of the interests of founding members, such was no longer the case beginning in the mid-19\textsuperscript{th} century:

\textsuperscript{17} 431 U.S. 209, 234-5 (1977).
They were taking on identities – often tied to brands – that were truly separate from any of their individual investors, directors, or managers, and their separate corporate identities were being promoted to facilitate their interactions with customers, suppliers, employees, and the communities in which they operated. (Blair and Pollman 2015, 1678)

How and why a corporate purpose might be ascertained without either the unanimous support of corporate members or a state directive requires explanation. For example, corporate participants do not even reason like private contractual partners pressing individual preferences. They often think of, and are occasionally required by law to think of, the good of the enterprise as a whole. This kind of ‘public’ reasoning is politically oriented around the common corporate good. It is not the kind of reasoning that contractual models capture well, just as minimalist models of democracy fail to account for public reason within political society. (See Bottomley, 2007, p. 32).

Accordingly, in addition to forsaking the prospect of corporate accountability and avoiding the normative repurcussions of a corporation’s cultural characteristics, the aggregation theory leaves uncertain the status of the corporation itself as an independent moral agent. At least with concession theory, a corporate purpose could be attributed to the state. It could therefore be critiqued as such. Here, it exists within a normative and ontological vacuum.

Critical Potentials

Despite its ontological and normative frailties, the aggregation theory develops and enriches some of the conclusions taken from the analysis of concession theory. Recall that concession theory accommodates a universalistic normative framework when working within a liberal, democratic and proceduralist conception of political legitimacy. The idea is that whatever norms apply to political authority ought to apply to corporate authority as well. It also left space for state regulation in the name of the public interest. Concession theory, unlike aggregate theory, acknowledges that corporate action can produce harms and benefits beyond the
capabilities of individual human beings and, therefore, warrants constraints beyond the enforcement of the typical array of Kantian rights. A weakness, however, lays in its occlusion of individual liberties. It likewise fails to address the role the corporation might play in associational freedom and creeps too close to authoritarianism.

Aggregation theory helps shore up some of these weaknesses. First, it suggests that whatever universalistic normative framework applies, it ought to pay specific attention to individual rights, and, in particular, contract and property rights. What individual property and contract rights people enjoy, they ought also to be able to enjoy them together. Further, aggregation theory suggests that any rights or constraints ascribed to the corporation ought not cause the violation of these freedoms, at least in so far as the corporate form vindicates them.

Second, aggregation theory suggests a divorce between the corporation and state control in order to cash out this associational economic freedom. It thus correctly emphasizes the importance of maintaining a boundary between the political and the social, the state and society. Highlighting the voluntarist aspirations of associational life, aggregation theories support the kind of de-politicized economic activity that at once (1) enables the democratic discourse and public opinion formation required by representative democracy while (2) providing space for people to go about their lives unmolested by politics. (Cohen and Arato 1994)

Finally, and especially in regards to the second generation variant, aggregation theory offers a normative template for internal corporate governance consistent with a universalist moral framework. In particular, its notion of contractual consent satisfies certain liberal democratic desiderata. Modeling the corporation as a contract voluntarily undertaken by its constituents to obey an authority, the “nexus-of-contracts” theory suggests a “social contract” model of intra-corporate legitimacy. Indeed, the Coasean prototype is blatantly Hobbesian when
it suggests that corporate members relinquish their freedom to a firm manager in order to protect themselves from the risks and uncertainties of incomplete contracting. A pure “nexus of contracts” is direct democracy *par excellence*, the ideal that political theorists attempt to replicate.

