2001

The Ambiguous Significance of Corporate Personhood

David K. Millon

Abstract:

Historically and culturally informed, "the corporation" is an indeterminate concept that shapes and is shaped by prevailing views of big business in American society. This is not to say, however, that scholars and practitioners today agree about how to characterize the corporate entity. In his article, The Ambiguous Significance of Corporate Personhood, David Millon shows that corporate personhood — a legal commonplace today — remains a contested notion that derives its varied shapes from the philosophical or ideological assumptions of its proponents; assertions about what corporations are are then supposed to support normative assumptions about appropriate objectives and content of corporate law. Millon traces the development of the corporation-as-legal-person concept and the debates about what kind of person the corporation should and could be. More provocatively, Millon outlines the current state of the discourse, including the "communitarian" and "contractarian" theories of the corporation. These competing philosophies do not resolve the proper nature of the corporate person but simply shift the debate to the responsibilities of natural persons toward each other. The indeterminacy of the corporate entity remains. As such, Millon argues that the more apt question for the future is not the nature of the corporate person but the proper relations among participants in corporate activity and between them and the state. These are questions about individual responsibility, wealth distribution, and state power. Professor Millon concludes that inconclusive arguments about corporate personhood continue to fail to address these important questions forthrightly.

THE AMBIGUOUS SIGNIFICANCE OF CORPORATE PERSONHOOD

David Millon*

In the eyes of the law, the business corporation is a person. So, for example, the corporation can own property in its own right; it can sue or be sued, in contract or tort or any number of other causes of action; it can be prosecuted and punished for criminal

* Associate Dean for Academic Affairs and Professor of Law, Washington and Lee University School of Law. J.D., Harvard Law School, 1983; Ph.D., (History) Cornell University, 1982 [M.A., 1978]; B.A.., Ohio State University, 1975. Prior to beginning his career in teaching, Dean Millon was a litigation attorney for Hale and Dorr in Boston. Dean Millon teaches primarily on corporate law and English legal history. He has written extensively on corporate law, focusing primarily on critiques of the law's traditional commitment to shareholder primacy. Within legal history, Dean Millon's work has centered on jury discretion during the middle ages and its implications for premodern legal theory.

activity; it enjoys various rights under the United States Constitution; and it is subject to tax liability. In these respects (and others), the corporation bears the legal attributes of an entity existing separately from the various natural persons who participate or have an interest in the corporation's activities.

This way of thinking about the corporation has been settled for more than a hundred years. Nevertheless, since the corporate form became the preferred vehicle for business organization during the second half of the nineteenth century, controversy has surrounded the place of the corporation in American society. Whether viewed as a source of monopolistic privilege[1] or as a vehicle for dangerous concentration of wealth,[2] corporate status has long implied economic and political power without accountability. Accordingly, historical American fears of unchecked power repeatedly have fueled debates over the need for legal regulation, even as large-scale production led to unprecedented efficiency and profits.[3]

The persistent theme of these debates has been disagreement over the importance of shareholder wealth maximization as the appropriate objective of corporate activity and therefore of corporate law. Proponents of a shareholder primacy model argue that shareholder interests should have priority among all of the various considerations that corporate management might consider in making policy decisions.[4] Critics of this position have insisted that relentless devotion to shareholder interests imposes costs on various other constituencies in American society, including employee layoffs, plant closings, barely acceptable wages and working conditions, environmental pollution, and financial restructurings that benefit shareholders at the expense of creditors. Because shareholder and nonshareholder interests often (though not always) conflict with each other and no broader political consensus supports a strict shareholder primacy regime, controversy about corporate law's appropriate objectives continually resurfaces as current events seem to attract attention to the social costs of shareholder primacy in different contexts.

A standard argumentative move in these debates has been the effort to justify a position for or against legal reform by reference to some kind of characterization of the corporate person. A descriptive assertion ("the corporation is *x*") is advanced on behalf of a normative claim ("therefore *y* should follow"). In this way, what might otherwise appear to be abstract, purely academic debates about corporate legal theory in fact

[1]For example, a Jacksonian Democrat wrote that "All Bank charters, all laws conferring special privileges, all acts of incorporation, for purposes of private gain, are monopolies, inasmuch as they are calculated to enhance the power of wealth, produce inequalities among people, and subvert liberty." Quoted in WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 65 (1965). *See generally* J. WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 at 33-36 (1970); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 194-98 (2d ed. 1985).

[2]*See generally* HURST, *supra* note 1, at 36-47.

[3]For discussion of the ideal of balanced economic power in American political economy, see David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1236-63 (1988).

[4]"Shareholder primacy" expresses the idea that shareholder interests should take priority over those of nonshareholder constituencies both in corporate law and in managerial decision-making. For discussion of some of the complexities of this idea, see Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1882-86 (1989).

support controversial political agendas. We will see, however, that while this form of argument has been used to substantial rhetorical effect, it has proved to be inconclusive. "The corporation" turns out to be an indeterminate concept, generating disagreement about what kind of person the corporate entity is. Others deny it is an entity at all, insisting instead that the corporation is merely an aggregation of natural persons. That claim, too, resolves nothing, however, because it is possible to characterize the relations among those persons in different ways.

This essay surveys the principal ways in which partisans of shareholder interests and their critics have deployed arguments about corporate personhood. Once the indeterminacy of this form of argument is appreciated, it will be suggested that political arguments based on claims about what corporations are obscure the real issues at stake in these debates. These are questions about individual responsibility and obligation, distribution of wealth, and state power. Inconclusive arguments about corporate personhood fail to address these questions forthrightly.

