

# CORPORATIONS, PROPERTY, & PERSONHOOD

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## ABSTRACT

One image of the corporation, the dominant business enterprise, animates the fields of corporate law and corporate governance both discursively and practically: the corporation is an institution that exists to facilitate the pursuit of a reasonably simple objective—to build wealth (i.e., profits). The dominant view is narrower still: the corporation does not exist merely to pursue profits but to maximize profits through the correct means (i.e., efficient ones). By and large, the law reifies and perpetuates this image by creating strictures that facilitate its perceived advantages and mitigate its perceived dangers. However, practice has shown that this foundational principle is not always or necessarily consistent with real world experience.

This Article provides an economic exploration of this disconnect that is grounded in property theory. It suggests a new explanation for the perplexing phenomena of corporate malfeasance, altruism, and deontology: people develop “identity property,” a type of intrinsically valuable property interest that transcends or belies traditional corporate law analyses, through corporations. Without undermining the importance of the profit motive, this property perspective suggests that the identity-affirming capacity of the pursuit of property through corporations is important to understanding the behavior of corporations and their constituents (employees, shareholders, agents, communities, etc.).

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<sup>†</sup> Professor of Law, University of Kansas. My intellectual work is the result of a dialogic method; it is the product of my own and countless others’ intellectual labor. Elizabeth Kronk Warner and Quinton Lucas nodded encouragingly as I articulated the seeds of an idea over lunch. The participants at a “Workshop on Vulnerability at the Intersection of the Changing Firm and the Changing Family” smiled, as I suggested my new way to think beyond *homo economicus*, while those at a regional law and economics conference frowned. Peter Eaton took seriously my plan—still in progress—for this work to someday yield an econometric model capable of providing meaningful empirical insight. James Sturgeon pushed for fairer, more careful application of institutional economics methods. Sam Levey gave the most thoughtful and comprehensive peer comments I have received in recent memory (some of which will be address in a future article). Participants in faculty workshops at the universities of Missouri, Oregon, and New Mexico provided useful comments. Martha McCluskey, Hila Keren, and Ronit Donyets-Kedar became intellectual collaborators and comrades. Others too numerous to mention have been helpful to this and my other work at the intersection of property, corporate theory, economics, and identity. This paper is a complete thought, but it does not purport to be “finished.” It is my hope that it is a catalyst for continued dialogue in the tradition of the late Lynn Stout; we never met, but like me, one day she realized that corporations don’t seem to actually work the way we keep saying they do. Deficiencies, of course, remain my responsibility. FTJ. JGY.

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“Man’s life is activity; and as he acts, so he thinks and feels. This is necessarily so, since it is the agent man that does the thinking and feeling.”

-Thorstein Veblen<sup>1</sup>

“The shift in the structure and character of work has created a demand that work produce more than purely economic benefits. To make a living is no longer enough. Work also has to make a life.”

-Peter Drucker<sup>2</sup>

“A thing which you have enjoyed and used as your own for a long time . . . takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”

- Oliver Wendell Holmes, Jr.<sup>3</sup>

#### INTRODUCTION

The contemporary idea of the business enterprise, or “the rule of investment for profits,”<sup>4</sup> is emblemized by the corporation. The dominant

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1. Thorstein Veblen, *The Instinct of Workmanship and the Irksomeness of Labor*, 4 AM. J. SOC. 187, 192–93 (1898).

2. PETER F. DRUCKER, MANAGEMENT: TASKS, RESPONSIBILITIES, PRACTICES 128 (1974).

3. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897).

4. THORSTEIN VEBLÉN, THE THEORY OF BUSINESS ENTERPRISE 2 (1904).

conceptions of the corporation have been mired in periods of intense and sustained controversy. Nonetheless, observers across disciplines and paradigms agree that its non-derogable characteristic is value-neutral profit maximization.<sup>5</sup> Alternative theories of the firm, likewise, center profit. Thorstein Veblen defined the business enterprise by reference to profit:

The motive of business is pecuniary gain, the method is essentially purchase and sale. The aim and usual outcome is an accumulation of wealth. Men whose aim is not increase of possessions do not go into business, particularly not on an independent footing.<sup>6</sup>

John R. Commons<sup>7</sup> agreed, saying of businessmen, “The sole motive which dominates them is Profit . . . Individuals may have other motives, but when they enter corporations all other motives are eliminated. Corporations are institutions for profit, as churches are institutions for worship, and homes are institutions for love.”<sup>8</sup>

Real-world experience appears inconsistent with these pronouncements. Ostensibly indifferent to the implications of their behavior on profit maximization, corporations engage in malfeasance, altruism, and deontology.<sup>9</sup> Potential exemplars of these phenomena abound: WorldCom and Enron remain paradigmatic cases of corporate malfeasance.<sup>10</sup> Executives of those companies took significant personal and organizational risks to protect or advance those corporations.<sup>11</sup> The Body Shop International

5. *From the Current Business Paradigm to the Second Renaissance*, WORLD BUS. ACAD., <https://worldbusiness.org/current-business-paradigm-second-renaissance/> (last visited Mar. 9, 2020).

6. VEULEN, *supra* note 4, at 20 (footnote omitted).

7. Commons’s foundational role and continuing influence within original institutionalist economic thought supports the reference made to him in this Article, notwithstanding his indefatigable, thorough, and indefensible racism, which he made part of his scholarly agenda by developing and publishing racist scholarship. While his racist views, no doubt, implicated all of his work, the Author has not identified ways they have directly shaped the contributions to which the present Article refers. Nonetheless, readers are encouraged to consider how racism and other prejudice might bias Commons’s views. For a discussion of the hidden impacts of citing work with racist foundations, see generally Justin Simard, *Citing Slavery*, 42 STANFORD L. REV. 1 (2020).

8. JOHN R. COMMONS, INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY 526–27 (1934).

9. *See infra* note 11 and accompanying text.

10. *See infra* note 11 and accompanying text.

11. There are now far too many accounts of the Enron and Lehman scandals to enumerate here. For expositions on the Enron corporate malfeasance, see, e.g., William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002); Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L. Q. 357 (2003); John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403 (2002); Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, 49 TEX. INT’L L.J. 297 (2014); Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (or: Culture Matters More than Codes)*, 45 J. BUS. ETHICS 243 (2003). For a sample of materials relating to the period leading up to its 2008 failure, see generally LAWRENCE G. McDONALD, A COLOSSAL FAILURE OF COMMON SENSE: THE INSIDE STORY OF THE COLLAPSE OF LEHMAN BROTHERS (2010); VICKY WARD, THE DEVIL’S CASINO: FRIENDSHIP, BETRAYAL, AND THE HIGH-STAKES GAMES PLAYED INSIDE LEHMAN BROTHERS (2010); Apostolos G. Christopoulos et al., *Could Lehman Brothers’ Collapse be Anticipated? An Examination Using CAMELS Rating System*, INT’L BUS. RES., Apr. 2011, at 11; Hope Greenfield, *The Decline of the Best: An Insider’s Lessons from Lehman Brothers*, LEADER TO LEADER, Winter 2010, at 30; Agatha E. Jeffers, *How Lehman Brothers Used Repo 105 to Manipulate Their Financial Statements*, 8 J.

skincare company sources all its products from fair wage suppliers<sup>12</sup> and implemented supply chain management strategies designed to lower the company's environmental impact.<sup>13</sup> This type of altruism is "a way of life for them."<sup>14</sup> In-N-Out hamburger chain and Trader Joe's grocery stores pay living wages and benefits to normally minimum wage workers.<sup>15</sup> Trader Joe's commitment is framed altruistically.<sup>16</sup> In-N-Out's reflects its Christian deontological commitments.<sup>17</sup> Christian deontological commitments famously drove Hobby Lobby and Conestoga Woods to embed their religious values into their daily operations.<sup>18</sup>

The standard accounts of corporate malfeasance and altruism, which can be analogized to deontology, suggest that what appears to be aberrant corporate behavior is consistent with the accepted conception of corporations as profit-centric entities. Altruism is often treated as a form of entrepreneurship.<sup>19</sup> Malfeasance is used as a stark example of agency costs.<sup>20</sup> This Article forms part of a series that elaborates an alternative role, function, and focus of the corporation. Its primary purpose is descriptive; it aims to better understand not what corporations should or could do but what they actually do. This Article introduces the concept of "identity property" into the space of corporate law theory, claiming that this powerful category of incommensurable, epistemologically, ontologically, and vocationally constitutive property may drive corporate malfeasance,

LEADERSHIP, ACCOUNTABILITY & ETHICS 44 (2011); Ross Levine, *An Autopsy of the US Financial System: Accident, Suicide, or Negligent Homicide*, 2 J. FIN. ECON. POL'Y 196 (2010); Julien Le Maux & Danielle Morin, *Black and White and Red All Over: Lehman Brothers' Inevitable Bankruptcy Splashed Across Its Financial Statements*, 2 INT'L J. BUS. & SOC. SCI. 39 (2011); Andrew Ross Sorkin, *Lehman's Last Hours*, N.Y. TIMES (Sept. 7, 2010), <https://www.nytimes.com/2010/09/07/business/07sorkin.html>; Andrew Ross Sorkin, *The Race to Save Lehman Brothers*, N.Y. TIMES (Oct. 20, 2009), <https://www.nytimes.com/2009/10/20/business/economy/20sorkin.html>.

12. See *Community Trade*, BODY SHOP, <https://www.thebodyshop.com/en-us/commitment/communitytrade?text=Community+Trade&autosuggest=Community+Trade&typed=community> (last visited Mar. 9, 2020).

13. Ian Wycherley, *Greening Supply Chains: The Case of the Body Shop International*, 8 BUS. STRATEGY & ENV'T 120, 120 (1999).

14. *Id.* at 124.

15. Melia Robinson, *In-N-Out Employees Can Work Their Way Up to \$160,000 a Year with No Degree or Previous Experience*, BUS. INSIDER (Jan. 22, 2018, 11:41 AM), <http://www.businessinsider.com/in-n-out-employee-pay-2018-1>; Sophie Quinton, *The Trader Joe's Lesson: How to Pay a Living Wage and Still Make Money in Retail*, ATLANTIC (Mar. 25, 2013), <https://www.theatlantic.com/business/archive/2013/03/the-trader-joes-lesson-how-to-pay-a-living-wage-and-still-make-money-in-retail/274322/>.

16. See *Careers*, TRADER JOE'S, <https://www.traderjoes.com/careers> (last visited Mar. 9, 2020) ("It's simple, really. We believe that doing the right thing, as it relates to all Trader Joe's stakeholders—Crew, Customers, Vendors—is the right thing to do. And it starts with our Crew.")

17. See Zachary Crockett, *The Church of In-N-Out Burger*, PRICEECONOMICS (Sept. 8, 2014), <https://priceconomics.com/the-church-of-in-n-out-burger/>.

18. See *About Us*, CONESTOGA WOOD, <https://www.conestogawood.com/about-conestoga> (last visited Jan. 18, 2020) ("We always strive to do the right thing, period. Our ethics and values are founded on the Christian principles that influence the way we do business."); Jerry Bowyer, *What Makes Hobby Lobby a Christian Company? Hint: It's Not a Greed or a Misogyny Thing*, FORBES (Apr. 25, 2017, 11:32 AM), <https://www.forbes.com/sites/jerrybowyer/2017/04/25/what-makes-hobby-lobby-a-christian-company-hint-its-not-a-greed-or-a-misogyny-thing/#cb99e3036d9e>.

19. See, e.g., Lua Kamál Yuille, *From Corpo Economicus to Corpo Sapiens*, 55 U. LOUISVILLE L. REV. 163, 190–94 (2017).

20. See, e.g., *id.* at 184.

altruism, and deontology. That is, people develop identity property through corporations, and they engage in behavior to advance or protect that identity property that belies traditional corporate law analyses.