**The Real Entity Theory of Corporate Personhood**

The last theory of corporate personhood discussed here, the real entity theory, defines the corporation as “a real and natural entity whose existence is prior to and separate from the state.” (M. J. Horwitz 1992, 101) It thus mirrors the Schmittian idea of the state as a political unity that factually pre-exists the constitution. (Bockenforde 1997, 10) Closely associated with early 20th century political pluralists: *e.g.*, Harold Laski, G.D.H. Cole, John N. Figgis, and, more saliently for business corporations, the jurist Frederick W. Maitland, it, like the other theories, contains several arguments. First is that corporations are the result of the natural, voluntaristic action and associative instincts of human beings. Nor are they mere aggregations of individuals only made whole by the “fiction” of interpersonal contracts or agreements. Rather, 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.” (Figgis, 1914, p. 40; *see also* Ripkin, 2009; McLean, 2012, p. 71) This personality is, for real entity theorists, a sociological fact, a fact first attributed to U.S. business corporations by legal scholar Ernst Freund in the late 19th century. (Freund 2000 (1897), 37-8)

Despite the metaphysical flourishes, many scholars admit the logical purchase of this idea. (Muniz-Fraticelli 2014) For example, Philip Pettit and Christian List credibly argue that one can identify an independent, performativist concept of corporate agency. They derive a
corporate will when individuals undertake intra-group discourse under fixed decision-making procedures and norms. (List and Pettit 2011, 59) Philosophers like Margaret Gilbert and Carole Rovane (Rovane 2014), as well as contemporary political pluralists van Dyke and Muniz-Fraticelli, likewise argue in favor of a real group “will.”

The second argument is prescriptive, offering a very different understanding of the state than do the other theories. Under real entity theory, the state, serving a much diminished role, does not delegate political authority. Instead, the entity possesses its own authority, often derived from the ‘personality’ or will emanating from the group as such. This personality sufficiently resembles the personality of a natural human being to merit autonomy rights. (Muniz-Fraticelli, 2014, p. 199; Jones, 1999)

**Real Entity Theory’s Strategic Historical Deployments**

Like its counterparts, the theory was employed strategically in response to contemporary historical developments, serving as a romantic battle cry for both left- and right-wing crusades against various status-quo powers. A new “corporate realism” had emerged, drawing on Continental European ideas about the “spiritual reality of group life” (Bratton 1989, 1490; Hager 1989) that were themselves a critical reaction to neo-Kantian and legal positivist accounts of the constitution and the state. (Seitzer & Thornhill, 2008, 12) Corporate law would focus on the social realities of corporate capitalism, in all its glory and distortions. However, whether and why a community required protection, and what such protection might look like, depended crucially upon the theory of political legitimacy motivating the theory’s user – in this case, usually some variety of political pluralism. It therefore, also like the other theories, provides an indeterminate account of corporate autonomy. In fact, the theory proved so indeterminate that John Dewey’s influential 1926 essay in the Yale Law Review, emphasizing the polemical and
inconsistent deployments of corporate personhood, nailed the coffin on its analytical usefulness for decades. (Dewey, 1926; Hager, 1989, 635)

The initial appeal of real entity theory derived from economic structural changes that stretched beyond credibility ontologies implied by both aggregation and concession theory (Colombo 2012, 14; Blair & Pollman, 2015). The same “steady incorporation of institutionalized rationality” (Trachtenberg 1982) that discredited state involvement, and therefore concession theory, likewise denied credit to easily identifiable individual initiative. State corporate laws began to allow for holding companies, i.e., corporate ownership of 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. (Blair and Pollman 2015, 1707) The exponential growth of public share ownership, where corporate equity was held by a diverse, dispersed and often disinterested group, laid rest the idea that the corporation could be analogized to a property partnership among engaged business associates. (Hovencamp 1988, 1600) At the same time, early 20th-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. (Bratton & Wachter, 2008, p.107) The “visible hand” of professional managerial direction, in Alfred Chandler’s (1977(1990)) terms, had replaced the “invisible hand” of the market. With their phenomenal growth in size, complexity, and bureaucratization, corporations did seem to be more than the mere sum of their parts, more than the boilerplate statutes of general incorporation, and certainly more than the simple property of their owners.