I. The Uncertain Status of the Corporation in Nineteenth-Century Legal Theory

Although the concept is generally accepted today, 150 years ago it was by no means clear that the corporation should be thought of as a distinct legal person.[5] In one influential view, the corporation was nothing more than an aggregation of natural persons, in this sense no different from a partnership. According to the author of a prominent treatise published in 1886, the corporation had no identity apart from its owners; it "is really an association formed by agreement of its shareholders, and . . . the existence of the corporation as an entity, independently of its members, is a fiction."[6]

Opponents of governmental regulation of the corporation relied on the aggregate characterization. This linkage was evident in the United States Supreme Court's implicit reliance on an aggregate theory of the corporation in the *Santa Clara* case, which held that the Equal Protection Clause of the Fourteenth Amendment prevented the states from taxing corporate property differently from the property of individuals.[7] In the Court's view, attempts to tax the corporation directly implicated individual constitutional rights because no meaningful distinction could be drawn between individual and corporate property. Similarly, in the *Railroad Tax Cases* a lower federal court declared that

[5]The best recent treatment of the question of corporate personhood in American law and legal theory is Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987). For additional historical discussion and consideration of the relationship of corporate theory to recent political controversies, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205-40.

[6]VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS at iii (2d ed. 1886). *See also* HENRY O. TAYLOR, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS HAVING CAPITAL STOCK iv (1884) ("By dismissing this fiction [of the 'legal person'] a clearer view may be had of the actual human beings interested, whose rights may then be determined without unnecessary mystification.").

[7]Santa Clara v. Southern Pacific Railway, 118 U.S. 394 (1886). For clarification of the assumptions behind this often misunderstood decision, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 at 65-107 (1992); Mark, *supra* note **Error! Bookmark not defined.**, at 1463-64.

> [t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. . . . [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though process be in its name.[8]

The aggregate theory challenged the older notion that the corporation was an entity or person created by the state. Chief Justice Marshall had this idea in mind in the *Dartmouth College* case when he referred to the corporation as "an artificial being, invisible [and] intangible," its "individuality" evident in such features as the power to sue, amenity to suit, and its durational existence defined without regard to the lives of its shareholders.[9] In a similar vein, Angell and Ames' influential treatise, originally published in 1831, defined the corporation as a "body, created by law, . . . for certain purposes, considered as a natural person."[10] Courts routinely construed statutory references to "persons" to include corporations as well as natural persons.[11]

The new aggregate theory, with its anti-regulatory trajectory, was important because the entity idea legitimated state regulation of business activity. According to this version of the entity theory, the corporation was a separate person in the eyes of the law, but personhood had a particular connotation. The emphasis was on the corporate person's artificiality, which was based on the fact that its existence depended on action by the state. For most of the nineteenth century, entrepreneurs required a special act of the legislature granting a charter of incorporation; private initiative alone was insufficient. Because the corporate person was a creature of the state, it was assumed to be subject to whatever limitations or regulatory burdens might emerge from the political process. In practice, traditional distrust of corporate economic and political power resulted in statutory limits on corporate size, wealth, and longevity. Furthermore, corporate charters routinely included a narrow definition of corporate purpose, and the *ultra vires* doctrine confined corporate activity within these legislatively imposed boundaries.

By the end of the nineteenth century, economic circumstances increasingly encouraged expansion of the scale of business activity. The entity theory, as long as it justified traditional state-imposed restrictions on accumulation and consolidation, stood in the way of the emergence of large-scale enterprise. By appealing to the individual property rights of the shareholders, the aggregate idea offered a potentially useful theoretical justification for shielding big business from public supervision.

---

[8]The Railroad Tax Cases, 13 F. 722, 747-48 (C.C.D. Cal. 1882), *appeal dismissed as moot sub nom.* San Mateo County v. Southern Pac. R.R. Co., 116 U.S. 138 (1885) (holding that Due Process Clause of Fourteenth Amendment applies to corporations).

[9]Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636-37 (1819).

[10]JOSEPH ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (10th ed. 1875).

[11]*See, e.g.*, Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351, 355 (1860); People v. Assessors of Watertown, 1 Hill 616, 620-21 (N.Y. Sup. Ct. 1841).

However, even as partisans of shareholder property rights successfully used the aggregate theory against state regulation in cases like *Santa Clara*, this conception of the corporation presented difficulties of its own. Most notably, the analogy of the corporation to the partnership posed significant obstacles to corporate expansion. For one thing, partnership law's traditional insistence on each partner's right to participate in control of the business implied that unanimous shareholder approval was necessary for corporate mergers and consolidations. For another, the partnership analogy also suggested the possibility of shareholder liability in cases of firm insolvency. Unlimited liability discouraged passive investment in corporations run by professional managers, because absentee owners could find their personal assets subject to creditor claims resulting from irresponsible management decisions over which they had no control.

II. Consolidation of the Natural Entity Theory

Perhaps the aggregate theory could have been reinterpreted to respond to these challenges, but, in the event, a new theory of the corporation emerged in the early decades of the twentieth century. This theory posited the corporation as a natural entity rather than an artificial creature of the state. Inasmuch as the corporation was now characterized as a natural person, it was that much harder to single out for special regulatory treatment. Further, if, as the new theory held, the corporation was a separate entity in its own right, rather than merely an aggregation of people, a new governance structure and limited liability for the owners could replace old doctrines of partnership law that stood in the way of capital formation and professional management.

A. The Naturalness of the Corporation.

The reconceptualization of the corporation as a natural rather than artificial being was possible because of changes in the law and in economic theory. During the latter half of the nineteenth century, states gradually enacted new "general incorporation laws." Replacing the old requirement of a special act of the legislature, these statutes (the ancestors of current corporation laws) made incorporation routinely available to anyone willing to comply with a few minimal formalities.[12] To be sure, the shift to general incorporation statutes retained a role for the state in the incorporation process and therefore represented a continuation of the state's traditional constitutive role. Still, the change encouraged a fresh evaluation of the relationship between state and corporation. Because of the ready availability of corporate status and minimal state involvement, the state's role in the creation of the business corporation seemed distinctly secondary to the creative energy of the entrepreneurs who were responsible for launching the venture.

Meanwhile, economists argued — for the first time — that economic concentration was inevitable. Traditional theorists had followed Adam Smith's assumption that size eventually yielded inefficiency, at least under ordinary

[12]By 1870, general incorporation statutes were replacing special chartering in most states. *See* HURST, *supra* note 1, at 56.

circumstances. As one writer noted, "such are the inherent defects of corporations that they can never succeed, except when the laws or circumstances give them a monopoly or advantages partaking of the nature of a monopoly."[13] Without such unfair advantages, corporations could never "work as cheap as the individual trader."[14] In contrast, a new generation of economic theorists insisted that economies of scale were far more pervasively available than previous economic thinkers assumed. According to H.C. Adams, in a range of manufacturing and processing industries, "[c]ost of production decreases with every additional application of capital in the form of machinery, and with every extension of the principle of division of labor."[15] The emergence of big business thus could be the result of natural, impersonal market forces. In this regard, too, the role of the state appeared to be minimal.

