



**Volume 2, Issue 1:  
Competing Conceptions of Personhood**

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# *Letter from the Editors*

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## **Competing Conceptions of Personhood:**

One of the most popular computer games of the year 2000 was a game called the Sims. The goal of the game is to guide your (human) character through everyday life — furnishing a house, making friends, getting a job, falling in love. This may sound rather boring, as it differs little from the experiences one has in one's own life, though admittedly condensed from several years down to a few hours. Yet, reviewers and players alike found the game to be intensely addictive. Perhaps one reason for this is the creativity available in establishing the starting elements of the game and the open-ended structure of gameplay that follows after that. The computer player gets to choose the initial personality traits of his or her character as well as all future interpersonal interactions the character has. Thus, the game is a means of experimentation, either testing how one might want to lead one's own life or, more likely, engaging in a fantasy projection of how one *wishes* one's life could be led. The underlying point, though, is that by making experimentation with personality the center of its gameplay, The Sims calls the very notion of personhood itself into question. A person is not just a collection of flesh and bones and select strands of DNA, but can also be an easily manipulable series of commands in a computer game.

The law likewise takes a rather nebulous view of personhood. When asked the definition of a "person," most respondents would probably reply with a definition something akin to "a human being." This is too simple of a response for legal discussion. The law sees a "person" not as a concrete entity, but rather as a set of legal relationships; what exactly these legal relationships are, and the legal powers and abilities they grant or deny, varies greatly according to the context. This issue of the Stanford Agora explores the concept of personhood from two distinct angles — race and corporate identity. While there are certainly many different ways in which the concept of a "person" impacts legal discourse, the two that we have chosen represent the boundaries of legal thought and the ways in which it is being stretched into larger political debates.

In "The Limits of Colorblind and Multicultural Personhood," Joel Olson argues that traditional approaches to race relations are misplaced because they ultimately reinforce the marginalization of minority identities. As opposed to the naïvete of colorblind and subtle insidiousness of multicultural approaches to personhood, Olson proposes an "abolitionist identity" as the ideal political actor. This identity actively disengages itself from conceptions of whiteness, which it views to be inescapably discriminatory. Two commentaries are presented in response to Olson's article. Samuel Chambers praises Olson's argument, but contends that it does not go far enough in its critique and thus runs the risk of falling into many of the same traps to which Olson accuses colorblindness and multiculturalism of being a victim. Chambers instead argues for a positive appropriation of hegemony as a way to bridge the divide between the universal and the particular. Bruce Baum suggests that Olson's abolitionist identity is overly reliant upon a black identity which itself is open to critique. Alternately, Baum argues for a "racialized identity" that rests upon "a commitment to the moral equality of all persons."

All three of these essays demonstrate the way in which politics, law, and personhood can be and are complexly intertwined. When speaking of racial identity in terms of political recognition, a failure to acknowledge the validity of minority identities calls their very personhood into question. While the three essays may differ somewhat in how to address race relations, they all posit personhood as their central concern. The sense of alienation that attend the questioning of one's personhood is highly emotionally charged; we feel that this experience can best be conveyed through the medium of poetry. Consequently, the Stanford Agora has compiled a collection of poems to convey these feelings to the reader. The exposition on race is further supplemented by selected film clips to illustrate similar points. Combined with the theoretical arguments advanced in the essays, one comes to understand the vital importance of debates over personhood and race not just to the law but to the ordinary experience of politics as well.

The discussion of corporations and personhood is no less vital. David Millon's article, "The Ambiguous Significance of Corporate Personhood," demonstrates how legal understandings of corporations are historically contingent and in fact have changed greatly over time. Corporations, despite being comprised of multiple shareholders and management authorities, are for legal purposes considered a single "person," meaning they can sue and be sued in a court of law. Once one looks beyond this notion of singular personhood, though, questions are raised about the moral obligations of corporations, either to its shareholders or to society in general. Millon contends that debates between differing philosophies of corporate personhood merely mask the underlying obligations of natural persons to each other, which should be the proper focus of our inquiry.

There are four commentaries responding to Millon's article. Kent Greenfield extends Millon by asserting that arguments for corporate rights only mythologize necessarily contingent corporate legal relations. Rather than engage in philosophical debates, corporate law scholars should turn their attention to empirical studies of the different effects of corporate laws. Thomas Smith makes similar points, but takes them further by suggesting that even historical analysis is of limited use as compared to social scientific inquiry. William Callison takes the debate outlined by Millon and applies it to reforms of the Revised Uniform Partnership Act, which adopts the "partnership-as-entity" model of corporate personhood. Terry O'Neill uses Millon as a starting point to examine more closely the extent to which corporate managers owe obligations to company shareholders by offering a feminist critique of corporate personhood.

Millon's article and accompanying commentaries, which are themselves supplemented by a set of prose passages and news articles critiquing the intertwining of corporations and personhood, illustrate how corporate identity has come to infect our understandings about the proper relations between individuals at the same time that it itself is being shaped by those understandings. While this may, or may not leave us pessimistic about the reach of corporate influences in contemporary society, it definitely shows us that our beliefs about corporate personhood can be radically changed. The impetus then falls on us to determine what we want those beliefs to be.

The apparent gap between corporate and racial conceptions of personhood is bridged by the two photo essays in this issue of the Stanford Agora. "This is America . . ." pairs World War II posters reflecting one vision of American idealism with a contrasting set of images that call into question our ingrained beliefs about American personhood. American identity is based not just upon a belief in a free political system

but also on certain moral and economic tenets of acceptability. Boundaries can be stretched, but perhaps only so far if one wants to be seen as a productive member of mainstream society. The images in this photo essay address the interconnections between marginalized identities and economic personhood. The personification of corporate identity is explored in the photo essay “Corporate Identity through the Kaleidoscope of Iconic Figurines,” which presents images of corporate figurines produced for public consumption over the last several decades. Some of these figurines provide cartoonish and often offensive portrayals of racial identity. Transforming stereotypical racial images into an icon for selling products represents yet another way in which these identities are marginalized. Even animal or fantasy figurines, while generally unoffensive, suggest that personhood may be nothing more than an image of themselves that corporations shape for public consumption.

The various content of this issue presents just some of the ways in which the topic of personhood can be explored. Needless to say, there are many more. As “an online journal of legal perspectives,” the Stanford Agora hopes to show different ways of looking at personhood, not just intellectually but also in the type of media we present. Personhood is not limited to academic articles. We hope that what you see here will help you reflect upon personhood in the encounters you have in your own life.

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# Submissions

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The *Stanford Agora: an Online Journal of Legal Perspectives* gladly accepts submissions for publication. The *Stanford Agora* seeks articles that explore the theoretical foundations of the law by focusing not on specific laws or public policies, but rather on more abstract approaches to law and jurisprudence in a way that informs our understanding of the role of law in human experience. The goal of the *Stanford Agora* is thus to provide a place for meaningful interdisciplinary inquiries into law and its impact on society at large.

Articles can be anywhere from 15 to 75 double-spaced pages. The *Stanford Agora* attempts to publish not only articles from a legal perspective but articles from other academic disciplines as well. Accepted articles will serve as focal points for a larger symposium, meaning the staff of the *Stanford Agora* will solicit response pieces as well as collect and assemble multimedia content to enhance the article.

If you have an existing or proposed essay or article that you believe fits the description of the journal, we would greatly appreciate its submission for review. Because the articles will be published on-line, pictures and/or brief audio-visual clips can be included with the written material.

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Abstract:

*The dominant debate over race relations and the law focuses either on colorblindness, in which the law fails to recognize racial distinctions, or on multiculturalism, in which each race is given special and different treatment for the purpose of recognizing the equal worth of all cultures. Joel Olson critiques both of these positions by arguing that each of them, while an improvement on the segregationist Herrenvolk ideal, reinforces, in different ways, the political superiority of a white racial identity. Olson examines the work of Stephen and Abigail Thernstrom to show that colorblindness in the law is hopelessly unrealistic in its appraisal of the social status of racial minorities. Similarly, the works of Charles Taylor and Henry Giroux fail to construct a positive white identity within a multicultural framework. In opposition to colorblindness and multiculturalism, Mr. Olson proposes an abolitionist identity, which is premised on actively rejecting a white racial identity and recognizing race as a form of political power.*

## THE LIMITS OF COLORBLIND AND MULTICULTURAL PERSONHOOD

Joel Olson\*

On July 27-31, 1997, police officers in Chandler, Arizona, a rapidly-growing suburb south of Phoenix, conducted a massive sweep of downtown Chandler searching for illegal aliens. Working with local Immigration and Nationalization Services officers, they stopped people with brown skin at random and greeted them in Spanish. If the person replied in Spanish, they demanded to see papers proving legal residency. In the process of arresting and deporting 432 people, they stopped thousands of people who were playing soccer, hanging out at their apartment complexes, or walking down the street. Sometimes entire families were searched. No white people were stopped and asked to prove their residency. A brown-skinned driver pumping gas at a convenience store had to produce papers proving her legal status, while the white-skinned driver at the next pump was ignored. Latino community leaders quickly filed a \$35 million lawsuit against the city, charging that the sweeps were part of a \$600,000 downtown revitalization plan by the Chandler city government to attract middle class white

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\* Ph.D., University of Minnesota. Joel Olson is currently a Faculty Associate at Arizona State University West, where he specializes in postmodern political thought and critical race theory, and co-editor of *The New Abolitionist* (<http://www.newabolition.org>), which seeks the abolition of white racial identity. Mr. Olson would like to thank Lisa Disch, Andrew Sabl, Luis Fernandez, Samuel Chambers, and Bruce Baum for their helpful comments in writing this article.

consumers to downtown Chandler and way from thriving downtowns in nearby Tempe and Scottsdale.<sup>1</sup>

A year and a half later, the *Arizona Republic* cheerfully reported Chandler was set to celebrate its fourth annual Multi-Cultural Festival, complete with Middle Eastern belly dancing, Irish step dancers, and Mexican mariachis, all designed as “a celebration of all our various backgrounds,”<sup>2</sup> according to festival director Karen Drake. Chandler Councilwoman Patti Bruno said the diversity of Chandler (whose population is nearly eighty percent white) is “awesome” and something for the city to be proud of.<sup>3</sup>

The Chandler government’s two minds about race — police raids and cultural festivals, white dollars and ethnic flavor, green cards and guacamole dip — is an increasingly common phenomenon in American cities. Racial profiling and diversity celebrations go hand in hand in a country that is glad to be done with segregation yet uncomfortable with all the consequences its dissolution might imply. Americans celebrate Martin Luther King, Jr. as they lock up more Black men than ever before; they praise diversity but agonize over affirmative action; they dance to mariachis after sweeping the streets for brown skin.

Americans love to think they can create anything from scratch, including their identities. Rock star, entrepreneur, president — it is all within our grasp if we work hard, play by the rules, and get a little lucky. Running against this myth of self-invention are certain inherited social characteristics such as race and gender. Up until recently, these characteristics were regarded as permanent and inflexible. One could be an astronaut or an acrobat, a cop or a robber, but one was forever male or female, Black or white, or one of the other approved Census racial categories. This attitude still holds sway for many people, especially regarding gender, but its grip is loosening somewhat in regards to race. Boundaries that once provided security now seem like obstacles. Old identities no longer seem adequate to capture our sense of self. Tiger Woods is not Black, he is “cablinasian,” which is short for Caucasian-Black-Indian-Asian. White people squeal with delight to find they are part Indian. Love sees no color. Racial identity, which once seemed like an immutable part of us, has turned out to be another choice we make. We can emphasize our racial identity, ignore it, or change it (witness the “biracial” movement).

However much we try to make it a matter of choice, our racial identities are not as easily adopted or rejected as we like to think. Our identities, especially our racial identities, are bound up in social structures that are beyond our direct control. These systems of power construct certain social and political ideals around which we consciously and unconsciously shape our identities. Any exploration of identity must therefore explore the ideals that shape it. In this essay I examine the three ideals that

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<sup>1</sup> See Hector Tobar, *An Ugly Stain on City’s Bright and Shining Plan*, L.A. TIMES, Dec. 28, 1998, at A1; Jim Walsh, *Illegals Target of Crackdown by Chandler Police*, ARIZ. REPUBLIC, July 31, 1997, at B2. The lawsuit was settled in February of 1999. The City of Chandler paid \$400,000 and enacted a new policy preventing city police from enforcing federal immigration laws. Janie Magruder, *\$400k Settles Roundup Suit in Chandler*, ARIZONA REPUBLIC, Feb. 11, 1999, at A1.

<sup>2</sup> Monica Davis, *Chandler Diversity Worth Celebrating, Festival Officials Say*, ARIZONA REPUBLIC, Jan. 21, 1999, East Valley §, at 1.

<sup>3</sup> See *id.*

have constructed racial conceptions of personhood in the United States. In the era of slavery and segregation, the dominant racial ideal was white supremacy, or what I call the *herrenvolk* ideal. In this era, race was central to Americans' sense of self, largely because it determined one's social and political status. According to the *herrenvolk* ideal, to be a full human being with all the rights and opportunities that accompany it, one simply had to be white. Becoming white, I argue, was not an automatic function of pale skin or European ancestry. It had to be fought for, like any other social status, and once achieved, it had to be defended, largely by excluding others.

The civil rights movement was a watershed in American history, not only because it ended legal segregation, but also because it dismantled the *herrenvolk* ideal that shaped our racial identities for centuries. No longer would race carry any publicly sanctioned status or stigma. The question that emerged from this was whether race should play a role in defining one's sense of self. The colorblind ideal has no place for race, while the multicultural ideal argues that race is an important part of the glorious mosaic that makes us who we are and thus should continue to play a role. In this essay I examine the colorblind and multicultural ideals by arguing that while both are certainly better than the *herrenvolk* ideal, neither constructs a truly democratic alternative to racist conceptions of personhood because neither addresses the problem of white identity. It is the white racial identity, I charge, that is behind the racial conflicts of our past and our present, and possibly our future. Examining Justice John Harlan's dissent in *Plessy v. Ferguson* and political scientists Abigail and Stephan Thernstrom's *America in Black and White*, I argue that the colorblind ideal perpetuates white identity even as it attempts to make race publicly insignificant, since it allows white privilege to continue unabated in the private realm. Examining philosopher Charles Taylor's work on "the politics of recognition" and the new "whiteness studies," I argue that white identity endures in multiculturalism through a redefinition of race as culture that counts whiteness as simply one culture among others, ignoring the ways in which it continues to profit whites.

Advocates of each ideal typically differ over the extent and nature of racial discrimination today as well as the proper means to achieve a society in which race no longer holds any political advantage or stigma. Both ideals, however, share a fundamental weakness: both dissociate race from politics, and in so doing neither effectively confronts the white world. The white world persists in colorblindness through a formal definition of race that redefines white as simply one physical characteristic among others. It also endures in multiculturalism through a definition of race as culture that counts the white world as simply one culture among others. Both redefinitions blanch the notion of power and alliance from their conception of race, defining away the cross-class alliance rather than confronting its operation. In this way, the colorblind and multicultural ideals both provide the surreptitious means by which the white world perseveres. Neither ideal, therefore, is a force for greater democracy.<sup>4</sup>

Any future democratic society requires a new political ideal that has no room for white personhood. The political challenge, I contend, is not to abolish all racial

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<sup>4</sup> I refer to the colorblind state or the colorblind democracy as the polity following the *herrenvolk* democracy whose core principle is to not discriminate on the basis of race. The colorblind ideal is one set of prescriptions and guidelines on how to achieve a colorblind democracy, while the multicultural ideal is a different set toward the same end. Multiculturalism is not a challenge to the colorblind state but an alternative notion as to how to achieve it.

categories nor to make them all equal but to eliminate the single explicitly antidemocratic racial identity, whiteness. I conclude by briefly sketching out a vision of what a non-white identity, which I call an *abolitionist personality*, might look like.

### I. THE DEATH OF THE *HERRENVOLK* IDEAL

The colorblind and multicultural conceptions of personhood are in large part a reaction to the forms of identity that existed under slavery and segregation. Following the sociologist Pierre L. van den Berghe, I will call this era of white supremacy a *herrenvolk* democracy, a regime that is “democratic for the master race but tyrannical for subordinate groups.”<sup>5</sup> The *herrenvolk* was a curious combination of democracy and tyranny, equality and supremacy, all of which coexisted with state repression, mob violence, and widespread belief (justified by God and science) of the eternal inequality of humanity. The mix is epitomized in Vice President of the Confederacy Alexander H. Stephens’s famous “Cornerstone Speech”:

Many governments have been founded on the principles of subordination and serfdom of certain classes of the same race; such were, and are in violation of the laws of nature. Our system commits no such violation of nature’s law. With us, all the white race, however high or low, rich or poor, are equal in the eyes of the law. Not so with the Negro. Subordination is his place. He, by nature or by the curse against Canaan, is fitted for that condition which he occupies in our system.<sup>6</sup>

The *herrenvolk* era, which we can date from roughly the 1670s (when explicitly *racial* slavery was codified into the colonial statutes) to 1964-65 and the passing of the Civil Rights and Voting Rights Acts, produced a peculiar form of identity I call white citizenship. On the one hand, white citizenship was an identity of equality: all those who were citizens were politically equal to all other citizens. It was, however, simultaneously an identity of supremacy: one was also superior to all those who were not citizens, particularly slaves. As evidenced by the Fugitive Slave Law, which made any free Black person subject to kidnapping and enforced bondage by any white man who claimed him or her, blackness was inherently linked to slavery. Likewise, citizenship and whiteness were bound together. Thus, both whiteness and citizenship were fundamentally forms of status: citizens enjoyed status over slaves, whites over those who were not white. White citizenship was not something automatically granted to all “whites,” however. Those who staked a claim for white citizenship had to *prove* themselves white (largely by proving they were not Black).<sup>7</sup>

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<sup>5</sup> PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 18 (1967).

<sup>6</sup> Quoted in GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914 63-64 (1971).

<sup>7</sup> See e.g. DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

Remnants of the struggle to achieve white citizenship litter American law. The 1857 *Dred Scott* decision declared that all whites are of a higher social status than any Black person, free or slave, thus providing an incentive to become white.<sup>8</sup> In 1896, *Plessy v. Ferguson* sanctioned a dual system of public accommodations, one for the white citizens and one for Black people, providing yet another incentive.<sup>9</sup> Both cases signified that no matter how low, poor, or despicable a person might be, if he is white he enjoys a higher status than that of the wealthiest, most esteemed Black person. Thus, as David Roediger notes, Black people in the *herrenvolk* democracy were not so much non-citizens as they were *anticitizens* whose exclusion and oppression set the boundaries and privileges of white citizenship.<sup>10</sup>

The courts, then, did more than merely regulate relations between citizens and anticitizens, they helped determine who was white as well. In *Plessy*, the Supreme Court deferred to the laws of Louisiana in determining whether Homer Plessy was Black. (Plessy, who had seven white great-grandparents and one Black one, was Black by Louisiana law.) Indeed, much of the task of determining who was Black fell to state courts and legislatures.<sup>11</sup> Yet the federal courts played an active role as well. As Ian Haney-López shows, in cases such as *In re Ah Yup*<sup>12</sup>, *In re Rodriguez*<sup>13</sup>, *In re Najour*<sup>14</sup> and numerous others, the courts inconsistently ruled on the racial status of Asian Indians, Mexicans, Armenians, and others who strived to be classified as white.<sup>15</sup> Racial designation was a political-legal matter in the *herrenvolk* era. There was a pressing need to be defined as white if one was to enjoy the privileges and prerogatives of a citizen. One could say that an individual was not a citizen because he was white but that he was white because he was a citizen.

When the civil rights movement swept away the *herrenvolk* democracy, it changed the character of white identity as well. The Civil Rights Act of 1964, which outlawed segregation of public accommodations, and the Voting Rights Act of 1965, which guaranteed Black people's right to vote, abolished the legal superior status of the white citizen and made Black people citizens as well. African Americans were now at least formally the political equals of whites. Of course, reality never matched ideal. Nevertheless, the Civil Rights acts were a watershed that altered the role of race in shaping one's identity, for no longer was it necessary to be white in order to be a citizen. The question, then, is what role, if any, should racial identity play in defining one's sense of self today? This question is particularly acute for white racial identity, since it was the

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<sup>8</sup> *Dred Scott v. Sanford*, 60 U.S. 383 (1857).

<sup>9</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>10</sup> ROEDIGER, *supra* note 7, at 57.

<sup>11</sup> See F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION*, chap. 3 (1991).

<sup>12</sup> *In re Ah Yup*, 1 F. Cas. 223 (1878) (granting citizenship to a Chinese immigrant, reasoning that the Thirteenth and Fourteenth Amendments only extended citizenship to people of African descent).

<sup>13</sup> *In re Rodriguez*, 81 F. 337 (1897) (granting citizenship to a man of Mexican descent).

<sup>14</sup> *In re Najour*, 174 F. 735 (1909) (stating that petitioner, of Syrian descent, appeared to be white and was therefore entitled to naturalization).

<sup>15</sup> See IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 54-73 (chap. 3) (1996).

dominant racial category of the *herrenvolk* democracy and therefore the lynchpin of the system of racial oppression.