Progressives reached to the real entity theory to empower labor while holding capital to account. Drawing on political pluralist ideas, the real entity theorists rejected the idea that the
state ought to serve as the lone legitimate authority in society. (Muniz-Fraticelli 2014, 18) They argued instead that many associations possess justifiable authority – even, perhaps, an authority with a better claim to people’s loyalties than the state. Pluralists celebrate a diversity of group-based authority because it necessarily works to limit potentially overweening state power (Muniz-Fraticelli 2014, 22, 43), including state power captured by business interests. It was tempting, therefore, to enlist it in support of labor unions and worker-controlled syndicates. (Ernst, 1993, p. 60; Dodd, 1932; Hager, 1989, p. 583) Meanwhile, aggregation theory was distasteful. The idea of the corporation as protected private property offered it too much rhetorical protection just as its influence in society was seen as increasingly oversized and pernicious. (Avi-Yonah, 2010, p. 1017) At the same time, though, concession theory proved a reluctant ally. The corporation had long lost any appearance of having once served the public purposes or the common good. (L. Johnson 2012, 1138-9) Observing the state’s unwillingness to regulate capital, progressives did not want to rely upon concession theory, and thus legislative action, before setting limits on corporate misbehavior. (Hager 1989, 638) But even if the state proved amenable, those scholars, as philosophical pragmatists eschewing moral absolutes, were suspicious of its ability to arbitrate social conflict in an impartial, non-authoritarian manner. (Horwitz 1982, 1427; Posner, 2004) They would rather have disputants work out their own solutions according to their own freely adopted ethical principles. (Ernst, 1993; Bratton & Wachter, 2008, p.107; Horwitz 1982, 1427)

Progressives also argued that because corporations were moral communities, they owed duties to their members. The gist of the “business commonwealth corporatist” argument was that if the corporation was sufficiently human to merit autonomy rights, it would also, naturally, exercise that autonomy in a civically responsible manner – like any other (human) citizen.
In 1932, Merrick Dodd, a Harvard law professor, famously clashed with Adolph Berle, a Columbia law professor, in a series of debates chronicled in the Harvard Law Review over this very issue. 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. (Dodd 1932, 1153-54, 1160-61)

Dodd’s opponent, Berle, 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 19th and early 20th centuries (M. J. Horwitz 1982, 1426, Hager 1989), Berle instead insisted on the hammer of law and economic planning to keep business attuned to the public good. (Bratton & Wachter, 2008, p. 131) When advising President Franklin D. Roosevelt in connection with the development of New Deal economic policies, Berle thus invoked “value monist” (Muniz-Fraticelli 2014, 29) pluralist ideas to support state mediation of otherwise freewheeling business interests. Such regulation, nevertheless, would not be accomplished by tinkering with corporate charters and, therefore, the valuable “internal life” of the entity. It came instead from the federal and state “exogenous” regulation (Johnson, 2012, pp. 1147, 1158; Hurst, 2004, p. 162) that supplemented the restraints of market competition amongst autonomous corporate entities. (Tsuk, 2005, p. 192) Berle, like Harold Laski and Constant, supported internal associational freedom but left ample space for a corporatist constitutional state to regulate their relations with other corporate bodies in the name of individual liberty and welfare.

Left-wing advocates also used the theory because its attribution of “real” personality to corporations allowed the state to hold them responsible for their harms. (Hager 1989) Unlike the concession and aggregation theories, which hold the corporate person to be a “fiction,” the real entity theory permits the allocation of blame to corporations for their antisocial behavior, even
when it cannot be directly traced to the actions of individual members. (P. A. French 1984) Thus, its presence is felt within U.S. case law attributing criminal and civil liability to corporations – liability that, by its nature, is contingent upon the corporate person possessing the requisite *mens rea*, or mental state. (Petrin, Forthcoming 2017, Hager 1989)

The theory had its right-wing, libertarian proponents, too. First, like aggregation theory, it was offered in response to a concession theory of corporation that was seen to empower a consolidated state against private economic actors. For some, the corporation, as an autonomous, ‘real’ entity, merited just as much protection as the human individual. It thus legitimated an anti-regulatory conception of corporate law and protected the growth of big business. (Millon, 1990, p. 241; Hager, 1989, p. 580) Accordingly, the theory appears in judicial opinions favoring business interests, including *Hale v. Henkel*, a 1906 U.S. Supreme Court opinion affording the corporation rights under the 4th Amendment. (Harris 2007, 48) “Managerialist” variations of the real entity theory, meanwhile, shored up expert executive authority over the complex corporate organizations arising during the Post-War years. (Bratton 1989, Horwitz, 1992)