The tendency to think about the corporation as a natural outgrowth of private initiative rather than state action seems to have encouraged a broader rethinking of the state's traditional regulatory authority, which had been justified by the state's constitutive role in corporate formation.[16] New ideas about the productive efficiencies of large scale manufacturing also called into question traditional limitations on consolidation and capital accumulation. Though they initially included constraints on corporations' capacity to grow and amass economic power, general incorporation statutes during the last years of the nineteenth century eliminated several significant restrictions. Most notably, beginning with New Jersey in 1888,[17] the states did away with traditional prohibitions on corporate ownership of stock in other corporations, facilitating the creation of gigantic holding companies. In addition, capitalization limits were abolished and presumptions of eternal life replaced grants of incorporation for limited terms.

B. The Corporation as an Entity.

As legal changes and economic conditions encouraged production on an ever larger scale, it became increasingly difficult to hold onto older views of the corporation as mere aggregation and to the partnership law assumptions that were associated with that view. Growth in enterprise size required capital accumulation, which, in turn, meant increasingly wide dispersal of share ownership and relatively small individual holdings.

---

[13] WILLIAM M. GOUGE, SHORT HISTORY OF PAPER MONEY AND BANKING IN THE UNITED STATES 17 (2d ed. 1835), *quoted in* Hurst, *supra* note 1, at 30. Adam Smith claimed that corporations (joint stock companies) were less efficient than partnerships or sole proprietorships because managers could never be expected to work as diligently on behalf of others as they would if working for themselves. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 699-700 (Modern Library ed. 1937). In modern economic parlance, this divergence of interests and effort is the "agency cost" problem.

[14] GOUGE, *supra*, note 13.

[15] H.C. ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION 33 (J. Dorfman ed. 1954).

[16] The relation between these developments is complex and not unilinear: while the notion of the corporation's naturalness discouraged special regulations, elimination of such restrictions also reinforced tendencies to think about the corporation in naturalistic terms.

[17] Act of Apr. 4, 1888, ch. 269, 1888 N.J. Laws 385; Act of Apr. 7, 1888, ch. 295, 1888 N.J. Laws 445.

This development also called for new managerial expertise and a professional class of corporate managers emerged to meet that need.[18] In this process, shareholders saw their status transformed from active entrepreneurs to passive investors whose fortunes depended on the efforts of others.

Traditional legal principles built on the assumption that the shareholder was an active participant in the business were ill-suited to the shareholder's new place as mere investor. In the area of voting rights, the old rule requiring unanimous shareholder approval of fundamental transactions (analogous to the rights of partners in a partnership) gave way to majority rule.[19] Once a majority of the shareholders could determine a corporation's fate, a corporation's "will" no longer equated entirely with that of its shareholders. Reconceptualization of the shareholder's role in the corporation – and with it a new tendency to think of the corporation as an entity existing separately from its shareholders – was also evident in the emergence of the idea that the powers of the board of directors were "original and undelegated,"[20] rather than a concession flowing from the shareholders. At the same time, the shareholders lost the right to participate directly in management of the corporation, enjoying only the indirect power inherent in their right to elect the board. The corporation thus acted through its board, and the board's power was coextensive with that of the corporation itself.

The entity idea of the corporation was also connected with subversion of traditional legal doctrines imposing shareholder liability for corporate obligations. Through the nineteenth century and even into the early years of the twentieth, corporate shareholders did not enjoy the limited liability that is a hallmark of share ownership today. In virtually every state, shareholders were liable to the creditors of an insolvent corporation for up to twice the value of their stock.[21] In addition, the "trust fund doctrine" exposed shareholders to personal liability in cases of corporate insolvency to the extent they had not paid the par value of their stock.[22] The emergence of an active secondary market for corporate stock undermined this doctrine when it replaced the older practice of private stock subscriptions, and the "trust fund doctrine" was rejected entirely in a series of judicial opinions that began to appear at the end of the nineteenth century.[23] As shareholders became passive investors rather than active owners responsible for corporate decision-making it made less and less sense to look to them to satisfy corporate obligations. Creditor claims should instead be limited to assets held in the name of the corporation.

---

[18]*See generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 381-483 (1977).

[19]For example, by 1927 at least 20 states adopted statutes conditioning approval of mergers on majority shareholder approval; in exchange for the loss of veto power, dissenting shareholders obtained a new right to a judicial appraisal of the value of their stock. *See* Joseph L. Weiner, *Payment of Dissenting Stockholders*, 27 COLUM. L. REV. 547, 548 n. 7 (1927).

[20]See Manson v. Curtis, 223 N.Y. 313, 322, 119 N.E. 559, 562 (1918).

[21]*See* 1 WILLIAM W. COOK, TREATISE ON STOCK AND STOCKHOLDERS, BONDS, MORTGAGES, AND GENERAL CORPORATION LAW 270-75 (3rd ed. 1894).

[22]The leading case was Wood v. Dummer, 30 F. Cas. 435 (C.C.D. Me. 1824).

[23]See, e.g., Christensen v. Eno, 106 N.Y. 97, 12 N.E. 648 (1887); Hospes v. Northwestern Mfg. Co., 48 Minn. 174, 50 N.W. 1117 (1892).

C. The Natural Entity as a Person

Once the corporation could be thought of as a distinct person born of private initiative rather than state action, the lure of metaphor might have encouraged legal theorists to take the further step of assimilating this person to a natural human being. After all, corporate persons were born and could die, and they were capable of doing many of the things that humans did, like own property, commit crimes, file lawsuits, and pay taxes. Legal theorists also showed how it was possible to talk of a corporation's "will" as being distinct from that of its shareholders.[24] Nevertheless, American theorists for the most part resisted extreme efforts to equate corporate persons with natural ones.[25] As a result, there was room for substantial disagreement over just what kind of person the corporation was, and, therefore, what the law's stance toward that person ought to be.