Part I of this Article outlines the central features of the *corpo economicus* paradigm as it is deployed in the relevant legal scholarship. Then, it offers examples of corporate behavior that fails to conform to the standard model: Lehman Brothers, TOMS Shoes, and Hobby Lobby, Inc. The examples demonstrate these corporations engaging in activity that reflects, in turn, malfeasance, altruism, and deontology.

Part II develops the theoretical foundation of this Article's descriptive thesis that people develop identity property through corporations. To explain identity property, the Article draws into conversation several disparate threads of property theory, including Charles Reich's *The New Property*,<sup>21</sup> Margaret Radin's *Property and Personhood*,<sup>22</sup> and Cheryl Harris's *Whiteness as Property*.<sup>23</sup> As synthesized here, this scholarship suggests that corporations can create a broader spectrum of property for their constituents than is generally recognized. The property generated in a corporate context is not limited to functional property, such as financial capital or monetary assets. Corporations also create and pursue those types of incommensurable property that are central to ontological, epistemological, and vocational humanity. Within this identity property framework, corporate malfeasance, altruism, and deontology may reflect corporate actors' pursuit of some identity value over profit for the corporation.

With the new property dimension of corporate behavior properly set forth, Part II suggests that engagement with identity property is subject to different social norms and amenable to different regulatory strategies than those that dominate corporate law. Then, adopting the analytical tools of institutional economics, Part II identifies two important drivers of the development of identity production in the corporation: Taylorism and financialization.

The Article concludes that laws that do not address the role of corporations in the identity of their constituents will have an inherently limited capacity to incentivize or disincentivize corporate behavior.

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21. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

22. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property*]. Though the discussion here relies primarily on *Property*, Radin has refined, developed, and evolved that theory she developed in a series of well-recognized articles and books. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996) [hereinafter RADIN, *CONTESTED COMMODITIES*]; MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993) [hereinafter RADIN, *REINTERPRETING PROPERTY*]; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*]; Margaret Jane Radin, *Regulation of Computing and Information Technology: Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996) [hereinafter Radin, *Cyberspace*]; Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988) [hereinafter Radin, *Liberal Conception*].

23. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

## I. WHAT DO CORPORATIONS REALLY DO?

In its simplest form, this Article asks, “What do corporations do?” To answer that question, it would seem, it serves to know exactly what a corporation is.<sup>24</sup> The answer seems simple: In essence, the corporation is merely one way individuals unite to pursue capital, often (but not always<sup>25</sup>) in the form of private property. The legal contours of the corporate form are easily identifiable by reference to the corporate law of an entity’s state of incorporation.<sup>26</sup> This characterization should be uncontroversial,<sup>27</sup> but it is also not particularly instructive.<sup>28</sup> The question—what is a corporation?—seeks to understand the fundamental nature of the choice to pursue capital using this legal mechanism. At a minimum, that nature contemplates the corporation as a legal person, separate from its constituents.<sup>29</sup> Otherwise, there is no universally accepted answer. Instead, the nature of the corporation is a conversation, debate, and polemic that “extend[s] far back into history.”<sup>30</sup> Several broad perspectives on this question have enjoyed cyclical dominance,<sup>31</sup> each contributing to the landscape of corporate law and theory.<sup>32</sup> These perspectives can be and have been denominated, framed, and grouped in a variety of ways and across different dimensions. However, the most common analytical strategy delineates three principle ways of thinking about corporations: as artificial entities, as natural entities, and as aggregate entities.

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24. In fact, “[t]he answer to the question, ‘What is a corporation?’ is much of (all of?) the law of corporations, including, all the exceptions built into the concept itself.” Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 877 (1991).

25. For example, labor unions and nonprofit organizations use the corporate form but generally pursue primarily other forms of capital of their constituents.

26. Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 SETON HALL L. REV. 879, 885 (2012) (“Defining the corporation itself is of course fairly simple—it is a legal entity possessing the characteristics defined by the corporate law of its state of incorporation, or if beyond the United States, by the law of the jurisdiction in which it is formed.”).

27. Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 J. CORP. L. 331, 338 (1987); Brynna Nelson Swenson, *The Corporate Form: Capital, Literature, Architecture I* (June, 2008) (unpublished Ph.D. dissertation, University of Minnesota) (on file with ProQuest Dissertations & Theses) (defining the corporate form as a structure for collective action).

28. In addition to legal personality (the capacity and authority to own property, sue and be sued, and bear criminal responsibility), standard across jurisdictions are limited liability for owners and managers, shared ownership by investors of capital, delegated management, and transferability of ownership interests. See, e.g., Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–40 (2001).

29. Exactly who the constituents of a corporation are is a distinct but related debate in corporate theory. Most perspectives on the nature of the corporation also expressly or implicitly ascribe to a view on this question. Nonetheless, that set of debates is of little consequence to the ideas being elaborated here. E. Merrick Dodd, Jr. inaugurated this debate in his still-debated piece, *For Whom are Corporate Managers Trustees?*. E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146–47 (1932).

30. Robert W. Hamilton, *The Corporate Entity*, 49 TEX. L. REV. 979, 980 (1971) (citing Lord Coke’s definition of the corporation in *The Case of Suttons Hospital*, 77 Eng. Rep. 937, 973 (K.B. 1613)).

31. Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 771 (2005) (tracing the cyclical dominance of the aggregate theory, the artificial entity theory, and the real entity theory).

32. See *id.*

In *Tr. of Dartmouth Coll. v. Woodward*,<sup>33</sup> Chief Justice Marshall set forth the original iteration of the artificial entity theory. This was the predominant image of the corporation in the first half of the nineteenth century, when their modern iteration was first developed:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . . Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use.<sup>34</sup>

From this perspective, corporations exist to facilitate whatever ends the government, which grants the corporate charter, concludes benefit society—an idea eventually understood to mean commerce or economic development.<sup>35</sup>

In contrast, the real or natural entity perspective posits that, rather than the progeny of government fiat, corporations are the result of the natural tendency of individuals toward collective action.<sup>36</sup> Under this view, the corporation is “an organic social reality with an existence independent of, and constituting something more than, its changing shareholders.”<sup>37</sup> The natural entity version of the corporation possesses independent morality, will, and goals, which cannot be directly identified with those of its constituents. This corporation exists and emerges without regard to the state, which merely legitimizes an extant entity.<sup>38</sup>

The aggregate theory, animating the Supreme Court’s description of the corporation as an “association[] of citizens,”<sup>39</sup> understands the corporation as “a group of otherwise disaggregated natural persons joining

33. 17 U.S. 518 (1819).

34. *Id.* at 636.

35. See Susanna Kim Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 107–08 (2009).

36. Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 805 (2013).

37. *Id.* at 806 (quoting Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 AMK. J. COMP. L. 49, 50 (1990)).

38. Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1305 (1979); see also George F. Deiser, *The Juristic Person. III*, 57 U. PA. L. REV. 300, 304 (1909) (“What really happens is that the state finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.”).

39. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 356 (2010).

together by agreement to mutually pursue a private endeavor.”<sup>40</sup> Thus, “[c]orporations have no reality over and above their constituents, because they are created by and function only because of them.”<sup>41</sup> That same perspective, that the corporation is not a real entity but a convenient fiction, underlies the currently prevailing contractarian or “nexus of contracts” perspective of the nature of corporations,<sup>42</sup> which was presaged by Ronald Coase,<sup>43</sup> coined by Michael Jensen and William Meckling,<sup>44</sup> and championed<sup>45</sup> by Frank Easterbrook and Daniel Fischel.<sup>46</sup> Under this perspective, the corporation is “a shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves.”<sup>47</sup> More simply, it is a set of “contractual relationships between the various parties involved with the firm: executives, directors, creditors, suppliers, customers, and employees. The corporation itself doesn’t really exist; it is merely the nexus (or connection or link) amongst these various corresponding relationships.”<sup>48</sup>

40. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1142 (2012).

41. PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 51 (1985).

42. The same perspective was described as a “property conception” by William T. Allen. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992).

43. See Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 783–85 (1972) (whose rejection of Coase’s construction advanced the paradigm); see, e.g., Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1, 9 (2002) (“This model’s origins fairly can be traced to Nobel Prize laureate Ronald Coase’s justly famous article, *The Nature of the Firm*.”); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 229 (1990) (explaining that the shareholder-centered foundation of corporate theory “can be traced to Ronald Coase’s 1937 article”); J. Gregory Sidak, *Mr. Justice Nemo’s Social Statics*, 79 TEX. L. REV. 737, 745 (2001) (“Coase’s insight that the firm is the nexus of contracts between the owners of various factors of production also has gained widespread acceptance among legal scholars.”); see generally R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Marshall’s opinion in *Dartmouth College v. Woodward* is an even earlier antecedent sited within legal canon. As noted by Margaret Blair, in that same decision, Marshall stated emphatically that the incorporation of Dartmouth College (i.e., its charter) was unequivocally a contract subject to the benefits of that legal institution. Blair, *supra* note 36, at 802.

44. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) (defining corporations as “a nexus for . . . contracting relationships”) (emphasis in original).

45. But see Henry N. Butler & Larry E. Ribstein, *Opting out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 16–18 (1990) (characterizing as weak the contractarianism promoted by Easterbrook and Fischel, normally characterized as strong).

46. See generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989) [hereinafter Easterbrook & Fischel, *The Corporate Contract*]; Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875 (1983); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982).

47. Easterbrook & Fischel, *The Corporate Contract*, *supra* note 46, at 1426.

48. Grant M. Hayden & Matthew T. Bodie, *The Uncorporation and the Unraveling of “Nexus of Contracts” Theory*, 109 MICH. L. REV. 1127, 1129 (2011). It is important to note that the eponymous



Ultimately, all of these perspectives (and those that revise, build on, or transform them) provide insight into the nature of corporations and the laws designed to constitute, recognize, and regulate them.<sup>49</sup> As John Dewey appreciated, the varying perceptions can be used to pursue identical, complementary, and competing or conflicting ends, based largely on independent normative considerations.<sup>50</sup> Indeed, present debates, conversations, and polemics surrounding the nature of the corporation are best characterized as primarily concerned, not with defining or understanding corporations, but with determining which understanding best meets society's needs.<sup>51</sup> Most important with respect to the advancement of the present discussion, the fundamental characteristics of *homo economicus* are embedded in each of these approaches. That is, there is a clear transperspective paradigm of *corpo economicus* that assumes corporations are profit-motivated, rational actors.<sup>52</sup>

*Homo economicus* is the personification of the rational choice model of decision-making that is the basis of most microeconomic analysis. Rational choice is defined as the process of determining what options exist and, then, choosing the "best" one according to some consistent criterion.<sup>53</sup> The rational actor model of human behavior assumes that individuals exhibit the following traits:

- (a) perfect self-interest, or consideration of only the costs and benefits that accrue to the actor;<sup>54</sup>
- (b) perfect information, or knowledge of all information and circumstances, including the probable outcomes, relevant to a decision; and

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contracts are not contracts in any lay or legal sense of the term. Rather than any express agreement or legally enforceable promise, Jensen and Meckling actually refer to reciprocal arrangements involving mutual expectations between parties. See Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, in PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 59–71 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 822 (1999); Ripken, *supra* note 35, at 158 (citing Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1549 (1989)).

49. Jeffrey Nesteruk, *Corporate Theory and the Role of Narrative*, 2009 MICH. ST. L. REV. 933, 934 (2009) ("[E]ach corporate conception may well capture something essential about the corporate entity, thus providing insight into its complex and evolving reality.")

50. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926). Alternatively, they may be unable to approach lasting consensus because they reveal fundamental questions outside the purview of legal and economic analysis. See Swenson, *supra* note 27, at 7–8.

51. That question, it should be clear, is wholly normative.

52. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003) (elaborating a neoclassical theory of law and economics that takes as a given that corporations are rational actors that seek to maximize profits).

53. Jonathan Levin & Paul Milgrom, *Introduction to Choice Theory* (Sept. 2004) (unpublished paper) (on file with Stanford University).