The real entity concept experienced a renaissance in the turn of the 21st century as critics of contemporary capitalism sought a theory that would hold increasingly powerful multinational corporations to account for their misbehavior. Articulated most influentially by Peter French, the real entity theory was de-mystified and used to attribute sufficient agency and intentionality to a corporation such that it might be held to moral duties. (Muniz-Fraticelli 2014, 195-6, P. A. French 1984, Ewick 1988) 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. (L. Johnson 2012, Hager 1989) More recently, however, real entity theory
has assumed a reactionary gloss. Political theorist Jean Cohen and legal scholars Reven Avi-Yonah and Seamus O’Melinn, for example, locate the idea lurking behind the awarding to business of free exercise rights in *Burwell v. Hobby Lobby* and speech rights in *Citizens United v. Federal Election Commission*. (J. L. Cohen 2015, Avi-Yonah 2010, O'Melinn 2006)

**Ontological Critiques**

Like its sister theories, real entity theory elides some salient ontological points and, as a result, contains normative holes.

**The Role of Law**

First, real entity theory, like aggregation theory, does not acknowledge the constitutive role law plays in forming the corporation. Indeed, Gierke went so far as to claim that “neither scholarship nor the law had any creative role” whatsoever. But as shown above, law does indeed have a role to play. In fact, some even argue that the social practice of ‘corporation’ emerged precisely because a sociologically lively legal definition treated the corporation *as if* it were a ‘person’ separate from its constituents and its foundational statute. (Roy, 1997, p. 47; Bowman, 1996, p. 25; Maitland, 2003). Laws providing for limited liability and asset lock-in, conceptually separating the economic life of the corporate group from its individual members, arguably created the foundations for these “real” entities to grow and thrive within a broad, complex society. Moreover, the influential “business judgment rule,” first appearing in 1888 and protecting managers’ decisions from judicial second-guessing (Avi-Yonah 2010, 218), erected an impermeable layer of bureaucratic leadership between individual stockholders and business operations. (Roy, 1997, at 154; Berle & Means, 1932) The modern business corporation, as it exists, is thus just as much a creature of law as it is a real entity. Indeed, without the law, it is
unlikely that the business corporation would have assumed its colossal position within the economy at all.

Because the corporation is not a natural, *sui generis* real entity any more than it is the unadulterated outcome of free individual contracting, it cannot claim *sui generis*, “natural” autonomy rights under real entity theory. Consequently, the corporation cannot claim legitimate authority according to justifications inconsistent with liberal democracy. If it is true that liberal democratic law helped create the corporation, the corporation has liberal democracy in its DNA. That DNA sets “endogenous limits” to corporate power. In so far as all valid law must respect individual rights and liberties, valid corporate and commercial law – and internal corporate governance – must do the same. Real entity theory, however, provides no analytical mechanism to investigate and critique corporate behavior at all, nevermind according to liberal democratic principles. At least not according to its traditional formulation.

The reason emerges from the real entity theory’s pluralist roots. Pluralism implies that groups enjoy a legitimate power to govern not only themselves but also, by logical implication, their component parts: their members. This is because the corporate person, as a person separate from any human members, may make claims against those members and must, at least sometimes, prevail on those claims. Otherwise its autonomy would perfectly overlap its members’ autonomy and so be reducible to them. In fact, authority over corporate members, under real entity theory, might be crucial to the meaning of the corporate community itself. (J. L. Cohen 2015, 197)

Second, under pluralism, the corporation’s authority is original to itself and, therefore, incommensurate with that of the liberal democratic state. It therefore, like aggregation theory, leaves no room for democratic regulation. To illustrate, a corporation’s own autonomy might be
exercised, like that of a human person, in the pursuit of some “ethical” or “comprehensive” good. This ethical orientation will shape how it guides or constrains its members yet may very well be at odds with principles of liberal democratic lawmaking, as it would be, for example, if it was governed by religious tenets or notions of utilitarian efficiency. (Muniz-Fraticelli 2014, 41)

