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CORPORATE RIGHTS AND MORAL THEORY: THE NEED FOR A COHERENT THEORETICAL JUSTIFICATION OF CORPORATE RIGHTS

RYNE T. DUFFY*

ABSTRACT

Corporations are the primary engine of economic activity in the United States and they are provided with legal rights primarily to facilitate their productive activity. As economic actors, corporations must inevitably interact with other corporations and natural persons within the legal system. Corporations must be allowed to invoke legal rights in order to operate within the American legal system. Traditionally, the American legal system has classified corporations as legal "persons" to allow them to seamlessly integrate into the existing legal system. This Note tackles the question of corporate personhood utilizing an approach inspired by social contract theory and seeks to answer the fundamental question of what kind of person a corporation ought to be considered. From this initial conclusion, this Note will address the legal implications of the chosen rights justifying theory and explore alternate options.

INTRODUCTION

The creation and maintenance of American law has always involved careful decisions about how to balance the competing interests of individuals, private organizations, and government bodies. We balance individual rights with restrictions on individuals, in the form of legal obligations, to enhance broader social cohesion. We assign rights to persons, not because they are earned, but because they are deserved. Social contract theory has grown alongside the American legal tradition and has had a strong influence on how Americans conceive of personhood, rights, and the role of the state in social ordering. Social contract theory posits that individuals consent to a government and willingly exchange a portion of their natural rights in exchange for the greater predictability and security of a centralized State. Social contract theory endeavors to describe the motivations for entering into this sort of an agreement and seeks to

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understand its terms—namely what rights have been preserved for natural persons and what rights have been allocated to the government.

While natural persons are the *central* actors in our society, even a cursory examination of the news will reveal that they are not the *only* actors. We live in a world of formal and informal organizations. These organizations consist of groups of natural persons who coalesce around goals which might be unattainable for a single individual. The clearest distinction between formal and informal organizations is how the law interprets their actions. Formal organizations—such as governments, non-profits, clubs, political parties, and corporations—are regarded by the law as the "actors."[1] These formal organizations are considered by the law to act on their own behalf—when a corporation purchases property, it does so in its own name. As such, formal organizations are assigned a variety of legal rights and obligations to ensure that they can operate within our existing rights-based legal structure. This Note will focus on a specific sub-type of formal organization: the business corporation. Corporations, like many other formal organizations, are analogized to "persons" under federal law.[2] This analogy was largely a product of history.[3] Following in the English tradition, early American corporations could only be created by a specific act of the state legislature.[4] Early corporations were perceived as agents acting in the public interest rather than as bastions of private enterprise.[5] This perception changed as corporations proliferated during the industrial revolution.[6] The American public, as well as legislators on the state and federal level, began to view corporations as fundamentally private entities.[7] As these newly conceived private corporations grew in size, legal scholars worried about how the law should classify corporations to protect natural persons from harm while preserving the ability of the corporation to conduct its business.[8] Legal theorists of the industrial era struggled to adapt the existing legal system to a new kind of private power—the modern business

1. John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 THE MONIST 488, 513 (1970).

2. *See* 1 U.S.C. § 1 ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

3. *See generally* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

4. ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 48-50 (2018).

5. Mark, *supra* note 3, at 1444-45.

6. *Id.* at 1445.

7. *Id.*

8 *Id.* ("With characteristics resembling those of individuals as well as governments, the large corporation did not fit well into a legal system designed to mediate conflicts between individuals and between individuals and government.").

corporation.[9] The American legal system dealt with the emergence of the private corporation by simply including corporations within the legal definition of personhood without critically examining the differences between corporations and natural persons.[10] Nobody actually believed that corporations were natural persons. Instead, courts and legislators extended the legal concept of personhood in order to assign rights—and their corresponding legal obligations—to corporations, enabling them to effectively interact with other organizations and natural persons within the existing legal system. This Note evaluates the three primary theoretical justifications for providing individual rights to corporations and compares these theories to the justifications for providing rights to natural persons.

The provision of individual rights, as a matter of political theory, is an intentional allocation of legal power. The law expects that natural persons are capable, conscious individuals and presumes that they will exercise their natural faculties when using their rights.[11] This Note begins with the premise that the U.S. Constitution, when drafted, was designed only to provide individual rights to natural persons and that these rights were specifically allocated to individuals as a means of restricting the power of the government. This premise implies that the particular individual rights assigned under the U.S. Constitution were not intended to be used by corporations.

Corporations are fundamentally different than natural persons. They differ in their decision-making, actions, and priorities. Business corporations, generally speaking, exist to make money for their owners. The actions of a corporation are controlled by a group of individuals known as a board of directors who are elected by shareholders.[12] Directors are supposed to pursue the interests of shareholders and to promote the wellbeing and financial success of a corporation.

Because corporations are motivated by a completely different set of incentives than individuals, we cannot expect them to act the same way that individuals would in any given situation. This idea—that corporations and individuals will exercise their legal rights differently due to divergent incentives—suggests that the individual rights allocated to natural persons under the U.S. Constitution may not be particularly appropriate for corporations. If we rely on a social contract-based understanding of the Constitution, this difference in motivations can be understood as disturbing

9. *Id.*
10. *See* 1 U.S.C. § 1.
11. *See infra* Section I (C).
12. James Chen, *Board of Directors (B of D)*, INVESTOPEDIA (Mar. 21, 2019, 1:05PM), https://www.investopedia.com/terms/b/boardofdirectors.asp [https://perma.cc/LG5P-GTAW]

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the Constitutional balance of individual rights and government power. If we cannot expect corporations to use their rights to uphold the balance of public and private power struck by the Constitution, then we should critically evaluate what rights we choose to give corporations. This Note will not argue for the abolishment of corporate rights. Instead, the core argument of this Note is that corporations should only be provided with rights which they are capable of exercising in the same ways that natural persons would.

Section I will explore the concept of legal rights and the dominant theoretical justifications for providing rights to natural persons in three sub-parts. Subsection A introduces a descriptive framework to understand the nature of legal rights. Subsection B presents two dominant strains of social contract theory, and Subsection C examines these theories and selected examples from modern common law doctrines to determine if there is an implied relationship between the provision of individual rights and the consciousness of the rights-holder. Section I ultimately seeks to introduce a basic social contractarian understanding of legal rights and to identify situations where the law treats consciousness as a necessary pre-condition for the exercise of these legal rights.

Section II presents the structure of a modern corporation and suggests important distinctions between individual and corporate behavior. Next, Section III will present the three dominant philosophical justifications for the provision of corporate rights and explore the doctrinal implications of each theory. Finally, Section IV will compare the theoretical justifications for providing corporate rights with the theoretical justifications for providing individuals with rights.