54. See ROBERT H. FRANK, *MICROECONOMICS AND BEHAVIOR* 18 (3rd ed. 1997); see also Robert H. Frank, *Rethinking Rational Choice*, in BEYOND THE MARKETPLACE: RETHINKING ECONOMY AND SOCIETY 53, 54 (Roger Friedland & A.F. Robertson eds., 1990); Robert H. Frank, *If Homo Economicus Could Choose His Own Utility Function, Would He Want One with a Conscience?*, 77 AM. ECON. REV. 593, 593 (1987).

(c) perfect rationality, or the capacity to logically order options according to their performance with respect to consistent criterion (utility) and the absolute tendency to select the utility-maximizing option.<sup>55</sup>

Such an individual will invariably act to maximize utility, accounting for existing opportunities and constraints, as well as probable outcomes.<sup>56</sup> While the idea of utility may take into account the full range of individual preferences, economic man<sup>57</sup> is only a functional predictive tool if utility is taken to mean material welfare.<sup>58</sup> The core features and, more importantly, the substantive implications of this paradigm have been incorporated into the understandings of the corporation outlined above implicitly, expressly, or both.

*Corpo economicus* is most apparent in aggregate theories of the nature of the corporation. These perspectives view the corporation as nothing more than the sum of its constituents.<sup>59</sup> The currently dominant contractarian framings of the aggregate theory view businesses as a collection of voluntary agreements entered into among stakeholders, from owners and management to employees, suppliers, and consumers.<sup>60</sup> The corporation is “an entity in rational patterns no different from those of human actors.”<sup>61</sup> From this perspective, fully informed, perfectly logical, and selfish profit-pursuers interact, leading to corporate behavior that reflects those aims. If each actor maximizes profit, profit will necessarily be maximized for the corporation. Profit maximization is, indeed, the *sine qua non* of the corporation under this perspective.

The corporation as a natural entity is also *corpo economicus*. Placed in its historical context, the perspective is a reaction to the difficulty of identifying a one-to-one correspondence between corporate behavior and either the behavior of any individual within the corporation or the

55. See Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 68–69 (2002).

56. Gary Becker offers a typical account of those principles: “[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.” GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

57. *Homo Economicus* is explicitly gendered male. He is free from feminized constraints on his choices, like familial and communal ties, and he is epistemologically male. See, e.g., MARTHA A. FINEMAN & TERENCE DOUGHERTY, *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, & SOCIETY*, at ix (Martha Albertson Fineman & Terence Dougherty eds., 2005); Julie A. Nelson, *The Study of Choice or the Study of Provisioning? Gender and the Definition of Economics*, in *BEYOND ECONOMIC MAN: FEMINIST THEORY & ECONOMICS*, passim (Marianne A. Ferber & Julie A. Nelson eds., 1993); Paula England, *The Separative Self: Androcentric Bias in Neoclassical Assumptions*, in *BEYOND ECONOMIC MAN: FEMINIST THEORY & ECONOMICS*, supra, passim.

58. See Irene C. L. Ng & Lu-Ming Tseng, *Learning to be Sociable: The Evolution of Homo Economicus*, 67 AM. J. ECON. & SOC. 265, 267–68 (2008).

59. See Ripken, supra note 35, at 106.

60. STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 27 (2002).

61. Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 L. & SOC. INQUIRY 179, 210 (2005) (quoting William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1496 (1989)).

combined behavior of many or all of the corporation's constituents.<sup>62</sup> Thus, the corporation is imbued with an independent will determined solely by the interests of the corporation. Indeed, this separation of control (the will of the corporation) from its ownership is a central feature, if not the defining characteristic, of the corporation.<sup>63</sup> These differentiated goals and interests support the idea that corporate personhood invests corporations with a parallel spectrum of rights as other independent individuals.<sup>64</sup> Chief among these rights is the idea that, as a real, independent entity, the corporation should be free from heavy state regulation and oversight.<sup>65</sup> Embedded in that idea is that corporations are amenable to the same predictive analyses as other persons, namely *homo economicus*.

The artificial grant or concession theory of the corporation, as articulated by Chief Justice Marshall, holds that the corporation possesses only those characteristics allowed by the state,<sup>66</sup> so the only relevant behavior of the corporation is what is prescribed in the charter. As the aims of the states in chartering corporations evolved and narrowed on economic contributions, the correspondence between the artificial entity perspective of the corporation and the *corpo economicus* was complete.<sup>67</sup> Corporations are chartered by the government to engage in economic activity (for the benefit of their owners).<sup>68</sup> These economic aims are the only aims included in the charter, so the corporation will singularly focus on this profit-maximizing imperative.

Each of the primary answers to the question “what is a corporation?” ultimately offers the same basic answer: the corporation is *corpo economicus*. “For example, proponents of the nexus of contracts perspective conclude that *corpo economicus* is largely self-regulating through market forces that dominate the various aspects of the corporate form: management, ownership, employment, etc.”<sup>69</sup> The acceptance of this normative position is arguably the basis of the significant judicial deference shown to corporate executives.<sup>70</sup> Alternatively, the separation of ownership and control in *corpo economicus*, emerging as a problem in the real-entity view

62. See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 211–12 (1990).

63. For example, the foundational text in corporate governance, The Modern Corporation and Private Property, made a central observation: In the mega-corporation that dominates the American economy, the unity of ownership and control is destroyed. ADOLF A BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 300 (2009).

64. Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 835–36 (2005).

65. See R. Paul Holland, *Should a Corporation be Considered a Citizen Under the Privileges and Immunities Clause of the Federal Constitution*, 36 W. VA. L. Q. 245, 254–55 (1930).

66. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819) (describing a corporation as an “artificial being, invisible, intangible, and existing only in contemplation of law . . . possess[ing] only those properties which the charter of its creation confers upon it.”).

67. See Millon, *supra* note 62, at 213.

68. *Id.* at 213.

69. Yuille, *supra* note 19, at 180.

70. See, e.g., *Joy v. North*, 692 F.2d 880, 884–85 (2d Cir. 1982), *superseded by statute*, Conn. Gen. Stat. Ann. § 33-724 (2019), *as recognized in* *Finley v. Superior Court*, 80 Cal. App. 4th 1152 (2000) (referencing the business judgment rule as a rationale for the Court's decision).

of the corporation, raises significant problems of agency costs, potentially supporting the imposition and enforcement of strong fiduciary duties.

These abstractions of *corpo economicus* provide the foundation on which business law—from incorporation to securities regulation to corporate governance rules—is built. And, unlike *homo economicus*, who has been empirically elusive, examples of *corpo economicus* abound. Where engaged directly, the paradigm tends to be accepted. It is not presented merely as the best predictor of corporate behavior, permitting intelligent regulatory decision-making. Rather, *corpo economicus* is largely accepted as the empirical norm from which deviations are pathological. Even critiques of *corpo economicus* tend to accept the paradigm. Notably, progressive corporate legal scholarship and advocates of corporate social responsibility engage in a largely normative discourse about what the corporation should be and how the law could incentivize rational profit maximizers to take into account a broader range of interests and concerns.<sup>71</sup> Nonetheless, such scholarship starts from the idea that *corpo economicus* is a standard position that must be addressed. “Similarly, newer developments in corporate law . . . clearly start from *corpo economicus*.”<sup>72</sup>

One such example is the benefit corporation, a relatively recent evolutionary corporate form that widens the scope of sanctioned corporate interests. Benefit corporation acts typically require entities that opt in to this organizational form, instead of the traditional corporation, to pursue some philanthropic or publicly beneficial aim in addition to optimizing shareholder value.<sup>73</sup> Proponents contend that benefit corporations “give flexibility to entrepreneurs and investors who reject profit as the only vector of utility.”<sup>74</sup> However, in creating a separate, special corporate form for such entities, states adopting the model reinforce the idea that a non-benefit corporation is the standard or “normal” corporation. That is, if the point of the benefit corporation is to protect corporate actors’ decisions to be responsive to the interests of nonshareholder partners and constituents,<sup>75</sup> it must be the case that those decisions are not (adequately) protected in the traditional corporation. The benefit corporation starts with *corpo economicus* and modifies it for the social entrepreneur.

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71. Taking a notably more nuanced approach and using behavioral economics to broaden the discussion of corporate law is the work of Lynn Stout over more than twenty years. Her approach, however, does not engage the identity roles for corporations suggested here.

72. Yuille, *supra* note 19, at 181 (emphasis omitted).

73. See, e.g., BENEFIT CORP., MODEL BENEFIT CORPORATION LEGISLATION (Apr. 17, 2017). As of 2020, thirty-six states (including influential Delaware) had passed some form of benefit corporation legislation. For a regularly updated state survey, see *State by State Status of Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/state-by-state-status> (last visited May 14, 2020).

74. *Id.*

75. Much of the existing legal literature concerned with benefit corporations engages the purpose of benefit corporation statutes. Many articles conclude that its main benefit is protective in nature. See, e.g., Leo E. Strine, Jr., *Making it Easier for Directors to “Do The Right Thing”?*, 4 HARV. BUS. L. REV. 235, 242–43 (2014).

Behavioral and experimental law and economic approaches to corporations are making advances with respect to empirical testing of basic business functions, relevant to corporate and securities law. “The descriptive contribution of this work . . . is largely limited to refining the concept of rationality applicable to *corpo economicus*. Even more circumscribed, the normative implications of this work only question the strength of the contractarian market hypothesis.”<sup>76</sup> *Corpo economicus* with bounded, rather than perfect, rationality should be agnostic toward regulation.

Notwithstanding the orthodoxy of *corpo economicus* as the paradigm of corporate behavior, corporations routinely diverge from this model in practice. There are many reasons why this could take place. A corporation may veer from the paradigm because of “groupthink,” which occurs when desires for conformity lead to irrational behavior . . . real corporations may diverge from *corpo economicus* because the model is too inflexible. As mentioned above, instead of perfect rationality, the model may need to contemplate bounded rationality—which essentially constitutes decisionmaking in the absence of information or the capacity to identify and pursue preferences. In both these examples, divergence is pathological . . . . The [S]ection that follows sets out three archetypal divergences from *corpo economicus*, . . . [suggesting that] each such divergence [was a] normal manifestation[] of the corporate form.<sup>77</sup>

#### A. Corporate Malfeasance

The rise and fall of the “titan of America’s financial system,”<sup>78</sup> by that time publicly traded as Lehman Brothers Holding, Inc.,<sup>79</sup> has been the subject of extensive academic and popular analysis.<sup>80</sup> Founded in 1850, Lehman was one of the oldest and most profitable investment banks on Wall Street.<sup>81</sup> Lehman’s historical strength was in underwriting and trading fixed-income securities, but by the 1990s the firm had diversified its sources of revenue.<sup>82</sup> After the repeal of the Glass-Steagall Act in 1999,<sup>83</sup>

76. Yuille, *supra* note 19, at 182.

77. *Id.*

78. Edward J. Estrada, *The Immediate and Lasting Impacts of the 2008 Economic Collapse—Lehman Brothers, General Motors, and the Secured Credit Markets*, 45 U. RICH. L. REV. 1111, 1113 (2011).

79. Lehman was comprised of many legal entities beyond this ultimate parent holding company; this legal structure was, in turn, unrelated to either its operational structure or the lines of business in which it engaged. Stephen J. Lubben & Sarah Pei Woo, *Reconceptualizing Lehman*, 49 TEX. INT’L L.J. 297, 303–04 (2014). These complexities reflect regulatory arbitrage and perceived operating efficiency, rather than any substantive impact on analysis of the group as a single corporation.

80. See *supra* note 11 and accompanying text.

81. See MCDONALD, *supra* note 11, at 82.

82. By 2008, it was involved in virtually all aspects of the economy impacted by the financial services sector. See Estrada, *supra* note 78, at 1114.