This boundary between corporation and state runs deeper than the line drawn by aggregation theory between public and private. Real entity theory pits two competing visions of sovereignty against one another: the democratic demos versus the group. (J. L. Cohen 2015, O’Melinn 2006) By investing corporations with an indefeasible, independent claim to legitimate authority, and leveling – or even elevating – that authority above the state, real entity theory implies an “ineluctability of latent conflict between the jurisdiction of associations and that of the state.” (Muniz-Fraticelli 2014, 24) This conflict endangers the protections the state can offer against corporate actions that amount to rights violations. The conflict often becomes meta-jurisdictional as self-governing groups seek to extend their own boundaries. (J. L. Cohen 2015, 198) Growing corporate use of “private” police power, non-compete contracts, and mandatory arbitration clauses attest to the danger. (Ripkin 2009, 142)

Metaphysics and the Individual

By now, the descriptive weakness of organicist “body” metaphors invoked by the earlier variations of real entity theory is apparent. (List & Pettit, 2011) Further, although their ostensibly natural personalities may resemble human personalities, they do so only in an analogical sense. (McLean, 2012, p. 81) Corporate purposes do no descend sui generis from heaven, but are the result of internal procedures, power relations, and incentives that shape human behavior. (Muniz-Fraticelli, 2014, p. 88) What is perhaps less well recognized is the particular fate the individual

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18 So, too, are recent corporate actions that challenge state policies on discrimination and climate change.
suffers under the organicist metaphor. For once a real entity theorist locates a group with an apparent “personality,” she declines on principle to open the organizational black box to see about the individual. An “unarticulated assumption of the pluralist tradition,” observes Daniel Ernst, is “that the groups themselves can safely be treated as organic, homogeneous, and voluntarily formed.” (Ernst, 1993, p. 60; also Freund, 2000 (1897), p. 39; Ewick, 1988, p. 180; Laski, 1916, p. 404)) The result is that this theory gives an insufficient account of internal power relations. For example, Morris Cohen, in his critical response to pluralist theory, argues that the real personality “… hides the fact that what we call group action is and must often be the result not of the unanimous agreement of all the members of the groups but only of a more or less limited part thereof.” (1919, p. 678) Pluralism’s oversocialization of the individual risks essentializing the corporate personality and drowning out dissident voices in the same way that Benhabib (2002) claims that certain communitarians essentialize cultures and over-determine the self.

Furthermore, assuming the existence of a metaphysical group will “[ignores] the reality of the hierarchical and bureaucratic management and the absence of effective shareholder participation in governance of the large public corporation.” (Blumberg, 1993, p. 30) Assigning rights to the corporation as such may therefore empower status-quo group leadership without the consent of current and future members. (Kukathas 1995, 267-8) Indeed, Adolf Berle himself famously warned that it would be naïve to expect that corporate princes would refrain from using their power for anything but their own personal benefit. (Berle 1932) It is no wonder, then, that the “corporate realism” of real entity theory “proved congenial to management’s interests.” (Bratton 1989, 1489)
Finally, given the corporation’s often superior resources, the autonomous political expression of its ethical positions risks infringing not just the political rights of an insider minority. It also endangers political rights of outsiders. For example, corporate constituents might agree to donate sums to a particular candidate’s campaign in an amount so significant as to offend notions of political equality. Or recognizing and empowering a labor organization and a capital organization empowers workers and property owners - neither of whom is looking out for the consuming public. (Ernst 1993, 68). Amounting to an overrepresentation of a certain ethical viewpoint, this is an objection routinely launched at corporatist theories of the state. (Cawson, 1986, p. 146)

Critical Potentials

Given these problems, real entity theory will be unattractive to political theorists looking for an anthropological account of corporate rights. But it has its uses. Its most promising critical potential derives from its more contemporary, non-metaphysical, institutional accounts. Within them we can find the fingerprints of procedural, representative democracy. Recall that philosophers of group agency find that a “real” group “will” might be formed given the existence of certain intra-corporate decision-making procedures. These procedures often bear more than family resemblance to the procedures embraced by contemporary democratic state constitutions. This should come as no surprise. After all, we generally attribute to democratic political associations autonomy rights (e.g., a right to “national self-determination”) notwithstanding their lack of human “personality.” To ascertain a group will, some kind of democratic discursive procedure is, by logical necessity, required. This will then assumes legitimate “authority” precisely by virtue of its democratic credentials. As a result, democratically formed corporate
authorities may likewise have a claim to autonomy rights – and be held responsible for the harms they commit.