New times call for new ideas, and new ideals of personhood. The death of the *herrenvolk* demanded a new way to make sense of racial identity, but given whites' loss of racial standing and their strong resistance to substantive Black equality, any new vision would have to balance a commitment to equal rights and opportunities with the need to mollify white anxieties if it were to avoid a white backlash. It would have to safeguard the material and social advantages whites had accumulated and come to expect as a matter of right under the *herrenvolk*, such as preferential access to the top schools, the best neighborhoods, the means to accrue wealth, and decent treatment by public officials. Colorblindness and multiculturalism emerged as competing ideals of personhood in this context.

## II. THE COLORBLIND IDEAL

The fundamental premise of the colorblind ideal is that one's race should carry no status in the public sphere. People should be judged according to their character and the merits of their labors, not their membership in an ascribed group. Given this, the ideal state would grant no recognition to any particular race or ethnic group via public policy, legislation, jurisprudence, or law enforcement, whether for purposes of discrimination (as in the *herrenvolk*) or for combating it (such as affirmative action). "Racial solutions, such as busing, affirmative action, black power, and multiculturalism, are bound to fail," Yehudi Webster reasons, "because they heighten the very racial awareness that is said to have led to 'racial problems' in the first place."<sup>16</sup> The state's only role regarding race is to prevent discrimination so that all individuals may have an equal opportunity to succeed in the economic and social spheres. Thus the state must deliberately ignore or be "blind" to one's membership in any race.

The colorblind ideal rests on a distinction between public and private realms. The defining characteristic of social relationships in the realm of politics and civil society is equality. All citizens are equal in the eyes of the law; one's race is not recognized except possibly as a neutral description for classification purposes.<sup>17</sup> In the private sphere, race may be recognized as the individual sees fit. Given this public/private split, the essence of the colorblind ideal is not so much that races do not exist — some colorblind advocates note that there are no biological races, others assume there are — but that their existence is politically irrelevant, since the state may not take them into account either way.<sup>18</sup>

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<sup>16</sup> YEHUDI O. WEBSTER, *THE RACIALIZATION OF AMERICA* 21 (1992).

<sup>17</sup> A number of colorblind advocates argue against racial classification of any kind, claiming that even this practice ultimately subverts a colorblind society. For Webster, for example, race is a myth that is perpetuated by any public acknowledgement of it, including racial classification. Race is a logical fallacy, he argues, so the system of racial classification is racist in itself and must be eliminated immediately, for even with the best of intentions it ends up perpetrating the power of race rather than undermining it. See *generally id.*

<sup>18</sup> In an extreme instance of this logic, Dinesh D'Souza actually calls for the repeal of the 1964

The colorblind ideal is not exclusively a right-wing phenomenon. Its advocates include liberals, conservatives, and even leftists, who claim to be preserving the true meaning of liberalism, progressivism, and/or the American spirit by defending a set of universal values premised on the freedom of the individual against a set of particularistic values premised on membership in a cultural group. As colorblind advocate Richard Payne argues, Americans must reject the “racial framework” for understanding the world and begin “reframing problems within the broader context of universal human virtues, and particularly American values.”<sup>19</sup> We get beyond race, he believes, by refusing to recognize it. If the essential principle upon which multiculturalism is based is the politics of recognition (as I explain below), the backbone of colorblindness is the principle of public *non-recognition* of human differences and an assertion of a common identity.

The intellectual origins of colorblindness lie in Supreme Court Justice John Marshall Harlan’s famous dissent in the 1896 *Plessy v. Ferguson* case. Ruling on a suit brought by Homer Plessy, the seven-to-one majority declared that Louisiana’s laws segregating Black passengers on its trains were constitutional on the grounds that providing separate but equal facilities did not deny African Americans their political rights guaranteed by the 13th and 14th amendments.<sup>20</sup> In his dissent, Harlan replies that the segregation of public facilities does in fact violate the civil rights of African Americans. The Civil War amendments pertain not only to the rights of citizenship (such as voting and serving on juries), as the majority stated, but also to personal liberty and therefore explicitly prohibit differential treatment according to race.

Harlan’s eloquent rebuttal of the majority decision as well as his famous “our constitution is color-blind”<sup>21</sup> phrase has made him the founding father of the colorblind ideal. Even though many Black writers and orators have made the same point, the acclaim accorded to Harlan is entirely appropriate, for his dissent foreshadows the limitations of the colorblind ideal in a way African American thinkers’ arguments generally do not. For example, the full “color-blind” quotation reads:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his

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Civil Rights Act, claiming that its antidiscrimination provisions should apply only to the public sector, and that any private business or institution should be free to discriminate as it pleases, since ethnocentrism is universal and natural. DINESH D’SOUZA, *THE END OF RACISM* 544–45 (1995).

<sup>19</sup> RICHARD J. PAYNE, *GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE* xi (1998).

<sup>20</sup> See *Plessy v. Ferguson* 163 U.S. 537, 546 (1896) (Harlan, J., dissenting). The phrase “separate but equal” is actually from Harlan’s dissent, not the majority opinion.

<sup>21</sup> *Id.* at 559.

color when his civil rights as guaranteed by the supreme law of the land are involved.<sup>22</sup>

Thus, in the same paragraph that Harlan defends a colorblind Constitution, he also sanctions the social superiority of the white race. A colorblind Constitution would protect the political and civil rights of Black people, but it would do nothing about whites' control over educational, financial, and political resources — nor should it, he concedes — since these lie outside of the political and civil realms. White domination in these areas is understood as the “normal” condition of society, reflecting the white race’s naturally “great heritage.” Harlan’s dissent draws a line between public activities such as voting and the enjoyment of public accommodations, in which the state must be colorblind, and private activities such as the accumulation of education or wealth, in which inequalities are natural and therefore immune from public deliberation and decision-making processes. Thus, Harlan’s “color-blind” defense of civil rights for African Americans also sanctions and perpetuates the advantages that whites have built up due to their privileged status. It perpetuates white privilege even as it would bring about formal political equality.<sup>23</sup>

This irony is reproduced in one of the most prominent academic voices for colorblindness today, Stephan and Abigail Thernstrom’s *America in Black and White*.<sup>24</sup> The Thernstroms gather voluminous amounts of data to show that African Americans have made great strides in income, housing, education, politics, and every other social indicator since the *herrenvolk* era, and that the gaps between Black and white are getting smaller. Further, they claim, these gains have been accompanied by dramatic changes in whites’ attitudes toward Black people. Contrary to popular wisdom, they argue, neither the civil rights movement nor affirmative action are responsible for racial progress. The boom in Black economic empowerment and the shift in white attitudes began in the 1940s and 1950s, before the civil rights protests, and without any sort of affirmative action. Black progress was the cumulative result of the migrations of African Americans from the South to the North, where jobs and higher wages were more plentiful; the ideological imperatives of World War II, which made racism disgraceful, and the waning prejudices of white Americans, who began to acknowledge and reject the gap between American ideals of equality and its practices. These factors, among others, led to higher incomes, lower poverty rates, greater political influence, and increased home ownership among Black Americans, all of which resulted in social progress heretofore unknown in the Black community. “The unprecedented progress of the 1940s and 1950s was not, for the most part, the product of deliberate decisions by government officials or by the leaders of organizations seeking to change public policy,” they assert. “Immense

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<sup>22</sup> *Id.*

<sup>23</sup> For a similar argument, see generally Kimberlé Williams Crenshaw, *Color Blindness, History and the Law*, in *THE HOUSE THAT RACE BUILT* (Wahnema Lubiano ed., 1998). See also Neil Gotanda, *A Critique of ‘Our Constitution is Color-Blind’*, 44 *STAN. L. REV.* 1 (1991).

<sup>24</sup> STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997). The book has received a great deal of attention in the press, particularly after Abigail Thernstrom challenged President Bill Clinton at one of his President’s Initiative on Race forums in December 1997 for his support for affirmative action.

progress was made by black Americans before the idea of racial preferences was seriously entertained by anyone.”<sup>25</sup>

The Thernstroms conclude from this that since Black Americans made their greatest strides in overcoming discrimination and whites made their greatest strides in shedding their prejudices without government programs or social movements, colorblind public policies are the best way to unite Americans across the racial divide. Racial preferences, they hold, are not just divisive, they have done little historically for Black progress. Thus, the government has no need nor any business maintaining programs of racial preference. Instead, it should pay heed to Justice Harlan’s words and create a color-blind social policy that treat people as individuals rather than members of an ascribed group. This, they hold, is a responsible middle ground between the racist policies of the past and the sky-is-falling racial doom saying of today’s affirmative action liberals. “It is on the grounds of individuality that blacks and whites can come together,” they argue, not by clinging to the divisive discourses of race.<sup>26</sup>

The Thernstroms’ plea is a noble one. Nevertheless, as with Justice Harlan’s dissent, their colorblind ideology naturalizes white advantage, shifting the blame for persistent racial gaps onto Black people and excusing whites almost entirely. Black poverty is almost exclusively the result of out-of-wedlock births and the decline in Black marriage rates. Their “spatial mismatch” theory explains away high Black unemployment by claiming that Black people simply do not live where the jobs are. Any remaining segregation is largely due to African Americans’ preference to live together. Affirmative action, not whites’ resistance to it, is responsible for widening the breach between the races. Their chapter on Black poverty concludes by arguing that Black people just have to buckle down, refuse to sell drugs, accept minimum wage jobs and work their way up like immigrants do. They even suggest we stop using the terms “racism” and “racist” because they just antagonize Black-white relations. At this point they have come full circle, from acknowledging the continuing existence of racism to contemplating eliminating the very language that allows one to name it.<sup>27</sup> Ultimately, they excuse whites from virtually any responsibility for the current condition of African Americans today.<sup>28</sup> “[T]he serious inequality that remains [today] is less a function of white racism than of the racial gap in levels of educational attainment, the structure of the black family, and the rise in black crime.”<sup>29</sup>

By excusing whites for racism, *America in Black and White* declares that any residual forms of white advantage are merely incidental — or are Black people’s fault. But denying that white privilege exists does not mean it really has disappeared. To not recognize race publicly one has to deny the historical connection of whiteness with racial subordination or, as the Thernstroms do, tuck it away safely in the past. This formalistic conception of race permits continuing subordination by denying the presence of all but

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<sup>25</sup> *Id.* at 95.

<sup>26</sup> *Id.* at 529.

<sup>27</sup> For a similar critique, see generally Stephen Steinberg, *Up From Slavery: The Myth of Black Progress*, 7 *NEW POLITICS* 69 (1998)

<sup>28</sup> See *supra* note 24, at chaps. 9, 15, 17.

<sup>29</sup> *Id.* at 534.

the most blatant forms of racial privilege and discrimination.<sup>30</sup> By defining race simply as skin color or by refusing to classify racially at all, race as a form of status, property and terror is not abolished so much as it is simply defined away. If anything, colorblindness perpetuates white advantage since it declares such advantage “normal” or “private” and therefore beyond the realm of public deliberation. Thus, the colorblind ideal actually reproduces a white identity that continues to see itself as both equal and privileged, although now its advantages are “natural” rather than enforced by a racist system. It preserves a material interest in being white. In so doing, it offers little toward the development of a democratic conception of personhood. Unfortunately, neither does its principal alternative, multiculturalism.

### III. THE MULTICULTURAL IDEAL

Multiculturalism is a term of many uses. In one sense it simply describes a fact of the world. If culture is “the context within which people give meanings to their actions and experiences, and make sense of their lives,” then most nations are by definition multicultural, for they contain numerous cultures within their borders.<sup>31</sup> In a more normative sense, multiculturalism represents an acknowledgment of the cultures of other peoples and a moral ideal of tolerance toward them. In a third sense, multiculturalism is not just a normative ideal but also a political imperative. In this conception, which I term the multicultural ideal, cultural diversity is not only a moral good, it is necessary for democracy, since the full inclusion of all individuals or citizens implies public recognition of their cultural identities. Rather than suggesting a colorblind universalism that would subordinate the sources of an individual’s identity (such as her culture, race, religion, or gender) to that of the citizen, the multicultural ideal asserts that a healthy public sphere should be committed to providing cultures (particularly minority cultures) the protection they need to survive and flourish. So long as they follow the rules of a common democratic civic culture, multiculturalism is perfectly compatible with a universalism “that counts the culture and cultural context valued by individuals as among

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<sup>30</sup> See Crenshaw *supra* note 23 at 282–85. Crenshaw argues that the strategy the Supreme Court used to uphold segregation in *Plessy v. Ferguson* is the same one the Court now uses to uphold colorblindness. The Court’s strategy in *Plessy* was to define equality formally, while ignoring the actual material context of segregation, as well as its effects. Thus, the Court saw the presence of two railroad cars, one for whites and one for Black people and declared it equal accommodations, all the while ignoring the actual context: one car was clean and comfortable and, most importantly, a sign of standing while the other car was hot and filthy and, most importantly, a sign of degradation. She claims that, when examining cases claiming racial discrimination, the Court still looks at race in narrow, formal terms, i.e. as skin color. In so doing, the Court ignores the historical, political, and economic context of race and racial discrimination. Thus, since everyone has a skin color, “equal treatment” means that the state should take no one’s skin color into account. Given such a definition, racism can just as easily be perpetuated against whites as Blacks, and proving it requires explicit, deliberate discriminatory intent. But since the state only recognizes intentional discriminatory behavior by a particular person or agency, Black people are essentially forced to depict themselves as “perfect victims as against a perfect discriminator.” This puts them in a Catch-22: they are chastised for using “victimology” when making claims of discrimination, yet they have no other way to claim discrimination.

<sup>31</sup> JOHN TOMLINSON, CULTURAL IMPERIALISM 7 (1991).

their basic interests.”<sup>32</sup>

As a fact of the world or as a commitment to tolerance, multiculturalism is largely unobjectionable today. There is great disagreement, however, over the multicultural ideal — its desirability, its implementation, and the kind of democratic politics it prefigures. Much of this debate in the areas of philosophy and political theory revolves around Charles Taylor’s seminal essay, “The Politics of Recognition.”<sup>33</sup>

“The Politics of Recognition” emerges from questions that originate in Taylor’s earlier study of Hegel. Hegel’s challenge to participatory democracy, Taylor argues, is to ask how much diversity a society can endure without dissolving. Modern society is fundamentally self-interested; it is thus fractured and alienated. Yet absolute freedom (or participatory democracy) requires homogeneity for it to function because the participation of all citizens in political deliberation requires a common foundation of purpose. Such a common foundation is impossible in a fragmented, self-interested society. Further, attempts to create such a foundation inevitably lead to an inability for the political order to cope with the complexity and fragmentation of modern society at best or a terror (such as the French Revolution) at worst. The question for Taylor is “What kind of differentiation can modern society admit of?”<sup>34</sup> What is needed, he argues, is a “meaningful differentiation” that both knits communities together and distinguishes them from others. “The Politics of Recognition” is his attempt at such a differentiation.

Human life, Taylor asserts, is fundamentally dialogical. That is, individuals construct their own identity, but not by themselves. We only become fully human through interaction with others, particularly those who in some way matter to us. “Thus my discovering my own identity doesn’t mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others.”<sup>35</sup> Taylor argues that in the pre-modern era, one’s identity was defined according to one’s “honor” or status in a system of social stratification. By contrast, in the modern era individuals must construct their own identity through the concept of dignity. While the underlying premise of honor is that only some share in it, the premise of dignity is that everyone possesses it. The demand for dignity thus results in “a politics of equal recognition,” in which all individuals demand the right to be recognized as an equal to all others.<sup>36</sup> Recognition, then, is the acknowledgement of one individual’s self-consciousness and identity by another self-conscious being.

But the modern politics of recognition has an element of uncertainty built into it. Whether one was prince, priest, or pauper, the social hierarchy guaranteed a premodern person’s identity. Yet in the modern era persons can lose their identity, they can fail to be recognized or they can be “misrecognized” by others. Historically, misrecognition has

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<sup>32</sup> Amy Gutmann, *Introduction to CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 5 (Amy Gutmann ed., 1994).

<sup>33</sup> Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994)

<sup>34</sup> CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* 111 (1979).

<sup>35</sup> TAYLOR, *supra* note 33, at 34.

<sup>36</sup> *See id.* at 26–27.

not only been the experience of individuals, but of entire groups. Misrecognition, then, is a lack of due respect shown for an individual or group by another individual or group. However, it is not just a snub to the person or group seeking recognition. Because our identities are created dialogically, misrecognition can be internalized, resulting in a damaged sense of identity that can “inflict a grievous wound, saddling its victims with a crippling self-hatred.”<sup>37</sup> The problem of misrecognition, Taylor argues, is the fundamental dilemma of the modern era.

The politics of recognition has assumed two forms in response to this dilemma. The politics of universalism insists that the way to achieve dignity and equal worth is to emphasize that which brings us together as members of a common community, in particular the possession of equal rights and entitlements. This is the colorblind position. The politics of difference, on the other hand, demands recognition not on the basis of what humans share but on that which makes them unique. All persons are of equal worth, but each person possesses a distinct identity, often derived (in part) from membership in a cultural group. It is this distinctness that defines us as humans and that demands equal recognition. Advocates of the politics of universalism contend that an emphasis on human particularity, particularly cultural differences, separates individuals rather than brings them together. A common political identity, usually consecrated by citizenship, is necessary to create the common bonds necessary for a democratic public. Advocates of the politics of difference charge that the “universalism” of the politics of universalism historically has been quite particular (i.e. white, male, and propertied). Further, universalism often demands the suppression of differences in order to construct a common political identity, denying the individual an opportunity to fashion her own publicly significant identity. The politics of universalism, its critics charge, is actually ethnocentric and elitist.

Taylor agrees that the politics of universalism tends to homogenize social life and can easily slide into the politics of ethnocentrism — and often has. Still, he is uncomfortable with the politics of difference since, he argues, it abandons all attempts to judge the moral worth of particular cultures in claiming that all standards of judgment are inherently tainted by power. Taylor thus sees his task as being to find a third path, not between the politics of difference and the politics of universalism so much as between poststructuralism and a homogenizing liberalism that can easily turn ethnocentric. His goal is a universalism that can respect (and protect) the demands for recognition by individuals and cultures alike.

Taylor’s solution is a “substantive liberalism” that he distinguishes from the “procedural liberalism” of universalism and the “difference” politics of poststructuralism. According to procedural liberalism, a liberal society can adopt no substantive view about what constitutes the good life. The state is restricted to a procedural commitment to protect the rights of individuals so that they are able to pursue their private definition of the good. But, Taylor argues, a society can have collective goals without violating liberal principles. Quebec, for example, expresses a collective desire to preserve its French language and culture but does not trample on the rights of those Quebecois who disagree with this goal, such as indigenous peoples and Anglophones. Cultural survival is a

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<sup>37</sup> *Id.* at 26.

substantive good: it makes a collective claim as to what the good life should, in part, consist of — such as that Quebec should be a French-speaking territory. This substantive good is worth preserving as a matter of state policy, Taylor argues. A substantive liberalism can be perfectly in keeping with principles of universalism while avoiding the dangers of homogenization so long as it respects the rights of those who do not share in the collective definition of the good.

Taylor is a Canadian; his theory of recognition is intended to explain the conflict between English and French-language cultures in that nation, particularly in Quebec. Misrecognition may indeed be Canada's fundamental dilemma, but it is not the United States'. A theory of the equal recognition of cultures cannot make sense of the American experience, for the fundamental dilemma here has been race, not the uneasy coexistence of two language-based cultures like in Canada.<sup>38</sup> A multiculturalism borrowed from Taylor assumes that social identities are defined culturally. Accordingly, each race must possess a corresponding culture. But this is an assumption that must be proven rather than asserted. An analysis of cultural groups implies equality: I grant your culture recognition and seek to learn about it because I feel it is potentially as worthy as mine. Racial injustice, however, is premised on relations of *inequality* between dominant and subordinate groups. Multiculturalism is premised on the valuing of difference, but racial oppression, for all the differences it concocts as a means to divide white from not-white, depends on the *suppression* of difference in order to forge disparate cultures and ethnicities into homogenous races for the purposes of privilege and subordination. Thus, lack of recognition and racial subordination are not the same thing. When they are conflated, the unfortunate tendency is to emphasize the former at the expense of the latter. Applying Taylor's theory of recognition to the United States requires making race equivalent to culture; the "American dilemma" is defined as whites' "misrecognition" of Black people. But race and culture are simply not synonymous; one is a form of status and subordination, the other is not necessarily so.

The conflation of racial and cultural identity points to a second problem with Taylor's theory of recognition: it lacks an analysis of power. Taylor acknowledges that power may prevent an individual from being recognized as she desires and that the state may need to protect against such misrecognition, but there is little sense in "The Politics of Recognition" that identities themselves are constructed (and not merely repressed) through power relations. As Linda Nicholson puts it, Taylor focuses too much "on the other to be recognized and too little on the practice of recognition itself."<sup>39</sup> Taylor interprets the problem of the modern age as the problem of misrecognition and the psychological damage it inflicts on its victims. The modern era, he argues, brought about the collapse of honor, and thus the instability of identity. Honor, though, is an eminently modern concept, fully compatible with liberal ideals and democratic governance. Status or "honor" as a white person historically has been a guaranteed form of social standing

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<sup>38</sup> Taylor himself acknowledges this. He implies that his model of recognition applies to the situation of Black people in the United States in several places in "The Politics of Recognition". *Id.* at 26, 36, 38, 65. In his review of Will Kymlicka's *Multicultural Citizenship*, 90 AM. POL. SCI. REV. 408 (1996), however, he acknowledges that African Americans do not fit into his cultural model. For a similar criticism, see generally LINDA NICHOLSON, *THE PLAY OF REASON: FROM THE MODERN TO THE POSTMODERN* (1999).