I. INDIVIDUAL RIGHTS, SOCIAL CONTRACT THEORIES, AND TRENDS IN AMERICAN LAW

A. Individual Rights Defined

This Note will rely on the analytical framework developed by Professor Wesley Hohfeld to inform the forthcoming discussion on individual rights and their corporate counterparts. Hohfeld offered a functional definition of rights that is logically consistent, analytically clear, and practically useful.[13] Hohfeld's theory rests on his understanding that rights can only logically

13. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

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refer to the legal relationships among persons to the exclusion of rights against things.[14]

Hohfeld identified eight core categories that describe the legal relations among persons which we colloquially understand to be rights: rights, privileges, powers, immunities, no-rights, duties, disabilities, and liabilities.[15] Hohfeld defines a right as a legally enforceable claim.[16] This definition limits the scope of pure rights to situations where an individual may legitimately invoke the power of the law to compel or enjoin the conduct of another. The Hohfeldian notion of rights corresponds to his understanding of legal duties.[17] Under this framework, whenever a right exists there is also a correlating duty.[18] If one person compels another by invoking the law, the party being compelled has a legal obligation—a Hohfeldian duty—to comply.[19]

In contrast, a person with a legal privilege is entitled to engage or abstain from a specified course of conduct. The Hohfeldian correlative of a legal privilege is called a "no-right."[20] When no-right exists, the person with no-right lacks legal authority to compel a course of conduct by the privileged party.

"Power" in the Hohfeldian scheme is the ability to rightfully and unilaterally alter a legal relationship.[21] Under the law of contracts, a party who is presented with an offer has the power to accept the offer and thereby unilaterally change the legal relationship between herself and the offeror.[22] Acceptance of the offer saddles each party with contractual duties and fundamentally limits the autonomy of each actor vis-à-vis each other. Power correlates with legal disability. Legal are legal relationships that cannot be altered by the parties subject to them. For example, under the law of agency, a disclaimer that no agency is created by a certain course of conduct will not serve to disprove an agency relationship if the requisite elements are met.[23]

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14. *Id.* at 721-22.
15. Hohfeld, *supra* note 13, at 710.
16. *Id.* at 718.
17. *Id.* at 710.
18. *Id.*
19. Hohfeld, *supra* note 13, at 710.
20. *Id.*
21. *Id.* at 746.
22. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979).
23. *See* RESTATEMENT (SECOND) OF AGENCY § 1 cmt. b (1958)

> Agency is a legal concept which depends upon the existence of required factual elements [....] The relation which the law calls agency does not depend upon the intent of the parties to create it, nor their belief that they have done so. To constitute the relation, there must be an agreement, but not necessarily a contract, between the parties; if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists

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The final family of rights identified by Hohfeld are immunities.[24] An immunity protects the holder from certain types of conduct by others.[25] Individuals with immunities have "negative rights." They may demand to not be treated in certain ways or to not be subjected to certain actions, and they have a Hohfeldian right to invoke government power to prevent or remedy a violation of an immunity. Intuitively, Hohfeldian immunities correlate with liabilities. Whenever an immunity is violated, the party who has violated the immunity is liable to its holder.

For simplicity's sake, immunities, rights, and privileges will all be referred to as "rights" or individual rights in this Note. The final Hohfeldian category of a right—the concept of a legal power—will be omitted from this discussion because the notion of Hohfeldian power is best suited to analyzing legal relations between private parties and is generally less applicable to the relationship between private parties and the government.[26] Throughout this work, the correlative notions of each sub-type of right will collectively be referred to as "legal obligations."

B. Social Contract Theories

American legal and political discourse has historically relied on several enlightenment-era rights theories. This Note will explore the contributions of two of the most influential thinkers of the enlightenment: John Locke and Jean Jacques Rousseau.

Both Locke and Rousseau are known as "social contract theorists."[27] Social contract theory posits that the function of a legitimate government is to protect pre-determined individual rights by creating legal obligations to refrain from certain behaviors.[28] Social contract theory treats governments as artificial creations of human societies whose only function is to perform according to the voluntary agreement to which they owe their creation. Governments define and protect individual rights, and citizens collectively agree to refrain from behavior that would invade upon other people's rights

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although the parties did not call it agency and did not intend the legal consequences of the relation to follow.

24. Hohfeld, *supra* note 13, at 710.

25. *Id.* at 746-47.

26. Hohfeld, *supra* note 13, at 746-66 (discussing legal power in terms of property disputes among individuals).

27. Fred D'Agostino, et al., *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA PHIL., (Edward N. Zalta ed. 2017) https://plato.stanford.edu/archives/win2017/entries/contractarianism-contemporary [https://perma.cc/83PX-S6S7]

28. *Id.* at § 1.1.

or otherwise contribute to social destabilization.[29] Traditional social contract theorists generally understood the notion of personhood to refer only to natural persons. Locke and Rousseau agreed with the notion that natural persons created "civil society" by relinquishing the privilege to do certain things, which could be harmful to the rights of others, in exchange for assurances that the state would protect socially sanctioned behavior. However, each theorist had his own distinct conception about what motivated this exchange and his own interpretation of the value of such a social arrangement. Their writings on social contract theory still inform our conceptions of why rights are provided and serve to justify the imposition of legal duties for both individuals and corporations.

John Locke's works were widely read in the American Colonies during the pre-revolutionary period and are still taught as a core pillar of American rights theory.[30] Locke's *Second Treatise on Government* has been particularly influential in American philosophy, both at the time of the founding and today.[31] Locke's rights theory begins with an acknowledgement that in a "state of nature" humans each possess an equal right to life, liberty, and property.[32] These rights are "natural rights" as they exist in the absence of any form of government. In Locke's state of nature, these basic rights are accompanied by obligations to refrain from invading upon the natural rights of another person.[33] In the Lockean state of nature, the enforcement of these duties is left to each individual.[34] This state of nature gives way to a legitimate civil society when each individual "forgoes his executive power of the law of nature, giving it over to the public."[35] Locke's executive power refers to the legal right of an individual in the state of nature to enforce their natural rights directly against another. This ability to enforce a right privately—without any intermediary—is itself a key natural right. However, Locke suggests that humans are willing to forego the right to enforce natural law privately in order to gain the practical ability to exercise their remaining rights.[36]

Locke's theory relies on three assumptions. First, that humans in the state of nature are conscious of their obligations to enforce the natural law

29. *Id.*

30. *See generally* Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CALIF. L. REV. 52 (1985).

31. *Id.*

32. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 38-40, (Johnathan Bennett ed. 2008).

33. *Id.* at 4.

34. *Id.* at 29.

35. *Id.*

36. LOCKE, *supra* note 32, at 40.

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but aware that decentralized justice systems lack predictability.[37] Locke notes that humans are self-aware, that we are primarily self-interested, and that we expect others to be similarly biased.[38] Locke finally suggests that individuals are willing to relinquish a portion of their rights in a state of nature to protect their physical beings. Locke posits that without a government "[p]eople who have committed crimes will usually, if they can, resort to force to retain the benefits of their crime."[39] He recognizes that "such resistance often makes the punishment dangerous, even destructive, to those who try to inflict it."[40]

Locke's theory is firmly couched in his understanding of individual behavior, but a great deal of his reasoning applies with equal force to corporate actors. Corporations rely almost entirely on the enforcement of contractual obligations for their survival. The very existence of a corporation can be analogized to a contract with the state, although separate from the broader social contract discussed by Locke.[41] Corporations rely on the stability afforded by a predictable body of law administered by an impartial government to the same extent—if not more so—than individuals.