83. Glass-Steagall Act of 1933, ch. 65, § 16, 48 Stat. 184-85; § 20, 48 Stat. 188-89 repealed by Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §101, 113 Stat. 1338, 1341 (1999); Glass-Steagall Act of 1933, ch. 65, § 21, 48 Stat. 189; *Id.* § 32, 48 Stat. 194. The Glass-Steagall Act of 1933 prohibited commercial banks from participating in the investment banking business because “affiliations between these institutions were perceived as a main factor contributing to the stock market crash of

Lehman began a more aggressive growth strategy, moving from a low-risk brokerage model to a higher risk banking model.<sup>84</sup> These decisions left the company highly leveraged and internalizing the risks associated with its expanded ventures in riskier activities (including subprime lending, packaging and trading mortgage-backed securities, and experimenting with other exotic derivatives).<sup>85</sup> But Lehman's investment in high-margin products led it to post record results during 2007, the precipice of the housing boom. When the housing bubble burst, the company was hyper-vulnerable to the risks it had internalized. Then, Lehman collapsed.<sup>86</sup>

### 1. What *Corpo Economicus* Dictates

Although the company has been criticized for what is framed as “foreseeably bad business judgment,”<sup>87</sup> the causes of its ultimately fatal distress (i.e., lending through subsidiaries that were making subprime loans to questionable borrowers and excessive risk taking in opaque derivatives and structured finance products) are not generally treated as malfeasance.<sup>88</sup> Lehman's response to that financial distress is seen as malfeasance and clearly diverged from the *corpo economicus* model.

*Corpo economicus* maximizes profit rationally. To do so, it abides by three axioms: (1) perfect self-interest; (2) perfect information; (3) and perfect rationality.<sup>89</sup> These axioms suggest that, when the housing market crashed, Lehman would have selected the available and feasible course of action most likely to produce the best financial return given the evident circumstances.

Two rational alternatives have been identified. One feasible option was to declare bankruptcy, which would have guaranteed the unwinding of the company and resulted in limited returns for Lehman's investors.<sup>90</sup> Another feasible option was to sell off Lehman's mortgage-related portfolio. Even at a large loss,<sup>91</sup> this option would have significantly mitigated, if not eliminated, Lehman's financial distress. “To facilitate [] a sale, Lehman would need to increase its liquidity, triage its exposure to the flailing

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1929 and the Great Depression.” Joseph Jude Norton, *Up Against “The Wall”: Glass-Steagall and the Dilemma of a Deregulated (“Reregulated”) Banking Environment*, 42 BUS. LAW. 327, 327 (1987). The restrictions created by Glass-Steagall were eliminated by the Gramm-Leach-Bliley Act of 1999. See James R. Barth & John S. Jahera, *Gramm-Leach-Bliley Act: Creating a New Bank for a New Millennium*, in ENCYCLOPEDIA OF FIN. 213, 213 (C.F. Lee & A.C. Lee eds., 2006).

84. See *Lehman Brothers and the Crisis: A Year on*, ECONOMIST (Sept. 10, 2009), <https://www.economist.com/node/14401030>.

85. *Id.*

86. *Id.*

87. Yuille, *supra* note 19, at 184.

88. See Mark Denbeaux, et al., *Lehman Brothers: A License to Fail with Other People's Money* 2, 6, 8–10, 17 (Seton Hall L. Ctr. For Policy & Research, Working Paper No. 2003618, 2012).

89. Yuille, *supra* note 19, at 177–78.

90. *Id.* at 185.

91. Assuming that portfolio would have necessarily been sold at a loss, the company would rationally have sought to, subsequently, raise sufficient capital to cover any losses incurred in such a sale.

mortgage market, and decrease its leverage.”<sup>92</sup> Under the second option, the company would have survived.

## 2. What Lehman Actually Did

Lehman appeared to choose the second option. Executives rejected a Berkshire Hathaway investment,<sup>93</sup> claiming the proposal undervalued the company.<sup>94</sup> During the summer of 2008, Lehman executives also rejected other similar offers for undervaluing the company.<sup>95</sup>

Management ego has been cited as a key factor in Lehman’s failure to pursue rational responses to its financial distress.<sup>96</sup> Its Chief Executive Officer, Richard Fuld, “lived for and identified with his firm. It was his oxygen . . . .”<sup>97</sup> He saw Lehman as a firm of hardscrabble mavericks, and this identity was embraced throughout the executive structure.<sup>98</sup> Loyalty to the identity they built for Lehman was not unfounded. The Fuld team had previously saved Lehman from collapse and had made it a bank for which premiums were paid.<sup>99</sup> From this perspective, the company could not agree to a deal that did not recognize this perceived value.<sup>100</sup>

So, Lehman chose a third option, doubling down on its risk and disguising the declining value of its assets. The company continued writing mortgage-backed securities in the rapidly deteriorating real estate market. To protect Lehman’s reputation as a “cat with nine lives,”<sup>101</sup> management increased the amount the company was prepared to lose in the real estate market, decimated remaining shareholder value, jeopardized potential strategic partnerships, and risked criminal sanctions.<sup>102</sup>

Executives at Lehman built a façade of financial strength using deliberate accounting misdirection, concealment, and communication of misleading information.<sup>103</sup> Financial statement massaging and “polishing” became aggressive manipulation.<sup>104</sup> Lehman’s primary strategy to

92. Yuille, *supra* note 19, at 185.

93. Yalman Onaran & John Helyar, *Fuld Solicited Buffett Offer CEO Could Refuse as Lehman Fizzled*, BLOOMBERG (Nov. 9, 2008, 6:10 PM), <https://www.bloomberg.com/news/articles/2008-11-10/fuld-solicited-buffett-offer-ceo-could-refuse-as-lehman-fizzled>.

94. Yuille, *supra* note 19, at 185.

95. See Jonathan Stempel, *Buffett Kept Distance from Lehman*, REUTERS (Mar. 11, 2010, 8:07 PM), <https://www.reuters.com/article/us-lehman-examiner-buffett/buffett-kept-distance-from-lehman-idUSTRE62B04P20100312>.

96. Onaran & Helyar, *supra* note 93.

97. Yalman Onaran & John Helyar, *The Fall of Lehman Bros - Part 2*, NZ HERALD (Dec. 29, 2008, 8:34 AM), [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10549901](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10549901).

98. See WARD, *supra* note 11, at 21–22.

99. See generally *id.*

100. For a complete account of this perspective, see generally *id.*

101. See generally JENNIFER TAUB, OTHER PEOPLE’S HOUSES: HOW DECADES OF BAILOUTS, CAPTIVE REGULATORS, AND TOXIC BANKERS MADE HOME MORTGAGES A THRILLING BUSINESS (2014); WARD, *supra* note 11.

102. See Report of Anton R. Valukas, Examiner, at 3–5, *In re Lehman Brothers Holdings Inc.*, No. 08-13555 (Bankr. S.D.N.Y. Mar. 11, 2010).

103. *Id.* at 3–9.

104. See *id.* at 5–8.

improve its financial position was the utilization of “Repo 105,” an accounting device that helped create favorable net leverage and liquidity measures on the balance sheet.<sup>105</sup> In simple terms, Lehman raised cash by selling its toxic assets to a Lehman-controlled company that appeared to be independent.<sup>106</sup> Lehman repurchased the assets shortly after these sales and, because they were valued at 105% of the cash received, Generally Accepted Accounting Principles (GAAP) allowed the transactions to be treated as sales, removing the assets from Lehman’s balance sheet altogether.<sup>107</sup> The company’s global finance controller would eventually admit that “there was ‘no substance to the transactions,’”<sup>108</sup> but Lehman used the Repo 105 technique to transfer \$100 billion off its balance sheet at the end of the first and second quarters of 2008.<sup>109</sup> Its leverage ratio fell from 13.9 to 12.1.<sup>110</sup>

Eventually, the façade crumbled, and Lehman fell behind it.<sup>111</sup> On September 15, 2008, after months during which its chief executive executed plan after plan to save the company; after the U.S. Treasury made it clear that Lehman would not be bailed out by the federal government; and after an around the clock weekend during which officials from the Federal Reserve Bank of New York, senior representatives of major New York based financial institutions, Secretary of the Treasury Henry Paulson, and Securities and Exchange Commission Chairman Christopher Cox—all advised by the highest billing distressed finance and bankruptcy lawyers from most of the major American law firms serving the banking sector—strategized to find any workable alternative,<sup>112</sup> Lehman sought bankruptcy protection at 1:45 a.m. Eastern Standard Time.<sup>113</sup> Lehman’s bankruptcy filing was the largest in history with \$639 billion in assets and \$613 billion in debt.<sup>114</sup> The failure was followed by systemic crises in financial

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105. *Id.* at 5–6; see William H. Widen, *The Arbitrage of Truth: Combating Dissembling Disclosure, Derivatives, and the Ethic of Technical Compliance*, 66 U. MIAMI L. REV. 393, 427 (2012).

106. Louise Story & Eric Dash, *Lehman Channeled Risks Through ‘Alter Ego’ Firm*, N.Y. TIMES (Apr. 12, 2010), <https://www.nytimes.com/2010/04/13/business/13lehman.html>.

107. See Widen, *supra* note 105, at 397, 427; see also James M. Lukenda & Michael Scannella, *International Financial Reporting Standards: Hello Accounting Convergence, Goodbye GAAP?*, AM. BANKR. INST. J., Apr. 2009, at 22, 22.

108. *The Role of the Accounting Profession in Preventing Another Financial Crisis: Hearing Before the Subcomm. on Sec., Ins., & Inv. of the S. Comm. on Banking, Hous., & Urban Affairs*, 112th Cong. 55–56 (2011) (statement of Anton R. Valukas, Chairman, Jenner & Block, LLP) (quoting Martin Kelly, Lehman Brothers’ former Global Financial Controller).

109. Ashleigh Montgomery, *The Death of Ethics and the Death of Lehman Brothers*, SEVEN PILLARS INST., <https://sevenpillarsinstitute.org/case-studies/the-dearth-of-ethics-and-the-death-of-lehman-brothers/> (last visited Mar. 9, 2020).

110. *Id.*

111. Christian Plumb & Dan Wilchins, *Lehman CEO Fuld’s Hubris Contributed to Meltdown*, REUTERS (Sept. 14, 2008, 5:46 PM), <http://www.reuters.com/article/2008/09/14/us-lehman-backstory-idUSN1341059120080914> (“Lehman’s fall from grace was brutally fast.”).

112. Debtors’ Disclosure Statement for Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and Its Affiliated Debtors Pursuant to Section 1125 of the Bankruptcy Code at 44–45, *In re Lehman Brothers Holdings Inc.*, 469 B.R. 415 (Bankr. S.D.N.Y. 2012).

113. *Lehman Makes It Official in Overnight Chapter 11 Filing*, WALL ST. J. (Sept. 15, 2008, 7:40 AM), <https://blogs.wsj.com/wallstreetcrisis/2008/09/15/lehman-makes-it-official/>.

114. TAUB, *supra* note 101, at 258.



markets, national economies, and the global economy, and Lehman Brothers became a paradigmatic case of corporate malfeasance.<sup>115</sup>

### B. Corporate Altruism

“Conscious capitalism,”<sup>116</sup> practiced by a growing number of corporations, is also the subject of considerable academic and popular attention. TOMS Shoes, LLC, is a privately owned corporation, which was valued at \$625 million at the time Bain Capital, a prominent private equity firm, acquired a 50% interest in the company.<sup>117</sup> The footwear company’s success is not based on the popularity of its primary product line, which consists of a single style of shoe based on the Argentine *alpargata* (a type of *espadrille*).<sup>118</sup> Instead its “buy-one, give-one” business and marketing model<sup>119</sup> is credited with the rapid rise and replication of the TOMS approach<sup>120</sup> to the retail industry.