<sup>39</sup> NICHOLSON, *supra* note 38, at 135.

largely insulated from the possibility of misrecognition. Racial oppression, then, is not a problem of misrecognition but a problem of *power* — the attempt by one group to maintain its standing and privileges over another group.<sup>40</sup> Taylor is loath to raise the question of power because he believes it will throw him in the bog of poststructuralism and its “half-baked neo-Nietzschean theories.”<sup>41</sup> Yet this reluctance, when borrowed for an American political and social theory, leads inquiry away from politics and into an unfruitful exploration of “cultural differences” and how to build bridges between them. At best such work misunderstands the nature of race; at its worst it actually perpetuates racial inequality rather than eradicates it.

The dangers of conflating culture with race are most apparent, ironically, in the emerging field of “whiteness studies,” which aims to study race not through a study of the oppressed but through an inquiry of the privileged.<sup>42</sup> An underlying assumption of much of the work on whiteness in the disciplines of education, cultural studies, and clinical psychology is that race is not biology but culture. Thus, whiteness must be a culture as well, and since all cultures should be equal, the logic goes, white identity deserves a place at the multicultural table. The problem, of course, is that whiteness historically has not been an expression of culture so much as a social status reflecting relations of inequality, discrimination, privilege, and terror. The political and pedagogical challenge as whiteness studies defines it, then, is to find a usable white history that, once disassociated from the strange fruit of white supremacy, can provide the basis for a non-racist white identity that can constructively join the multicultural tapestry.

Furthermore, if no such history can be found, it will have to be invented. Since whiteness historically has not been an expression of culture so much as a status reflecting social relations of inequality, discrimination, privilege, and terror, its strongest advocates have found it very difficult to locate a white culture independent of its function as a form of standing. In his work on whiteness and youth, for example, education professor Henry A. Giroux blames identity politics for the inability of white youth to develop solidarity with youth of color.<sup>43</sup> Identity politics has alienated poor white youth and led to a “crisis

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<sup>40</sup> It is possible to interpret misrecognition itself as a form of power, and Taylor indeed does say that misrecognition can be a form of oppression. But the focus of misrecognition is on the demeaning images the misrecognized have had forced on them (and in some ways have internalized) by the powers that be, not the social relations that enable one group to (mis)recognize another. Misrecognition is largely an *effect* of material relations of subordination, not the source of subordination.

<sup>41</sup> TAYLOR, *supra* note 33, at 70.

<sup>42</sup> I exclude from the following critique works on whiteness by scholars such as Neil Foley, Ian Haney-López, bell hooks, Noel Ignatiev, Matthew Frye Jacobsen, David R. Roediger, and Alexander Saxton, as well as other important works such as TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992). These scholars are more interested in critiquing whiteness than in discovering a usable past in its name, and thus have much to teach political theorists interested in questions of race. David Roediger locates the origins of this sort of inquiry in African American scholarship and terms it “critical studies of whiteness” to distinguish it from the field of “whiteness studies” I criticize here. David R. Roediger, *Introduction* to *BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE* (David R. Roediger ed., 1998).

<sup>43</sup> See Henry A. Giroux, *White Noise: Toward a Pedagogy of Whiteness*, in *RACE-ING REPRESENTATION: VOICE, HISTORY, AND SEXUALITY* 53 (Kostas Myrsiades & Linda Myrsiades eds.,

of self-esteem” by denying them an ethnicity of their own. White people, especially white youth, need an identity and a culture to which they can belong. Given American history, he argues, such an identity will inevitably be tied to race. Giroux complains that conservatives have appropriated whiteness for their own politics, duping some poor white youth into right wing politics along the way. The only thing that can save white youth from the right wing reaction, Giroux holds, is a reconstructed, progressive, anti-racist white identity. Thus, the political and pedagogical task is to locate serviceable elements of the white experience and use them to form the basis of a new, anti-racist white culture and identity.<sup>44</sup> He strongly resists claims that whiteness is nothing but a racist identity. Even if true, he warns, telling this to white youth would be psychologically damaging, for these youth need to find a place for themselves in the multiracial mosaic. “Defining ‘whiteness’ largely as a form of domination . . . while rightly unmasking whiteness as a mark of ideology and racial privilege, fails to provide a nuanced, dialectical, and layered account of whiteness that would allow white youth and others to appropriate selective elements of white identity and culture as oppositional.”<sup>45</sup> Whiteness is more than a form of oppressive power, he asserts, it is also a possibility.<sup>46</sup>

Giroux’s effort to create a progressive white culture sounds promising at first glance, but the reconstruction of white identity is a dangerous undertaking. Some of the dangers are evident in Joe Kincheloe and Shirley Steinberg’s introduction to the anthology *White Reign*. Kincheloe and Steinberg anxiously warn about “the white identity crisis” and how it “cannot be dismissed simply as the angst of the privileged.”<sup>47</sup> In fact, their primary criticism of multiculturalism is that it has yet to produce a “compelling vision of a reconstructed white identity.”<sup>48</sup> The task of educators, they assert, is to create “a positive, proud, attractive, antiracist white identity that is empowered to travel in and out of various racial/ethnic circles with confidence and empathy.”<sup>49</sup> They even call for a redirecting of funds and pedagogical energy toward the development of a progressive white identity: “Such pedagogical work is anything but easy; progressive Whites will require sophisticated help and support to pull them through

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1998).

<sup>44</sup> See *id.*, at 43.

<sup>45</sup> *Id.* at 43.

<sup>46</sup> For similar approaches to whiteness, see generally 47 THE MINN. REV. (1996); BECOMING AND UNBECOMING WHITE: OWNING AND DISOWNING A RACIAL IDENTITY (Christine Clark & James O’Donnell eds., 1999); WHITENESS: A CRITICAL READER (Mike Hill ed., 1997); AnnLouise Keating, *Interrogating “Whiteness,” (De)Constructing “Race,”* 57 C. ENG. 901 (1995); Thomas K. Nakayama & Robert L. Krizek, *Whiteness: A Strategic Rhetoric*, 81 Q. J. SPEECH 291 (1995); Beverly Daniel Tatum, *Teaching White Students about Racism: The Search for White Allies and the Restoration of Hope*, 95 TCHRS. C. REC. 462 (1994); George Yúdice, *Neither Impugning nor Disavowing Whiteness Does a Viable Politics Make*, in AFTER POLITICAL CORRECTNESS 255 (Christopher Newfield & Ronald Strickland eds., 1995).

<sup>47</sup> Joe L. Kincheloe & Shirley R. Steinberg, *Addressing the Crisis of Whiteness: Reconfiguring White Identity in a Pedagogy of Whiteness*, in WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 12 (Joe L. Kincheloe et al. eds., 1998). One should note that they offer no such version in their book either.

<sup>48</sup> *Id.* One should note that they offer no such vision in their book either.

<sup>49</sup> *Id.*

the social, political, and psychological dilemmas they all will face.”<sup>50</sup> This “sophisticated help” includes funding as well as support groups of people of color to help “progressive whites” cope with unsympathetic white colleagues! With Kincheloe and Steinberg, whiteness studies reaches its logical endpoint — instead of challenging discrimination it demands people of color support groups; instead of channeling funds to deprived students of color, they now go to aggrieved whites; instead of challenging white supremacy, effort is devoted to reconstructing and sustaining white identity. The desire to create a positive white identity quickly turns a well-meaning anti-racism into white narcissism, which perpetuates white privilege rather than undermines it.

Despite their vigorous defense of an antiracist white identity, white culture advocates have yet to define what “white culture” is apart from white supremacy.<sup>51</sup> The problem, however, is not bad scholarship; it is the fact that a white culture *does not exist*. After all, it is not white culture that unites a Brooklyn cop, a Silicon Valley entrepreneur, a rural West Virginian, a Portland hippie, or a Phoenix metal head, it is white *power*: the enjoyment or expectation of preferential treatment by public and private officials. Further, as Albert Murray points out, given the pervasive influence of African, Indian, and other cultures, American culture can in no way be defined as white but is “incontestably mulatto.”<sup>52</sup> This is not to say that whiteness is culturally insignificant, or that politics and culture can be neatly distinguished. In one sense, as David Cochran writes, white culture could be described as “the elevation of norms and practices that embody the experiences of white Americans to the position of neutral and universal standards used to judge everyone.”<sup>53</sup> However, the attempt to raise one group’s way of seeing the world to a hegemonic position is a problem of power, not culture. If all that whites share *as whites* is an expectation of favored treatment, then whiteness is best understood as an identity of power, not of culture.

Whiteness studies’ failure to understand whiteness as a form of power follows from the politics of recognition’s tendency to understand the modern dilemma in terms of the misrecognition of cultures rather than the persistence of relations of privilege and subordination. If the problem is defined as misrecognition, the challenge becomes to make all races equal, which compels not only a multicultural politics but also, as Giroux and Kincheloe and Steinberg argue, a reconstructed white identity that can helpfully join a multicultural polity. Whiteness, though, cannot be understood apart from the history of

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<sup>50</sup> *Id.* at 23.

<sup>51</sup> Neither Giroux nor Kincheloe and Steinberg are able to define white culture. Kincheloe and Steinberg falsely claim that “no one at this point really knows exactly what whiteness is,” as if African American scholars and others have not been exploring it for years. *Id.* at 4. Giroux claims it is possible to construct a white identity without essentializing whiteness (as if the main problem with whiteness is its essentialism), but it is his own logic that is essentializing. Because blackness contains a content independent of relations of subordination, Giroux assumes that whiteness must have one, too. He cannot conceive that it might be possible for a Black culture to survive without a white one, or that whites might someday identify themselves other than racially.

<sup>52</sup> See generally ALBERT MURRAY, *THE OMNI-AMERICANS: SOME ALTERNATIVES TO THE FOLKLORE OF WHITE SUPREMACY* (1990).

<sup>53</sup> DAVID CARROLL COCHRAN, *THE COLOR OF FREEDOM: RACE AND CONTEMPORARY AMERICAN LIBERALISM* 62 (1999).

white supremacy. Multiculturalism undermines *herrenvolk* conceptions of personhood by positing the equality of all persons and the equal worth of various cultures. By redefining whiteness as culture, however, multiculturalism sets as its task to fit the white world into the multicultural mosaic rather than to question whether the world needs whiteness. Yet, what can a program of whiteness as merely a form of unjust power offer the multicultural tapestry besides a rip? If, as Marx says, “the formulation of a question is its solution,”<sup>54</sup> then the misformulation of a question is its problem. The dilemma of how to construct a progressive white identity evaporates when whiteness is critiqued as a political category rather than as a cultural identity.

#### IV. TWO LOGICS OF GLOBAL CAPITAL

Multiculturalism and colorblindness are often presented as competing ideals due to the former’s emphasis on culture and the latter’s emphasis on the individual. Multiculturalism would highlight human differences, while colorblindness would overlook them in order to emphasize what human beings share. Ultimately, however, what the two ideals share is more significant than their differences. The purpose of both is to secure political stability in an increasingly global and rapidly changing economy. As the Soviet Empire fell, political challenges to capitalism and liberal democracy wilted from all quarters. Even many leftists resigned themselves to a world in which the market must be taken for granted. The only holdouts to this new world order so far are virulent forms of nationalism, fundamentalism, and the occasional protest against globalization. Multiculturalism and colorblindness are useful ideologies for controlling these conflicts. As Slavoj Žižek points out, multiculturalism is the perfect cultural logic for a world in which capital is loyal to no country, empire, or race, yet people still are.<sup>55</sup> Tolerance, diversity, equality, and liberal democracy, he argues, all form the basis of a new “hegemonic ideal” through which global capital functions. “Diversity” is not a radical ideal, it is a corporate imperative.<sup>56</sup> Similarly, Justice Harlan warns that the grave cost of *Plessy* will not only be the humiliations inflicted on Black people but the sowing of instability and discord in the nation. Only a colorblind polity, he holds, can secure social peace.

The destinies of the two races, in this country, are indissolubly linked

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<sup>54</sup> See Karl Marx, *On the Jewish Question*, in KARL MARX AND FREDERICK ENGELS, 3 COLLECTED WORKS 146, 147(1975).

<sup>55</sup> Slavoj Žižek, *Multiculturalism, or, the Cultural Logic of Multinational Capitalism*, 225 NEW LEFT REV. 28 (1997).

<sup>56</sup> A 1995 poll found that 73 percent of CEOs (most from companies with 10,000+ workers) would continue their company’s affirmative action programs even if federal contracts no longer required them. The reason most CEOs gave for this is that race-conscious hiring helps their marketing. TERNSTROM, *supra* note 24, at 452. In the twenty-first century business world, diversity is as necessary to profit making as a web site. Yet while diversity may be good business, confronting white privilege is decidedly not. As a vice president for human resources in one company told journalist David Shipler, “Diversity is good business [but as for] sitting people down and trying to unearth their racial inclinations, I don’t think it’s healthy.” DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* 539 (1997).

together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. . . . The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.<sup>57</sup>

However, the imperative of political stability in the global era does not eliminate the problem of white identity. Globalism has undoubtedly worked to undermine white identity of the *herrenvolk* era, if only because capital is increasingly unwilling to continue paying white workers more for the same work. Yet, globalism is not a resolute enemy of whiteness. White privileges are generally unopposed by globalists so long as they are not prohibitively costly and so long as they are not the product of conscious forms of discrimination but result from the apparently unintended effects of the routine functioning of the political and economic order. Just as economic elites accommodated themselves to Jim Crow, they can easily accept normalized white advantages in a formally race-neutral democracy, as long as they preserve the political stability required for future growth rather than threaten it.

Whether one tries to ignore or deny away the power of white personhood, as colorblindness does, or to harness it for good rather than evil, as multiculturalism does, neither confronts the fact that white personhood is inherently an identity of privilege, inequality, and supremacy, and is therefore incompatible with a democratic society. The task of a democratic politics, then, is neither to ignore nor redefine white personhood but to *abolish* it. If a racial order is inherently hierarchical and anti-democratic, by definition so is the race at the top of the hierarchy. Abolishing the hierarchy therefore eliminates its dominant category, much as the abolition of slavery eliminated the slaveholder and the abolition of feudalism eliminated the aristocracy as significant social identities. This abolition does not imply mass murder, of course, it implies rendering the white identity as socially useless as the Danish royalty are to the average Dane. Rather than a colorblind or even a multicultural personhood, then, we need an anti-white personhood. In the tradition of the American abolitionists of the nineteenth century, I propose to call this an *abolitionist personality*.

## V. WHAT WOULD AN ABOLITIONIST PERSONALITY LOOK LIKE?

If conceptions of personhood are constructed through social structures, it is also true that new forms of identity are necessary to create new structures. Creating a truly democratic society in the United States will require an *abolitionist* identity, particularly for those citizens who formerly assumed they were white. While spelling out the details of an identity that does not exist can easily turn into fanciful dream work, I conclude by suggesting some of the basic elements of an abolitionist identity.

First, an abolitionist personality would be resolutely opposed to white privileges

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<sup>57</sup> Plessy v. Ferguson 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

of any kind. As a result, it would support any and all policies, including affirmative action, busing, reparations and other forms of wealth distribution, that undermine the racial gap in housing, education, employment, wealth, health, criminal justice, and politics.

Second, this identity would adopt a new set of core values to ground it. An obvious source for such values is Black culture, for as the lone culture that emerged within and against white supremacy, it has the most experience both struggling against white identity and imagining a world beyond it. Historian V. P. Franklin argues that the core cultural values of the African American experience are self-determination, freedom, resistance, and education.<sup>58</sup> An abolitionist personality would seek to articulate what these values mean in the twenty-first century. A reconsideration of these core values could change the way people understand democracy. Freedom could come to mean the ability for all interested persons to participate in those affairs that affect their daily life rather than merely freedom from government interference. Equality could come to mean substantive social equality rather than formal political equality and equality of opportunity. After all, defining freedom and equality as narrowly as we do today are legacies of the *herrenvolk* era, when citizenship was a status to possess rather than a power to employ and when social equality not only meant the equal distribution of wealth but equality with Black folk. In any case, an abolitionist personality founded on the Afro-Atlantic heritage rather than the heritage of white supremacy would be willing to explore new ways of thinking about such matters. Such a founding would not steal from Black culture, which has happened too many times in American history, but place it at the center of the American experience.

Above all, an abolitionist personality would be a *political* identity. One of the biggest problems with colorblindness and multiculturalism alike is that both leave little room for politics. Colorblindness wants us to ignore people's racial identity and to look at each other as citizens, but it says very little about how limited the power of citizenship is today. Multiculturalism tends to divide the world into culture and socioeconomics, leaving expressly political questions of citizenship, participation, and governance to fall through the middle. Both approaches reflect a fundamental misunderstanding of the nature of whiteness. Whiteness certainly has cultural and economic effects, but it is first and foremost a political identity of status and privilege. It organizes people into groups, distributes them according to a hierarchy, allocates advantages to some and disadvantages to others, and shapes the way in which people make sense of the world. These are all *political* operations. An abolitionist identity would bring politics back into the picture both by understanding race as a form of power and by understanding that the solution to the problem of race is not to ignore differences nor celebrate them, but to secure greater participation and more democracy by undermining the privileges of whiteness.

In developing an abolitionist personality, I propose we look to the utopian moments of Black political thought. "Utopian" is not a word to fear. While utopian can represent the hopelessly unrealistic, it can also represent a political vision that is willing to go outside the boundaries of conventional political thinking to imagine new ways of living and organizing our lives. Such willingness is found in Black political thought

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<sup>58</sup> V. P. FRANKLIN, *BLACK SELF-DETERMINATION: A CULTURAL HISTORY OF THE FAITH OF THE FATHERS* (1984).

more than any other American political tradition, socialism included. The interests of white identity ultimately lie in its own self-interest, and it therefore resists any political vision in which its privilege is not central. Black people, on the other hand, have led the resistance against the white democracy. As a result, Black political thought is typically free of any white blinders that might restrict its democratic vision.

This utopian strain is easily located in the works of people such as W. E. B. Du Bois. For example, Du Bois hints at the latent possibilities of a world without whiteness in an article “Criteria of Negro Art,” published in 1926 in the NAACP’s *Crisis* magazine. The article asks its Black readers, living under Jim Crow, “What is the thing we are after?” Du Bois replies, “We want to be Americans, full-fledged Americans, with all the rights of other American citizens.”<sup>59</sup> This seems like an honorable demand for full civil rights, and indeed it is. But he continues:

But is that all? Do we want simply to be Americans? Once in a while through all of us there flashes some clairvoyance, some clear idea, of what America really is. We who are dark can see America in a way that white Americans cannot. And seeing our country thus, are we satisfied with its present goals and ideals? . . . [P]ushed aside as we have been in America, there has come to us . . . a vision of what the world could be if it were really a beautiful world . . . a world where men know, where men create, where they realize themselves and where they enjoy life. It is that sort of a world we want to create for ourselves and for all America.<sup>60</sup>

This expanded political imagination, borne of Black struggle, is one of the potential fruits of unshackling democratic politics from the bonds of whiteness. For Du Bois, the political problem is not how to find a way for democracy to integrate Black people. Rather, *democracy should aspire to blackness*. The struggle for Black equality opens up political possibilities unimaginable to those tethered to the white world.

In 1965, the editors of *Ebony* magazine announced that there is no “Negro problem” in America; rather, the problem of race is a *white* problem. The source of the solution to that problem lies “not in the Negro but in the white American and in the structure of the white community.”<sup>61</sup> Today there is no “multicultural” or “diversity” problem, there is still only the white problem — its attitudes, its power, its solidarity. The willingness of both ideals to acquiesce to whiteness is not so much a sign of their hypocrisy as it is proof of the determination of white personhood to hold together in the post-*herrenvolk* era. Whether through resistance to analyzing race in terms of power or through a rearticulation of whiteness into a culture that, properly purged of its racist features, deserves recognition with any other, white identity yet lives and has a will to live. The task for those who want a different world from the one we live in, then, is not the refusal of recognition of race in general nor the equal recognition of races but *the*

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<sup>59</sup> W.E.B. DU BOIS, *Criteria of Negro Art*, in W.E.B. DU BOIS: A READER 509 (David Levering Lewis ed., 1995).

<sup>60</sup> *Id.* at 509–10.

<sup>61</sup> EBONY EDITORS, *THE WHITE PROBLEM IN AMERICA* (1966).

*refusal of recognition of whiteness.* Such a refusal creates the opportunity to invent new conceptions of personhood, such as the abolitionist personality, that are not tied to superior status but to a commitment to freedom for all.