To summarize, John Locke's vein of social contract theory emphasizes that humans voluntarily form political societies as a conscious mechanism to ensure that each individual's security—namely their body and physical property—are protected by a predictable and impartial system of law. His theory emphasizes the importance of individual and group consciousness in the formation of rights-based political societies.

Jean Jacques Rousseau's theory suggests that human consciousness was a primary motivation for the organization of early political units.[42] His premise is that humans, in their natural state, had the ability to be self-

37. *Id.*

> The state of nature lacks an established, settled, known law, received and accepted by common consent as the standard of right and wrong and as the common measure to decide all controversies. What about the law of nature? Well, it is plain and intelligible to all reasonable creatures; but men are biased by self-interest, as well as ignorant about the law of nature because they don't study it; and so they aren't apt to accept it as a law that will bind them if it is applied to their particular cases.

38. *Id.* ("[T]he law of nature…is plain and intelligible to all reasonable creatures; but men are biased by self-interest…they aren't apt to accept [the law of nature] as a law that will bind them if it is applied to their particular cases." (alterations added)).

39. *Id.* (emphasis removed).

40. *Id.*

41. For a thorough discussion of the contractual theory of corporate organization see Steven N. S. Cheung, *The Contractual Nature of the Firm*, 26 J. L. & ECON. 1 (1983). *See also* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

42. JEAN JACQUES ROUSSEAU, A DISCOURSE ON A SUBJECT PROPOSED BY THE ACADEMY OF DIJON: WHAT IS THE ORIGIN OF INEQUALITY AMONG MEN, AND IS IT AUTHORISED BY NATURAL LAW?, 13-14 (G.D.H. Cole trans., n.p. 1754) [hereinafter ORIGINS].

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sufficient animals.[43] However, as consciousness developed, humans could conceive of, and therefore desire, specific physical objects.[44] As humans became more aware of their abilities to alter the natural world, they came to desire products which they could not produce themselves.[45] In order to obtain the fruits of specialization, humans were forced to depend on each other and to formalize a system of exchange to fulfill their conscious wants.[46] This newfound interdependency was accompanied by a desire for protection. Individuals, particularly those with the most material goods to lose, craved stability in their dealings with each other and pursued a system of centralized government to protect individuals from violence.[47] Rousseau's theory is especially applicable to corporations, which tend to concentrate wealth under the control of relatively few individuals who might not otherwise be able to protect their property.

Despite the differences in their reasoning, Rousseau and Locke provide similar analyses of the root causes of rights-oriented political organizations. Rousseau's theory emphasizes human consciousness as a primary motivating factor for the development of governments. His explanation for the development of societies centers on the need for property rights, which arose after humans began to conceive of material wants and engaged in the production of material goods. Rousseau placed great weight on the notion that humans create governments to incentivize manufacturing and to protect individuals' rights to property. Locke's writings focused on the conscious motivations of individuals in forming voluntary governments. Locke stressed that a state apparatus was necessary to protect individuals from the inconsistencies of privately enforced laws while preserving some degree of individual rights.

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43. *Id.* at 14.

44. *Id.*

> It is by the activity of our passions, that our reason improves: we covet knowledge merely because we covet enjoyment, and it is impossible to conceive why a man exempt from fears and desires should take the trouble to reason. The passions, in their turn, owe their origin to our wants, and their increase to our progress in science; for we cannot desire or fear anything, but in consequence of the ideas we have of it.

Id. at 15.

45. See *id.*

46. *Id.* at 29.

> On the other hand, free and independent as men were before, they were now, in consequence of a multiplicity of new wants, brought into subjection, as it were, to all nature, and particularly to one another; and each became in some degree a slave even in becoming the master of other men: if rich, they stood in need of the services of others; if poor, of their assistance; and even a middle condition did not enable them to do without one another.

47. *Id.* at 26-27.

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The writings of Locke and Rousseau are certainly timeless, but both authors died before the establishment of the United States. In order to build a better understanding of the justifications for individual rights in the American system, we must now turn to examples from contemporary voices and the law itself to elucidate exactly why we give individuals rights and what we expect those individuals to do with them.

C. Philosophical Personhood: Examples in the Law

Our system of law harbors an implicit expectation that individuals will understand their physical surroundings,[48] will be aware of themselves, will control their physical actions,[49] will predict the likely effects of their actions on inanimate objects and other people,[50] and will internalize and act according to a code of social norms collectively known as morality. We exercise consciousness constantly and expect others to do so as well.

Both the criminal law and the law of negligence rely on notions of individual consciousness.[51] These common law doctrines form the context within which rights are exercised and are essential to understanding why individuals are provided with rights and the expectations for how those rights will be used. Individuals use their rights as a means to pursue and secure personal satisfaction. As a society we feel comfortable affording these rights to individuals because we expect them to employ their rights within the bounds of morality. We can rely on individuals, for the most part, to utilize their rights responsibly because we assume that each individual will possess—and exercise—the ability to consider the possibility of harm posed by their actions and seek to avoid harm to others.[52] This theory assumes that individuals possess both autonomy and empathy and that they can employ these dual facilities to act as moral agents when faced with

48. RESTATEMENT (SECOND) OF TORTS § 290 (AM. LAW INST. 1965).

49. *Id.* at § 2 cmt. a.

50. *Id.* at § 282 cmt. c (AM. LAW INST. 1965).

51. *See id.* at § 2, 282, 290 (AM. LAW INST. 1965) and accompanying text; *See also* 21 AM. JUR. 2D *Criminal Law* § 33 (2019) and accompanying text.

52. 21 AM. JUR. 2D *Criminal Law* § 33 (2019) (footnotes omitted) (alterations added)

> A basic postulate of criminal law is a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong. A verdict of guilty is dependent upon the concept of responsibility, and focuses on the punishment of an individual for his vicious will—his free choice to do wrong. To prove that a defendant had the mental capacity to commit the crime, the State must show that he or she knew right from wrong under the test for determining whether a person was sane at the time he or she committed the crime. Capacity to commit a crime is therefore an essential requisite to criminal responsibility. A person lacking the mental capacity to commit a crime cannot be held criminally responsible for his or her actions.

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decisions. The moral agency of individuals—their ability to consider the consequences of their actions and to understand how their community is likely to react to those actions—is an essential justification for the assignment of individual rights to natural persons.