#### 1. What *Corpo Economicus* Dictates

Business literature has outlined the dictates of the *corpo economicus* model for a retail fashion brand like TOMS: (1) identify a unique product; (2) perform a strategic analysis of competitor pricing to select a position in the market with respect to the market leader; (3) determine a wholesale price (based on that position); and (4) develop a product by defining costs and materials at about half the wholesale price.<sup>121</sup> This strategic process is a logical integration of available market information to permit a brand to maximize its profits for any product line.<sup>122</sup> TOMS does not follow this strategic process.<sup>123</sup>

115. Montgomery, *supra* note 109.

116. See JOHN MACKEY & RAJ SISODIA, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS 55 (2014).

117. Clare O’Connor, *Bain Deal Makes TOMS Shoes Founder Blake Mycoskie a \$300 Million Man*, FORBES (Aug. 20, 2014, 4:57 PM), <https://www.forbes.com/sites/clareoconnor/2014/08/20/bain-deal-makes-toms-shoes-founder-blake-mycoskie-a-300-million-man/#4b69bae75668>.

118. *About Toms*, TOMS, <https://www.toms.com/about-toms> (last visited Mar. 9, 2020).

119. Christopher Marquis & Andrew Park, *Inside the Buy-One Give-One Model*, 12 STAN. SOC. INNOVATION REV. 28, 28–30 (2014).

120. A Harvard Business School study counts sixteen such companies created since 2009. However, Warby Parker Retail, Inc., a private B corporation selling eyewear, is the next largest and most successful adopter of the model. Its “buy a pair, give a pair” commitment is less prominently promoted, but within its first three years of operation it reported donating more than 500,000 pairs of glasses, a figure which more than doubled during fiscal year 2014. Christopher Marquis & Laura Velez Villa, *Warby Parker: Vision of a “Good” Fashion Brand*, HARV. BUS. SCH., July 2012, at 11; see also *id.* at 28–30 (explaining that Warby Parker has kept its operating costs down by selling directly to consumers online, which has allowed their price point to include a pair of glasses from VisionSpring their non-profit partner).

121. E.g., Matthew Carroll, *How Fashion Brands Set Prices*, FORBES (Feb. 22, 2012, 4:12 AM), <http://www.forbes.com/sites/matthewcarroll/2012/02/22/how-fashion-brands-set-prices/>. For a general discussion of these concepts, see Marguerite Moore & Ann Fairhurst, *Marketing Capabilities and Firm Performance in Fashion Retailing*, 7 J. FASHION MARKETING & MGMT. 386, 387 (2003); Sherwin Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34, 34, 54 (1974).

122. See *supra* note 121 and accompanying text.

123. See *infra* Section I.B.2.

## 2. What TOMS Does

The consensus is that TOMS's success is attributable to its "buy-one, give-one" model, which is the company's socially conscious version of the more traditional "buy-one, get-one" promotional strategy.<sup>124</sup> For every pair of shoes that TOMS sells, it donates a pair of shoes to a needy child in a developing country. As the company has expanded its new product lines, the pledge has evolved: "For every TOMS product purchased, TOMS will help a person in need. One for One."<sup>125</sup> When TOMS introduced an eyewear line, it also began donating prescription glasses, medical treatment, or sight-saving surgery with each purchase;<sup>126</sup> when the company launched a line of coffee, it pledged to give 140 liters of safe water (a one-week supply) through its giving partners;<sup>127</sup> when it ventured into hand bags, it began distributing maternal health kits and training birthing attendants;<sup>128</sup> when it began selling backpacks, it began funding bullying-prevention programs.<sup>129</sup>

None of these initiatives are particularly interesting as corporate philanthropy<sup>130</sup> or innovative brand development. TOMS's approach to the programs is notable because TOMS does not approach the initiatives as either strictly philanthropy or brand development.<sup>131</sup> TOMS founder, Blake Mycoskie, does appear to have completed the basic strategic analyses associated with brand development: He identified the shoe aesthetic and a particular American demographic; he set a wholesale price to position himself in the lower end of the luxury market; and he chose materials and a manufacturing site<sup>132</sup> that allowed the company to enjoy a strong debut, rapid brand identification, and early profitability.<sup>133</sup> However, TOMS's altruistic divergence from the model is evident in its primary commitments. "*Corpo economicus* identifies a business opportunity or innovative product and uses that idea as a tool for creating value."<sup>134</sup> TOMS

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124. See *Your Impact*, TOMS, <https://www.toms.com/impact> (last visited Mar. 9, 2020). In addition to its buy-one, give-one strategy, TOMS organizes an online marketplace where customers can shop for products from other like-minded companies engaged in the traditional range of corporate philanthropy, as well as sustainability initiatives. LEWIS D. SOLOMON, ALLEVIATING GLOBAL POVERTY: THE ROLE OF PRIVATE ENTERPRISE 45–46 (2015).

125. *Affiliate Program*, TOMS, [www.toms.com/affiliate-program](http://www.toms.com/affiliate-program) (last visited Mar. 9, 2020).

126. TOMS, [Y]OUR IMPACT TOMS 2019 GLOBAL IMPACT REPORT 37 (2019).

127. *Id.* at 45.

128. *Id.* at 66.

129. *Id.* at 67.

130. Most of the interest in the TOMS giving model has questioned whether and to what extent it has unintended negative impacts or replicates discredited foreign aid models. See, e.g., Marquis & Park, *supra* note 119, at 32–33.

131. See *The TOMS Story*, TOMS, [www.toms.com/about-toms](http://www.toms.com/about-toms) (last visited Mar. 3, 2020).

132. Jeff Chu, *Toms Sets Out to Sell a Lifestyle, Not Just Shoes*, FAST COMPANY (June 17, 2013), <http://www.fastcompany.com/3012568/blake-mycoskie-toms>.

133. He also engaged in compelling branding and marketing of the purchase and consumption as social engagement. For his business acumen, Mycoskie has been criticized and congratulated as a "legendary storyteller[] and clever advertising guru[]." Nathan Rothstein, *The Limits of Buy-One Give-One*, STAN. SOC. INNOVATION REV. (Jan. 28, 2014), [https://ssir.org/articles/entry/the\\_limits\\_of\\_buy\\_one\\_give\\_one](https://ssir.org/articles/entry/the_limits_of_buy_one_give_one).

134. Yuille, *supra* note 19, at 194.

identified a social need and developed an entrepreneurial strategy to fill it.<sup>135</sup> Notwithstanding the company's adherence to some basic business principles, the initial impetus and the organizing principle behind the development of TOMS was to "start something that matters":

Mycoskie was traveling in Argentina . . . when he met a woman who was collecting shoes for the poor. Startled that in the 21st century so many kids still needed shoes, he decided to start a shoe company that would give a pair away for every one it sold.<sup>136</sup>

Indeed, crediting Mycoskie's own account, he planned to found a shoe-giving charity but concluded that a for-profit model would better meet the need he had identified.<sup>137</sup>

### C. Corporate Deontology

Hobby Lobby, Inc., has become the emblem of corporate deontology in the form of religious practice.<sup>138</sup> Founded in 1972, the retailer of arts, crafts, hobbies, home decor, holiday, and seasonal products has become one of the largest closely held corporations in the United States.<sup>139</sup> Owned by several generations of an evangelical Christian family led by founder and chief executive officer, David Green, the corporation is open about its theological commitments: "We believe that it is by God's grace and provision that Hobby Lobby has endured. God has been faithful in the past, and we trust Him for our future."<sup>140</sup> Hobby Lobby highlights this commitment on its website:

We are committed to: Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles. Offering our customers exceptional selection and value. Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families. Providing a return on the family's investment, sharing the Lord's blessings with our employees, and investing in our community.<sup>141</sup>

The company operates in a manner consistent with Biblical principles in a range of ways that have little to no direct connection to its retail business. It buys religious newspaper advertising that provides resources for readers to get to "know Jesus as Savior and Lord," in which the company's

135. See *The TOMS Story*, *supra* note 131.

136. Chu, *supra* note 132; see also BLAKE MYCOSKIE, *START SOMETHING THAT MATTERS* (2011).

137. MYCOSKIE, *supra* note 136, at 6–7.

138. Deontology is the moral obligation to act in accordance with a certain set of principles and rules regardless of outcome. Corporate deontology can be easily distinguished from corporate altruism in that the latter is the *choice* by the corporation to selflessly do "good," while the former is the *obligation* of the corporation to do "right."

139. *Our Story*, HOBBY LOBBY, <https://www.hobbylobby.com/about-us/our-story> (last visited Mar. 3, 2020).

140. *Our Story*, HOBBY LOBBY NEWSROOM, <https://newsroom.hobbylobby.com/corporate-background/> (last visited Mar. 6, 2020).

141. *Our Story*, *supra* note 139.

name appears only in small, unremarkable print;<sup>142</sup> it employs chaplains in a “Chaplain Services” department,<sup>143</sup> and it offers a free health clinic for employees at its corporate headquarters because “[i]t’s the right thing to do.”<sup>144</sup>

Hobby Lobby rose to national prominence in September 2012. Soon after, it would become subject to the provisions of the Patient Protection and Affordable Care Act of 2010, part of the legislative package that significantly reorganized the U.S. healthcare system, mandating that businesses provide contraceptive coverage to employees as part of their insurance plan offerings.<sup>145</sup> Businesses failing to offer an employee health plan covering the required drugs are subject to employer mandate fines of up to \$174 dollars per employee per day.<sup>146</sup> For large employers, this can result in millions of dollars in fines each year.

### 1. What *Corpo Economicus* Dictates

If Hobby Lobby were *corpo economicus*, the decision of whether to comply with the contraceptive mandate would rest on whether the cost of compliance (i.e., providing a health plan covering the required drugs) is less than the cost of noncompliance.

The available evidence is not conclusive; however, it suggests that, even absent daily fines, compliance with the mandate is likely cost neutral and possibly cost saving.<sup>147</sup> This conclusion is based on the prediction that the contraceptive coverage mandated by the Affordable Care Act would not increase insurance premiums because the savings from preventing unwanted and ill-timed pregnancy outweighs the increased cost of providing the coverage.<sup>148</sup>

For example, estimates of the cost of providing contraceptives for one year range from \$100 to \$600.<sup>149</sup> Costs of prenatal care, delivery, and newborn care range from \$18,000 to \$28,000.<sup>150</sup> Accordingly, preventing one unplanned pregnancy among eighteen covered women would result in cost

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142. *Holiday Messages*, HOBBY LOBBY, <https://www.hobbylobby.com/about-us/holiday-messages/> (last visited Mar. 9, 2020).

143. Janet Adamy, *Are Firms Entitled to Religious Protections?*, WALL ST. J. (Mar. 21, 2014, 10:33 PM), <https://www.wsj.com/articles/oklahoma-billionaire-takes-health-law-challenge-to-supreme-court-1395455299>.

144. Jennifer Palmer, *Hobby Lobby’s Health Clinic to Aid Employees, Cut Costs*, NEWSOK (Mar. 2, 2010, 12:00 AM), <http://www.newsok.com/hobby-lobbys-health-clinic-to-aid-employees-cut-costs/article/3443213>.

145. For a description of the contraceptive mandate at issue in *Hobby Lobby*, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682–83 (2014).

146. See Tina Bull, *IRS Employer Mandate Penalty Assessments Begin (Benefit Minute)*, PSA FIN. (Nov. 30, 2017), <https://www.psafinancial.com/2017/11/irs-employer-mandate-penalty-assessments-begin-benefit-minute/>.

147. *Good for Business: Covering Contraceptive Care Without Cost-Sharing is Cost-Neutral or Even Saves Money*, GUTTMACHER INST. (July 16, 2014), <https://www.guttmacher.org/article/2014/07/good-business-covering-contraceptive-care-without-cost-sharing-cost-neutral-or-even>.

148. *Id.*

149. *Id.*

150. *Id.*

savings for an insurer.<sup>151</sup> While there is no guarantee that insurance providers would pass on any of those cost savings, especially as they would only be realized in the long run, the expansion of federally provided insurance coverage in this way did not result in cost increases.<sup>152</sup>

Available evidence also suggests that insurance coverage of contraception increases the productivity of female workers, who make up the majority of Hobby Lobby's workforce.<sup>153</sup> In addition to avoiding absences associated with abortion, pregnancy, and maternity leave for women faced with unwanted pregnancies, women report that access to contraception enabled them to take better care of themselves or their families, support themselves financially, complete their education, or get or keep a job.<sup>154</sup> These are key determinants of female worker productivity. Thus, there is a not insignificant business case for contraceptive insurance.