The point that pluralists make about leveraging autonomous groups against a potentially tyrannical state is also salient, even if overstated – especially in the context of politically formidable business agents. An empowered civil society with a diversity of strong actors does not just act as a prophylactic against totalitarian tendencies. A multitude of power centers will also tend to check themselves, preventing private tyrannies. Further, real entity supports a devolution in decision-making institutions that would permit local control of social life. (Hager 1989, 611) (citing Durkheim) The net result is a good thing when it comes to individual liberty.

Finally, real entity theory, responding as it does to the realities of the modern, industrialized, bureaucratized business corporation, draws attention to corporate life in a way the other theories do not. It thus provides a perch from which to investigate the impact of the “social” on the individual corporate member.

Excavating a New Theory of Corporate Personhood

The strategic deployments of corporate legal personhood do not, on their own, offer a convincing account of corporate autonomy rights. At the same time, though, proponents wielded them critically and in response to historical circumstances that presented real challenges to constitutional, liberal democracy. As shown above, they each, therefore, offer something useful in their own right. Recall that, when viewed from the perspective of procedural democracy and liberal rights, concession theory suggests that a theory of corporate personhood should be embedded within a universalistic normative framework that also allows for state regulation in the public interest. Simply, whatever norms and constraints apply to state authority ought to apply to
corporate authority as well. Within that same framework, aggregation theory suggests that these norms include a respect for property and contract rights, as well as for rights of free association. Group rights, in word, should be respected in so far as they vindicate individual rights. Aggregation theory also teaches that any group autonomy right, at least to the extent that it amounts to an authority claim over corporate members, may be legitimated through a consent mechanism. In addition, aggregation theory insists on a separation between state and society.

When adding real entity theory’s insights, a first draft of a political theory of the corporation can now be assembled. The theory of political legitimacy underpinning the account is liberal, procedural, constitutional democracy, while political pluralism is rejected. I distill the following desiderata from the three historical conceptions of corporate personhood discussed precisely because they (1) fit within this theory of political legitimacy, and (2) are responsive to contemporary problems associated with corporate capitalism:

a. From concession theory, a universalistic moral framework where both state and corporate authority must satisfy liberal and democratic desiderata;

b. From aggregation theory, the notion that contractual consent can legitimate intra-corporate authority and that free exit from the corporation can proxy this consent;

c. From real entity theory, a corporate right to autonomous self-governance can be justified using the liberal democratic desiderata articulated in (a) and (b) and set forth by contemporary philosophers working on group agency;

d. From real entity theory, the notion that the state should refrain from controlling a corporation’s ethical purposes, selected according to (c), except when -
e. (1) protecting equal individual rights; and, perhaps, (2) it is otherwise strongly in the public interest (from concession theory); and

f. From real entity theory, (a) – (c) should be analyzed not only in terms of formal legal relations, but also be attentive to “informal” group-level characteristics like culture and ‘exogenous’ power disparities.

Succinctly, this is a regulation of self-regulation. The framework, of course, works backwards. Rather than moving from fact to value, it starts with value and leaves the corporate ontology unspecified. This move may not prove overly controversial, as the theorists of corporate personhood may have performed the same trick when building their own models. (Petrin Forthcoming 2017, Dewey 1926) Further, it is perhaps better political theory to develop political principles from tenets not derived from a mutable, historical social ontology. Else, important values might be sacrificed to illiberal traditions.
Works Cited


Austin, John. 1875. *Lectures on Jurisprudence*. Vol. XII.


Lopez, Linette. 2016. "American companies have developed a very particular disease — and CEOs hate the cure." Business Insider, June 14.


Mazzucato, Mariana. 2013. The Entrepreneurial State. 1. Anthem Press.