Abstract:

*Samuel A. Chambers' "The Hegemonic Politics of Race" expands Joel Olson's article into a broader critique of liberalism by referencing and building upon the work of Ernesto Laclau and Chantal Mouffe, who develop what Chambers interprets as a viable "politics of hegemony." While congratulating Olson for his powerful elucidation of the problems of whiteness, both in the context of multicultural and color-blind ideals, Chambers cautions that without expanding Olson's call for an "abolitionist" personality into a new form of radically democratic politics, Olson may be subject to the very same critiques of mythical self-invention he levels at the multicultural and color-blind ideals in his essay. In articulating the nature of a "radical democracy," Chambers provides an additional component to Olson's arguments that allows for the practical dismantling of the traditional, liberal democratic order through a deep questioning of white hegemony.*

**THE HEGEMONIC POLITICS OF RACE:  
THE PLACE OF AN ABOLITIONIST PERSONALITY  
IN THE RADICAL DEMOCRATIC IMAGINARY**

Samuel A. Chambers\*

Anyone who thinks through, or works with, politics and the law, has known for quite some time now that — despite the eloquence, force, and historical staying power of Justice Harlan's famous phrase — our Constitution simply *is not* colorblind.<sup>1</sup> From the

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<sup>1</sup> See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 34 (1987), where Bell refers to the work of historian William Wiecek who has documented in the main text of the Constitution at least seven specific accommodations to slavery.

original document produced by the framers' compromises, to the Reconstruction Amendments, to the Civil Rights legislation of the late 1960's, both the Constitution and the laws emanating from it have had to deal directly with issues of race. The Constitution has thus never been blind to color, even when it tries to make the law neutral with respect to race. Indeed, the latter efforts attest to the former fact. Moreover, multiculturalism offers no real resolution of this paradox. Very few of even those activists most committed to its goals, still believe that multiculturalism provides any sort of simple solution to the problems of the colorblind doctrine. Multiculturalism remains plagued by real or apparent problems of overwrought particularism, racial bias, and idealist fantasy. It might, therefore, seem somewhat redundant, or perhaps simply unnecessary, to point out "The Limits of Colorblind and Multicultural Personhood."

However, Joel Olson's essay does much more than its title might suggest. Rather than merely drawing out some contingent limitations in the colorblind and multicultural ideals of personhood, Olson exposes the fundamental and necessary contradictions that lie at the core of those ideals.<sup>2</sup> Both colorblindness and multiculturalism serve to maintain whiteness as an often invisible racial identity of power and privilege. Olson's precise and potent critique of multiculturalism and colorblindness shows how both ideals remain trapped within and emerge from the logic of political liberalism, which is itself tied to an expansionist economic capitalism. Olson's essay thereby greatly exceeds the scope of a critique of ideals of personhood;<sup>3</sup> it calls into question the very terms of liberalism, that regime which circulates and maintains such ideals. This radical questioning often goes on in between the lines of Olson's essay — emerging only in the repeated references to "greater democracy" and the "truly democratic" — but it reaches its focal point in his clearly radical conclusion: "*democracy should aspire to blackness.*"<sup>4</sup>

Yet, to paraphrase Olson, what would a democracy that aspires to blackness look like? Certainly such a transformation could never be carried out within the given conditions of liberal-capitalism. However, it also cannot be achieved merely by the articulation of an alternative ideal of personhood, the abolitionist personality.<sup>5</sup> Olson admits, and eloquently defends, the somewhat utopian nature of his description of the abolitionist personality. I wish to challenge not utopianism itself, but the content Olson

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<sup>2</sup> Such structural tensions cannot be reconciled through some sort of Hegelian synthesis; rather, these contradictions serve to deconstruct the ideals themselves. In other words, the logic of Olson's argument precludes reconciliation with advocates of either multiculturalism or the colorblind ideal and calls for a much more radical political project concerning race.

<sup>3</sup> Here one might fruitfully compare Olson's work to that of Ruth Frankenberg, who delineates three distinct but overlapping discourses on race, and whose chief critical target is the colorblind discourse. Frankenberg favors a "race-cognizant discourse" as the best way for feminists to overcome the entrenched problems of race. Throughout her work, Frankenberg's central question remains that of how white women "think through race," so larger structural issues, and questions of democracy, fall outside her scope. I hope to push Olson's work in a direction that I think it already gestures, well beyond the frame of individual thought. See generally, RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993).

<sup>4</sup> Joel Olson, *The Limits of Colorblind and Multicultural Personhood*, 2 STAN. AGORA 1, 3, 18, 20 (2001) (emphasis in original).

<sup>5</sup> Olson traces the contours of the abolitionist personality with three primary elements. Whatever the context-specific content, an abolitionist personality will be: 1) opposed to white privilege; 2) based on the values of black culture; and 3) resolutely political in its identity.

gives it, for he may fall prey to the same myth of self-invention that he begins his essay by criticizing. Our racial identities are historically constructed through relations of power—abolitionist, no less than white and black—so the *invention* of “new conception of personhood” may ring hollow without a formulation of the expressly *political* terms in which such a personality might emerge or flourish. In short, if liberalism gives rise to the multicultural and colorblind ideals of personhood, and if their critique calls for a reconstruction of democracy and the creation of an abolitionist personality, then we need a description of both the abolitionist personality — which Olson provides — and that new form of democracy — which he does not.

In the space remaining I cannot work up such a description from scratch. Instead, I wish to argue that the project of radical democracy as recently articulated by Ernesto Laclau might offer a home for the abolitionist personality painted by Olson. Specifically, I think that to save the abolitionist personality from becoming just another self-invention myth, it needs to be woven into the tapestry of what Laclau and Mouffe call the radical democratic imaginary.<sup>6</sup> Therefore, I will attempt to understand, or perhaps reinterpret, the abolitionist personality within the framework of a politics of hegemony. What prevents such a reinterpretation from becoming uncharitable is the key link that exists between Olson’s project of challenging whiteness and the project of radical democracy: namely, hegemony. I see these connections between the abolitionist personality and the scope of radical democracy as latent within Olson’s very description.

The force of Olson’s argument lies in its pellucid articulation of the problem of whiteness today, which proves to be an issue not of individual bias or overt racism, but of hegemonic power. The power relations that produce and maintain whiteness remain embedded within a particular history, a history that Olson’s essay and many of the works he cites have begun to trace. Colorblindness utterly ignores and at times goes so far as to suppress this history; hence Justice Harlan’s famous but no less false claim that “our constitution is color-blind.”<sup>7</sup> Multiculturalism, on the other hand, asserts the importance of history but does so only by *depoliticizing* it, by asserting that each race or culture has their own history, separate from the rest and developing along some neutral path. Hence, we witness the narcissistic desire to find or, if necessary, invent a white culture, a drive that forms the logical *telos* of whiteness studies. “Whiteness, though, cannot be understood apart from the history of white supremacy.”<sup>8</sup> Therefore, a genealogy of whiteness reveals neither a blank slate nor an unobjectionable set of natural cultural developments but rather a battleground of political contestation — a struggle for the creation and maintenance of whiteness as a hegemonic articulation of dominant power.

The task of historicizing shows precisely how multiculturalism and colorblindness remain trapped within the binaries of liberalism. In illustrating that Olson’s critique hinges upon the historicizing of colorblindness and multiculturalism, I would like to challenge the very a-historical logic of liberalism that bears these ideals. Colorblindness, to start, rests squarely upon a postulation of the abstract “we” of liberalism. The “we” of

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<sup>6</sup> See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS* (1985) 152.

<sup>7</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

<sup>8</sup> Olson, *supra* note 4, at 16–17.

the preamble to the Constitution or the Declaration of Independence becomes the abstract and utterly disembodied we of liberalism — a completely free and equal, and non-raced we. But as Wendy Brown argues: the “‘we’ in liberalism is sustainable [only] as long as the constituent terms of the ‘I’ remain unpoliticized.”<sup>9</sup> Race, particularly whiteness, must remain unpoliticized in order to maintain the fiction of liberal equality — an equality formally granted to all but substantively denied to many. This abstractness of the liberal we — which is also the colorblind we — perpetuates whiteness by removing it from the political realm and thereby implicitly condoning or encouraging it in the social realm.

By turning to the other binary pole of liberalism, the individual ‘I’, multiculturalism fares no better. Olson’s most significant criticism of Charles Taylor’s politics of recognition is that by conflating race with culture Taylor occludes a genealogical study of the political construction of race and race relations. I would submit that Taylor’s communitarian commitment to multiculturalism remains perfectly assimilable to a pluralist interpretation of liberalism. Rather than autonomous and spontaneously-forming interest groups competing freely for government outputs, Taylor has pre-existing cultural groups competing freely for public recognition. In either case, the historical and political constitution of those groups is eclipsed, so individual identity remains a private matter only to be represented abstractly on the plane of politics. The individual of liberalism or multiculturalism — the logics are the same — becomes raced only as an individual issue of culture. Once again, the power and privilege of whiteness remain shielded from political scrutiny or radical questioning by lodging them firmly, and safely, within an apolitical realm. The political logic of liberalism therefore obscures the problem of whiteness either by making it disappear — since the universal “we” is not only not racist, but not even raced — or by displacing it onto the individual I, as a problem of personal racism.<sup>10</sup>

What we need today to effectively challenge whiteness, not as a form of culture or an idea in someone’s head, but as a set of precisely *political* structures and relations of power, is a politics of hegemony. To give a preliminary definition that I hope to expand upon through this discussion, hegemony names the political practices by which a particular political group seeks to articulate a demand out of which irradiates a set of

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<sup>9</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 56 (1995).

<sup>10</sup> On this issue, witness George W. Bush’s presidential debate responses on questions of hate crimes or lesbian and gay civil rights legislation. Bush simply refused to take a clear position on either of these forms of legislation (even though he has opposed them both in the past); instead, he continually reasserted his own, individual “compassionate conservatism.” When pressured by Al Gore, Bush responded by insisting that he is a “tolerant person” and appeared hurt that Gore or the voters might think he had a “hard heart.” The implicit logic to such a response suggests that homophobia and racism remain problems only of individuals. The rhetorical force of the phrase “compassionate conservatism” lies in its ability to deflect structural issues — of poverty, racism, or homophobia — by emphasizing individual values of generosity and care. In a historical sense, this issue has precedent. Civil rights leaders in the early days of the Kennedy administration debated one another over whether it was better to have, on the one hand, a president whose appointment of federal judges and position on civil rights supported the black community but who did not personally like to even share the company of blacks (Eisenhower), or, on the other, a president who not only tolerated blacks but seemed genuinely to enjoy their company and respect their humanity, but whose appointment of federal judges and lip service to civil rights tended to thwart the movement (Kennedy). See, TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63* 700 (1988) (discussing of the contrast between the Eisenhower and Kennedy appointees to the Federal bench).

universal or universalizing effects.<sup>11</sup> We have to understand whiteness today not simply as an individual identity, for few whites explicitly and consciously identify with whiteness in this way. Whiteness is a hegemonic articulation of power that has been maintained despite the decline of the *herrenvolk* era as a legitimate political ordering of race relations. However, the colorblind and multicultural ideals have secured the hegemony of whiteness precisely by depoliticizing race — especially whiteness.<sup>12</sup> The universal effects of whiteness — its structuring of economic, political, and social logics, and its seepage into almost all variants of power relations — continue to circulate despite the explicit illegitimacy of whiteness as a universal political ideal.

We can only make sense out of the universality of whiteness by understanding that universality as hegemonic, as containing the ghosts of the particularity that constitute it — the legacy of the *herrenvolk* era masked by the colorblind and multicultural ideals. In other words, the classical philosophical understanding of universality as pure, transcendental, and unchanging proves false, hollow, and dangerous (since historical atrocities have been carried out in the name of such a universal). This is not to suggest a false universal/true universal binary — as if we could finally, today, achieve the true universality that has evaded us for so long — but to reject the classical conception of universalism outright.<sup>13</sup> Such a rejection entails a concomitant acceptance that all claims to universality are just that, political *claims* to universality enunciated by and from some realm of particularity. Laclau extends this logic to the broadest realms of politics when he states: “there is no universality which is not a hegemonic universality.”<sup>14</sup> However, we can see how powerfully it illuminates the politics of race<sup>15</sup> in which a foundationalist universal principle of white supremacy could never hold. Nevertheless, white supremacy prevails.

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<sup>11</sup> Laclau and Mouffe seek to “retrieve” the concept of hegemony out of the history of Marxism, particularly the writing of Gramsci, in which it originally developed. In doing so, they have taken a term that initially contains largely pejorative connotations — as hegemony serves to explain the continued ideological and material dominance of capitalism—and *resignify* it as a mostly neutral or positive term, one which seeks to describe all efforts at political articulation. For a partial set of references to the concept of hegemony as it develops in the works of Laclau and Mouffe, see JUDITH BUTLER, ERNESTO LACLAU, & SLAVOJ ZIZEK, *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* (2000); LACLAU & MOUFFE, *supra* note 6; ERNESTO LACLAU, *NEW REFLECTIONS ON THE REVOLUTION OF OUR TIME* (1990) [hereinafter LACLAU, *NEW REFLECTIONS*]; ERNESTO LACLAU, *EMANCIPATION(S)*, (1996) [hereinafter LACLAU, *EMANCIPATION(S)*]. It involves no overstatement to say that the central concern of all of these works is the concept of hegemony. In a recent article I have tried to provide a more fully-developed articulation of the meaning of hegemony. See, Samuel A. Chambers, *Giving Up (on) Rights?* (2000) (unpublished manuscript).

<sup>12</sup> That is to say, race *is* still a political topic in America, but only when the issue concerns African-Americans or other citizens of color — only when the question is one of Affirmative Action or the demographics of crime, for example. Whiteness, however, remains thoroughly unpoliticized, precisely as that which exists outside of the domain of the political.

<sup>13</sup> See Linda Zerilli, *The Universalism Which is Not One*, 28 *DIACRITICS* 3 (1998).

<sup>14</sup> ERNESTO LACLAU, *Structure, History and the Political*, in *CONTINGENCY, HEGEMONY, UNIVERSALITY* 182, 193 (2000).

<sup>15</sup>F or one explicit effort to apply Laclau and Mouffe’s thought to the politics of race, see ANNA MARIE SMITH, *LACLAU AND MOUFFE: THE RADICAL DEMOCRATIC IMAGINARY* (1998).

The project of radical democracy insists on conceptualizing politics as at root a matter of hegemonic articulations; radical democracy thereby provides a vehicle through which to challenge the hegemony of whiteness. A hegemonic political articulation spans the liberal divide between universal (the abstract disembodied ‘we’) and particular (the private, depoliticized ‘I’) because hegemony depends on the capacity of a group’s particular demand to reach beyond itself, gesturing toward the level of the universal. Yet precisely because the universality always retains traces of the particularity that articulates it, the universal itself must be thought as an empty signifier. There is thus no substantive content to the universal besides that given to it through a particular political articulation. Hegemony, therefore, must be conceived as *hegemonizing* — as filling the empty signifier. As Laclau writes: “this relation by which a particular content becomes the signifier of the absent communitarian fullness is exactly what we call a *hegemonic relationship*.”<sup>16</sup> The particular demands, of course, cannot be programmed in advance of their actual political articulation,<sup>17</sup> but we can certainly conjecture and offer visions of possible empty signifiers. Laclau and Mouffe have named this envisioning process: the radical democratic imaginary.<sup>18</sup> “The democratic imaginary does not constitute itself on the level of the positivity of the social, but as a transgression and subversion of it.”<sup>19</sup> For democracy to aspire to blackness, it must, at the least, subvert the current configuration of the liberal democratic order. Thus, the content and scope of the abolitionist personality can be thrown into relief by placing it within the frame of the radical democratic imaginary.

The abolitionist personality has the potential to emerge within a politics of hegemony, for only through *political* action can the hegemony of whiteness be confronted, and only through such contestation can the abolitionist personality remain viable. Indeed, Olson’s primary charge to the abolitionist personality, “*the refusal of [the] recognition of whiteness*,”<sup>20</sup> only holds within the terms of a politics in which whiteness can be explicitly challenged. Yet whiteness can only be subverted if it can first be located, named, and specified — an impossible task within the terms of a foundationalist politics. In other words, liberal universalism, that abstract and disembodied we, does not advocate explicitly the supremacy of whiteness precisely because the “we” is not even raced in liberalism. If we reject the universal/particular binary of liberalism — and this is exactly what radical democratic politics insists — then it quickly becomes possible to locate whiteness within the frame of hegemonic politics. Thus, the democratic aspirations to blackness can only ever be hegemonic aspirations because outside the logic of hegemonic politics (i.e., inside the logic of liberalism)

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<sup>16</sup> LACLAU, EMANCIPATION(S), *supra* note 11, at 43.

<sup>17</sup> Here we see one crucial distinction between radical democratic thought and utopian thought, since utopian thought bases itself on the vision of “Utopia,” a blueprint of the ideal society, while the project of radical democracy (while depending upon the production of various discursive “myths”) refuses any such programmatic approach. For Laclau’s own elaboration on both the differences and affinities between the radical democratic imaginary and utopian thought, see LACLAU, NEW REFLECTIONS, *supra* note 11, at 232.

<sup>18</sup> LACLAU & MOUFFE, *supra* note 6, at 149–94 (chap. 4).

<sup>19</sup> LACLAU, NEW REFLECTIONS, *supra* note 11, at 187

<sup>20</sup> Olson, *supra* note 4, at 21.

whiteness, contra Olson's assertions, never shows itself. It proves rather difficult to confront that which cannot be seen.

To put it otherwise, we can emphasize and attempt to unravel the meaning of *abolition* within the idea of an abolitionist personality. I do not wish to downplay the importance of the historical lineage to nineteenth century abolitionists, but clearly the goal of an abolitionist personality in the twenty-first century has to be something quite different. What must be abolished through the struggles of this personality — within the terms of a hegemonic politics — is not a specific law or edict but whiteness itself. Or, perhaps more strictly, we can say that the hegemony of whiteness must be overcome.<sup>21</sup> For this very reason, such abolition cannot be carried out merely by individuals (or even the liberal aggregation of many individuals) but by a broader political articulation that seeks to subvert white hegemony.

It is for this reason and in this manner that I now wish to read the claim, democracy must aspire to blackness. Democracy aspires to blackness not simply by having more individuals who identify with black culture — as those who take up an abolitionist personality may well do — but by opening up democratic structures and institutions to a radical questioning of white hegemony. Laclau describes democratic politics as follows: “a succession of finite and particular identities which attempt to assume universal tasks surpassing them; but that, as a result, are never able to entirely conceal the distance between task and identity.”<sup>22</sup> This articulation of the practice of democracy radically undermines the liberal binary I/we since it describes the I as emerging through the political articulation of a partial and indeterminate we. The corollary seems clear: “incompletion and provisionality belong to the essence of democracy.”<sup>23</sup> The aspiration of democracy to blackness through the vehicle of the abolitionist personality amounts to nothing more, and certainly nothing less, than a hegemonic subversion of the power and privilege of whiteness.

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<sup>21</sup>Because I wish to avoid a discussion of race that centers upon the individual, I would also prefer to circumvent a debate over whether white identity must be abolished. If the hegemony of whiteness can be subverted then the question of white identity becomes secondary, or perhaps even moot. In either case, the abolition of whiteness cannot be effected merely by a wholesale conversation from white personality to abolitionist personality; such a transformation will depend upon politics, a politics of hegemony.

<sup>22</sup>LACLAU, EMANCIPATION(S), *supra* note 10, at 15.

<sup>23</sup>*Id.* at 16.

**Abstract:**

*Bruce Baum offers a serious response to Joel Olson’s radical call for the abolition of white racial identity and for American democracy to “aspire to blackness.” Providing both critical commentary and praise for Olson’s critique of the colorblind and multi-cultural ideals, Baum largely shares Olson’s diagnosis for the root causes of racial injustice in contemporary American society. But while Baum shares Olson’s understanding of how we got here, his solution is slightly different than what Olson has proposed. Though he does not completely reject Olson’s call for an abolitionist personality, Baum argues that a critical theory of racialized identity is a more effective means by which to cultivate the anti-racist democratic identities and institutions that both he and Olson so passionately believe are necessary to rescue American society from its long legacy of racial injustice.*

**THE WHITENESS PROBLEM IN “COLORBLIND”  
AND MULTICULTURAL POLICY:  
A RESPONSE TO JOEL OLSON**

Bruce Baum \*

At the end of his influential 1963 book, *The Fire Next Time*, James Baldwin says, “Color is not a human or a personal reality; it is a political reality. But this is a distinction so extremely hard to make that the West has not been able to make it yet.”<sup>1</sup> Focusing on the case of the United States, Baldwin is emphatic that white supremacy has been the source of the racial mystification and terror, advantage and degradation, that have marked the country’s history. White people, he says, “are, in effect, still trapped in a history which they do not understand; and until they understand it, they cannot be released from it. They have had to believe for many years, and for innumerable reasons, that black men are inferior to white men. Many of them, indeed, know better, but . . . people find it very difficult to act on what they know.”<sup>2</sup>

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<sup>1</sup> JAMES BALDWIN, *THE FIRE NEXT TIME* 104 (1963).

<sup>2</sup> *Id.*, 22-23.