The law generally presumes that individuals operate on a fairly level playing field in terms of their cognitive abilities. Individuals are generally allowed to act as they please, subject to a legal obligation to avoid causing harm to others.[53] The common law expects that individuals will take appropriate precautions before acting in order to avoid subjecting others to unreasonable risks of harm.[54] Under the common law doctrine of negligence, an individual's actions are compared with those of a hypothetical "reasonable person," under the same circumstances, to determine if the individual has violated a legal obligation owed to an injured party. The Second Restatement of Torts suggests that an

> actor is required to recognize that his conduct involves a risk of causing an invasion of another's interest if a reasonable man would do so while exercising…such attention, perception of the circumstances, memory, knowledge of other pertinent matters, intelligence, and judgment as a reasonable man would . . . .[55]

While the Second Restatement of Torts is not law, it is a reliable catalogue of the principles to which common law judges generally adhere.[56] The standard imposed by section 289 suggests an implicit expectation that individuals are capable of perceiving their immediate circumstances, understanding the rights of other people around them, and predicting that their actions may affect others.[57] Most importantly, the restatement and generally the law of negligence assume that individuals can consciously alter their course of conduct by controlling their physical behavior.[58] The common law's reasonable person standard is an important indication of the degree of consciousness which our legal system presumes individuals

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53. RESTATEMENT (SECOND) OF TORTS, *supra* note 48, at § 282.

54. "Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk." *Id.*, at § 283 cmt. c.

55. *Id.* at § 289.

56. Catherine Biondo, *Secondary Sources: ALRs, Encyclopedias, Law Reviews, Restatements, & Treatises*, HARVARD LAW SCHOOL LIBRARY (Feb. 4, 2019), https://guides.library.harvard.edu/c.php?g=309942&p=2070280 [https://perma.cc/5SEJ-YMGD] ("Restatements are not primary law. Due to the prestige of the ALI and its painstaking drafting process, however, they are considered persuasive authority by many courts. The most heavily cited Restatements are the Restatement of Torts and the Restatement of Contracts.").

57. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 41, at § 282.

58. *Id.* at § 291 cmt. d (explaining the method by which the law expects an individual to weigh the probable outcomes of their actions).

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possess. The law of negligence provides an excellent outline of the mental faculties that each individual is presumed to have. In contrast, the criminal law operationalizes our understanding of the reasonable person by providing concrete examples of behavior that the law classifies as categorically prohibited.

Criminal law is the largest body of legal obligations in the American system. In theory, the criminal law functions as a moral barometer, translating general moral principles into specific prohibitions. The most basic definition of a crime is a prohibited act performed with a culpable mental state.[59] The requirement of a culpable mental state in criminal law is fundamentally concerned with the moral decision making of the actor.[60] The criminal law creates a legal obligation to exercise moral judgements and punishes those who fail to consider the moral implications of their actions.

When individuals do not possess the conscious faculties to fully understand the world around them, they can legitimately be stripped of some of their legal rights. For example, every state has some system of guardianship.[61] Guardianship is a legal arrangement where a court may, on petition from an interested party, appoint a guardian to oversee the personal life of an incapacitated person, known as a ward.[62] Wards are generally older people who, by reason of their age or a serious medical condition, cannot protect themselves against abuse, neglect, and predation.[63] When a guardian is appointed, their ward "loses basic rights, such as the right to vote, sign contracts, buy or sell real estate, marry or divorce, or make decisions about medical procedures."[64] The fundamental premise of guardianship is that when a ward lacks the ability to exercise their consciousness fully, they should not be entrusted with the same legal rights. The practice of guardianship demonstrates that the law expects legal rights to be exercised consciously and that those lacking consciousness cannot avail themselves of legal rights. When individuals are unable to understand the moral implications of their actions, they are relieved of some of their legal obligations. The diminished capacity and insanity defenses in criminal law

59. 21 AM. JUR. 2D *Criminal Law* § 4 (2019).

60. Elonis v. United States, 135 S. Ct. 2001, 2009 (2015) (*quoting* Morissette v. United States, 342 U.S. 246, 252 (1952)) ("[T]he basic principle [is] that 'wrongdoing must be conscious to be criminal.'").

61. NATIONAL COUNCIL ON DISABILITY, (NCD), BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 31 (2018) https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives [https://perma.cc/DFM5-VVSB].

62. *Id.* at 30.

63. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 5 (2004).

64. *Id.*

provide clear examples. The diminished capacity defense allows criminal defendants to offer evidence showing that they were incapable of having a culpable mental state during the commission of an act by virtue of mental handicaps, trauma, or intoxication.[65] The diminished capacity defense essentially claims that a person was incapable of either predicting the likely result of their actions or incapable of fully grasping the moral significance of those acts.[66] The diminished capacity defense is a partial defense, and generally will only serve to reduce the severity of the offense charged, or in the federal system, to reduce the defendant's recommended sentence.[67] Insanity takes this line of reasoning even further and provides a complete defense, meaning the absolution of all criminal liability for the accused, if that person "suffered from a mental disease or defect which prevented him from distinguishing between right and wrong at the time he committed the conduct in question."[68] The insanity defense is squarely aimed at relieving individuals—who are incapable of understanding the moral implications of their actions—from the legal obligation to conform to the criminal law. While a successful insanity defense is rare, the theory underlying the defense remains potent: individuals who cannot exercise moral judgement should not be subject to the same legal obligations or possess the same legal rights as those who can.

If natural persons are regularly stripped of individual rights and legal obligations, which the law determines that they are unable to exercise, corporations ought to be similarly limited. Corporations should only be provided with rights that we trust them to use in conformity with our social conception of morality. If corporations cannot be expected to act as moral agents, then it would be dangerous to entrust them with the wide latitude for autonomy that our society provides to moral agents.

II. CORPORATIONS

Broadly speaking, business corporations are legal entities created by individuals to accumulate property and engage in productive activity. The corporate law has long recognized that the primary purpose of the business corporation is to maximize the profits for shareholders using an appropriate degree of business judgement.[69] Corporate literature refers to this concept

65. 21 AM. JUR. 2D *Criminal Law* § 36 (2019).
66. *Id.*
67. *Id.*
68. 21 AM. JUR. 2D *Criminal Law* § 43 (2019).
69. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919).

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be

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as the shareholder wealth maximization norm, and corporate scholars argue this norm is particularly important in the American economic system. [70] Modern society relies almost exclusively on corporations to produce necessary and desirable goods and services.[71]

The modern corporation is characterized by six key features: formal creation, the separation of ownership and control, limited liability for shareholders, freely alienable ownership interests, an indefinite duration, and legal personality.[72] A corporation is a specific type of legal entity and must be created according to the incorporation procedures of the state in which it resides.[73] The feature that historically distinguished corporations from other types of business organizations is limited liability for shareholders.[74] In sole proprietorships and partnerships, the people who own the business are liable for the debts of the business. Limited liability refers to the concept that a shareholder of a corporation cannot lose any more money than the value of the shares they own.[75] Corporations exhibit a separation of ownership and control.[76] The corporation and all of its assets are theoretically owned by the shareholders. However, the conduct of a modern corporation is controlled almost entirely by a body known as the board of directors and the managers that the board hires.[77]

The shares of a corporation are freely alienable, meaning that the shareholder generally can, at the time of their choice, sell any shares that they own without the consent of the corporation.[78] This system of dispersed ownership and alienability allows corporations to exist indefinitely—beyond the life of any natural person. Once a corporation is chartered, its existence continues indefinitely until the shareholders choose to liquidate the corporation or fail to pay the requisite fees to the state, allowing their charter to lapse.[79] Bestowing legal personality on the corporation entrusts

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exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Cf. Lyman Johnson & David Millon, *Corporate Law after Hobby Lobby*, 70 THE BUS. LAW. 1 (2014).