## 2. What Hobby Lobby Did

Hobby Lobby did not engage in the cost-benefit analysis outlined above. Indifferent to the efficiency or profit implications (or lack thereof) of its anticontraceptive policy position, Hobby Lobby engaged in the following deontological analysis. As a Christian company, Hobby Lobby believes that life begins at conception; therefore, it opposes abortion.<sup>155</sup> Facilitating access to contraceptive drugs or devices that operate after the point of conception is the equivalent to facilitating abortion, so to do so would violate its religious beliefs.<sup>156</sup> Accordingly, Hobby Lobby claimed the right to refuse contraceptive insurance to its employees.<sup>157</sup> It filed suit seeking exemption from the obligation to provide insurance coverage for drugs the company deemed were abortifacient.

Hobby Lobby's religious deontology rendered profit considerations irrelevant.<sup>158</sup> The company has repeatedly taken similar positions. It elected to keep its stores closed on Sundays, despite losing millions of dollars in revenue.<sup>159</sup> It refused to transfer a building lease to a liquor store because they object to supporting alcohol consumption, even though accepting the offer would have resulted in significant cost savings.<sup>160</sup> It also refused to transport beer for a major distributor, losing significant profit.<sup>161</sup>

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151. *Id.*

152. *Id.*

153. *Id.*

154. Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of U.S. Women Seeking Care at Specialized Family Planning Clinics*, 87 *CONTRACEPTION* 465, 469–70 (2013).

155. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700–01 (2014).

156. *Id.*

157. *Id.* at 701–02.

158. Hobby Lobby's twenty-page complaint dedicated one paragraph to the potential financial impacts of the mandate on the business. Complaint at ¶ 144, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012) (No. CIV-12-1000-HE).

159. *Id.* ¶ 6.

160. *Id.* ¶ 44.

161. *Id.*

Hobby Lobby's ultimately winning lawsuit has been analyzed in academic, political, and popular discourse, primarily as a fascinating religious freedom case. This makes sense. At issue was whether the corporation could "exercise" religion. That religious freedom debate, as well as discrimination perspectives, corporate personality debates, and the potential implications of the Supreme Court's decision are all interesting and exciting paths of inquiry revolving around the case. However, it also provides a clear model for the concept of corporate deontology.

## II. AN IDENTITY PROPERTY PERSPECTIVE FOR THE CORPORATION

*Corpo economicus* personifies the one-dimensional, popular, intuitive, and academic conception of the corporate form—value-neutral profit maximizer. However, the preceding vignettes recall that practice has shown the inconsistency of this foundational corporate law concept, painting a much more complex and nuanced picture of what corporations do.<sup>162</sup> The complex picture of the corporation varies considerably based on the vector of divergence from the model, malfeasance, altruism, or deontology.<sup>163</sup> Nevertheless, the preceding vignettes reveal several important characteristics of the corporation that remain underappreciated and undertheorized within legal discourse.<sup>164</sup> The sociocultural, political, and economic functions of corporations as social actors and societal institutions reinforce that the central function of a corporation is the promotion and creation of capital.

But connecting those vignettes to property theory reveals that corporations serve multiple capital creation functions. It is true that corporations typically pursue profit.<sup>165</sup> However, they also produce "identity property,"<sup>166</sup> a distinct and particularly important category of property that merits heightened protection or deference because it is closely connected to proper self-development.

### A. What Corporations Do

As early as 1916, scholars began to intuit that traditional notions of capital<sup>167</sup> were too narrow to capture the ways in which power (i.e., resources) is accumulated and exploited in social life.<sup>168</sup> Pierre Bourdieu responded to that intuition by redefining capital as the sum of all the

162. See *supra* Part I.

163. See *supra* Sections I.A–C.

164. See *supra* Sections I.A–C.

165. See *supra* pp. 566–67 (discussing, for the first time, the concept of *corpo economicus* and the goal of profit maximization).

166. This term is meant to refer to that property that implicates one's being more fully human (e.g., Radin's personal property), as well as those property interests that impact one's identity as such (e.g., taking into account Harris and Davidson's insights).

167. One traditional definition of capital is those "assets that yield income and other useful outputs over long periods of time." Gary S. Becker, *Human Capital*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS 248, 248 (David R. Henderson ed., 2d ed. 2008).

168. See L. J. HANIFAN, THE COMMUNITY CENTER 78 (W. W. Charters ed., 1920) (describing social capital as "tangible substances [that] count for most in the daily lives of [] people").

resources available to facilitate action,<sup>169</sup> which he elaborated into a taxonomy: economic, cultural, social, and symbolic.<sup>170</sup>

Broadly, “economic capital” is equated with material wealth.<sup>171</sup> “Cultural capital” is comprised of “knowledge, skills and other cultural acquisitions, as exemplified by educational or technical qualifications . . . .”<sup>172</sup> Social capital describes those resources available to secure benefits or advance one’s interests due to social connections, membership in social groups, or access to social networks.<sup>173</sup> And, “symbolic capital” denotes the resources associated with one’s value as perceived by others—standing, good name, honor, fame, prestige, and reputation.<sup>174</sup> The particular volume and composition of capital for an actor motivates that actor’s actions towards particular types of goals and interests and facilitates “social mobility.”<sup>175</sup> Embedded in the malfeasance, altruism, and deontology profiled above was the role of the corporation as a source of significant cultural, social, and symbolic capital.

What might be an alternative to the orthodox and heterodox stories? What must be the case for corporations to engage in this non- (or even anti-) pecuniary behavior? This Section engages this question through the process of abduction to develop the hypothesis that will drive the remaining Sections of this Article.

To develop such an abductive hypothesis, Charles Sanders Peirce set out the following heuristic: The surprising fact, C, is observed. But if A were true, C would be a matter of course. Hence, there is reason to suspect that A is true.<sup>176</sup> Here, C is the nonpecuniary—malfeasant, altruistic, deontological—conduct of representative corporations Lehman, TOMS, and Hobby Lobby. And this Article hypothesizes an idea that will be called “identity value” as “A.” Plugging these two concepts into Peirce’s

169. Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 245 (John G. Richardson ed., 1985). For a brief intellectual history of the “plethora of capitals,” see Michael Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, 27 THEORY & SOC’Y 151, 159–61 (1998).

170. HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION, *supra* note 169, at 242–43, n.3.

171. See PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 229–31 (John B. Thompson ed., 1991).

172. *Id.* at 13–14. Cultural capital is further differentiated into subtypes: embodied, objectified (e.g., physical cultural goods, like books), and institutionalized (e.g., institutional recognition of such capital, like diplomas). HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION, *supra* note 169, at 243–47. For Bourdieu, the neoclassical economic concept of human capital most associated with Theodore Schultz and Gary Becker would fall within this category.

173. HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION, *supra* note 169, at 247 (defining social capital as “the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition”).

174. See PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION 40–41 (Randal Johnson ed., 1993).

175. See *id.* at 40–43. Writing from a neo-Marxist perspective, Bourdieu saw the motivational power of capital as distinctly in line with traditional capitalist values.

176. Linwood F. Tauheed, *A Critical Institutional Reconciliation of “Contradictory” Institutional Institutions: What is an Institution?*, 47 J. ECON. ISSUES 147, 161–62 (2013).

heuristic yields the following: (1) The surprising nonpecuniary conduct of corporations is observed. (2) But if corporate managers obtain identity value from the corporation, then, malfeasance, altruism, and deontological behavior in the service of that value would be a matter of course. (3) Hence, there is reason to suspect that corporate managers obtain identity value from the corporation.

Before exploring this hypothesis further, it is necessary to elaborate on the idea of identity value. First, this concept draws on extant articulations of identity, a somewhat nebulous concept that “is never *a priori*, nor a finished product; it is only ever the problematic process of access to an image of totality.”<sup>177</sup> The social psychology literature describes this process as “who the individual thinks he or she is and who is announced to the world in word and action.”<sup>178</sup> Manuel Castells framed the concept from a sociological perspective as “people’s source of meaning and experience.”<sup>179</sup>

Thus, identity is a paradigmatic Veblenian institution, functioning to “suggest what to do, think, and even feel.”<sup>180</sup> As an institution, identity consists of “learned patterns of thought, meaning and value . . . [that] take concrete form in organizations that structure human action.”<sup>181</sup> This social or dialogic institutionalization occurs within particular settings, which include a corporate economy and a society “graded” to stratify people according to race, gender, ethnicity, and class.<sup>182</sup> Institutionalization is, at its core, a theory of value, which means that identity itself is a unit of value that can be deployed in real transactions. For example, “race is also a form of personal identity, that is, a produced good whose demand is responsive to changes in the costliness of racial identity.”<sup>183</sup>

### 1. Corporation as an Identity Producer

The preceding inquiry led to a hypothesis that the corporation produces identity value for corporate managers. From the institutionalist perspective, this can only be so as a result of the institutional evolution that preceded it. The evolution, or adjustment, that led to the present can be collocated phenomenologically with Taylorism and privatization and financialization.

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177. Judith A. Howard, *Social Psychology of Identities*, 26 ANN. REV. SOC. 367, 367 (2000) (quoting HOMI K. BHABHA, *THE LOCATION OF CULTURE* 51 (1994)) (emphasis added).

178. JOEL M. CHARON, *SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION* 85 (4th ed. 1992).

179. MANUEL CASTELLS, *THE POWER OF IDENTITY: THE INFORMATION AGE – ECONOMY, SOCIETY, & CULTURE* 6 (2d ed. 2009).

180. Blake E. Ashforth & Glen E. Kreiner, “How Can You Do It?”: *Dirty Work and the Challenge of Constructing a Positive Identity*, 24 ACAD. MGMT. REV. 413, 417 (1999).

181. William M. Dugger, *Old Age is an Institution*, 57 REV. SOC. ECON. 84, 85 (1999).

182. *Id.*

183. William A. Darity, Jr., Patrick L. Mason & James B. Stewart, *The Economics of Identity: The Origin and Persistence of Racial Identity Norms*, 60 J. ECON. BEHAV. & ORG. 283, 284 (2006).



## 2. The Corporate Production of Identity

Identity is, and always has been, socially constructed from history, geography, biology, productive and reproductive institutions, collective memory and personal fantasies, power apparatuses, and religious revelations.<sup>184</sup> At earlier historical moments, however, it was to a great extent assigned, rather than selected, adopted, negotiated, or produced.<sup>185</sup> Now, individuals, social groups, and societies process the constitutive influences of identity, and rearrange their meaning, according to social determinations and cultural projects that are rooted in their social structure.<sup>186</sup> People with “institutionalized minds” are endogenously shaped by their environment (e.g., culture, advertising, etc.) and vary in systematic ways across social classes and groups. A core space for this dialectical, dialogic productive process is the workplace.

The role of work (writ large to include both the status of worker, the reality of employment, the nature of the occupation, and the location and conditions of the position) has always been recognized as a central structure of identity. As Kanter quipped,

The most distinguished advocate and the most distinguished critic of modern capitalism were in agreement on one essential point: the job makes the person. Adam Smith and Karl Marx both recognized the extent to which people’s attitudes and behaviors take shape out of the experiences they have in their work.<sup>187</sup>

Jobs create people; people adapt their actions—indeed, even their hopes and dreams and values—to function as well as possible within the parameters established by their work roles.<sup>188</sup> These adaptations have “real spillover effects”<sup>189</sup> in all aspects of people’s lives.

“If jobs ‘create’ people, then the corporation is the quintessential contemporary people producer.”<sup>190</sup> However, people must assimilate their identities, and who constructs the identity and for what purpose determines its institutional character as ceremonial or instrumental.<sup>191</sup> Contemporary low-status workers may receive very little instrumental value from the work-tethered identity, so these workers may resist the stratifying effect of the identity imposed on them through work to center antonymic “resistance identities” or “project identities.”<sup>192</sup> In contrast, higher status workers get purchase from their association with and through the business

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184. CASTELLS, *supra* note 179, at 7.