Baldwin uses his critical acumen mainly to highlight the great social, economic, political, and psychic tolls that white people have inflicted on themselves and others by vigorously asserting and guarding their whiteness. But he also suggests a way for whites to become part of the solution rather than remain the root of the problem:

White Americans find it as difficult as white people elsewhere do to divest themselves of the notion that they are in possession of some intrinsic value that black people need, or want. . . . The white man's unadmitted — and apparently, to him, unspeakable — private fears and longings are projected onto the Negro. The only way he can be released from the Negro's tyrannical [psychic] power over him is to consent, in effect, to become black himself, to become a part of that suffering and dancing country that he now watches wistfully from the heights of his lonely power and, armed with spiritual traveler's checks, visits surreptitiously after dark.<sup>3</sup>

Baldwin's recommendations foreshadow Joel Olson's compelling call for the abolition of white racial identity and for U.S. democracy to "aspire to blackness."<sup>4</sup> Olson outlines these ideas in the course of his powerful critique of two competing approaches to the "political reality" of racialized conceptions of personhood: the colorblind ideal and the multicultural ideal.<sup>5</sup> As Olson explains, it is *precisely because "race" is a political reality and not a biological reality* that colorblind and multicultural policies are inadequate to overcome racialized oppression and injustice.

Olson's critique of the colorblind and multicultural ideals includes two crucial insights for our efforts to overcome the "American dilemma" of racial injustice. First, he explains that the "colorblind ideology naturalizes white advantage, shifting the blame for persistent racial gaps on Black people and excusing whites almost completely."<sup>6</sup> Second, he points out that the multicultural ideal, which seeks to establish equal recognition in the public sphere for distinct cultural groups, is inappropriate for the politics of "race" because "race is not a form of culture but a form of *power*."<sup>7</sup> Olson elaborates this crucial point by examining the problematic way that multiculturalism has been deployed in the new field of "whiteness studies." *Some* of this scholarship, he notes, has sought

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<sup>3</sup> *Id.*, 108, 110.

<sup>4</sup> Joel Olson, *The Limits of Colorblind and Multicultural Personhood*, 2 STAN. AGORA 1, 20 (2001).

<sup>5</sup> I placed "colorblind" in scare quotes in my title because this ideal is arguably something of a misnomer. Calls for "colorblind" policies tend to be "color- and power-evasive" with respect to actually existing racialized inequalities. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 147 (1994); and K. ANTHONY APPIAH AND AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996).

<sup>6</sup> Olson, *supra* note 4, at 9.

<sup>7</sup> *Id.* at 13.

inappropriately to reconceptualize whiteness as a *cultural* rather than *racial* identity to secure for “white identity deserves a place at the multicultural table.”<sup>8</sup>

I find the main lines of Olson’s critique of colorblind and multicultural approaches to racialized injustice thoroughly compelling. I contend, however, that the problems Olson identifies call for a slightly different understanding than he provides of the interplay of power and culture in the production of racialized identities.<sup>9</sup> Olson rightly insists that racialized identities — as distinct from ethnic or cultural identities — are *primarily a manifestation of unequal power between groups* rather than a matter of cultural diversity. Nonetheless, racialized identities have significant cultural dimensions that beg to be more fully theorized.<sup>10</sup> Racialized identities give rise to diverse cultural practices and modes of self-definition — ranging, for example, from white supremacy to more subtle proprietary assertions of whiteness to Black nationalism and other oppositional nationalisms. Therefore, an anti-racist, democratic politics that seeks to affirm the moral equality of all human beings *as human beings* must not simply reject or endorse all the diverse cultural manifestations of racialized identity. Instead, such a politics demands a critical theory of racialized identity. The guiding principle of this theory is that we should support positive public recognition only for those cultural manifestations of racialized identity that, in Nancy Fraser’s words, “can be coherently combined with the social politics of equality.”<sup>11</sup>

A critical theory of racialized identity, I contend, confirms Olson’s insights about the antidemocratic character of white racialized identity.<sup>12</sup> At the same time, it offers more qualified support for his call to cultivate an *abolitionist personality* and his suggestion that “democracy should aspire to blackness”.<sup>13</sup>

## I. THE PROBLEM OF WHITENESS

Olson builds on recent critical studies of whiteness to illuminate the limitations of colorblind and multicultural policy approaches. Neither, he says, constructs “a truly democratic alternative to racist conceptions of personhood because neither addresses the problem of white identity.”<sup>14</sup> In this regard, both ideals are *power-evasive*.<sup>15</sup> The

<sup>8</sup> *Id.* at 14; It should be noted that Olson himself is contributing to the branch of “whiteness studies” — called “critical studies of whiteness” or “critical white studies” — that avoids this error by critiquing whiteness. See also CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997).

<sup>9</sup> I speak of racialized identities to emphasize the politically constructed character of “race.”

<sup>10</sup> See generally PAUL GILROY, THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS (1993); Lawrence Blum, *Multiculturalism, Racial Justice, and Community: Reflections on Charles Taylor’s “Politics of Recognition,”* in DEFENDING DIVERSITY: CONTEMPORARY PHILOSOPHICAL PERSPECTIVES ON PLURALISM AND MULTICULTURALISM (Lawrence Foster and Patricia Herzog eds., 1994); Robert Gooding-Williams, *Race, Multiculturalism, and Democracy*, CONSTELLATIONS, March 1998, at 18.

<sup>11</sup> NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 12 (1997).

<sup>12</sup> Olson, *supra* note 4, at 3, 17–19.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 3.

colorblind approach acknowledges the non-reality of biological “race” only to deny its continuing political salience. Thus, while the colorblind ideal is certainly an advance over expressly racist theories that construe the so-called “races” as inherently different and unequal, it in effect perpetuates the material inequalities that have been produced by the historical and current inequalities of *racialized status*.<sup>16</sup>

As Olson makes clear, the role of power in the construction and perpetuation of racialized identities becomes evident when we consider whiteness. Recent work by Cheryl Harris and George Lipsitz is especially helpful here. Harris persuasively leads us away from the erroneous view that *either* “race” is biological reality *or* it has no reality at all by explaining how white racialized identity, or whiteness, operates as a form of property;<sup>17</sup> and, in a similar vein, George Lipsitz speaks of a “possessive investment in whiteness” among whites.<sup>18</sup> The basic point is that racialized whiteness operates as a property interest in the United States because it yields material benefits or dividends (e.g., superior educational opportunities, employment networks, income, and wealth accumulation) to those people who get themselves counted as white *only as long as it is maintained as an exclusive possession*.<sup>19</sup> Moreover, whiteness has served to distribute these benefits to white people *across class lines* in a way that has partially obscured class-based inequalities among whites and, thus, has significantly undermined opportunities for both class-based and anti-racist redistributive politics.<sup>20</sup>

Lipsitz explains: “This whiteness is, of course, a delusion, a scientific and cultural fiction that like all racial identities has no valid foundation in biology or anthropology.” At the same time, it is “a social fact, an identity created and continued with all-too-real consequences for the distribution of wealth, prestige, and opportunity.”<sup>21</sup> Harris adds that from its beginnings “the concept of whiteness was premised on white supremacy rather than on mere difference. ‘White’ was defined and constructed in ways that increased its value by reinforcing its exclusivity.”<sup>22</sup> She notes that while these features of whiteness

<sup>15</sup> FRANKENBURG, *supra* note 5, at 147.

<sup>16</sup> Olson, *supra* note 4, at 4–6.

<sup>17</sup> Cheryl I. Harris, *Whiteness as Property*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 277* (Kimberlé Crenshaw et. al. eds., 1995).

<sup>18</sup> *See generally* GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998).

<sup>19</sup> In Lipsitz’s useful summary, the dividends that this property interest in whiteness pays to “white” people include the following:

. . . advantages that come to individuals through profits made from housing secured in discriminatory markets, through unequal education allocated to children of different races, through insider networks that channel employment opportunities to relatives and friends of those who have profited most from present and past racial discrimination, and especially through intergenerational transfers of wealth that pass on the spoils of discrimination to succeeding generations.

*Id.* at vii.

<sup>20</sup> *See generally* Harris, *supra* note 17; Lipsitz, *supra* note 18, at chap. 1; and DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

<sup>21</sup> LIPSITZ, *supra* note 18, at vii.

<sup>22</sup> Harris, *supra* note 17, at 283.

were most strikingly evident in the United States in the eras of most rigid racial hierarchy — i.e., the eras of slavery, Manifest Destiny, and Jim Crow segregation — the character of whiteness as a lucrative property interest has persisted in more subtle forms. In the wake of the Civil Rights Movement, the government now appears to treat all citizens as equal before the law. Yet insofar as law and public policy pursue equality by treating all citizens the same, *despite* their different racialized identities, they work to sustain the social and economic inequalities that have been produced by white supremacy and more subtle forms of white privilege:

Because the law recognized and protected expectations grounded in white privilege (albeit not explicitly in all instances), these expectations became tantamount to property that could not permissibly be intruded upon without consent. As the law explicitly ratified those expectations . . . by failing to expose or to disturb them radically, the dominant and subordinate positions within the racial hierarchy were reified in law. When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces black subordination.<sup>23</sup>

The problem of racialized identity in general and of white racialized identity in particular, then, is evaded by both colorblind and multicultural policies. Proponents of colorblind policy present it as egalitarian and democratic, yet it undercuts true equality of opportunity and substantive democracy by de-legitimizing the kinds of “race”-conscious policies that offer a means to achieve these ends, such as affirmative action or reparations.<sup>24</sup>

Likewise, multiculturalism fails to confront adequately the problem of racialized injustice. Advocates of multiculturalism present it as an egalitarian and democratic response to the problem of group differences because it promotes equal public recognition for all different cultural groups. By itself, however, it fails to promote democratic equality with respect to racialized groups because “race” is primarily a matter of domination and subordination, advantage and disadvantage, and only secondarily a matter of cultural diversity.<sup>25</sup> Accordingly, overcoming racialized injustice requires not equal recognition for different cultures, but dismantling racialized hierarchies.

In this light, Olson’s critical examination of white racialized identity illuminates significant tensions between anti-racist and multicultural approaches to group difference. He tellingly discusses the anguished efforts of some scholars of whiteness, such as Henry Giroux, to recuperate white racial identity positively as something other than a racist

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<sup>23</sup> Harris, *supra* note 17, at 281; *Cf.* Olson, *supra* note 4, at 4–6, 9–10; and LIPSITZ, *supra* note 18, at chap. 1.

<sup>24</sup> As Harris says, affirmative action offers promise in this regard because it “denies the privileges of whiteness and seeks to remove the legal protections of the existing hierarchy spawned by race oppression.” Harris, *supra* note 17, at 288. The same can be said, I would argue, for reparations.

<sup>25</sup> See Blum, *supra* note 10, at 188–189; and PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993).

identity that perpetuates racial domination — indeed, to recover it as a potentially progressive, anti-racist identity.<sup>26</sup>

In our age of identity politics, the efforts by Giroux and others to reconstruct whiteness are understandable, but still deeply flawed. They speak to people's variegated efforts find sources of meaning, purpose, self-definition, and affiliation in and through their social identities.<sup>27</sup> Thus George Yúdice suggests, "Whites must feel that they have a stake in the politics of multiculturalism and not simply see themselves as a backdrop against which subordinated groups take on their identity."<sup>28</sup> The difficulty here is that insofar as racialized identities persist, their character as cultural modes of self-identification, affiliation, and self-expression is evident in various ways, many of which cannot be coherently combined with a basic commitment to the moral equality of all persons. For instance, cultural dimensions of racialized identity can be found among racialized groups whose cultural practices challenge racist cultural norms by positively re-valoring previously demeaned "racial" identities — e.g., in the Black nationalist assertion that "Black is Beautiful." Yet they are also evident among in the cultural norms and practices of groups that enact racist identities, such as white supremacy, as well as in more subtle cultural assertions or evasions of racial privilege by dominant groups.

This, of course, is precisely the kind of asymmetry that leaves many whites feeling rootless in an era of identity politics and, then, striving to rehabilitate whiteness in a benign if not anti-racist form.<sup>29</sup> In the end, however, whiteness *as whiteness* — something distinct from the various ethnicities that have been folded into it — remains a problem: it is difficult (if not impossible) to grasp just what whiteness might mean or signify other than being an assertion of white supremacy or a defense of more subtle forms of white privilege. That is, it is one thing for people to identify themselves as Irish Catholics or English Protestants or Italian- or Jewish- or Egyptian-Americans, even if these identities are not unproblematic; it is quite another thing for people to identify themselves or their culture *as white*. In Olson's terms, the former designations are not necessarily forms of status and subordination, but the assertion of whiteness intrinsically constitutes forms of status and subordination.<sup>30</sup> Therefore, insofar as we can identify white culture — i.e., the cultural practices and manifestations of white racialized identity — it seems to have no content other than sum of the exclusionary norms, values, and practices that define "whiteness" and distinguish it from that which is *not-white*.

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<sup>26</sup> Olson, *supra* note 4, at 14–16.

<sup>27</sup> See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994); see also HOWARD WINANT, *Racial Dualism at Century's End*, in *THE HOUSE THAT RACE BUILT 108* (Wahneema Lubiano ed., 1998).

<sup>28</sup> George Yúdice, *Neither Impugning nor Disavowing Whiteness Does a Viable Politics Make: The Limits of Identity Politics*, in *AFTER POLITICAL CORRECTNESS: THE HUMANITIES AND SOCIETY IN THE 1990S 280* (Christopher Newfield & Ronald Strickland eds., 1995).

<sup>29</sup> Frankenburg comments that the troubling history of whiteness "produces a discursive bind for ... [those] white women and men concerned to engage in antiracist work: if whiteness is emptied of any content other than that which is associated with racism or capitalism, this leaves progressive whites apparently without a genealogy." FRANKENBERG, *supra* note 5, at 232; Cf. Yúdice, *supra* note 28, at 259–75.

<sup>30</sup> See Olson, *supra* note 4, at 14.

With these considerations in mind, Olson contends, “[t]he task of a democratic politics . . . is not to ignore nor redefine white personhood, but to *abolish* it.”<sup>31</sup> This requires the cultivation among whites of an *abolitionist personality* that would be “resolutely opposed to white privileges of any kind.”<sup>32</sup> This notion, I believe, definitely points us in the right direction to develop new forms of identity that would support a truly democratic society. With that said, however, I see one difficulty with the abolitionist idea. As Olson says, the task of overcoming racialized inequalities requires those persons who benefit from white privilege to support “race”-conscious redistributive policies, such as affirmative action and reparations, for groups that have been defined as not-white. Yet this requires that whites learn to *dis-identify* with whiteness in a way that is more ambivalent than the abolitionist ideal suggests. It calls for a deconstructive and strategic *rearticulation of whiteness* by anti-racist “whites,” for as long as “race,” racialized inequality, and white privilege persist, as a way to bring about its abolition.<sup>33</sup>

The challenge, as Yúdice says, is for those persons who are currently racialized as white to claim responsibility for the social capital that “they assume with their [white] identity.”<sup>34</sup> This task may be especially challenging for white youths and older white workers who, due to class-based vulnerabilities and disempowerment, find themselves torn between, on the one hand, supporting an anti-racist and redistributive progressive agenda and, on the other hand, rallying behind conservative, colorblind (if not racist) agendas that offer largely “racial” and cultural explanations for structural, political economic problems.<sup>35</sup> For whites, this rearticulation would mean that, as Yúdice says,

the basis for their relative privilege must be uncovered and replaced with an understanding of how life chances have diminished under free-market policies not only for people of color but for themselves too. It must be demonstrated that their opportunities to get ahead in the world are diminished not because of affirmative action but rather because of the abandonment of the social contract . . . [and] the logic of late capitalism.<sup>36</sup>

## II. TOWARDS A CRITICAL THEORY OF RACIALIZED IDENTITY

The kind of deconstructive critical rearticulation of whiteness that I have just sketched is a far cry from proprietary investments in whiteness. It regards whiteness as a problematic political construction and makes no attempt to rehabilitate either whiteness or “white culture.” At the same time, it calls on whites to avow responsibility for the

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<sup>31</sup> *Id.* at 18.

<sup>32</sup> *Id.* at 19–20.

<sup>33</sup> See generally Yúdice, *supra* note 28; and Howard Winant, *Whiteness at Century’s End*, in *THE MAKING AND UNMAKING OF WHITENESS* (Matt Wray ed., forthcoming).

<sup>34</sup> Yúdice, *supra* note 28, at 275.

<sup>35</sup> See LIPSITZ, *supra* note 18, at 16–19.

<sup>36</sup> Yúdice, *supra* note 28, at 275.

social capital that accrues to them *as whites*, even while many of them may face considerable insecurities and diminished life chances based on their *class status*. Consequently, it involves a conception of democratic political identity and agency that is similar to but slightly different than Olson's notion of an abolitionist personality.

My alternative is rooted in a critical theory of racialized identity that features a somewhat different account than Olson presents of the interplay between power and culture in the shaping of racialized identities. It comprehends racialized identity primarily as a manifestation of unequal power between groups, but also, in part, as a source of self-definition and affiliation. Therefore, it calls upon us to endorse *only* those cultural manifestations of racialized identity that can be coherently combined with a commitment to the moral equality of all persons. With respect to whiteness, then, a critical theory of racialized identity affirms Olson's basic point: the intrinsically antidemocratic character of white racialized identity means that it must be deconstructed, resisted, and dismantled rather than positively affirmed. Yet in contrast to Olson's abolitionist approach, a critical theory of racialized identity demands a more ambivalent engagement with *all modes of racialized identification*, including oppositional identities. This would involve not only a critique of how white people's possessive investments in whiteness perpetuate racialized and class-based inequalities, but also a critical (though by no means merely negative) approach to various assertions of blackness, such as Olson's suggestion that "democracy should aspire to blackness."<sup>37</sup>

Olson, for his part, recommends that we look to Black culture as a source of core values for a new anti-racist democratic identity. Black culture, he notes, has been the most prominent oppositional culture that has "emerged within and against white supremacy" to "imagin[e] a world beyond it."<sup>38</sup> Drawing on the historian V.P. Franklin, Olson goes on to assert that "the core values of the African American experience are self-determination, freedom, resistance, and education."<sup>39</sup>

Without a doubt, these values are crucial for any truly democratic forms of identity and social transformation. It is problematic, however, to claim that these are core *democratic* values exclusively for Black culture, just as it would be erroneous to claim these are white Anglo-Saxon values.<sup>40</sup> Those of us who are committed to advancing an emancipatory struggle for freedom, resistance, democracy, self-determination, education, and equality have much to learn from such Black Atlantic theorists as Frederick Douglass, W.E.B. Du Bois, Ida B. Wells, Richard Wright, and the Combahee River Collective. Yet we also have much to learn on these topics from such white, European (and Eurocentric) thinkers as Mill, Marx, and Simone de Beauvoir.<sup>41</sup>

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<sup>37</sup> Olson, *supra* note 4, at 20. For related critical engagements with Black culture, see generally PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993); Angela Y. Davis, *Black Nationalism: The Sixties and the Nineties*, in *BLACK POPULAR CULTURE*, A PROJECT BY MICHELE WALLACE (Gina Dent ed., 1992); Gooding-Williams, *supra* note 10.

<sup>38</sup> Olson, *supra* note 4 at 19.

<sup>39</sup> *Id.*

<sup>40</sup> In the United States during much of the nineteenth and twentieth centuries, prevailing racial discourse commonly maintained that these values were indeed *distinctive* to white Anglo-Saxons! See THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* (1963).

<sup>41</sup> Insofar as the latter thinkers contribute culturally to this emancipatory democratic project, they

Finally, a critical theory of racialized identity offers a couple of further insights for thinking about the emancipatory contributions of Black culture. First, it recognizes that Black culture does indeed contain unique contributions for elaborating anti-racist and democratic identities and institutions. These contributions lay not so much in a distinctive set of ideals and values, but rather in a unique history of resistance and, as Olson suggests, in profound insights about how we might achieve the ideals of freedom, resistance, self-determination, education, and equality in a fully inclusive and substantively democratic way.<sup>42</sup> Indispensable contributions in this vein include Frederick Douglass’s critique of how US racism betrayed the promises of the Declaration of Independence, W.E.B. Du Bois’s analysis of the “wages of whiteness,” James Baldwin’s account of the racialized character of the “American Dream,” the Black Power Movement’s insistence that freedom requires empowerment, and the Combahee River Collective’s path breaking discussion of interlocking forms of oppression rooted in “race,” class, gender, and sexuality.<sup>43</sup> Second, a critical theory of racialized identity addresses the ways in which Black culture as well as white culture includes some narrow, chauvinistic elements that must be acknowledged and critically engaged rather than simply endorsed.<sup>44</sup>

In sum, Olson has given us a compelling critique of “colorblind” and multicultural approaches to racialized injustice in the United States. I contend, however, that if our goal is to cultivate anti-racist democratic identities and institutions, a critical theory of racialized identity offers some advantages over his notion of an abolitionist personality. In particular, it provides a more nuanced approach to the cultural manifestations of racialized identity.

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are *not* contributing to anything recognizable as “white culture.”

<sup>42</sup> See Olson, *supra* note 4, at 19.