70. O. Scott Stovall et al., *Corporate Governance, Internal Decision Making, and the Invisible Hand*, 51 J. BUS. ETHICS 221 (2004); *See generally* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001).

71. Gomory, Raloh, Sylla, Richard, *The American Corporation*, 142 DAEDALUS 101, 112 (2013).

72. STEPHEN M. BAINBRIDGE, CORPORATE LAW 1 (3d ed. 2015).

73. *Id.*

74. *Id.* at 7.

75. *Id.*

76. BAINBRIDGE, *supra* note 72, at 4-5.

77. *Id.*

78. *Id.* at 7.

79. *Id.* at 6-7.

the organization with the ability to own property, sue in its own name, and, to some extent, to invoke individual rights.[80]

The six traits outlined above each contribute to corporate behavior. Limited liability encourages potential shareholders to "buy in" to a corporation by limiting their exposure in the event that the venture fails. The separation of ownership and control allows individuals, who may not have the skills to pursue a business on their own, to reap the rewards of a successful corporation with minimal effort. Additionally, corporations have a single goal, profit maximization. The separation of ownership and control in the corporate context facilitates this end by instituting small, efficient boards of directors in order to make quick and professionally considered decisions. Freely alienable ownership interests allow corporations to gather capital by selling shares—significantly lessening the amount of money that any particular individual would need to pursue a business. Alienable ownership interests allow shareholders to come and go as they please. If a shareholder is dissatisfied with the corporation, or simply wants their money back, it is relatively easy to sell any shares on a stock market. The indefinite duration of corporations eliminates the need to dissolve an organization every time its leadership changes, making corporations extremely stable and potentially quite profitable. Finally, and most consequentially, the legal personhood of corporations allows the organization to—in the eyes of the law—act independently from its owners. Personhood allows the corporation to interact with our legal system as an independent entity—exercising its own rights and assuming liability for its own obligations.

These structural features of the corporation contribute heavily to the process of corporate decision making. The most prominent descriptive model of corporate behavior is neoclassical economics.[81] Neoclassical economic theorists often rely on the work of Adam Smith, an eighteenth-century political economist, best known for his book *The Wealth of Nations*.[82]

Neoclassical economists stress that the shareholder wealth maximization norm is the optimal theoretical objective of corporate behavior because individual corporations acting solely in their own interests create the largest possible net benefit to society.[83] This theory explicitly relies on the separation of ownership and control to justify a normative theory of corporate behavior where a corporation acts to benefit the tiny fraction of the population who are shareholders. Smith, unlike many modern

80. BAINBRIDGE, *supra* note 72, at 3-4.
81. Stovall, *supra* note 70, at 222.
82. *Id. See* ADAM SMITH, THE WEALTH OF NATIONS (1776).
83. Stovall, *supra* note 70, at 222-23.

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neoclassicists, recognized that an unfettered devotion to the principle of wealth maximization would result in the very social instability that the law wishes to preserve.[84] Smith recognized that individual cognition and moral agency were essential elements of social cohesion.[85] Because corporations are only concerned with making money, they cannot be expected to consider and assess the moral implications of their actions. Corporations act differently than natural persons because their motives are entirely controlled by others, whereas individuals are presumed to operate according to purely internal decisions.[86] The law ought to accept this fundamental premise of organizational theory and adapt its provision of corporate rights to conform with the largely amoral decision making structure of a corporation.

III. CORPORATE PERSONHOOD THEORIES

For most of American legal history, corporations have been afforded rights under the law.[87, 88] Corporations have a right to free speech,[89] freedom of religion,[90] freedom from unreasonable searches and seizures,[91] as well as the right to equal protection under the law,[92] and the right to due process of law.[93]

There are three primary theories of corporate personhood: the artificial-dependent theory, the independent personhood theory, and the aggregate

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84. "[V]irtues such as justice and beneficence hold self-interest in check in order to maintain and enhance social welfare. Self-interest alone, without the presence of justice, provides an untenable condition, one in which society cannot sustain itself." *Id.* at 226-23 (citing ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Edinburgh, 1790), https://www.econlib.org/library/Smith/smMS.html?chapter_num=1#book-reader).1759 [https://perma.cc/D9UL-7CW5]

85. *Id*. at 225

> For Smith, this original passion or latent capacity of sympathy allows one to build a sense of morality, what we might call a moral or ethical code. Smith maintains that this innate sense of being able to see others' interests allows individuals, and ultimately societies, to develop concepts such as benevolence, altruism, and even justice.

86. *See* Ladd, *supra* note 1, at 494-95.

87. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819) (holding that private corporations are the holders of certain constitutional rights); *cf.* Bank of the United States v. Deveaux, 9 U.S. 61, 86-87 (1809) (holding that a corporation is not a citizen under the constitution and denying the right of corporations to invoke diversity jurisdiction in the federal courts).

88. KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO: AND THEY SHOULD ACT LIKE IT 3 (2018).

89. *Id.* at 13.

90. *Id.* at 57-58.

91. *Id.* at 77-79.

92. GREENFIELD, *supra* note 88, at 90.

93. Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PENN L. REV. 95, 133 (2014).

theory of corporate rights.[94] The theories offer divergent perspectives on the nature of the corporation and the justifications for giving corporations rights, but they all seek to fit corporations into the existing rights-based American legal system.[95]

The artificial existence theory posits that corporations exist solely as legal entities—fictions created by the law to facilitate the integration of corporations into the existing rights-based structure of American law. Under this theory, the law does not use the term "personhood" in a descriptive sense. Rather, corporations are referred to as persons to provide a mechanism for providing the limited legal rights and obligations which society has determined to be necessary for corporations to be productive.[96]

The independent personhood theory arose in the late nineteenth century as the legal realist response to an increased interest in the regulation of large corporations.[97] At this time, the United States was experiencing a period of rapid economic development while continuing to grapple with how to treat corporate entities.[98] Shareholders were , by this time, more dispersed than ever before, and it was becoming clear that corporations were shifting away from "ownership control" and towards "managerial control."[99] Independent personhood theorists posited that the corporation, distinct from its individual owners, possessed the requisite autonomy to consider its actions and to act as an independent moral agent.

The aggregate, or associational, theory of the corporation posits that corporations are nothing more than products of both contractual agreements between the government and natural persons and agreements between individual natural persons to conduct a joint business. Corporations are personified as an administrative convenience in order to allow natural persons, who are actually acting on the corporation's behalf, to signal to the outside world that their particular courses of conduct can be attributed to the

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94. Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 106-12 (2009); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to A Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 63 (2005).

> Three distinct metaphors of the corporate entity are discussed: the artificial entity theory, the aggregate entity theory, and the real entity theory. . . . The Court has adopted all three metaphors in addressing the constitutional rights of corporations, and all three metaphors (as well as their variants) can be seen in modern corporate constitutional jurisprudence.