185. Howard, *supra* note 177.

186. CASTELLS, *supra* note 179, at 7.

187. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 3 (1977).

188. *Id.*

189. Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1890–91 (2000).

190. KANTER, *supra* note 187.

191. See CASTELLS, *supra* note 179, at 7.

192. See *id.* at 8.

enterprise.<sup>193</sup> Thus, they build new identities around this work-tethered identity that redefines or entrenches their position in society.

### *B. Identity Property & Personhood*

Exploring the idea of property—that is, what does the concept mean, and what does it have to offer as an independent unit of analysis?<sup>194</sup>—is a primary task of theoretical property inquiries in law, politics, economics, and philosophy.<sup>195</sup> Property theorists have drawn a fault line between ostensibly lay understandings of property-as-things<sup>196</sup> and legalistic “bundle of rights”<sup>197</sup> formulations.<sup>198</sup> Others portray the same line as property, defined as the relationship of a person to an entity,<sup>199</sup> versus property, defined as the relationship among persons with respect to entities.<sup>200</sup> From either side of these intellectual divides, the corporate capital project related in the vignettes above can be logically understood as creating property.<sup>201</sup>

As described above, the idea of corporate cultural, social, and symbolic capital satisfies traditional property definitions. It is also consonant with a line of contemporary scholarship that develops the way property not only organizes and incentivizes—its instrumental role—but also its intrinsically valuable function as constitutive of self, personality, community, and freedom.<sup>202</sup> The surface form of property creates a descriptively

193. *See id.*

194. For some of the most recognized work attacking the viability of property, *see* Thomas C. Grey, *The Disintegration of Property*, 22 *NOMOS* 69, 69–85 (1980); Edward L. Rubin, *Due Process and the Administrative State*, 72 *CALIF. L. REV.* 1044, 1086 (1984) (“[P]roperty is simply a label for whatever ‘bundle of sticks’ the individual has been granted.”); Joan Williams, *The Rhetoric of Property*, 83 *IOWA L. REV.* 277, 297 (1998) (“Labeling something as property does not predetermine what rights an owner does or does not have in it.”); *but see* STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 31 (1990) (rejecting the argument that property is “too fragmented” for a general theory).

195. *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* xi (2012) (defining competing theories of property as “different understandings of what private property is, why we have it, and what its proper limitations are”).

196. Grey, *supra* note 194, at 69.

197. J. E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. REV.* 711, 712 (1996) (explaining that the origins of the metaphor are not entirely clear, but it is popularly believed to have been inspired by “Wesley Hohfeld’s analysis of rights and A.M. Honore’s description of the incidents of ownership”).

198. BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26–29, 97–100 (1977) (contrasting the definition of property held by the “Scientist” policymaker with that of the “Ordinary Observer”); MUNZER, *supra* note 194, at 23–24 (contrasting the “popular conception[] of property” as things with the legal conception of property as relations); CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 1–2 (1994). For the legal transition from “things” to the “bundle of rights,” *see* GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, 37–41 (1997); Michael A. Heller, *Three Faces of Private Property*, 79 *OR. L. REV.* 417, 429–31 (2000).

199. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357, 358 (2001) (defining the *in rem* character as the “distinctive type of right to a thing, good against the world”).

200. *See* RESTATEMENT (FIRST) OF PROPERTY div. § I, ch. 1, intro. note (AM. LAW INST. 1936).

201. The financial capital created by the corporations profiled unequivocally constitutes legally recognized property. However, the additional property is not intended to suggest legal recognition.

202. An alternative catalogue of these intrinsic functions might be that the “individual right of property is not simply an economic right. Maximizing aggregate wealth is one, but only one, purpose served by property rights. Individual property rights are also about self-expression, self-governance,

compelling connection to corporate capital, but its deep structure provides a normative foundation for countenancing that connection.

Charles A. Reich charted the first steps on this course in *The New Property*.<sup>203</sup> He viewed property in traditional terms as “guard[ing] the troubled boundary between [the] individual . . . and the state,”<sup>204</sup> concluding that it facilitated the individual’s ability to control his own life, which directly and inextricably connects to the acquisition and control of wealth.<sup>205</sup> However, Reich observed a change<sup>206</sup> in the nature of wealth from things to status derived from a relationship to the state.<sup>207</sup> Reich recognized that traditional land or physical asset-based wealth had been replaced by new sources.<sup>208</sup> At that time, government-created sources, like largess, was key among them.<sup>209</sup> These new sources of wealth performed the traditional functions of land-as-property: “maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.”<sup>210</sup> As it did the same work, Reich argued that this new wealth should be treated like property.<sup>211</sup> “Reich’s novel descriptive and prescriptive moves operationalized the idea that property cannot be understood outside of its social context.”<sup>212</sup> Property is a deliberate social construct that can be wielded to promote societal interests.<sup>213</sup>

Though she disagreed with Reich’s functional approach (claiming it undermines the value of property as a concept),<sup>214</sup> Margaret Jane Radin, beginning with *Property and Personhood*,<sup>215</sup> provides a theoretical

belonging, and civic participation.” GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 67 (2006).

203. Reich, *supra* note 21, at 733.

204. *Id.* Reich’s definition of property aligns with the *in rem*/property-as-things definition. *Id.* at 739 (“A man who has property has certain legal rights with respect to an item of wealth . . .”).

205. *See id.* at 733.

206. It is probably more accurate to describe Reich’s “change” as his recognition of facts that always were.

207. Reich, *supra* note 21, at 738.

208. *See id.* at 738–39.

209. In his original piece, Reich suggested, but did not explore, other new forms of wealth, including private business franchises, corporate equity, and private organization membership. *Id.* at 786. The connection among these sources of “wealth” and Bourdieu’s capital taxonomy is clear.

210. *Id.* at 771. This function was closely tied to Reich’s acceptance of the idea that power over the means of subsistence is functionally equivalent to power over his will.

211. *Id.* at 771, 786–87.

212. Lua Kamál Yuille, *Blood in, Buyout: A Property & Economic Approach to Street Gangs*, 2015 WIS. L. REV. 1049, 1096 (2015).

213. Property as a social construct has clear classical antecedents. *See, e.g.*, DAVID A. SCHULTZ, *PROPERTY, POWER, AND AMERICAN DEMOCRACY* 19 (1992) (explaining Blackstone’s position that property was “a conventional institution created by law, habit, or the passage of time,” and the “rules prescribing its use and transfer were determined by society.”); *see also* JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 248 (1990) (“[P]roperty is, of all the basic rights, perhaps most obviously the creation of the state.”).

214. *See* Radin, *Property*, *supra* note 22, at 989 n.111.

215. Though the discussion here relies primarily on *Property and Personhood*, Radin has refined, developed, and evolved the theory she developed there in a series of well-recognized articles and books. *See* Radin, *CONTESTED COMMODITIES*, *supra* note 22; Radin, *REINTERPRETING PROPERTY* *supra* note 22; Radin, *Market-Inalienability*, *supra* note 22; Radin, *Cyberspace*, *supra* note 22; Radin, *Liberal Conception*, *supra* note 22.

foundation for and refinement of new property. If, to Reich, wealth in the form of property is key to individuality,<sup>216</sup> Radin identifies which wealth is infused with this special individuation power. Moreover, she hones the connection between individuality and property through her qualified Hegelian philosophy. Elaborating the intuitive notion that “[m]ost people possess certain objects [that] they feel are almost part of themselves,”<sup>217</sup> Radin categorized property as either “fungible” or “personal.”<sup>218</sup> Fungible property is valuable for instrumental reasons: for example, to enable the owner to do something else.<sup>219</sup> It can be replaced with property that equally meets the purposes of the owner. Personal property, by contrast, has value per se because it is “bound up” with the owner.<sup>220</sup> The loss of this property “causes pain that cannot be relieved by the object’s replacement.”<sup>221</sup> Radin asserts, “[T]o achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment.”<sup>222</sup> The purpose of property rights, then, is to secure such control.<sup>223</sup> Thus, property for personhood—property “important to the freedom, identity, and contextuality of people”<sup>224</sup>—is a fundamental category that deserves greater legal protection:

Where we can ascertain that a given property right is personal, there is a *prima facie* case that [this] right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.<sup>225</sup>

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216. See Reich, *supra* note 21, at 771–72.

217. Radin, *Property*, *supra* note 22, at 959.

218. *Id.* at 960. Here, Radin’s personal property will be described as “property for personhood” or “personality property,” a term which Radin later adopted for the same concept. The term “identity property” connotes a broader notion of property, of which Radin’s personality property forms only one part.

219. *Id.*

220. See *id.* A one-dollar bill is a clear example of the distinction. In most cases, a one-dollar bill is fungible property, replaceable with any other one-dollar bill or any property worth one dollar. But a particular one-dollar bill may be the personal property of a business proprietor if, say, it is the first dollar earned in her commercial enterprise. The proprietor’s sentimental attachment to the physical dollar bill transforms it from a replaceable utilitarian good into part of the proprietor’s sense of self. Examples of personal property used by Radin include the home (to a person living in it), a wedding ring (to the bride or groom), and body parts. *Id.* at 959, 960, 966.

221. See *id.* at 959.

222. *Id.* at 957 (emphasis added).

223. An alternative construction of that control focuses on the control of the social relations connected to an object—the relationship among individuals—rather than the particular connection a person has to the object itself. This tracks Radin’s insights from her distinctly *in rem* understanding of property to a relational understanding thereof. See Lisa M. Austin, *Person, Place, or Thing? Property and the Structuring of Social Relations*, 60 U. TORONTO L.J. 445, 446 (2010). This interesting alignment of Radin’s theory does not change its underlying import.

224. See Radin, *Liberal Conception*, *supra* note 22, at 1686.

225. Radin, *Property*, *supra* note 22, at 1014–15.

Personality theory is the subject of a growing literature,<sup>226</sup> some of which extends the property-as-personhood premise to contexts and concepts that further the present discussion.<sup>227</sup> Radin's work generated streams of scholarship that examine the connections among property and communities.

For example, Eduardo Peñalver has explained how property rights are fundamental to the creation of communities.<sup>228</sup> Property is a necessary and useful concept only in a community context: "In the world of Robinson Crusoe property rights play no role."<sup>229</sup> However, property also "binds individuals together into normative communities."<sup>230</sup> In this sense, property and community may be symbiotic. To develop this point, Peñalver accepted the centrality of exit<sup>231</sup>—defined as "the right to withdraw or refuse to engage: the ability to dissociate, to cut oneself out of a relationship with other persons"<sup>232</sup>—to the types of control or autonomy that animates utilitarian property perspectives. But he reversed the analysis to determine the role of property in facilitating *not exit from* the demands of a community *but access to* that community and the social and legal obligations concomitant therewith. Peñalver called the inductive aspect of the reciprocity between individuals and communities mediated by things "property as entrance."<sup>233</sup>

The normative underpinnings of property as entrance are anchored in an Aristotelian community theory of property advanced by Peñalver and Gregory Alexander.<sup>234</sup> That theory conceives of people as social and political animals, inherently dependent and interdependent on other people to develop the uniquely "human capacities" necessary for "human flourishing,"<sup>235</sup> a rich concept that "must include at least the capacity to make meaningful choices among alternative life horizons."<sup>236</sup> That capacity

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226. For a review of the influential works and authors engaging Radin's concept, see Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93, 94–98 (2011).

227. Personality theory has other important implications unrelated to the present discussion.

228. See Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1892–94 (2005).

229. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

230. Peñalver, *supra* note 228, at 1972.

231. Peñalver defines exit as "the right to withdraw or refuse to engage: the ability to dissociate, to cut oneself out of a relationship with other persons." *Id.* at 1891 (quoting Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 568 (2001)).

