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.” 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.  

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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2 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.\(^3\) 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.\(^4\)

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.\(^5\) 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\(^{rd}\) century physics that fell by accident into the 20\(^{th}\) 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

\(^3\) See generally, E. Merrick Dodd, Jr., For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932).

\(^4\) Millon, supra note 1, at 51 (citing RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 17-32 (1976)).

\(^5\) 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. 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.”

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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7 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.