95. Krannich, *supra* note 94, at 62.
96. Ripken, *supra* note 94, at 106.
97. Krannich, *supra* note 94, at 82-83.
98. *Id.*
99. *Id.*

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corporation. Under the aggregate theory, a corporation is nothing more than the product of these contractual agreements.[100]

A. Artificial-Dependent Existence Theory

Under the artificial-dependent existence theory, we give corporations rights because it is a convenient way to insert the corporate form into our pre-existing rights system.[101] Corporations, under this theory, are considered to be both fictional and functional entities. The corporate form is a legal fiction, a tool to help natural persons engage in productive activity with the protections of limited liability and access to capital markets. The artificial-dependent existence theory posits that corporations are "artificial," in the sense that they are a product of human creation, and that corporations are "dependent" because their very existence depends on recognition from the state.[102,103] The artificial theory also posits that corporations depend on legislative action for their creation.[104]

The artificial-dependent theory has its roots in the historical conception of corporations as quasi-public entities.[105] This theory was derived from the practices of early Roman and British companies who were chartered by the state.[106] Corporations were approved by legislators who had to be convinced of a public need for the operation of that particular corporation.[107] This method of specific, rather than general, incorporation was intended to create corporations designed to provide direct public benefits. Public corporations aggregated capital to meet public needs that could not be adequately be fulfilled by individual actors or small joint enterprises.[108] Because corporations created by specific incorporation were, in effect, negotiating with the legislature for their existence, it makes sense that the legislature should be free to negotiate the "terms" of the agreement—the rights and legal obligations of the corporation.[109]

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100. Careful readers will note that the aggregate theory of corporate personhood applies the contractual theory of corporate organization discussed in Cheung, *supra* note 41 and accompanying text.

101. Ripken, *supra* note 94, at 106.

102. *Id.*

103. WINKLER, *supra* note 4, at 49-52.

104. *Id.*

105. *Id.* at 48.

106. *Id.* at 44-48

107. *Id.* at 48

108. *Id.* (stating that English law would only allow the creation of corporations if the king was sufficiently satisfied that the corporation's charter was directed to the public interest).

109. This perspective on incorporation could also be accurately described as a contractual theory of the firm. However, unlike the contractual theory of the firm described in Cheung, *supra* note 41, this contractual theory concerns a contract between private parties hoping to create a corporation and the legislature who has the power to create one. The contractual theory of the firm asserts that

Corporations should be subject to legal obligations in order to deter corporate misconduct and provide an avenue of relief for individuals harmed by corporations. The American system of civil law relies on private suits as a deterrent to ensure that commercial actors conduct themselves scrupulously. We want natural people to have the capacity to settle commercial disputes with corporations and to have legal recourse for any wrongdoing. Legal obligations define the behavior that we expect from corporations and shape the expectations of natural persons who deal with them. In order to enforce their rights and obligations, corporations must be provided with a legal right to use the courts. Without the legal fiction of personhood, there is no clear way to sue a corporate entity and, therefore, no way to deter wrongdoing by these organizations.

The Supreme Court endorsed the artificial view of corporate rights in one of the earliest corporate rights cases, *Trustees of Dartmouth College v. Woodward*.[110] In *Woodward*, the New Hampshire legislature passed three pieces of legislation that would effectively turn Dartmouth College, a private corporation, into a public university. The legislation purported to amend Dartmouth's charter by increasing the number of trustees from twelve to twenty-one, creating a twenty-five person oversight board where twenty-one seats would be controlled by the state of New Hampshire, and vesting the power to appoint new trustees in New Hampshire's governor and council.[111] These actions, when taken in concert, would have effectively given the state government control over Dartmouth College—a private corporation.

In *Woodward*, the Supreme Court faced three legal issues. First, the Court had to determine whether a corporate charter constituted a contract.[112] After determining that a charter produced by the process of specific incorporation was a contract, the Court then addressed whether a corporate charter constituted a private contract, protected from government interference, as opposed to a public contract that the legislature could rightfully alter.[113] The Court held that Dartmouth's charter was a private

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corporations are a collection of private contracts binding individuals to one another in pursuit of a productive purpose.

110. *See* GREENFIELD, *supra* note 88, at 19 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)).

111. *Woodward,* 17 U.S. at 626.

112. At the time of this case corporations were still created by the process of specific incorporation discussed on p. 18. Dartmouth College's charter was actually granted by King George of England in 1769. GREENFIELD, *supra* note 88, at 19.

113. *Woodward,* 17 U.S. at 627.

> It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. . . . The charter is granted, and on its faith the property is conveyed. Surely, in this

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contract.[114] Finally, to determine whether Dartmouth college should receive the protection of the Contracts Clause, the Court had to address the ability of a corporate entity to invoke a constitutional right.[115] The contracts clause does not reference persons, reference citizens, or in any way indicate that the contracts clause can only be invoked by natural persons.[116] The Court did not have to squarely address the question of legal personhood or citizenship in this case; however the Court made it clear that corporations do indeed hold legal rights—including the right to invoke constitutional protections.[117]

In his majority opinion, Chief Justice John Marshall famously wrote that "[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."[118] Marshall determined that the legal immunity from state action amending private contracts—provided by the Contracts Clause—was incidental to the existence of the corporation and that corporations must be allowed to assert such rights.[119] While the Court has since retreated from its staunch preference for the artificial theory of corporate personhood, the theory remains academically viable.[120] Artificial theory takes the most flexible approach to the provision of corporate rights, leaving the decision of which rights to provide to legislatures—except for core commercial rights incident to the productive functions of the corporation.

Corporations can still be considered legal "people" even if they are a creation of the law. Under the artificial-dependent theory, legal personhood is a practical means to accommodate corporations within the existing legal system. The fictitious and functional nature of corporate legal personhood justifies the discretionary assignment of corporate rights and responsibilities

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> transaction every ingredient of a complete and legitimate contract is to be found. The points for consideration are, 1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?

See Woodward, 17 U.S. at 629-30.

114. *Id.*

115. *Id.*

116. The contracts clause is squarely aimed at limiting the power of state legislatures rather than bestowing rights on any individuals. In Hohfeldian terms the contracts clause provides an immunity against state interference with private contracts. Hohfeld, *supra* note 13, at 57.

117. *Woodward,* 17 U.S. at 654 ("[I]n these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.") (alterations added).

118. *Id.* at 636.

119. *Id.* at 588-9.

120. *See generally* GREENFIELD, *supra* note 88.

without regard for typical normative concerns. Corporations should only be afforded rights that are necessary to promote a corporate function. The primary purpose of corporations is to engage in productive activity with the goal of maximizing the wealth of shareholders.[121] The shareholder wealth maximization norm constrains corporate autonomy and limits the ability of corporate decision-makers to consider the same range of options as an individual facing a similar dilemma.[122] The artificial-dependent theory suggests that corporations lack autonomy because they are controlled by private individuals. The externalized decision-making process in a corporation prevents corporations from fully considering the moral implications of their actions. As a result of the "artificial-dependent" theory so applied, corporations cannot be expected to police their own actions subject to the principles of morality. Legislators could disregard any moral consideration over what rights a corporation deserves and instead focus on determining which rights the corporation needs. This contention does not defeat the utility of the artificial-dependent theory. Instead, it limits corporate rights to the rights that can be exercised without extensive moral judgements. This would include certain practical rights, such as property ownership and standing to sue, which corporations need to function.