D. The Politics of the Natural Entity Theory

Regardless of this lingering uncertainty, the natural entity theory had two important political implications as it took hold in the early twentieth century. The minimization of the state's role in the incorporation process — in favor of the view that the corporation was the product of private initiative and inevitable market forces — discouraged legal regulations that applied specially to corporations. Older concerns about the social and political costs of economic concentration, therefore, ceased to find expression in corporate law.

As corporate law disclaimed any public regulatory function, it took on a new focus. Now operating on an unprecedented scale, the publicly owned corporation had become a complex, far-flung organization under the supervision of a cadre of professional managers. It no longer resembled the small, locally owned partnership. With the advent of this separation between ownership and control, rendering managers accountable to the shareholders became corporate law's primary objective.

There surely was nothing inevitable about corporate law turning inward in this manner. Traditional concerns about the dangers of economic concentration could have been exacerbated by the emergence of big business. Corporate law could have addressed these fears by using existing regulatory techniques – such as limits on capitalization and restriction on combinations – but it did not. Instead, the anti-regulatory impulse implied by the vision of the corporation as natural and private yielded an internal focus in place of older attention to the external relations between the corporation and the larger society. In this regard, corporate law's acceptance of economic concentration only mirrored the larger success of a legitimating strategy wholly at odds with an older commitment to dispersed, balanced economic power.

---

[24] *See* ERNEST FREUND, THE LEGAL NATURE OF CORPORATIONS 52–55 (1897) (corporate will as decision of a majority of the corporation's managers).

[25] *See* Mark, *supra* note 5, at 1473–74.

III. CORPORATE CITIZENSHIP

In retrospect, the acceptance of the idea that the giant business corporation is an entity separate from its shareholders seems plausible. The group of shareholders had become a large, anonymous mass of investors, shifting in composition and barely involved in the business itself. Others did the actual work of production, under the supervision of professional managers. The old identity between a business and its owners no longer made sense.

More surprising was the notion that the law should accord this legal construct status essentially similar to a natural person. Without this additional move, the corporation, as a special kind of entity, could still have been subject to special legal regulations. If, however, this entity was to be viewed in the same light as natural persons, there was a basis for arguing that the corporation should be exempt from special efforts to regulate its conduct that did not apply to natural persons.

It soon became apparent, however, that the corporation-as-person idea itself possessed implications capable of subverting its anti-regulatory, internal vision for corporate law. In the wake of the Great Depression, critics turned their attention to perceived abuses of large corporations' economic power. In an article published in 1932, Harvard Law School professor E. Merrick Dodd, Jr. showed how the entity conception of the corporation could provide an effective basis for a theory of corporate social responsibility.[26] Dodd noted that a corporation's constituencies included more than just the shareholders. Employees, consumers, creditors, and the communities in which plants were located all had a stake in management's decisions about how to run the business. Furthermore, these interests could conflict with those of the shareholders. Policies designed to benefit lower-level workers, for example, could result in lower corporate profits and therefore a lower rate of return for shareholders.

If corporate managers were thought of simply as trustees or agents for the shareholders,[27] policies that deviated from shareholder wealth maximization were an illegitimate abuse of power. However, if in fact the corporation was an entity existing separately from its shareholders, management acted on behalf of the corporation and its business decisions involved the corporation's property. In other words, an entity theory of the corporation rejected the notion that management worked directly for the shareholders and was charged to manage their property. Shareholders had interests in the corporation that were entitled to due regard, but so, too, did the various other nonshareholder constituencies of the corporation. Presumably their well-being ought to be taken into account as well.

Once the idea of management's sole duty to shareholders had been challenged and a potentially broader conception offered in its place, it was possible both to expand the idea of what counted as the corporation's internal affairs and also to downplay the significance of the internal/external distinction itself. Not only were workers and other providers of inputs affected by management's control of the corporate entity with which

---

[26] E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145 (1932).

[27] Dodd's article was a response to this argument, presented in Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

they dealt; the corporation's activities also had potential effects on society at large. If a focus solely on shareholder financial interests ignored questions about the corporation's potentially broad and costly social effects, how should corporate law think about the corporation?

Dodd's answer drew on what he saw as an emerging trend among business leaders to think of the corporate entity as a citizen rather than just an engine for shareholder wealth accumulation:

> If we think of it as an institution which differs in the nature of things from the individuals who compose it, we may then readily conceive of it as a person, which, like other persons engaged in business, is affected not only by the laws which regulate business but also by the attitude of public and business opinion as to the social obligations of business.[28]

Dodd quoted Owen D. Young, an officer of General Electric Co., who argued that the corporation should recognize "its public obligations and perform its public duties — in a word, vast as it is, that it should be a good citizen."[29] Applied to natural persons, the idea of good citizenship implies right conduct in the context of a community of others. It emphasizes the aspect of personhood that encompasses affirmative obligations toward one's neighbors and de-emphasizes that other aspect, the individual's right to be free from coercion by the group. Regard for others and a willingness to sacrifice personal interests for others' sake characterize responsible citizenship.

Applied to the corporation, citizenship likewise suggests other-regarding obligation. The corporate person needs to be sensitive to the impact of its activities on those whose lives it affects, including not just its investors, but also employees, creditors, consumers, and the larger society in which it operates. Certainly a narrow-minded focus on profit maximization without regard to social costs would be inappropriate for the corporate citizen, just as it would be for the natural person.

Relying on the citizenship idea, theorists like Dodd[30] turned the privatized, anti-regulatory, shareholder primacy premises of the entity theory of the corporation on their heads. In their place, citizenship theorists substituted a public notion of corporate law,

---

[28]Dodd, *supra* note 26, at 1161.

[29]*Id.* at 1154. Regarding the categories of people who have an interest in the corporation, Young referred to workers, customers, and the general public, in addition to its shareholders.