<sup>43</sup> See Frederick Douglass, *Oration, Delivered in Corinthian Hall, Rochester, July 5, 1852*, in I AM BECAUSE WE ARE: READINGS IN BLACK PHILOSOPHY (Fred Lee Hord & Jonathan Scott Lee eds., 1995); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (1962); JAMES BALDWIN, THE FIRE NEXT TIME (1963); the *Black Panther Party Platform and Program, October 1966*, in LET NOBODY TURN US AROUND: AN AFRICAN AMERICAN ANTHOLOGY 469 (Manning Marable and Leith Mullings eds., 2000)(declaring, “We want freedom. We want power to determine the destiny of our Black Community”); *Combahee River Collective, A Black Feminist Statement*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et. al. eds., 1982).

<sup>44</sup> See generally GILROY, *supra* note 10; Paul Gilroy, *Black Fascism*, 81/82 TRANSITION AN INT’L REV. (2000) 70. Let me be clear: I agree with Olson that white culture *as white culture* is nothing other than an racially exclusionary set of ideas and practices. My point here is that there is no univocal and unequivocally emancipatory *Black culture*.

# Corporate Personhood



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

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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<sup>1</sup> or as a vehicle for dangerous concentration of wealth,<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

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<sup>1</sup>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).

<sup>2</sup>See generally HURST, *supra* note 1, at 36-47.

<sup>3</sup>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).

<sup>4</sup>"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.<sup>5</sup> 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.”<sup>6</sup>

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.<sup>7</sup> 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

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<sup>5</sup>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.

<sup>6</sup>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.”).

<sup>7</sup>*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.<sup>8</sup>

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.<sup>9</sup> 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.”<sup>10</sup> Courts routinely construed statutory references to “persons” to include corporations as well as natural persons.<sup>11</sup>

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.

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<sup>8</sup>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).

<sup>9</sup>Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636-37 (1819).

<sup>10</sup>JOSEPH ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (10th ed. 1875).

<sup>11</sup>*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.<sup>12</sup> 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

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<sup>12</sup>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.”<sup>13</sup> Without such unfair advantages, corporations could never “work as cheap as the individual trader.”<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup> 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,<sup>17</sup> 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.

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<sup>13</sup> 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.

<sup>14</sup>GOUGE, *supra*, note 13.

<sup>15</sup>H.C. ADAMS, *RELATION OF THE STATE TO INDUSTRIAL ACTION* 33 (J. Dorfman ed. 1954).

<sup>16</sup> 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.

<sup>17</sup>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.<sup>18</sup> 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.<sup>19</sup> 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,"<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.

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

<sup>19</sup>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).

<sup>20</sup>See *Manson v. Curtis*, 223 N.Y. 313, 322, 119 N.E. 559, 562 (1918).

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

<sup>22</sup>The leading case was *Wood v. Dummer*, 30 F. Cas. 435 (C.C.D. Me. 1824).

<sup>23</sup>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.<sup>24</sup> Nevertheless, American theorists for the most part resisted extreme efforts to equate corporate persons with natural ones.<sup>25</sup> 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.

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

<sup>25</sup>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.<sup>26</sup> 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,<sup>27</sup> 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

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<sup>26</sup> E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

<sup>27</sup> 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.<sup>28</sup>

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."<sup>29</sup> 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<sup>30</sup> 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,

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<sup>28</sup>Dodd, *supra* note 26, at 1161.

<sup>29</sup>*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.

<sup>30</sup>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,<sup>31</sup> 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."<sup>32</sup> 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

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<sup>31</sup>ADOLF A. BERLE, JR. & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

<sup>32</sup>*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.”<sup>33</sup>

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<sup>34</sup> and that incorporation creates a “legal person independent of any of the associates.”<sup>35</sup> However, even though they could not avoid the organic metaphor,<sup>36</sup> 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.

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<sup>33</sup>*Id.* at 248.

<sup>34</sup>*See id.* at 221-22 (“the corporation is a distinct legal entity, separate and apart from stockholders”).

<sup>35</sup>*Id.* at 128.

<sup>36</sup>*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.<sup>37</sup>

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.<sup>38</sup> 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.<sup>39</sup> 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

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<sup>37</sup>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.

<sup>38</sup>RALPH NADER, MARK GREEN, & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 17-32 (1976).

<sup>39</sup>*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.<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup> 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,

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

<sup>41</sup>*Id.* at 33.

<sup>42</sup>*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.<sup>43</sup> 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."<sup>44</sup> 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

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<sup>43</sup>The most important and thorough application of this idea is FRANK EASTERBROOK & DANIEL R. FISCHER, *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).

<sup>44</sup>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.”<sup>45</sup>

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.<sup>46</sup> 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.”<sup>47</sup> 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.”<sup>48</sup>

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

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<sup>45</sup>Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

<sup>46</sup>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).

<sup>47</sup> 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).

<sup>48</sup>Chayes, *supra* note 47, at 41.

interdependence and vulnerability.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

Today's version of the debate over the desirability of shareholder primacy is conducted without regard to entity-based arguments over corporate personhood.<sup>52</sup> 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

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<sup>49</sup>Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

<sup>50</sup>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).

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

<sup>52</sup>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."<sup>53</sup> 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

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<sup>53</sup>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.

Abstract:

*Kent Greenfield's article starts where David Millon's stops, namely with the proposition that metaphor plays too strong a role in evaluating the conduct of corporations. Greenfield challenges the notion that shareholders "own" the firm in which they possess shares by suggesting that this interpretation is dependent upon a particular system of corporate law, a system that is not the only conceivable way for corporate law to be organized. Once the view of corporations as property or contracts is demythologized, discussions of corporate rights becomes meaningless because any alternate arrangement of the law can be justified or explained through some system of rights. Instead, Greenfield argues, we need to turn to empirical examinations of the different effects of different legal arrangements as a tool for understanding why we make the choices we do regarding corporate law.*

## FROM METAPHOR TO REALITY IN CORPORATE LAW

Kent Greenfield\*

As David Millon so ably demonstrates, metaphor drives much of the debate within corporate law jurisprudence and corporate law scholarship. It has done so for decades, even centuries. Scholars have used metaphors — corporation as person, corporation as creature of the state, corporation as property, corporation as contract, corporation as community, to name the most prominent — as justifications for the imposition of, or freedom from, legal and ethical requirements. These metaphors are often taken as given or as self-evident. The legal and ethical arguments flow, then, quite naturally. In this essay I will join Millon in his criticism of the way metaphors are used within corporate law scholarship and then offer an alternative for consideration.

### I. METAPHOR

While the use of metaphor and syllogism has been a rhetorical practice for many years for many corporate scholars, it certainly seems to be particularly common among those who have dominated corporate law scholarship over the last half century: the

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property theorists and the contractarians. Corporations are property — it has been famously said — and thus any effort to spread the corporate surplus, for example, to workers or the community in a way that reduces corporate profit is spending money that belongs to the shareholders and imposing an illegitimate “tax” on them.<sup>1</sup> Indeed, in this view, corporate governance that takes into account the interests of stakeholders other than shareholders, if such a practice disadvantages shareholders in any way, is an unconstitutional taking<sup>2</sup> or, even more provocatively, “socialism.”<sup>3</sup>

In the alternative, corporations are viewed contracts (or so most law students in 2000 are taught), and thus have no ethical or legal duties other than those specified in the contract.<sup>4</sup> Most shareholders, it is assumed, would contract with the business’s managers to ensure that the managers seek to maximize profit. Therefore, so-called corporate social responsibility activities cannot be allowed, much less required, unless the shareholders expressly agree to contract around the standard contract terms provided by corporate law, thereby allowing the managers to forego profits for such socially responsible reasons. In other words, there can be no responsibility outside of the contract, so unbargained-for responsibility is oxymoronic. Non-shareholders are parties to the contract and deserve only what they bargain for.<sup>5</sup>

These metaphors of property and contract are powerful and seductive. While they may be helpful pedagogically, as Millon suggests we must be careful not to mistake the descriptive power of metaphor for normative prescription. To oppose corporate social responsibility reforms on the basis that it is inconsistent with the property or contractual rights of shareholders is simply unhelpful, since in reality neither pure property nor

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<sup>1</sup> See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32, reprinted in MANAGERIAL DECISION MAKING AND ETHICAL VALUES: COURSE MODULE 2 (Kenneth E. Goodpaster & Thomas R. Piper, eds., 1989).

<sup>2</sup> See Lynda J. Oswald, *Shareholders V. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 J. CORP. L. 1 (1998).

<sup>3</sup> See Friedman, *supra* note 1, at 1. This name-calling occurs not only in scholarly works. I recently gave a faculty colloquium arguing for changes in corporate governance that would require corporate management to take into account the interests of workers. One listener referred to my views as “socialism.” For a partial justification for my views that the interests of workers be taken into account within corporate law, see Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998).

<sup>4</sup> See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) (because corporations are contracts, and thus legal fictions, they are “incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations”).

<sup>5</sup> See Jonathan R. Macey, *An Economic Analysis of the Various Rationale for Making Shareholders the Exclusive Beneficiaries of Corporate Duties*, 21 STETSON L. REV. 23, 36, 42 (1991) (arguing that workers and other non-shareholder constituencies can protect themselves through contract or through the political process); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 23 (1991) (all parties to the corporate “contract” can protect themselves through negotiation); cf. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 649 (1988) (because contract outcomes depend on preexisting entitlements, bargained for outcomes are just only if preexisting circumstances are fair and just); Greenfield, *supra* note 3, at 283, 322–26 (arguing that market defects make contract between labor and the corporation inefficient, and criticizing the assumption that contract norms should be the basis for public policy since “the ability of parties to bargain is a function of their preexisting entitlements and wealth”).

explicit contract is involved. What is meant, presumably, when one says that a stakeholder statute is contrary to the property and contract rights of shareholders is that such a statute is inconsistent with corporate law as it is now, or is inconsistent with the way corporate law should be. If the former argument is what is meant, such a description is beside the point of a normative debate. That is, in considering whether, say, directors should owe fiduciary duties to workers is in an important sense asking whether shareholders should “own” the firm. One cannot answer this question simply by saying that the shareholders own the firm.<sup>6</sup> If the latter argument is what is intended, then the argument must depend on a detailed description of why corporate law should be based on property or contract principles. It is meaningless to talk about property or contract “rights” without a much thicker normative justification for those rights. To the extent that these metaphors are placeholders for that thicker justification, the debate should take note of that fact and encourage that the justification be brought forward so that the debate can progress on specific normative grounds.

Another problem with the use of metaphors is that they do not inexorably lead to the conclusions that one supposes. Even if corporations are best seen as contracts, that decides little in itself since contract law includes a wide range of common law and statutory exceptions to contractual obligations. A contract for murder or for blackmail is unenforceable. A court would require an employer to pay an employee the minimum wage, even if the employee had entered into a contract to work for only \$2 an hour. In many jurisdictions, a duty of good faith is injected, as an act of law, into the terms of every contract.<sup>7</sup> Some states prohibit firms from terminating employees for reasons that are contrary to the public interest, even when the agreement between the employee and employer provides for “at will” employment.<sup>8</sup> These are only a few of the “exceptions” in the law of contract,<sup>9</sup> and the contract metaphor cannot be applied to corporate law without an exploration of why any number of “exceptions” should not be applied as well.

Similarly, to say that the shareholders “own” the company is unhelpful without a description of why certain aspects of property law are relevant and others are not. Notwithstanding the “illusion of absoluteness” that accompanies much property-rights rhetoric, property has always been subject to reasonable regulation.<sup>10</sup> The broad principle that one should not use one’s property to inflict harm on others has been “routinely

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<sup>6</sup> Greenfield, *supra* note 3, at 290; *see also* Margaret M. Blair, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 224 (1995) (asserting that the argument that shareholders own the corporation and should thus be able to control it “is simply circular logic”); Singer, *supra* note 5, at 637-38 (“To assume that we can know who property owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided.”).

<sup>7</sup> *See* Restatement (Second), Contracts ' 205 (1979).

<sup>8</sup> *See, e.g., Derosé v. Putnam Management Co.*, 496 N.E.2d 428 (1986); *Hobson v. McLean Hosp. Corporation.*, 522 N.E.2d 975 (1988).

<sup>9</sup> *See, e.g., Sternamen v. Metropolitan Life Ins. Co.*, 62 N.E. 763, 764 (1902) (“The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy.”).

<sup>10</sup> *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 18, 20 (1991).

applied” in U.S. courts since the nation’s beginning.<sup>11</sup> The Supreme Court recognized over 150 years ago that “[w]hile the rights of private property are sacredly guarded, we must not forget[,] that the community also have [sic] rights.”<sup>12</sup> A property owner cannot burn noxious trash in her backyard so as to cause a nuisance to her neighbors, for example, and a factory owner may not operate a factory that is unreasonably dangerous to the employees working there. To use the metaphors of property or contract as a normative argument therefore is unhelpful without an explanation of why some aspects of the metaphor are excluded and others included. Unfortunately, however, these metaphors are so powerful that they are taken not as placeholders but as arguments themselves, thus not only describing the law but shaping it as well.

It is no coincidence that those who oppose more socially responsible corporate governance choose metaphors from the common law. Common law “rights” have long had significant rhetorical power. Much of this persuasiveness is based on the fact that they are seen as neutral, pre-political, and pre-legal — witness Daniel Fischel’s assertion that reformers should not disturb the nexus of contracts imbedded in corporate governance but should focus instead on imposing political restrictions from outside the corporation.<sup>13</sup> Consider also Milton Friedman’s assertion that requiring corporate managers to weigh societal concerns makes those managers into unelected public servants instead of agents of the shareholders.<sup>14</sup> Both views rely implicitly on the notion that corporate governance is, as presently constructed, neutral and insulated from politics.

This takes one back to *Lochner v. New York*.<sup>15</sup> There, in striking down New York’s law establishing maximum work hours for bakers, the Supreme Court interpreted the U.S. Constitution’s Fourteenth Amendment to create a category of impermissible legislative ends and used a laissez-faire conception of government as its theoretical basis.<sup>16</sup> What was seen as liberty and laissez-faire, however, was the framework of common law rights. The common law was seen as private and non-coercive, as “resistant to the dangers of political influence.”<sup>17</sup> The market was viewed as a “self-executing system that justly distributed rewards through voluntary agreement among individuals.”<sup>18</sup> Under this conception of liberty and government neutrality, the Court struck down the New York law restricting the work hours of bakers as a violation of the right of “free

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<sup>11</sup> *Id.* at 25.

<sup>12</sup> GLENDON, *supra* note 10, at 26 (citing *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

<sup>13</sup> Fischel, *supra* note 4, at 1271 (those who are concerned with corporate misdeeds should “seek redress through the political process and [should] not attempt to disrupt the voluntary arrangements that private parties have entered into in forming corporations”).

<sup>14</sup> *See* Friedman, *supra* note 1, at 3.

<sup>15</sup> 198 U.S. 45 (1905).

<sup>16</sup> *See* Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1697 (1984).

<sup>17</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 11 (1992).

<sup>18</sup> *Id.* at 33.

contract.”<sup>19</sup> The institution of contract was seen as “the legal expression of free market principles, and every interference with the contract . . . was treated as an attack on the very idea of the market as a natural and neutral institution for distributing awards.”<sup>20</sup>

Much of the rights-based discourse in present-day corporate law harkens back to *Lochnerian* justifications. Corporate law is private law (whether the law of property or contract), defined by common law principles, and therefore neutral. To change it is impermissible. *Lochner*, though, came at the Supreme Court’s “nadir of competence”<sup>21</sup> and has since been repudiated. One of the mistakes of the *Lochner*-era Court was to believe that the marketplace was neutral, existing outside the realm of politics and law.<sup>22</sup> Even the so-called laissez-faire marketplace is shot through with government, and even the most basic common law entitlements are functions of legal rules.<sup>23</sup> “[T]he market status quo [is] itself a product of government choices,”<sup>24</sup> and had long been so even at the time of *Lochner*. Morton Horwitz tells us that as contract law had become more formalized and generalized after the Civil War, “the legal rules came to bear a more and more tenuous relationship to the actual intent of the parties.”<sup>25</sup> Instead, judgments in common law courts came to “depend upon the notions of the court as to policy, welfare, justice, [and] right and wrong.”<sup>26</sup> As Cass Sunstein explains, it was the law that “created property and contract rights, and . . . imposed various limits on those rights.”<sup>27</sup> The so-called “free market” was a creation of law, not of nature, and “[t]he common law could not be regarded as a natural or unchosen baseline.”<sup>28</sup> Thus *Lochner*’s defense of the common law as private law was indefensible, and eventually came to be recognized as

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<sup>19</sup> 198 U.S. at 54.

<sup>20</sup> Horwitz, *supra* note 17, at 33. As history rarely falls into neat categories, it is important to note here that, while *Lochner* is often invoked to characterize turn-of-the-century jurisprudence, the Supreme Court was quite inconsistent in its adherence to freedom of contract even during the “*Lochner* era.” See Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism, United States Supreme Court, 1888-1921*, 5 LAW & HISTORY REV. 249, 250 n. 4 (1987).

<sup>21</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

<sup>22</sup> <sup>23</sup> See *id.* (Souter, J., dissenting) (“It was the characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect.”).

<sup>23</sup> See CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 41 (1990).

<sup>24</sup> Sunstein, *supra* note 16, at 1697.

<sup>25</sup> Horwitz, *supra* note 17, at 35.

<sup>26</sup> Horwitz, *supra* note 17, at 35 (citing Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169, 206 (1917)). See also Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (“Why do you imply [a condition in a contract]? It is because of some belief that as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.”).

<sup>27</sup> CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 50.

<sup>28</sup> *Id.*

such.<sup>29</sup> Contract and property law are no more neutral, private, or pre-legal than statutory law.

My point is not that a legal regime should not include a bundle of common law entitlements. The point here, rather, is that these rights are not best perceived as natural, pre-legal, or non-political, but rather should be recognized as tools to be utilized for the furtherance of social good, however defined. This language of rights as neutral arbiters may be used as a descriptive matter, but such language is out of place in a normative discussion. One cannot justify the present make-up of corporate law as non-political or pre-legal because it is based on common law principles any more than *Lochner* could justify common law itself as non-political or pre-legal. The corporate law scholars who make this mistake are thus subject to Roscoe Pound's criticism of *Lochner* and its progeny — they “exaggerate the importance of property and contract . . . [and] exaggerate private right at the expense of public interest.”<sup>30</sup>

## II. REALITY

If, as Millon proposes, corporate law scholars were willing to “jettison our obsession”<sup>31</sup> with the various rights-based metaphors used to understand and explain the corporate form, how should we move forward? In other words, how should we engage in a conversation about possible changes in corporate governance if the language of rights is temporarily off limits?

Let me suggest that one useful way to think of these issues is to look at corporate law as regulation. Instead of being seen as a set of statutory and common law rules contained within itself, corporate law should be subject to the same analysis as environmental law, labor law, tax law, communications law, and the like. There are a number of ways to characterize what this analysis should be, of course, and there are many grounds for vigorous disagreement about what “counts” in regulatory theory. But at a high level of generality, behind all the complexity, the analysis with regard to corporate law rules should be the same as the analysis for other kinds of statutes and regulations. That is, one should ask what we want our society to look like. Then, we should seek to craft a bundle of legal rules and regulatory programs that are likely to move us in that direction.

This construction could be at such a high level of abstraction as to be unhelpful, but it is worth noting that this conversation starts quite differently than how the discussion about corporate governance usually begins. Instead of looking at the outset to common law principles and notions of property and contract (or, for that matter, the

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<sup>29</sup> See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 739 (1986) (*Lochner* “turned on an indefensible distinction between the ‘public’ and ‘private’ spheres, defined in terms of common law categories.”).

<sup>30</sup> Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454, 461 (1909) (quoted in Horwitz, *supra* note 17, at 34).

<sup>31</sup> David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA, 39, 59 (2001).

rights of people in some kind of community), we are forced to state, at the very least, our assumptions about the purposes of law and our vision for society. Thus David Engel is correct in his claim that the issues of corporate social responsibility “cannot be debated except against the background of a general political theory.”<sup>32</sup> The project, then, of constructing corporate law ought to depend on a broader, and ongoing, project that asks what our society should look like and analyzes the capacity of law — including corporate law — to get us closer to that ideal.

One can illustrate the ways this would change the debate within corporate law by pointing to the way debates about other public policy choices affecting business enterprises take place. The minimum wage provides a good example. Several years ago, the U.S. Congress increased the minimum wage from \$4.25 to something over \$5 per hour. Note the similarities with a proposal to have corporations balance the needs and interests of non-shareholder constituencies in making corporate decisions. Both proposals impose costs on the corporation that might result in a decrease in shareholder return.<sup>33</sup> Both proposals restrict the internal decisionmaking of the corporation -- the minimum wage statute by disallowing labor contracts offering wages below the statutory minimum, the stakeholder statute by disallowing agreements between management and shareholders that include a promise by management to maximize returns without concern for other constituencies. Both proposals impose mandates on the corporation that were not necessarily assumed by the shareholders when they purchased their shares.