The downside of the fictitious personhood theory is that corporations face a great deal of uncertainty as to what rights they actually possess. A legislature relying on the artificial-dependent theory could justify stripping a corporation of some right or imposing a substantial legal obligation *ex post* to accord with their own changing views of the appropriate social functions of corporations. If basic rights are not fixed by an underlying legal theory and are subject to change at the will of a legislative body, then corporations will bear a heavy burden to determine whether a proposed course of action would *ex ante* be protected by a legal right. This state of affairs would shake the certainty of assumptions and could chill the activities of corporations by imposing extra decision-making costs on firms.[123]

B. Independent Personhood Theory

The independent personhood theory of the corporation began circulating in the late nineteenth century as a philosophical foil for the artificial-dependent theory of corporate personhood. The basic premise of

121. *See* Dodge v. Ford Motor Co., 204 Mich. 459, 500 (1919); Roe, *supra* note 70.

122. *Id.*

123. *See generally* John Thrasher, *Ordering Anarchy*, 5 RMM 30, 32-35 (2014) (Explaining that decision costs are generally understood as an opportunity cost borne by an organization's use of human capital to analyze any applicable rules to predict the likelihood of success of a proposed action.).

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the independent personhood theory is that associations of natural persons can exist as entities outside of their members.[124] Independent personhood theorists assert that corporations are capable of making rational decisions and that we should treat them as moral agents because they exist, act, and have the capacity to evaluate their decisions before acting.[125] The independent personhood theory considers personhood to be a threshold and posits that corporations are deserving of all of the legal rights given to natural persons simply because they have met the absolute bare minimum description of a natural person.[126]

The independent personhood theory treats corporations as moral agents with the ability to use their given rights according to moral principles. Therefore, because all moral agents have the capacity to make rational and socially acceptable decisions, corporations should be bestowed with every existing right of natural persons. The assignment of rights in our society comes with certain moral obligations. So long as corporations are able to perform the essential functions of moral agency, they should be entrusted with rights and expected to conform to legal obligations. As for the question of which rights to assign to corporations, the independent personhood theory suggests that corporations must receive the same rights as individual natural persons. Under the independent personhood theory, withholding rights from a corporate person—who is capable of exercising them—based solely upon their form is an impermissible form of discrimination. The Supreme Court has not directly addressed the independent personhood theory but has nonetheless relied on the basic premises of the theory to extend constitutional rights to corporations.[127] There is also substantial academic literature surrounding the independent personhood theory.[128]

The independent personhood theory offers corporations a tremendous amount of legal protection. By suggesting that there are no meaningful differences between how we would expect natural persons and corporations to exercise legal rights, the independent personhood theory acts as a barrier

124. Krannich, *supra* note 94, at 80 ("The real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state.")

125. *Id.* at 83 ("To legal realists, 'the management corporation reconstituted the classical profit maximizer in collective form.' This theory effectively turned the corporate entity into the individual actor the law sought to recognize.") (footnote omitted) (quoting William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1490 (1989)).

126. Krannich, *supra* note 94, at 83.

127. *See generally* Dow Chem. Co. v. United States, 476 U.S. 227, 229, 106 S. Ct. 1819, 1822, 90 L. Ed. 2d 226 (1986) (extending the Fourth Amendment to a chemical corporation whose property had been surveilled by EPA aircraft); United States v. Martin Linen Supply Co., 430 U.S. 564, 567, 97 S. Ct. 1349, 1352, 51 L. Ed. 2d 642 (1977) (extending the Fifth Amendment's double jeopardy protections to a group of corporations previously acquitted by a hung jury).

128. *See* Krannich, *supra* note 94, at 83-84.

https://openscholarship.wustl.edu/law_jurisprudence/vol12/iss2/7

to imposing additional legal obligations on corporations. This theory would lower the ex-ante costs of legal analysis for courts by providing predictability for corporate decision-makers. Similarly, adopting greater legal protections for corporations may serve to increase their total commercial output. However, the negative implications of the independent personhood theory loom large. Allowing corporations to avail themselves of rights which were specifically devised to protect the interests of natural persons may hinder the ability of the government to effectively regulate corporations in a manner that would be beneficial to the rest of society.

C. Aggregate Theory

The aggregate theory of corporate rights offers a logically distinct justification for providing legal rights to corporations. The aggregate theory posits that corporations are essentially nothing more than collections of individuals who are contractually bound to each other to pursue business purposes.[129] Aggregate theory proponents rightfully point out that every action attributed to a corporation must actually be performed by a natural person.[130] Because certain rights are deemed to be basic and inalienable in our society, individuals acting on behalf of the corporation should retain their existing legal rights.[131]

Aggregate rights theory provides a justification for corporate rights that does not include the "invention" of corporate specific rights and, at first glance, seems to assuage many progressive concerns over the personification of corporations. Aggregate corporate rights theorists recognize that individual rights are designed to protect natural persons and simply argue that the social liberties accorded to individuals should not evaporate when those individuals act in the name of a corporate organization. Aggregate theory claims to protect the rights of the individuals rather than any rights specially vested to the organization. This theory is appealing because it seems to address the concerns of realist critics of corporate rights by recognizing the truism that corporations are in no way actual persons. The downside of aggregate rights theory is that it severely limits the ability of governments to regulate corporations without limiting the rights of natural persons along the way.

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129. Ripken, *supra* note 94, at 109-110.

130. *Id.* at 110.

131. Krannich, *supra* note 94, at 76-77 (citing VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE § 1, at 2 (1882)).

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The Supreme Court has been receptive to the aggregate theory of corporate rights, especially in recent years.[132] In *Burwell v. Hobby Lobby Stores Inc.,* the Court considered whether the owners of private, for-profit corporations could claim that complying with a regulation substantially burdened their rights under the Religious Freedom Restoration Act ("RFRA") and the First Amendment.[133] The RFRA prohibits the Government from placing a substantial burden on any person's exercise of religion unless the method of regulation chosen is the least restrictive possible means to achieve a compelling government interest.[134] The RFRA did not define the word "person" in the statute so the court was left to determine whether Hobby Lobby, and other for-profit corporations, should be considered persons.[135] In a 5-4 decision, the Court ruled that corporations are indeed people and that closely held corporations could invoke the RFRA to avoid providing certain types of contraceptive care through their company health plan.[136,137]

Justice Samuel Alito, writing for the majority, opined that "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of [shareholders, officers, and employees]."[138] The *Hobby Lobby* decision thus rests on an assertion that these privately held corporations must be considered to hold the religious beliefs of their shareholders. This underlying assumption is incompatible with the doctrine of corporate separateness and imputes the idiosyncratic views of shareholders to the corporate entity. The majority opinion brushes off HHS's argument that the owners of for-profit corporations forfeit their rights to assert RFRA claims on behalf of the incorporated entity.[139] The Court, in effect, asserts that the corporation must be considered to be an extension of the family that owns it.