[30]For a more recent statement, see James Boyd White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 YALE L.J. 1416 (1985). Boyd writes:

> The corporation is and always has been a collective citizen. It serves not only its shareholders, but its bondholders and creditors of other kinds, as well as its employees and future employees, its suppliers and customers. It has the proper aim not only of making money but of maintaining the conditions that make meaningful economic and social activity possible, for itself and for others. It is a citizen, and I believe it should be spoken of as having both the responsibilities and benefits of that status.

Id. at 1418.

based on the public effects of corporate activity, which implied a much richer notion of obligation than a unitary duty to shareholders.

The emergence of ambiguity in the normative implications of the entity theory should not be surprising. Once the entity was thought of as a person, uncertainty followed because the concept of personhood is itself rich and ambiguous. In our tradition, one aspect of personhood is, of course, a claim to be free from discriminatory legal restrictions. This idea inspired earlier efforts to analogize the corporation to a natural person. But personality implies much more than just a negative right to freedom from coercion. There are also notions of obligation that have occupied moral philosophers for centuries. Dodd and his fellow corporate social responsibility advocates simply drew on this basic premise when they suggested that the corporate person should bear the responsibilities of a citizen.

Dodd's subversive spin on the entity idea was not just the product of abstract theorizing. As his quotation of the business leader revealed, critique of a simple anti-regulatory, profit maximization agenda already abounded in American political discourse. The success of the natural entity metaphor had itself depended on changes in political thought (even as it was used to influence politics), and as uncertainties in that realm emerged, so too were they bound to emerge in the area of corporate theory. As always, debates about corporate personality reflected larger political controversies, just as the theories themselves were used to intervene in those debates.

IV. THE PERSON AS PROPERTY

Dodd's argument for corporate social responsibility based on a citizenship model met with a forceful response from advocates of shareholder financial interests, most notably Adolf Berle and Garner Means. In their famous book, *The Modern Corporation and Private Property*, published in 1932,[31] Berle and Means did not challenge the corporation-as-entity notion; to the contrary, their emphasis on the separation between ownership and control seemed to confirm the notion that the corporation existed apart from its shareholders. They raised a new question that relied on an old idea: ownership and the shareholders' claim, based on property rights, of privileged status among the corporation's various constituencies. The property rights argument did not claim that the shareholders themselves owned the assets of the business enterprise; it was undeniable that legal title was vested in the corporate entity. However, if the shareholders owned the corporate entity, management arguably owed a duty to them to manage the shareholders' property solely in their best interests: "The corporation was theirs, to be operated for their benefit."[32] Accordingly, corporate management exercised control over the corporation like trustees administering a trust; the corporation was the trust property and their powers were therefore "powers in trust." As such, these powers were "necessarily

[31] ADOLF A. BERLE, JR. & GARDNER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[32] *Id.* at 334. *See also id.* at 354 ("a corporation 'belongs' to its shareholders . . . and theirs is the only interest to be recognized as the object of corporate activity").

and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."[33]

The problem, in Berle and Means' view, was the danger that management might fail to discharge its trust obligation. A new separation between ownership and control was the result of widely dispersed share ownership, which in turn made a practical necessity of governance by a small group of professional managers whose personal ownership interests in the corporation typically were negligible. Because the people who owned the corporation did not control it, there was a distinct possibility that those who did would exercise their power in ways that were not in the shareholders' best interests. Separation thus meant discretion, and that raised important questions of accountability and legitimacy.

Berle and Means thus drew attention to what they perceived as the dark side of the managerial discretion on which Dodd had based his argument for corporate citizenship. If those in control of the corporation possessed the power to deploy corporate resources and make strategic decisions according to considerations of public welfare, clearly they might act in ways that failed to maximize shareholder wealth. From the shareholders' point of view, management's use of its powers of control to benefit nonshareholder constituencies at the shareholders' expense was just as illegitimate as outright theft. Either way, management was breaching its obligation to hold the shareholders' property in trust for their benefit. The property rights argument, which had its roots in old ideas about the ownership of business organizations, therefore supported the view that shareholders, among all the constituencies interested in a corporation's behavior, should hold a place of primacy.

The property rights argument against corporate social responsibility did not directly address Dodd's corporation-as-citizen spin on the corporate personhood idea. Berle and Means acknowledged that the corporation is a separate entity[34] and that incorporation creates a "legal person independent of any of the associates."[35] However, even though they could not avoid the organic metaphor,[36] their argument for shareholder rights based on ownership in effect "de-humanized" the corporate person. Had they retained Dodd's identification of the corporation with a natural person, Berle and Means' ownership argument would have required denial of that person's free agency. Dodd's citizen would have been transformed into a slave. Instead, they simply asserted that the corporation was a piece of property. The denial of Dodd's analogy to the natural person was implicit and allowed Berle and Means (and subsequent theorists) to sidestep a direct confrontation over the accuracy of the corporation-as-citizen metaphor.

[33]*Id.* at 248.

[34]*See id.* at 221-22 ("the corporation is a distinct legal entity, separate and apart from stockholders").

[35]*Id.* at 128.

[36]*See id.* at 134 (corporation as a "business organism"), 357 ("economic organism").

V. REVIVAL OF THE CORPORATE SOCIAL RESPONSIBILITY DEBATE

The corporate social responsibility idea advanced by Dodd resurfaced in the 1950s and 1960s. One strand of argument seemed implicitly to rely on a conception of corporate personhood, but it was very different from the one that Dodd had in mind. The thrust of Dodd's legal argument had been to show that current corporate law allowed management freedom to act as good citizens, and he claimed to identify an actual trend in that direction. However, lurking in the background of the idea of the corporation as a citizen was another implication. If social and economic power gave rise to a responsibility to act with due regard toward those affected, it would not be a large step to suggest that the obligations of citizenship might need to be embodied in rules of law if corporate citizens chose to act irresponsibly. Corporate persons, like natural persons who fail to live up to society's expectations, might be coerced into doing the right thing.[37]

By the 1970s, Dodd's optimistic assessment seemed unrealistic in many circles. Ralph Nader and his colleagues pointed to the tremendous economic power of America's largest corporations – power that could not have been imagined in 1932 – and laid a catalog of social problems at their doorstep. These included industrial environmental pollution, workplace toxicity, employment discrimination based on race and sex, workplace alienation, illegitimate political influence, unsafe products, and monopoly power.[38] Freedom from meaningful regulation, while it might allow corporations to act as good citizens, was not enough because it did nothing to promote socially responsible behavior if corporations chose not to pursue the best moral options. The states were unlikely to respond to this problem, because competition for corporate charters encouraged leniency rather than regulation. Nader therefore proposed that responsibility for incorporation be transferred from the states to the federal government, which would impose a wide range of regulations on corporate activity through the chartering process.