In the debate about the minimum wage, however, an argument that a legislated increase is impermissible because the shareholders “own the corporation” would seem incongruous and unresponsive, or a throw-back to *Lochner*. People seem to understand that the debate about an increase in the minimum wage turns on, and should turn on, the effect of such an increase on workers, companies, and the economy as a whole. Few serious commentators would argue that raising the minimum wage is impermissible because it forces managers to give away money that “belongs” to the shareholders, and no one would find it persuasive (after the New Deal) that increasing the minimum wage violates a “contract” between managers and shareholders. The “rights” of the shareholders are simply beside the point in the debate. In contrast, when a proposal is made to change the rules of corporate governance, rights-based arguments become a common part of the discourse.

Of course, if we were to move away from rights-based arguments toward more hard-nosed empirical judgments about the effects of corporate governance on public policy goals, we would not expect much initial consensus about either the goals or the value of corporate law to help meet them. But this is the debate we need to have. Perhaps there is reason to believe that corporate law should remain focused primarily on shareholder profit. Shareholders might belong on the pinnacle of corporate law in order to facilitate raising capital and to maximize the incentives for profitmaking.<sup>34</sup> Perhaps social utility is maximized when profits are maximized.

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<sup>32</sup> David L. Engel, *An Approach to Corporate Responsibility*, 32 STAN. L. REV. 1, 1 (1979).

<sup>33</sup> How much of a loss will depend in large part on how much of the costs can be passed on to consumers or suppliers of capital and labor. This will in turn depend on the elasticity of supply and demand in the various markets.

<sup>34</sup> See EASTERBROOK & FISCHER, *supra* note 5, at 6–7.

But once we move corporate law from the realm of metaphor and rights-based debate to the terrain of regulatory theory, reasons to doubt this simple, profit-oriented utilitarian argument abound. It cannot seriously be claimed that societal utility will be maximized if corporations are unrestrained by law. Even if one assumes that a maximization of utility should be the end goal, it is routine to note that government intervention is often necessary to repair market “defects” and thereby to maximize utility. Externalities, collective action problems, “prisoners’ dilemmas,” inadequate information, tragedies of the common, and natural monopolies may all result from market forces and each can make the satisfaction of legitimate desires impossible. They all thus require government intervention in order to maximize utility. In addition, if we expand our view of the permissible grounds for regulation to include public-regarding reasons not based in utilitarianism, the presumption in favor of “laissez-faire” government falls further away.<sup>35</sup> That is, perhaps we would want non-utilitarian values of equality or human dignity to influence and inform corporate law just as they inform and influence other areas of the law.

The implications of this point for corporate social responsibility and corporate governance may not be immediately obvious. Critics of the corporate social responsibility movement will admit the occasional need for regulation to correct market defects, and some may even allow for other regulatory rationales as well, but they would almost certainly argue that such regulation should be external to the corporate form (such as regulations requiring plant closing notification), rather than internal to it (such as a requirement that employees have a representative on companies’ boards of directors).<sup>36</sup> Yet if this is the argument, it cannot be based on a general presumption against government regulation, which relies in turn on the notion that the absence of government regulation will bring about maximization of utility. Rather, the argument that government should not encourage corporate social responsibility by regulating internal corporate governance must be based on arguments about how “internal” interventions are less beneficial in ameliorating market defects than “external” requirements.

There are legitimate arguments to be made to support such a distinction. To give corporate managers more than one legal duty may increase the agency costs of their supervision: it is less costly to monitor the performance of an agent if the agent has one task than if the agent has two, especially if the second is as seemingly abstract and unmeasurable as the pursuit of corporate citizenship.<sup>37</sup> Perhaps managers have no expertise with regard to social concerns, so giving them more power in that regard is unlikely to have a significant positive effect and will provide a deadweight cost on the corporation and its shareholders.<sup>38</sup> Perhaps a loosening of management’s fiduciary duty

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<sup>35</sup> See Sunstein, *supra* note 23, at 55–60.

<sup>36</sup> See EASTERBROOK & FISCHEL, *supra* note 5, at 37–39.

<sup>37</sup> See ABA Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2269–70 (1990); ROBERT CLARK, CORPORATE LAW 20 (1986); but see Macey, *supra* note 5, at 33 (arguing that the “too many masters” argument is overstated, since corporate managers have long had to balance sometimes conflicting fiduciary duties to holders of different classes of stock).

<sup>38</sup> See Fischel, *supra* note 4, at 1268–69.

to shareholders will make shareholders less likely to invest, because they will lose some of their legal power to monitor and constrain management. Moreover, perhaps these corporate social responsibility reforms will be pointless, because shareholders will simply invest their capital in companies organized in states and countries that still require profit maximization.

These points may end up being persuasive. If they are, however, it will not be because of the use of the language of rights and duties. Rather, the success of such arguments turns on relative costs and benefits, effectiveness, the existence of other options, and similar analyses. In other words, the discussion depends not on rights and duties but on regulatory theory.

Once regulatory theory becomes the battleground, however, the victor is not so obvious. There are also reasons to believe that changes in corporate law should be part of the bundle of legal responses to market defects. Indeed, corporate law may have comparative advantages over other legal processes in addressing certain kinds of concerns.<sup>39</sup> Corporate managers may in fact have expertise in areas that government bureaucrats do not. Corporate managers may have a great deal more information about certain matters than a government official charged with monitoring corporate behavior.<sup>40</sup> There may be economies of scale and other efficiencies in a corporate setting that do not exist in a governmental setting. A problem may be better addressed by an “internal” solution rather than by an “external” one. External regulations to reach certain ends may require greater ongoing enforcement costs than would changes in internal governance procedures intended to move toward the same ends. Changes in corporate governance and expansion of legal duties to include more than profit maximization may allow corporations to be proactive in addressing issues of societal concern, which in turn might be more efficient than relying on the mostly reactive power of government regulation. Reforms within the corporation might create more trust among the various stakeholders, thereby encouraging reciprocal actions (for example, workers being more productive because they feel they are being fairly treated) so as to reduce the costs of the regulatory initiative. Finally, reforms within corporate law would follow the corporation wherever it goes, whereas regulatory reforms largely stop at the border.

There is reason to think hard about the possibility of using corporate law as a regulatory tool. Indeed, there are major public policy problems that otherwise seem intractable,<sup>41</sup> and reforms in corporate governance may prove to be powerful and efficient

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<sup>39</sup> See generally CHRISTOPHER STONE, WHERE THE LAW ENDS: THE SOCIAL CONTRACT OF CORPORATE BEHAVIOR 134 (1975).

<sup>40</sup> See *id.* at 160–70.

<sup>41</sup> I am referring here to the fact that wages for working people in the United States are stagnant or falling and that income inequality is at historically high levels. Indeed, hourly wages fell for the bottom 80% of workers over the last 10 years and in constant dollars were *less* in 1997 than in 1973. LAWRENCE MISHEL, JARED BERNSTEIN, AND JOHN SCHMITT, STATE OF WORKING AMERICA 1998–99 5, 127, 131 (1999). Income inequality is at its highest level since the Census Bureau began tracking these data in 1947. Economic Policy Institute, “Income Picture” (Sept. 30, 1999) (available at <http://epinet.org/webfeatures/econindicators/income.html>); see also Census Bureau, “Current Population Reports” (June 1996), available at [www.census.gov/ftp/pub/hhes/www/img/p60-191.pdf](http://www.census.gov/ftp/pub/hhes/www/img/p60-191.pdf). For a more detailed exploration of these issues and their relation to corporate law scholarship and pedagogy, see Kent Greenfield, *There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 GA. L. REV. 1011 (2000).

mechanisms to address them. We cannot begin this task, though, until, as Millon suggests, we put our “obsession” with metaphor behind us.

Abstract:

*In "The Use and Abuse of Corporate Personality," Thomas A. Smith responds to David Millon's article, focusing on his suggestion that legal concepts such as the corporate person are always artificial and used to achieve some political end. The way to view the idea that a corporation is a person is not as a means to a political end, according to Smith, but rather as a relationship to a corresponding social form that can be described and studied. Smith argues that the way to discern the truth or veracity about the theory of corporate personhood is to depart from traditional historical analysis and to instead use the social sciences like economics, psychology, and sociology, to understand the forms human productive associations take and how these relate to the legal form of a corporation or a partnership.*

## THE USE AND ABUSE OF CORPORATE PERSONALITY

Thomas A. Smith\*

David Millon has written an elegant and learned meditation on the significance in American corporate law of the idea that the corporation is a legal "person."<sup>1</sup> His essay, which would be well included in the leading corporate law casebooks, has many admirable features. What strikes me most, however, is the quite appropriate stress it lays upon how opportunistically the concept of corporate personality has been used, first by one faction, and then another, to support their goals in the various political and economic struggles we see in our national history. This, in my view, is the flavor that honest history of legal ideas has.<sup>2</sup>

Millon makes quite clear just how opportunistic the use of the idea of corporate personality has been in corporate law. To mention two important examples, E. Merrick Dodd, Jr. used the concept of corporate personality as the basis for his argument that a

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<sup>1</sup> See generally David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 39 (2001).

<sup>2</sup> For documentation in overpoweringly convincing detail how the opportunistic use by lawyers of legal ideas and doctrines generated the historical evolution (or at least change) we observe in the history of English common law, see S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1981).

corporation was a kind of citizen and therefore had what were, in effect, civic duties.<sup>3</sup> Ralph Nader and other contemporary reformers, as Millon points out, have also used this conception to argue that corporations are entities with special responsibilities to society at large.<sup>4</sup>

On the other hand, the rejection of corporate personality as “reification” by libertarian economists is motivated by equally political ends. Rather than responding directly to the claim that corporations *qua* persons or entities should be subject to special duties, Milton Friedman and his fellow travelers have argued that corporations are not persons at all, and so cannot be subject to special duties.<sup>5</sup> The only persons around here, they argue, are real persons, who own property—the shares of the corporation. Any regulation thus has to be justified with respect to these individuals and their property, not some pale abstraction such as the “corporation.”

The lesson we draw from Millon’s account might therefore be that legal concepts such as the corporate person are always artificial and always used for some political end or another. Indeed, if I have any criticism of Millon’s essay, it is that at his conclusion he seems to indulge somewhat in the practice he so clearly and critically describes when he briefly considers how corporate personality might help or hurt some of the policies he thinks are important, such as deterrence of corporate crimes.

I suggest, however, that the use of legal ideas for some transient political end or the other, while ubiquitous, is not inevitable. The idea that the corporation is a legal person can be looked at in a way that, in my view, is more interesting and rewarding than how it has been and can still be used to support or undermine some political-economic agenda item. In making this claim, I am dissenting from the historicist view of the history of ideas, legal and otherwise, which I detect, perhaps mistakenly, in Millon’s essay. By historicism, I mean the belief that all ideas and theories, legal and otherwise, are caused by and relative to the course of history and that nothing more than that can be said about their truth or falsity. I concede that ideas always have historical causes — we might not have, for example, the theory of relativity, which some physicists have described as a piece of 23<sup>rd</sup> century physics that fell by accident into the 20<sup>th</sup> century, if Einstein had not found himself with time on his hands at the Swiss patent office. His theory, however, is better and truer than other theories, quite apart from when and how it happened to be discovered. While legal theory will never be as precise as physics, I hold the idiosyncratic view that some legal theories, as descriptions of the world, are better, in the sense that they are truer, than others, and that this is the case quite distinct from who invented them and for what purpose in the past.

That said, I will “show my hand” and proclaim that it seems to me of the whole menu of theories of corporate personality that is offered to us by American legal history, including the artificial entity theory, the natural entity theory, and the “nexus of contracts” theory, among others, that it is the natural entity theory of some hundred years

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<sup>3</sup> See generally, E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

<sup>4</sup> Millon, *supra* note 1, at 51 (citing RALPH NADER, MARK GREEN & JOEL SELIGMAN, *TAMING THE GIANT CORPORATION* 17-32 (1976)).

<sup>5</sup> See Millon, *supra* note 1, at 53.

ago or so that comes closest in its broad overall outlines to the truth. In a peculiar way, contemporary economic theory has tended to blind us to this fact, but I believe that in the decades ahead, economists and legal scholars will become more sophisticated in their appreciation of human groups and of social forms such as corporations. Contemporary microeconomics has a strong commitment to methodological individualism, the idea that the only real entities to be studied in social science are human individuals and that everything can ultimately be explained in terms of their behavior. This methodology, in an unfortunately philosophically unsophisticated form, is the source of many corporate law scholars' hostility to the idea of legal entities. Economics has been the most fruitful of the social sciences, so its simplifying assumptions are not to be dismissed lightly, but like everything else, they have both costs and benefits. Among the costs of occasionally simple-minded individualism is the reduction in the attention paid to the sorts of groups humans naturally form.

The discipline that has focussed most on human groups has traditionally been sociology, and as Lynn Stout, Margaret Blair, and others have shown, sociology can be a mother lode for insights applicable to corporate law.<sup>6</sup> However, it is also true, in my view, that sociologists and other social scientists have been hobbled by methodological commitments of their own, mainly to the idea that "social facts" can never have any explanation in terms of some underlying facts, such as psychological facts, for example.

My hope is that the coming century will see the abandonment of these antique methodological commitments and that we will see great progress in the social sciences. One thing I hope this progress will make possible is a better understanding of the patterns of human economic cooperation. My guess is that when we understand the psychology and (new) sociology of economic cooperation better, we will see that partnerships and corporations, and their cognate forms in other legal systems, are not the arbitrary products of legal, political and economic history, but rather like what one would expect human beings to construct to carry out complex, cooperative productive tasks. Among the new scientific approaches that look promising to me are economic principles based on evolutionary game theory, computer models that attempt to capture complexity in social organization, evolutionary psychology, and psychology and sociology of human cooperation and teamwork. All of these studies, and what they give rise to, hold much promise for giving us richer and less reductive understandings of the forms human productive associations tend to take. The legal thinkers in our history whose views were most compatible with these new approaches might be, surprisingly enough, those late nineteenth century scholars who spoke of corporations as "natural entities."<sup>7</sup>

I would guess that very few corporate law scholars think this way now. My claim, or at least my wish, is that the next few decades will see the emergence of something similar to this view. If one thinks a legal form like the corporation or the partnership corresponds to some underlying social form that can be described and studied, then one can think of the project of understanding why legal forms have the shape they do (and not another) as real social science. While social science will never be

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<sup>6</sup> See MARGARET M. BLAIR & LYNN A. STOUT, TRUST, TRUSTWORTHINESS, AND THE BEHAVIORAL FOUNDATIONS OF CORPORATE LAW (Working Paper Series in Business, Economics and Regulatory Law Working Paper No. 241403, 2000).

<sup>7</sup> Millon, *supra* note 1, at 43.

as rigorous as physical science, it can be much more than special pleading for some political agenda item or another. When we understand better the social science of legal forms, such as the corporation, for example, we will be in a better position to make good social policy, or at least to avoid making really bad social policy.

On the other hand, the real purpose of social science is not to change the world, but to understand it. Just understanding why so many different legal systems have what amount to corporate persons in them should be enough for legal scholars. To return to Millon's essay, I would just offer a caution to resist the temptation that first-rate history of legal ideas (like Millon's essay) inevitably presents. This is the temptation to believe that the history is all there is. History offers ideas and approaches that are better and worse, and the most recent is not always the best. Something important is going on in the persistent and widespread idea of a business entity or "person" that deserves more study and may ultimately be within our ken, if social science can hopefully cast off some of its methodological chains and make progress in coming decades.

Abstract:

*In Indeterminacy, Irony and Partnership Law, J. William Callison draws parallels between the corporation entity-aggregate debate as articulated by Millon and changes in the Revised Uniform Partnership Act (RUPA) as put forth by the National Conference of Commissioners on Uniform State Laws (NCCUSL). Historically partnerships have been considered aggregates, but RUPA departs from this tradition. It attempts to make partnership law determinate, embracing the “partnership-as-entity” model especially through its adoption of the appellation “LLP”. Ironically, while the entity-aggregate debate persists in corporate law, it has seemingly been resolved in partnership law. However, Callison suggests that the NCCUSL drafters must now focus on determining when individuals have person liability.*

## INDETERMINACY, IRONY AND PARTNERSHIP LAW

J. William Callison \*

In his article, *The Ambiguous Significance of Corporate Personhood*, Professor Millon notes that a standard form of argument has been to assert that the business corporation is some kind of person and then, from the “ostensibly disinterested”<sup>1</sup> descriptive assertion, derive normative conclusions on one side or the other concerning the respective rights and obligations of shareholders and other interested parties. Thus, an assertion that “the corporation is an entity” can be followed by a conclusion that shareholders lack personal responsibility for corporate debts, obligations and liabilities.<sup>2</sup> Millon maintains that the idea of the corporation as a legal person is indeterminate, and that legal theorists have long argued about whether the corporation should be considered as an entity or an aggregation of natural persons. After tracing the historical development of entity-aggregate characterization, with different approaches being taken with different results over time, Millon states that normative issues remain unresolved because characterization questions cannot be settled. In Millon’s view, this focus on the distinctiveness of activities engaged in by corporations, specifically with regard to the entity-aggregate dichotomy, has hindered social policy analysis. He concludes that we might be better off focusing on the problem of personal obligation.

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<sup>1</sup> David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 39, 58 (2001).

<sup>2</sup> See *id.* at 45.

As a legal practitioner and an unincorporated business organization scholar/writer, I believe that interesting parallels can be drawn between the corporation aggregate-entity debate described by Professor Millon and law changes in the partnership and unincorporated business organization arena. At common law, a partnership was considered an aggregate of the individual partners, rather than a distinct legal entity separate from the partners. Extrapolating this aggregate theory to its extreme, a partnership would be nothing more than a relationship between persons acting for a common business purpose and for which common business purpose such persons would jointly own assets, jointly incur obligations, and conduct a pro rata share of the partnership business in their own behalf. A pure aggregate theory of partnerships, which places emphasis on the individual rights and responsibilities of the partners rather than the collective rights and responsibilities of the partnership, was ill suited for the commercial environment in which modern commercial partnerships operated. In response, the courts often adopted and applied an entity view of the nature of partnerships or reached decisions which, while not expressly based on an entity theory, are more easily reconciled with it than with an aggregate theory. In any case, the fact that the 1914 Uniform Partnership Act did not state either that a partnership is an aggregate or that it is an entity (although it generally adopts an aggregate approach, with entity twists) left room for wiggle and evolution.<sup>3</sup>

In 1994, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) declared that its Revised Uniform Partnership Act (“RUPA”) was ready for adoption by the states. As of this writing, a majority of the states have adopted RUPA in its 1992, 1994 or 1996 forms. RUPA section 201(a) states, “*A partnership is an entity distinct from its partners.*”<sup>4</sup> The comment to RUPA § 201 provides “RUPA embraces the entity theory of partnership. In light of the [Uniform Partnership Act’s] ambivalence on the nature of partnerships, the explicit statement provided by subsection (a) is deemed appropriate as an expression of the increased emphasis on the entity theory as the dominant model.”<sup>5</sup> Numerous “since/then” results follow. For example, since RUPA partnerships are entities separate from their partners, then under RUPA such partnerships need not dissolve whenever a person is admitted to the partnership or dissociates from the partnership.

Notwithstanding the impact of entity characterization on important issues such as partnership dissolution, personal liability remains the “600-pound gorilla” of business organization law. It is the liability question that has led to modern developments such as the limited liability company, the limited liability partnership and the limited liability limited partnership. Although RUPA § 307(d) adheres to the new “partnership-as-entity” model by providing that partnership judgment creditors generally may not execute against individual partner assets without first attempting to satisfy their claims from partnership assets,<sup>6</sup> RUPA §306(a) backs away from fully embracing the entity form and

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<sup>3</sup> For a full discussion of the aggregate-entity approach to partnership law, see J. W. CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS (1994).

<sup>4</sup> UNIF. P’SHP ACT § 201(a), 6 U.L.A. 52 (Supp. 1997)(emphasis added).

<sup>5</sup> UNIF. P’SHP ACT § 201(a), cmt., 6 U.L.A. 52 (Supp. 1997).

<sup>6</sup> UNIF. P’SHP ACT § 307(d), 6 U.L.A. 70 (Supp. 1997). This is contrary to the case law in some

leaves partners jointly and severally liable for partnership obligations.<sup>7</sup> The Prefatory Note to RUPA states that “the aggregate approach is retained for some purposes, such as partners’ joint and several liability.”<sup>8</sup> What one hand attempts to clarify, the other hand obfuscates; thus, under RUPA a partnership is an entity unless RUPA provides that it is an aggregate. In light of more modern developments, this aggregate perspective with respect to liability can be viewed as a hangover from partnership law past and probably accommodated both NCCUSL’s original reluctance to tinker with the liability expectations of persons who deal with “partnerships” and NCCUSL’s desire to bring all existing partnerships under RUPA.<sup>9</sup>

Yet, the RUPA drafters were quickly compelled to recognize the current “business organization as entity” focus of modern law concerning participant liability. In the 1996 version of RUPA, NCCUSL adopts the limited liability partnership (“LLP”) form and provides in RUPA § 306(c) that “an obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.”<sup>10</sup> An LLP is a partnership which has filed a registration statement with the appropriate state authority. Such organization typically uses the appellation “LLP” in its name to separate itself from partnerships in which partners have joint and several liability. Following the aggregate-entity classification, an LLP can be viewed as a partnership that declares that it does not follow the aggregate characterization of RUPA § 306(a) and instead is a separate entity for liability purposes. It likely is a historical anachronism that LLP status is not the default rule for general partnerships, with an affirmative election required for joint and several partnership liability.<sup>11</sup>

All this brings me to several observations. First, it is ironic that legal theorists addressing the nature of the corporate personality continue to discuss aggregate-entity characterization and the results therefrom, while the drafters of modern partnership law have attempted to resolve the issue by stating “a partnership is an entity.” I, like many other practitioners, view the business corporation as the ultimate entity form with its inherent characteristics of limited liability, centralized management, continuity of life and free transferability of interests. Partnerships, on the other hand, historically have been considered aggregates of their partners for many purposes, with an entity overlay for

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jurisdictions. See CALLISON, *supra* n.1 at 14-6.