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132. *See* Burwell v. Hobby Lobby Stores, 573 U.S. 682, 691-92 (2014).
133. *See generally id.*
134. *Id.* at 705.
135. *Id.* at 706-08.
136. *Id.*
137. GREENFIELD, *supra* note 88, at 97.
138. *Hobby Lobby*, 573 U.S. at 706-07.
139. *Id.* at 705-06.

> HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.
>
> As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests?

Id. at 706 (footnote omitted).

Throughout the majority opinion, Justice Alito implicitly relies on the aggregate theory to refute the contention that for-profit corporations cannot exercise religion. His analysis focused on the burdens imposed on the ability of Hobby Lobby's controlling shareholders to exercise their religion. However, the Court also accepted Hobby Lobby's assertion that the company ought to be considered a person under the RFRA. If Hobby Lobby is a person possessing rights to freely exercise their religion, it seems like Hobby Lobby must, itself, have a religion to exercise. Instead, the Court slyly takes advantage of the metaphor of personhood, which entails some form of either the independent personhood theory or the artificial dependent theory, and then proceeds to disregard the theoretical implications of either theory to assure that the RFRA applies.

IV. WHY SHOULD WE GIVE CORPORATIONS RIGHTS?

Legislators and scholars should seek to find and apply a corporate-rights-justifying theory which meshes with the underlying rationales for providing individual rights to natural persons. We need corporations, and corporations need rights. Our common law system seeks to define and direct the behavior of natural persons, governments, and associations by assigning rights and imposing legal obligations. Without some notion of personhood, or another rights-justifying framework, corporations could not operate under the existing legal structure. The ideal rights-justifying theory of the corporate person should be consistent with the underlying rationales for providing individual rights to natural persons while providing corporations with a high degree of predictability about their legal rights and obligations.

The artificial-dependent theory of corporate personhood is the best available theory of corporate personhood because it provides legislators with the flexibility they need to assess which rights corporations need and which rights we cannot expect them to exercise responsibly. Individuals only keep rights which they are able to exercise, and the granting of corporate rights should be no different. Corporations should only be afforded rights which they possess the requisite consciousness to use appropriately to pursue their organizational objectives. This approach to the provision of corporate rights all but eliminates the viability of an aggregate rights theory.

By vesting a corporation with the rights of the individuals who own the corporation, the aggregate theory ignores the question of whether or not a corporation has the capability to use this right and whether or not a corporation should be able to invoke a specific right. Furthermore, the aggregate theory is inconsistent with the basic premise of corporate law that a corporation is distinct from its owners. The owners of corporations are

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able to reap the financial benefits of the corporation's activities while escaping personal responsibility for the corporation's actions. Shareholders should not be able to assert their own rights through a corporate entity while dodging the accompanying legal obligations of the corporation. Corporate separation is a core piece in the background of corporate law and, although it is a legal fiction, should be applied consistently to all facets of the corporation's legal existence—including the existence and breadth of corporate rights. Aggregate right theory does not mesh with the underlying corporate law and, as such, is an inadequate rights theory.

The law should strive to provide corporations with the rights they need to fulfill their productive mandate while preserving the primacy of natural persons in rights theory. Individual rights are assigned with the understanding that the recipients will exercise their mental faculties and exercise their moral judgement when acting.[140] Corporations cannot rationally be said to exercise *the same* type of consciousness as individuals. Individuals and corporations exercise fundamentally different decision-making processes. Corporate decision making is clearly distinct from individual decision making in terms of both the processes employed and the range of objectives pursued.[141] Individuals consider their options internally, although we will occasionally ask one another for help. However, in the realm of individual decision making, the ultimate choice of conduct is ultimately controlled entirely by a single entity. Every internal consideration which informs the ultimate decision is presented on equal footing and given equal weight—allowing moral concerns an equal platform for consideration. However, in the corporate context, almost every significant decision requires input from individuals within the firm.[142] Moral perspectives can be ignored entirely, or given relatively little weight, if they originate from a natural person who is low on the institutional totem pole or disfavored by the ultimate decision maker. Additionally, the profit maximization motivation of business corporations can blind corporate managers to the negative implications of their decisions for others.[143]

Corporations are built differently than natural persons, and these differences shape the ways we expect corporations to exercise their rights. As such, our legal system should carefully evaluate the nature of

140. *See* the discussion *supra* Section I.C.

141. According to moral theorist John Ladd, corporations, and other formal organizations, make decisions that are directed towards and evaluated against some pre-determined objective rather than being evaluated for their moral value. Ladd, *supra* note 1, at 495-96.

142. *See generally,* Bernard K. Hooper, *Choose One: Expediter or Cat Herder? The Role of The In-House Counsel in Corporate Decision Making*, 12 BUS. L. TODAY 11 (2003); Ladd, *supra* note 1, at 493.

143. Roe, *supra* note 70, at 2066.

corporations and provide these organizations with the rights they need to carry out their functions, while reserving the remaining rights for natural persons. Instead of hoping to build up corporate morals, the law ought to recognize that corporations are fundamentally limited in their ability to exercise morality when making decisions. Consequently, the rights of corporations should be curtailed to include only those rights that we are comfortable with corporations exercising in an amoral fashion.

Given the fundamental differences between the existence of corporations and natural persons, it makes more sense to apply the artificial-dependent existence theory. The artificial-dependent theory would allow legislatures to assess what rights are necessary for corporations to operate in our society. If legislatures were to proceed in accordance with the aggregate theory, corporations would be able to exercise rights that are commensurate with their incentives and abilities to make organized decisions while preserving rights that were intended only for natural persons. The artificial dependent theory allows legislators to assess the conscious capabilities of corporations and legislate appropriately.

V. CONCLUSION

The law ought to ensure that corporations are afforded only the rights that are relevant to their purposes to preserve the delicate balance of rights and legal obligations among private citizens, the government, and corporations. Social contract theory posits that the rights assigned to natural persons and the corresponding legal obligations owed by natural persons to each other and the government represent an intentional balance between public and private power. Corporations have upset this delicate balance by taking advantage of "personhood" to pursue their financial interests at the expense of the broader community.

Corporations are fundamentally different from natural persons, and the law should recognize these differences when determining the proper extent of corporate rights. The law presumes the existence and operation of conscious decision-making in individuals. Most importantly, the law assumes that individuals will consider the moral implications of their actions. Unlike individuals, corporations are obligated to pursue the interests of their shareholders rather than the interests of morality. Corporations are unable to exercise the same decision-making processes as individuals due to their externally motivated decision-making structure and the resulting lack of autonomy. Because corporations do not act as moral agents, the law should not entrust them with the same rights as individuals.

Legislators ought to critically examine the nature and purpose of business corporations to determine why corporations need rights and to

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asses which rights to provide to corporations. The artificial dependent theory provides the best theoretical justification for the provision of corporate rights because it offers legislators the flexibility to make practical decisions about the provision of corporate rights that account for the lack of moral agency among business corporations.