Nader did not rely explicitly on the citizenship metaphor. In his view, it was sufficient to point to the vast size and power of America's largest corporations and assign responsibility for a long list of social ills. However, by conceiving of the corporation as an actor capable of committing a range of wrongs and therefore an appropriate object of regulation, he implicitly conjured up images of gigantic entities of great power.[39] Rather than good citizens, Nader claimed to see a race of Goliaths striding irresponsibly across the landscape in search of profits, leaving paths of destruction in their wake.

VI. DE-REIFYING THE CORPORATE PERSON

In different ways, Dodd, Berle and Means, and Nader all relied on an entity

[37]Dodd himself had suggested as much when he expressed the hope that the law might "keep those who failed to catch the new spirit of [public service] up to the standards which their more enlightened competitors would desire to adopt voluntarily." Dodd, *supra* note 26, at 1153.

[38]RALPH NADER, MARK GREEN, & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 17-32 (1976).

[39]*See id.* at 16 (likening giant corporations to high-powered "[h]erbivorous dinosaurs").

conception of corporate personhood. Each of them characterized the corporate person in a different way, because the descriptive assertion supported a conclusion about how the law ought to treat corporate activity. In fact, any particular characterization was inevitably controversial because several different descriptions could plausibly be advanced, depending on the traits one wished to emphasize. The exercise, while purportedly a matter of disinterested observation, was not like counting the number of pigeons on a clothesline or describing a ball as red instead of blue. The entity itself was actually an intellectual construct and its content was vague enough to support different descriptions. These differences were themselves reflections of competing normative agendas. The priority of the positive claim over the normative one was actually only a matter of rhetoric.

Rather than proposing yet another vision of the corporate person, the most prominent response to the social responsibility revival dispensed with an entity conception of corporate personhood altogether. Like Berle and Means, Milton Friedman, in a well known *New York Times* article, focused attention on the rights of shareholders.[40] However, rather than speaking of corporate managers as trustees managing the corporate entity for their benefit, Friedman referred to them as employees. The shareholders, who had put up the capital, hired management "to conduct the business in accordance with [the shareholders'] desires, which generally will be to make as much money as possible."[41] Management's dealings with workers, creditors, and suppliers of goods and services were all undertaken on behalf of the shareholders and for their benefit.

Friedman's agency idea had the same thrust as did Berle and Means' trust model. In either event, management acted improperly if it did anything other than maximize profits. However, while Berle and Means saw the corporation as an item of property managed by trustees, Friedman grounded corporate managers' exclusive obligation to the shareholders solely on their contractual status as agents. There was no need to worry about the implications of corporate personhood or questions of ownership, because the entity was nothing but a legal fiction. This is what Friedman had in mind when he derided the idea that corporations as such could have social responsibilities: "What does it mean to say that 'business' has responsibilities? Only people can have responsibilities."[42] A corporation, Friedman wrote, was merely "an artificial person" and failure to appreciate this fact prevented people from understanding what was really at stake when corporate managers compromised the quest for profits in favor of other agendas.

Friedman's exclusive emphasis on the interests of shareholders did not indicate a failure to appreciate that efforts to maximize profits for shareholders generated social costs. Like Nader, he understood that profit-seeking can generate externalities, and that various members of the public may be affected adversely. The question for Friedman was how such problems ought to be addressed, and he took for granted that a government accountable to the public, rather than private initiatives undertaken in the boardroom,

---

[40]Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32.

[41]*Id*. at 33.

[42]*Id*.

should make the necessary cost-benefit decisions. Corporate policies that aimed to benefit nonshareholder constituencies at the shareholders' expense (such as corporate philanthropy or wages that were higher than market rates) amounted to a tax levied on the shareholders' wealth. Unelected private parties thereby used other peoples' money to pursue their own notions of public welfare.

Friedman claimed to take a realistic look at the corporation as it actually functions. In his view, the shareholders' status as the contributors of the corporation's capital led readily to the conclusion that corporate management, as their agent, should devote its energies to maximizing return on their investment. The argument dispensed entirely with the idea that the corporation was an entity existing separately from its constituent participants and focused attention instead on those relationships. The corporate person was reduced to the shareholders and their agents. The result was an aggregate conception of corporate personhood.

VII. CURRENT CONTROVERSIES

Subsequent economists, sharing Friedman's Chicago School anti-regulatory bent, have pursued a similar argumentative strategy. However, rather than emphasizing a shareholder-management employment relationship, these theorists describe the corporation as a "nexus of contracts" among all the participants in a corporation's activity.[43] According to this view, "the corporation is seen as a market writ small, a web of ongoing contracts (explicit or implicit) between various real persons. The notion that corporations are 'persons' is seen as a weak and unimportant fiction."[44] The terms of these contracts are supplied either by actual bargaining or by the rules of corporate law itself. Efforts by government to impose obligations on the parties to these arrangements offend the freedom of contract, anti-redistributive ideology that lies at the heart of the nexus-of-contracts agenda. Thus, contractarians claim contract as the source of shareholders' entitlement to profit maximization, dispensing with property rights. Nevertheless, the corporation is de-reified; the point of the exercise again is to justify shareholder primacy.

Friedman's property rights argument and fellow economists' nexus-of-contracts model appeared to escape from the indeterminacy of the corporation-as-person idea, which could support both social responsibility and shareholder primacy agendas. Once one thought of the corporation as nothing more than a set of relationships among the natural persons involved in production, notions of *corporate* citizenship made no sense. In the words of a prominent theorist, "Since it is a legal fiction, a corporation is incapable of having social or moral obligations, much in the same way that inanimate objects are

[43]The most important and thorough application of this idea is FRANK EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). For a concise overview, see Henry N. Butler, *The Contractual Nature of the Corporation*, 11 GEO. MASON L. REV. 100 (1989).