<sup>7</sup> UNIF. P’SHP ACT § 306(a), 6 U.L.A. 66 (Supp. 1997).

<sup>8</sup> UNIF. P’SHP ACT prefatory note, 6 U.L.A. 5 (Supp. 1997).

<sup>9</sup> See UNIF. P’SHP ACT §1006(b), 6 U.L.A. 122. (“After January 1, 199\_, this [Act] governs all partnerships.”)

<sup>10</sup> UNIF. P’SHP ACT § 306(c), 6 U.L.A. 66–7 (Supp. 1997).

<sup>11</sup> Section 404(a) of the current draft of the Proposed Revisions of Uniform Limited Partnership Act (1976) with Revisions (“Re-RULPA) provides that general partners do not have personal liability for limited partnership obligations unless the certificate of limited partnership provides for unlimited liability and the general partner consents to such liability. Re-RULPA has flip-flopped on the appropriate default rule and the final outcome is uncertain.

some purposes. Now, RUPA attempts to make partnership law determinate, while corporate law remains, in Millon's view, indeterminate.

Second, I have some hope that the attempted determinacy of partnership characterization will permit the drafters and courts to move beyond the entity-aggregate approach to focus on policy decisions concerning the precise meaning of "partnership as entity." Once the aggregate-entity lingo is decided, it may be possible to focus on what it means to be an entity and when carve-outs should be made from entity status as a matter of policy. The lingering joint and several liability of partners in a RUPA partnership can be focused on as a policy matter — should persons who associate in a business community have personal responsibility for the community's acts and obligations, and when should personal liability exist? I do not believe the NCCUSL drafters focussed on these policy issues, and they should.

Third, I am skeptical. I believe that the entity characterization of partnerships will strip partnership law of its vitality and adaptability. I fear that much of the conversation will end with a descriptive assertion that "a partnership is an entity, therefore *y* must follow." Millon demonstrates that corporate law remains alive and adaptable in part because the law does not contain a statement that "a corporation is *x*." At the end of the day, I think that is a good thing.

**Abstract:**

*In "Gender and Corporate Personhood: A Feminist Response to David Millon," Terry A. O'Neill applies a feminist lens to David Millon's article on corporate personhood. She first examines Millon's view that the interminable debate about corporate personhood acts as a smokescreen to obscure the more critical question of the relationship between shareholders and other corporate constituencies. Reinforcing Millon's contention that the competing aggregate and entity theories of corporate personhood are indeterminate on the subject, O'Neill agrees with Millon's communitarian view of corporations as a web of contractual relations. She asserts that this view is consistent with and supports the feminist perspective that corporate participants are not merely self-interested profit maximizers, but are humans responding to the needs of others within and without the corporation.*

**Gender and Corporate Personhood: A Feminist Response to David Millon**

**Terry A. O'Neill\***

David Millon's article<sup>1</sup> on the seemingly endless debate over corporate "personhood" is a breath of fresh air. Cutting to the heart of the problem, he persuasively argues that what is at stake in this debate is a fundamental disagreement over "how relationships ought to be understood."<sup>2</sup> More specifically, the corporate personhood debate masks a more critical struggle over how the relationship among shareholders and other corporate constituencies should be understood. Because the personhood question sidesteps the most important issues, Millon is more or less agnostic about whether the corporation is an entity akin to a "jural person," or some sort of aggregate of individuals. He concludes that it matters a little, but not much.<sup>3</sup> There are numerous more important questions. Are shareholders the constituency whose interests count the most? Does the

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<sup>1</sup> David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA 39 (2001).

<sup>2</sup> *Id.* at 56

<sup>3</sup> *Id.*

corporation exist primarily for their benefit, or does it also exist to benefit other stakeholders, such as employees, lenders, and local communities? How should corporate managers be held accountable for their decisions? Should they be permitted to take non-shareholder interests into account in their decision making? Should they be required to do so?

As Millon shows, the corporate personhood question is of limited help in answering these questions. Over the last century and a half, defenders of shareholder primacy first relied on an aggregate conception of the corporation, then switched to an entity view, and have now reverted to a new form of aggregate view.<sup>4</sup> Each of these conceptions of the corporation turns out to be indeterminate, however, in that each can be used to support a diametrically opposing conclusion. Thus, over the decades, proponents of corporate social responsibility have alternately used the very same aggregate and entity conceptions of the corporation in arguing for the protection of all stakeholders' interests.

Millon's indeterminacy argument brings to the surface the ideological underpinnings of the corporate personhood debate. Even if everyone agrees that a corporation is an entity — in other words, a “jural person” — there would still be a struggle over questions about how persons, jural or natural, should treat one another. For example, a hard line anti-regulatory view holds that the corporate entity, no less than a natural person, has the right to single-mindedly maximize its own wealth, without regard to its impact on others. Critics of this view, on the other hand, call on the corporate entity to behave in a socially responsible manner, as a “good corporate citizen.”<sup>5</sup>

The same indeterminacy is also seen in differing views of the corporate entity's relationship with its employees. The conservative view has the corporation bargaining at arm's length with employees, entitled to use whatever bargaining leverage it has to its own advantage.<sup>6</sup> However, this view can be criticized on two levels. First, as Millon has argued elsewhere, the common law background rule of employment at will gives employers a significant bargaining advantage over employees.<sup>7</sup> He suggests leveling the playing field by reversing the employment at will doctrine, giving employees the right not to be fired without cause. Second, as I have argued elsewhere, agency law also tilts the playing field toward employers by imposing fiduciary duties of care and loyalty on employees, but not vice-versa.<sup>8</sup> The employees' duty of loyalty restricts their ability to

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<sup>4</sup> *Id.* at 56–57.

<sup>5</sup> *Id.* at 48.

<sup>6</sup> See, e.g., Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25–26 (1991).

<sup>7</sup> See generally David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975 (1998).

<sup>8</sup> Terry A. O'Neill, *Employees' Duty of Loyalty and the Copororate Constituency Debate*, 25 CONN. L. REV. 681, 707 (1993) (hereinafter O'Neill, *Employees' Loyalty*). The asymmetry in fiduciary duties cannot be justified by arguments from contract law. See *id.* They are really holdovers of the

jump from one employer to a competing firm, whereas employers can replace employees without similar restrictions.<sup>9</sup> I have therefore suggested that employers (including corporate entities) should owe a reciprocal duty of loyalty to their employees.<sup>10</sup> Thus, mere agreement that the corporation is an entity does not produce agreement about how the corporate entity should treat its employees.

As Millon notes, however, the neoclassical economic analysis, which dominates corporate governance law, insists that the entity theory of the corporation is wrong, and that a new version of the old aggregate theory is correct. Under the neoclassical view, that is, the corporation is a “nexus of contracts,” a sort of marketplace where individuals enter into contractual relationships, the totality of which constitute the corporation.<sup>11</sup> Millon accepts this new aggregate view of the corporation — accepts it, that is, in the sense that he does not find it particularly worthwhile to reject it.<sup>12</sup> So he grants that the corporation is a web of contractual relationships. Even so, as he points out, we still face an ideological struggle over the rules and norms by which their association should be operated.

From a right-leaning perspective, although a corporation has numerous constituencies, the shareholders should have a privileged status among them. This belief in shareholder primacy is currently grounded in contract rights, albeit in years past it was grounded in property rights.<sup>13</sup> Whatever its grounding, shareholder primacy demands that the corporate managers owe their allegiance strictly to the shareholders. This means that decisions such as downsizing a workforce, or locating plants where environmental protections are lax, should be made without regard for how non-shareholder constituencies might be affected. If the shareholders profit, the policies are presumptively good.

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instrumentalist view of employment, under which the parties are in a master/servant relationship. Indeed, agency law to this day calls employment a relationship of “master” and “servant.” See RESTATEMENT (SECOND) OF AGENCY § 429 (master/servant relationship is a subset of agency relationship). Under this instrumentalist view, the “servant” exists for the benefit and purposes of the “master.” See *id.* § 387 (employee has fiduciary duty “to act solely for the benefit of the principal [employer] in all matters connected with his agency [employment].” Fiduciary duties are unidirectional because the master is entitled to use the servant to achieve his (the master’s) goals, and not the other way round.

<sup>9</sup> See O’Neill, *supra* note 8 at 709–10.

<sup>10</sup> *Id.* at 714–15. The employer’s fiduciary duty would not be the same as a termination-for-cause rule. It would not flatly prohibit a corporation from downsizing the workforce or relocating a plant. However, it would require the corporation to be candid, and to accomplish its goals in the least harmful manner. See *id.*

<sup>11</sup> Millon, *supra* note 1, at 53; see also, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

<sup>12</sup> Millon, *supra* note 1, at 57.

<sup>13</sup> *Id.* at 50.

Dramatically different conclusions flow from a left-leaning perspective. This view treats the corporate web-of-contractual-relations more as a community for mutual gain than as a market place where “self-seeking individuals come together in order to seek private advantage.”<sup>14</sup> On this view, shareholders should not be privileged over other corporate stakeholders. Rather, everyone should be able to thrive within the corporate community. This means that profits for shareholders, albeit one aim of corporate management, should not be the only aim. Managers should take other stakeholders’ interests into account as well. For example, as Marleen O’Connor has argued, managers should honor “implicit contracts” on which employees have legitimately come to rely, even if this means reduced shareholder profit in the short term.<sup>15</sup> A major implication of this view is that the directors should have broad discretion to manage holistically for all stakeholders, more or less free from interference by shareholders or any other corporate constituency.<sup>16</sup>

Advocates of shareholder primacy have sharply attacked calls for broad directorial discretion. First, they assert that shareholders deserve their privileged status, and need to be able to challenge directors whenever the latter fail to maximize shareholder gain.<sup>17</sup> In addition, they argue that directorial discretion only encourages directors to line their own pockets, at the expense of nonshareholders as well as shareholders. They warn that directors would be able to justify any decision, no matter how self-serving, by claiming that it benefits some stakeholder group, even if other groups’ interests are compromised in the process. In other words, directors would have free reign to serve their own interests without being held accountable to anyone.<sup>18</sup>

Progressive advocates of corporate stakeholder interests downplay the risk that directors will inevitably run amok unless held to strict standards of accountability to shareholders. Lawrence Mitchell, for example, has argued that, in general, it is appropriate to trust corporate directors to act in good faith, taking all stakeholder interests into account.<sup>19</sup> Mitchell has pointed out, for one thing, that shareholders will still enjoy a

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<sup>14</sup> *Id.* at 54.

<sup>15</sup> 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).

<sup>16</sup> For symposia providing overviews of managing for stakeholders, see *Symposium: New Directions in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993); *Symposium: Corporate Malaise—Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 1 (1991); *Symposium: Defining the Corporate Constituency*, 59 U. CINN. L. REV. 319 (1990).

<sup>17</sup> See, e.g., James J. Hanks, Jr., *Playing With Fire: Nonshareholder Constituency Statutes in the 1990’s*, 21 STETSON L. REV. 97 (1991).

<sup>18</sup> See *id.* at 113; Nell Minow, *Shareholders, Stakeholders, and Boards of Directors*, 21 STETSON L. REV. 197 (1991).

<sup>19</sup> Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry Into the Causes of Corporate Immorality*, 73 TEXAS L. REV. 477 (1995).

positive return on their investment.<sup>20</sup> For another thing, Mitchell has argued that the obsession with holding managers strictly accountable to shareholders is actually counterproductive. It treats managers as if they are moral infants, incapable of living up to higher expectations. This ultimately encourages selfish, irresponsible behavior on their part. According to Mitchell, giving corporate boards of directors discretionary power lets them develop as morally mature decision making bodies. Furthermore, higher levels of moral maturity at the corporate helm is worth the risk that some managers may not rise to the occasion.<sup>21</sup>

Margaret Blair and Lynn Stout suggest another reason to give managers broad discretion to act for all stakeholders' benefit. They assert that the salient feature of the corporate form of enterprise is that it facilitates "team production."<sup>22</sup> That is, all of the stakeholders agree that they will do better by pooling their resources to produce goods or services as a team. Each team member contributes something of value to the production process: financing from shareholders and lenders, labor from employees, materials from suppliers, infrastructure from local communities, and so on. The key problem with team production, however, is figuring out how to distribute the group's profits in a way that fairly reflects the contribution of each team member. Blair and Stout argue that the most efficient solution to this problem is for the team members to appoint an "independent hierarch" — i.e., a board of directors — to make distributional decisions.<sup>23</sup> This solution is, obviously, undermined if any and all team members can challenge the board's decisions whenever they are dissatisfied with their distributional share. Therefore, the board needs wide discretion in setting corporate policies, especially when making judgment calls about who gets what share of the wealth produced by the corporate team.<sup>24</sup>

Millon, albeit a leading critic of shareholder primacy, is nonetheless considerably skeptical about broad directorial discretion. To Millon, the pressing question is not so much about directors and their freedom of action, but rather about the actual, material welfare of beleaguered stakeholders. His concern is well founded. The last twenty years have witnessed a remarkable transfer of wealth to shareholders from other constituencies, as merger waves, globalization, and the rise of the institutional investor pressured managers to squeeze out ever higher profits at the expense of employees, lenders, suppliers, and local communities.<sup>25</sup> What good does it do to give managers broad discretion while maintaining an unequal playing field that privileges the interests of

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<sup>20</sup> *See id.* at 594.

<sup>21</sup> *Id.* at 537.

<sup>22</sup> Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999).

<sup>23</sup> *See id.* at 289.

<sup>24</sup> *See id.* at 291–292.

<sup>25</sup> *See, e.g.*, RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS (1995).

shareholders over everyone else, if the managers only use their broad discretion to pay lip service to the idea of stakeholder management? In other words, unlike his conservative counterparts, who fear independent directors channeling wealth away from shareholders, Millon is concerned that the opposite will continue to happen.<sup>26</sup>

Millon therefore takes the communitarian view of the corporation-as-a-web-of-contractual-relations in a different direction. He stresses that the community of corporate stakeholders is one “in which such values as trust and respect for others determine the success of the venture and therefore are a necessary part of intra–corporate relations.”<sup>27</sup> For Millon, the communitarian view also requires rejecting the neoclassical premise “that people are entitled only to what they can bargain and pay for.”<sup>28</sup> He elaborates:

[C]ritics 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 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.<sup>29</sup>

In other words, sometimes people are entitled to things because they need them, even if they have not bargained and paid for them. Moreover, sometimes a person can owe something to others, not because he has agreed to pay it, but simply because the others, with whom he stands in a particular kind of relationship, need it.

I am substantially sympathetic with Millon’s perspective. In particular, it resonates with a feminist approach to corporate governance which I have begun to explore in the last few years.<sup>30</sup> This feminist approach maintains that corporate participants are not *merely* self-interested profit maximizers, although of course personal gain is *one* reason why people work together. Another reason, usually ignored (sometimes strenuously denied) by the neoclassical economic tradition, is that in certain kinds of relationships, human beings respond to the needs of others simply because the

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<sup>26</sup> See Millon, *supra* note 1, at 53–56.

<sup>27</sup> See *id.* at 54.

<sup>28</sup> See *id.* at 55.

<sup>29</sup> See *id.* at 55–56. (emphasis added).

<sup>30</sup> See Terry A. O’Neill, *The Patriarchal Meaning of Contract: Feminist Reflections on the Corporate Governance Debate*, in 2 PERSPECTIVES ON COMPANY LAW (Fiona Macmillan Patfield ed. 1997).

need exists.<sup>31</sup> The mother-child relationship is one paradigmatic example of this phenomenon, but it is by no means the only one. More broadly, a feminist approach maintains that in any relationship marked by longevity and vulnerability — for example, in partnerships and close corporations, and in employment relationships as well — we routinely observe people responding to one another's needs.<sup>32</sup>

Feminist scholars point out that the capacity to respond to the needs of others is a core aspect of being human. A feminist understanding of corporate law thus recognizes that this aspect of human nature operates in corporate relations as well as in intimate, personal relations. This does not imply, however, that the urge to compete for one's own advantage, and the right to autonomously pursue one's own vision of the good life, are not also core human values which are very much at work in corporate relationships.<sup>33</sup> That is, a feminist approach rejects the simplistic assumption, driven by Cartesian dualistic reasoning, that relationships must be *either* competitive *or* co-operative.<sup>34</sup> Not only is such an assumption contradicted by ordinary, everyday experience, it also systematically disadvantages women.

Bifurcating competitiveness from co-operation disadvantages women in our workplaces, and our own homes. Deeply gendered, this either-or proposition presents self-interested competitiveness as hard-nosed, rational, and masculine, while presenting empathy and responsiveness as soft, emotional, and feminine.<sup>35</sup> The obvious message is that it is impermissible for women to be competitive, autonomously to assert and pursue our own interests, and especially impermissible to do so within our families and intimate relationships. Simultaneously, on the other hand, men are encouraged to act in their own self-interest, certainly in commercial relations, but also within their families and intimate relationships. Indeed, men are often culturally sanctioned for expressing any "soft" or "emotional" capacity to respond to others' needs. In short, the neoclassical adherence to an ancient public/private divide is not only descriptively wrong, but also normatively troubling because of the material disadvantages for women and emotional disadvantages for men that it entails.

Millon's view of the corporation as a community characterized by interpersonal trust and respect for others seems to me to resonate with this feminist analysis. It goes beyond the neoclassical myth that a corporation is nothing more than a marketplace

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<sup>31</sup> See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

<sup>32</sup> See Terry A. O'Neill, *Self-Interest and Concern For Others in the Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations*, 22 SETON HALL L. REV. 646 (1992).

<sup>33</sup> See West, *supra* note 31; at 6–8; JULIE A. NELSON, *FEMINISM, OBJECTIVITY & ECONOMICS* (1996); *OUT OF THE MARGIN* (Edith Kuiper & Jolande Sap eds., 1995); *BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS* (Marianne A. Ferber & Julie A. Nelson eds., 1993).

<sup>34</sup> A growing body of feminist economics literature critiques this dualistic reasoning. See, e.g., GILLIAN HEWITSON, *FEMINIST ECONOMICS* (1999).

<sup>35</sup> *Id.*

where insensitive, irresponsible players dicker for immediate personal advantage. The more accurate, and more just, conception of the corporation is that it is a site where participants express both competitiveness *and* co-operation in their relations with other stakeholders. It is important to affirm, as Millon does, that all corporate stakeholders have a right to assert their own interests. Equally important, we need to acknowledge that, at some point, any given stakeholder may have an affirmative obligation to put his own advantage to one side, in response to another stakeholder's need.

The question remains, of course, how to determine *when* competitiveness or co-operation is called for. Millon suggests that we look to material outcomes, in combination with a sense of personal responsibility, for some guidance.<sup>36</sup> For example, if a corporation's directors pursue a policy that harms a particular constituency group, that group should be entitled to be made whole. Obviously, their compensation must come from other corporate participants' share of the corporation's wealth. However, Millon also suggests that, rather than take compensation entirely out of shareholder profits, it might be fairer to place the burden (or at least part of it) on the directors personally whose actions directly caused the loss.<sup>37</sup>

Another way of clarifying what it would mean for stakeholders to balance their pursuit of self-advancement with responsibility for their colleagues' welfare is to increase a corporation's social transparency. Shareholders already benefit from financial transparency, thanks to federal disclosure laws. Such transparency allows shareholders to compare corporate performances, and to move in and out of investments according to their own criteria, whatever that may be. Analogously, stakeholders would benefit from reliable, regular reports on corporations' social performance. Social transparency would allow stakeholders to compare corporations in a more meaningful way. By looking at both financial and social criteria, stakeholders could make better informed choices about whether to stay with a particular corporation or leave. In other words, enhanced transparency would afford all stakeholders a clearer sense of whether a corporation is providing the best situation available to them. In turn, transparency would also allow us to observe and assess the ways in which stakeholders sort through the struggle for advancement and the solidarity with friends and colleagues that make up the pushes and pulls of everyday corporate life.

Millon is surely right to say that the "controversy over the rights of corporate shareholders in relation to nonshareholders . . . is no closer to resolution today than it ever has been."<sup>38</sup> Moreover, he is surely right that we must engage the real underlying questions — How responsive should stakeholders be to each other? How selfish should they be allowed to be? Which, if any, are entitled to a privileged status? — even though they are the most difficult.

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<sup>36</sup> See Millon, *supra* note 1, at 56–57.

<sup>37</sup> See *id.* at 57.

<sup>38</sup> See *id.* at 58.