[44]William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993).

incapable of having these obligations. Only people can have moral obligations or social responsibility."[45]

It turns out, however, that the corporate law contractarians' de-reification strategy cannot end the debate. Controversy merely shifts from the nature of the corporate person to the responsibilities of natural persons toward each other. Thus "communitarian" critics of the contractarian position similarly disregard the question of corporate personhood and focus instead on the relationships among the actual participants in corporate activity.[46] In place of a vision of the corporation as a market in which self-seeking individuals come together in order to seek private advantage, critics see the corporation as a community in which such values as trust and respect for others determine the success of the venture. Because these values are a necessary part of intra-corporate relations, communitarians reject the contractarians' simplistic commitment to shareholder primacy and profit maximization.

One communitarian approach argues for broader participation in corporate governance. Toward this end, Abram Chayes criticized corporate law's conventional focus on shareholders: "A concept of the corporation which draws the boundary of 'membership' this narrowly is seriously inadequate. . . . A more spacious conception of 'membership,' and one closer to the facts of corporate life, would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way."[47] All these people, in Chayes's view, ought to have the benefit of "an institutional arrangement appropriately designed to represent the interests of a constituency of members having a significant common relation to the corporation and its power."[48]

Chayes' strategy of bringing affected nonshareholder constituencies into corporate governance was one way to use an aggregate theory to counter shareholder primacy. Other critics have argued that nonshareholder constituencies develop enforceable legal rights through their commitment to long-term relationships of mutual

---

[45]Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

[46]Whether there is more to "communitarianism" in corporate law scholarship than a shared critical stance toward shareholder primacy is not entirely clear. Important contributions have come from such scholars as Bill Bratton, Lyman Johnson, Larry Mitchell, and Marleen O'Connor. For a general discussion and an effort to identify a common agenda, see David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies, in* PROGRESSIVE CORPORATE LAW 1 (Lawrence E. Mitchell ed., 1995). For a now incomplete bibliography of scholarship in a more or less communitarian mode, see David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1391-93 (1993).

[47] Abram Chayes, *The Modern Corporation and the Rule of Law*, *in* THE CORPORATION AND MODERN SOCIETY 25, 41 (E. Mason ed. 1959). Strictly speaking, it is a misnomer to refer to Chayes as a communitarian because at the time he wrote this article, that label had not yet appeared in corporate law scholarship. Nevertheless, the approach he took resonates with current scholarship that has been termed communitarian. That term was first applied by critics of scholars who were advocating reform of the shareholder primacy idea. *See* Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 395 (1993) (labeling critics of shareholder primacy "communitarians" because they favor a "public law" conception of corporate law).

[48]Chayes, *supra* note 47, at 41.

interdependence and vulnerability.[49] Natural persons are moral agents – even if the fictitious corporate entity is not – and their dealings with others can give rise to obligations that supplement or even supercede contract. Having induced nonshareholders to rely on legitimate expectations of fair dealing, shareholders therefore may forfeit the right to insist on contract terms guaranteeing profits at the expense of others.

Yet another communitarian strategy rejects the sufficiency of contract as the vehicle for the definition of the rights of nonshareholder constituencies. For example, if workers must bargain for job security and pay for it in the form of lower wages, their well-being depends on whatever bargaining leverage they are able to exert. One response is to redefine management's fiduciary duty to encompass regard for nonshareholders as well as shareholders.[50] It may also be possible that reversal of existing default rules (for example, from employment-at-will to job security) could improve bargaining outcomes for workers and perhaps other nonshareholders, too.[51]

Today's version of the debate over the desirability of shareholder primacy is conducted without regard to entity-based arguments over corporate personhood.[52] Perhaps this omission marks a reaction to the indeterminacy of assertions about what kind of "person" the corporation is. More likely, the move to an aggregate conception reflects impatience with arguments based on metaphor in favor of a more hardheaded emphasis on what corporations "really" are. Here too, however, we encounter indeterminacy. Partisans of both sides of this debate look at the same set of human relationships but characterize the ties that bind these people together in different ways.

At the core of the communitarian critique of shareholder primacy is rejection of the contractarian premise that people are entitled only to what they can bargain and pay for. This difference, in turn, can be traced to distinct characterizations of the people who actually constitute the corporation. Contractarians see a web of atomistic, self-seeking individuals devoted to wealth maximization. From that observation they derive the normative conclusion that corporate law's job is to facilitate their pursuits. Rules that impose obligations to which they have not consented interfere with that objective and therefore are illegitimate. In contrast, critics of shareholder primacy observe a community of participants who may or may not be capable of obtaining an acceptable standard of living through their own devices. They find themselves bound together in a common venture and therefore depend on each other's efforts for its success. This

---

[49]Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

[50]Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189 (1991).

[51]David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998).

[52]An important exception is the recent work of Margaret Blair and Lynn Stout. In contrast to the corporation-as-community idea, these critics of shareholder primacy have described the corporation as a team. Interestingly, they rely on an entity conception of the corporation to ground an argument for an independent board of directors responsible for balancing the interests of all of the corporation's constituencies. See Margret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). For criticism of the Blair and Stout argument on the ground (among others) that it does not improve the bargaining situation of nonshareholders in relation to shareholders, see David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001 (2000).

commonality of interest can give rise to obligations or burdens that reduce some peoples' shares of the joint product in order to confer on others more than could be obtained through the exercise of bargaining leverage alone. However selfishly motivated individual participants might be, they in effect agree to temper their own claims once they enter into a community founded on cooperation.

So, just as proponents and critics of shareholder primacy were able to look at the corporate person and see different beings supporting competing normative agendas, the turn to a de-personalized corporation yields similar results because the aggregation of natural persons is also subject to competing characterizations. Resolution of this debate is not a matter of observation and description. The people involved in corporate life are real and their activities can be observed and described, but the ties of obligation that bind people together are themselves invisible. Claims about the extent and nature of interpersonal obligation therefore are really claims about how relationships ought to be understood. As was the case with entity-based arguments, the differences between contractarians and communitarians are really normative arguments masquerading as positive assertions.

VIII. Does Personification Matter?

Communitarians' use of an aggregate theory of the corporation looks closely at existing relationships and attempts to alter or adjust those relationships in ways that improve the status of nonshareholders in relation to shareholders. In this respect, the argumentative strategy differs from the entity-based arguments for corporate social responsibility of Dodd and Nader, both of whom conceive of the corporation as a person whose actions affect broad segments of the American public. Conceding this difference, is it one that matters?

Both the communitarians and the contractarians share a similar focus on the relationships among the corporation's participants. Chayes, for example, speaks of "the line between those who are 'inside' and those who are 'outside' the corporation."[53] This line is important because, in his view, those who are on the inside are entitled to participate in corporate governance, and the thrust of his argument was that more than just the shareholders should be considered within the boundary. Contractarians similarly focus on those who have entered into contractual relations with each other, and communitarians refer to those participants in corporate activity who are part of a single community constituted by their relationships with each other. For both contractarians and communitarians, the spotlight is on the insiders, and corporate law therefore looks inward, at the relations among the corporation's various participants.

If instead of speaking of the corporation as a collection of natural persons one thinks of it as an entity, it may be necessary to think about corporate law in a different way. The question now is the relation between the corporate person and those natural persons with whom it comes in contact. These people include its shareholders, its

[53]Chayes, *supra* note 47, at 41.

employees and other "insiders." The law must concern itself with their relationships to the corporation. In addition, however, corporate activity can also affect other people whom it is difficult to think of as being part of or inside the corporation.

Consider, for example, a corporation that pollutes the environment here in the United States or discharges toxic chemicals in some far away country, affecting the lives of individuals who may have no other connection with the corporation. An entity theory of the corporation readily accommodates the possibility of legal regulation or civil damages liability for the benefit of such outsiders. The corporate person is treated as an actor and legal consequences can be assigned to its behavior. In contrast, thinking of the corporation in aggregate terms complicates the issue. If rights and obligations are a function of membership in a single community, the claims of pollution victims depend on defining the corporation in a way that embraces thousands of people who otherwise are unconnected with the corporation's activities. The inward-looking focus of the corporation-as-community model does not lend itself well to thinking about such problems because doing so threatens to expand the boundaries of the corporation so broadly that it ends up dissolving into the larger society. Public regulation of corporate activity therefore seems more problematic under an aggregate theory of the corporation. This way of thinking about the matter thus differentiates older entity-based arguments for corporate social responsibility from more recent communitarian law reform proposals, which depend on aggregate assumptions.

Even so, there is something to be said in defense of aggregate-based approaches to questions of obligation arising out of corporate activity. While an entity theory can facilitate assignment of responsibility for harmful effects as an analytical matter, it will not necessarily put the burdens where they belong. Criminal fines or civil damages liability, for example, will deplete the corporate treasury and thereby reduce the value of the shareholders' interest in the corporation. Yet the shareholders themselves, ordinarily uninvolved in the decisions for which liability has been imposed, would seem less deserving of punishment than would the managers who actually made the decisions at issue. An aggregate analysis, which discards the notion of the corporate entity as actor, could more readily facilitate assigning responsibility to the real culprits.

This last point does not necessarily lend support to a communitarian understanding of obligation because there is still the problem, already discussed, of bringing the victims of corporate wrong-doing into the corporate community. Perhaps, then, the real challenge is to discard both entity- and aggregate-based arguments for responsibility and turn attention instead to the individual actors and the question of their responsibility, without regard to anyone's status in relation to a corporation. If one does this, the boundary between the corporation – entity or aggregate – and the rest of society dissolves completely and we are left with the stark question of the obligations of individuals to each other. Ironically, the contractarians' denial of a distinction between intra- and extra-corporate interactions in favor of a model that sees all interpersonal relations as occurring in a single, all-encompassing market may point in the right direction. But theirs is only a first step. It is also necessary to accept the possibility that personal obligation can arise independently of consent.

IX. CONCLUSION

The long-standing controversy over the rights of corporate shareholders in relation to nonshareholders involved in or affected by corporate activity is no closer to resolution today than it ever has been. At times, the argument has assumed that the corporation is an entity separate from its constituents, and disagreement has centered on the question of what kind of person the corporation is. More recently, the debate has been conducted in terms of aggregate theories of corporate personhood, forsaking entity notions in the name of realism. The point of these arguments over characterization has been to support various normative claims, but the normative issues remain unresolved because the questions of characterization necessarily remain controversial. So, just as it is possible to argue over whether the corporation is really an entity or, instead, is just an aggregation, acceptance of one position or the other settles nothing because there is no agreement over what kind of person the entity is, any more than there is consensus over how to think of the relationships among the natural persons who have associated with each in the name of a corporation.

It would be interesting to know whether this form of argument, according to which normative conclusions are supposed to follow from an ostensibly disinterested characterization of a group or activity as one thing or another, can be found in other areas of the law and how prevalent it may be. If it is to be found outside of corporate law, it seems unlikely that it would be any more determinate in those contexts, because characterization of human activity is not a matter of objectively true assertions about real phenomena. Human beings are too complex in their motivations, and the nature of their relations to each other is too mysterious to lend itself to simple, reductive assertions about things as they are.

At least in the area of corporate law, efforts to derive "ought" from "is" have not succeeded. Indeed, such intellectual exercises may have stood in the way of careful examination of the truly urgent questions raised by corporate activity. Analysis of difficult questions of social policy have probably been hindered by assumptions about the distinctiveness of activity in the corporate form, whether the corporation is thought to be an entity or instead is an aggregation of people distinct from the rest of society. Perhaps we would be better off if we concentrated instead on the problem of personal obligation. That problem, of course, is no easy matter, and closure is no more likely to be reached. Nevertheless, at least we will have jettisoned our obsession with the endlessly fascinating but inevitably indeterminate question of corporate personhood. Then we can proceed with an appropriately focused debate.