232. *Id.* (quoting Dagan & Heller, *supra* note 231).

233. Peñalver, *supra* note 228, at 1894.

234. See ALEXANDER & PEÑALVER, *supra* note 195. Alexander has elaborated this concept of community. See generally ALEXANDER, *supra* note 202.

235. ALEXANDER & PEÑALVER, *supra* note 195, at 87–89. Without providing an exhaustive analysis of the "well-lived life" implied by human flourishing, Peñalver and Alexander broadly include at least four capabilities necessary to the pursuit thereof: life, freedom, practical reason, and affiliation. *Id.* at 89–90.

236. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES LAW 127, 135 (2009). They further explain the contours of "meaningful" decision-making within a robust conception of freedom as including both the ability to discern the "salient differences" among choices and "deliberate deeply" about their relative value. *Id.* For an elaboration of this idea in the property context, see generally Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089 (2011).

justifies the value and effort invested in individual autonomy.<sup>237</sup> In the communitarian framework, property facilitates access to the human networks that allow an individual to become fully human.<sup>238</sup>

Such community access, however, is mediated by the sociocultural meanings attached to property.<sup>239</sup> Among the denominative or expressive functions of property is its ability to signal the status of the property owner in the community. Nestor Davidson has explored the manifestation of this role on several levels.<sup>240</sup> In its thin form, the expressive function of property is to denote the relationship of a party to a valuable resource or the relationship of several parties to each other with respect to that resource.<sup>241</sup> Property's thick expressive role is to shape and reinforce the economic, social, and cultural hierarchies that define mutual obligations and set the borders of social relations.<sup>242</sup> The type, volume, and composition of an individual's ownership situate that individual horizontally and vertically in the social order.<sup>243</sup> Thus, property not only constitutes communities, it orders them.

Though they did not necessarily intend to contribute to Radin's personality theory, the ideas represented by the work of Peñalver, Alexander, and Davidson extend her insights about the ontological role of property beyond the individual to the body politic. Other scholars deliberately extend Radin's personality theory to collectivities, like insular minorities and indigenous peoples.<sup>244</sup>

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237. See Alexander & Peñalver, *supra* note 236, at 137.

238. Alexander & Peñalver's prescriptive conclusion asserts that their communitarian/human flourishing analysis provides a valuable heuristic for resolving property questions. See ALEXANDER & PEÑALVER, *supra* note 195, at 204–05. León Duguit's view of property as a social function in service of community solidarity reaches a more rigid conclusion that property should only be protected where it fulfills this social function. See Sheila R. Foster & Daniel Bonilla, *The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 1003, 1004–08 (2011).

239. Jeffrey Douglas Jones advances the importance of sociocultural meaning to suggest that the relevant unit of analysis is the way property advances specific "sociocultural meanings grounded in specific object relationships" rather than property for personhood. Jones, *supra* note 226, at 130–31.

240. See generally Nestor M. Davidson, *Property and Relative Status*, 107 *MICH. L. REV.* 757 (2009).

241. These are the alternative basic definitions of property that are often the core of the property theory debate. See *supra* notes 194–202 and accompanying text.

242. See Davidson, *supra* note 240, at 808.

243. This function clearly correlates to the Bourdieuan idea of capital facilitating social mobility. See *supra* notes 169–75 and accompanying text. Davidson explores the connection between social mobility and property with respect to implications of stability and instability in the institution of property and how the law can or should be used to influence those implications. Davidson, *supra* note 240, at 807–10.

244. See, e.g., Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., 2005) (applying Radin's theory to "subordinated groups" seeking protection for their intellectual property rights to songs, folklore, agricultural knowledge, and religious symbols); Kristen A. Carpenter, *Real Property and Peoplehood*, 27 *STAN. ENVTL. L.J.* 313, 348–49 (2008); Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 *PENN ST. L. REV.* 641, 642 (2011); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 *B.U. L. REV.* 559, 561–62 (1995) (defining cultural property as tangible objects and intangible expressions that capture a group's identity); John Moustakas, *Group Rights in Cultural Property: Justifying Strict*

For example, Kristen Carpenter, Sonia Katyal, and Angela Riley draw an intellectual divide between standard market-amenable visions of property and a “more relational vision” that seeks to honor interests related to property (independent of ownership status) that promote various (and possibly nonmarket) values to advance a theory of property for “peoplehood.”<sup>245</sup> This theory directly extends Radin’s descriptive argument. Just as some property should be entitled to enhanced protection because it performs the personhood function, Carpenter, Katyal, and Riley argue, “[C]ertain lands, resources, and expressions are entitled to legal protection as cultural property because they are integral to the group identity and cultural survival of indigenous peoples.”<sup>246</sup> Normatively, the move is slightly different. In line with the broader body of Radin’s work, which uses her personality theory to contest almost blanket (and certainly default) market valorization in favor of context-specific inalienability,<sup>247</sup> they reject the still-standard perspective that property values are universally “commodifiable” and “commensurable,” and, thus, “alienable.”<sup>248</sup> However, they also challenge the traditional ownership model as the nexus of property interests.<sup>249</sup> Instead, property for “peoplehood” contemplates “stewardship” as an alternative nexus.<sup>250</sup> That concept illustrates the potential functions, manifestations, and protections of property outside strict ownership, which is capable of promoting various rights and obligations with respect to property—without necessarily requiring any legal title thereto.<sup>251</sup>

Radin began a discourse that demonstrates the connection between being a fully actualized person and property. The extension of her work into community and group contexts permits the distillation of an enriched version of her ontological thesis: there is a constitutive relationship among property, individuality, community, status, and group identity that is central to vocational humanity (i.e., necessary to go about the business of being human).<sup>252</sup> These relationships can be advanced and supported through traditional and nontraditional property structures.

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*Inalienability*, 74 CORNELL L. REV. 1179, 1185 (1989) (first suggesting the application of Radin’s theory to group ownership of cultural property).

245. Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1027–28 (2009).

246. *Id.* at 1028.

247. *See supra* note 22 and accompanying text.

248. Carpenter et al., *supra* note 245, at 1047 (quoting RADIN, CONTESTED COMMODITIES, *supra* note 22, at 8–15).

249. *See* Carpenter et al., *supra* note 245, at 1029.

250. *See id.* at 1028–29.

251. *See id.* at 1124–25.

252. The term vocation is meant to evoke Paulo Friere’s understanding that the ontological vocation of becoming more fully human (“humanization”) is the central problem of humanity. *See generally* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970). Freire places education at the core of this vocation and freedom (which Freire defines in terms complementary to those advanced by Aristotle, as the capacity to autonomously and responsibly take control of one’s own life through authentic, critical insights into the social construction of human society as its metric, *see* PAULO FREIRE, EDUCATION FOR CRITICAL CONSCIOUSNESS 34, 41 (1974)). PEDAGOGY OF THE OPPRESSED, *supra*, at 30. The work reviewed in the preceding discussion indicates that, at a minimum, property plays a central role in this vocation. The “mythical” connection between property and freedom in legal and

In her groundbreaking article, *Whiteness as Property*,<sup>253</sup> Cheryl Harris created a bridge that directly connects Reich's potentially expansive new property to personality theory.<sup>254</sup> Drawing on Radin's theory and other prevailing conceptions of property, Harris charted the way whiteness (a racial construct that escapes definition in the "thing"-based terms generally applied to traditional tangible and intangible property) theoretically and functionally meets the criteria to be denominated property.<sup>255</sup> Not only does whiteness satisfy traditional conceptions (like James Madison's "everything which a man may value" and Jeremy Bentham's "basis of expectation") the historical evolution of property rights reinforces that denomination by according protection to the strongest sticks of the axiomatic property bundle: alienability, use, and exclusion.<sup>256</sup> In Harris's account, notwithstanding its lack of "thing-ness," because whiteness is accorded the legal attributes of property, it plays the same role as Radin's property for personhood in the development of individual and group identities and to the constitution and organization of communities.<sup>257</sup>

Harris's work introduces two elements to the robust framing of property being developed here. First, Harris showed that new property had already been constituted in American law in the form of whiteness.<sup>258</sup> In so doing, she concretized Reich's aspirational break from the entity-centered property framework by setting forth how a construct as ethereal as race had been imbued with the powerful (even if poorly defined) substance of property traits and protections.<sup>259</sup> The American reification of race through property law suggests, in the Reichian tradition, that some values can become so contextually important as to beg institutional recognition, which may or may not be formalized.

Second, whiteness as property extended Radin's personality theory. While Radin established an important link between vocational humanity and property, Harris drew the essential epistemological line, connecting property—written in her broader terms—to how people<sup>260</sup> understand and

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political discourse seems to indicate that freedom (however defined) remains an appropriate metric for property as a feature of vocational humanity.

253. Harris, *supra* note 23.

254. *See id.* at 1728–29.

255. *See id.* at 1730–31.

256. *See id.* at 1736.

257. *Id.* at 1730.

258. *Id.* at 1731.

259. *See id.*

260. Harris focused exclusively on whiteness as having been transformed into property. She considered formal (though only implicit) legal recognition—a proxy for value—as the lynchpin of whiteness as property. Accordingly, she expressly excludes from her construct unvalued subaltern identities. This position is reasonable since the reinterpretations of property that are advanced by Harris (as well as Radin and Reich) find inspiration from understandings of the idea of property as a system for assigning rights to valued resources. However, Harris's insights have inspired theoretical extensions of her idea to blackness and race, generally, as identity categories that exhibit value in contemporary law in distinct but analogous ways to whiteness. *E.g.*, Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1157–59 (1997). *See generally* Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51 (2005). On the strength of



know themselves and their relationships to others (and to the government).<sup>261</sup> This epistemological role is linked to property's individuating authority because "[p]eople form their sense of self at least in part by comparison to others, with property serving as a particularly important and informational metric for that comparison."<sup>262</sup> Davidson examined the implications of property's epistemological power to organize communities in ways that are important to a mutable identity.<sup>263</sup> His focus on the fetishism of ownership illustrates this point: property communicates where an individual stands in the social order at any given moment, and more property and better property suppositions an individual in that order.<sup>264</sup> This implies that every individual can potentially change the composition and character of their property to change their position in the social hierarchy.<sup>265</sup> The implication of Harris's arguments, in this respect, is that property also communicates the degree of positionality change that is possible for an individual.<sup>266</sup> Harris's whiteness is a limited, excludable, and extremely valuable resource.<sup>267</sup> Ownership thereof automatically suppositions the owner, and members of nonwhite group members will indelibly occupy less favorable social positions than individuals that have an otherwise comparable mix of property.<sup>268</sup>

In *Property Outlaws*, Peñalver and Katyal map how the centrality of property to both vocational and epistemological identity creates tension among politicolegal, individual, and community incentives.<sup>269</sup> Vocational humanity creates a property creation instinct, but the way property is organized may push individuals out of that system.<sup>270</sup> That centrifugal motion incentivizes "those excluded from participation in the system of ownership to challenge both existing property rules and established property entitlements."<sup>271</sup> Those pushed outside the boundaries of ownership also have little political voice, so among the only avenues of relief from this marginalization is the violation of legally sanctioned property

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these expansions, this Article takes the key contribution of Harris's work in this respect to be generally applicable to a diverse range of identity frames, specifically corporate identity. Of course, the precise task of elaborating whether and how such identity frames do or could constitute property is beyond the scope of this Article.

261. See Harris, *supra* note 23, at 1736–37.

262. See Davidson, *supra* note 240, at 787 (detailing the important function of property in the development of individual identity).

263. See *id.* at 772–73.

264. *Id.* at 787.

265. See *id.*

266. See Harris, *supra* note 23, at 1728.

267. See *id.* at 1737.

268. See HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION, *supra* note 169, at 21–22 (noting that this is the same position Bourdieu advances in nonracialized terms with respect to capita. In his terms, access to identity-based networks impacts the availability of the full range of capital that provides the basis for social mobility).

269. See Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 378 (2009) (noting the importance of wealth creation for communities of color); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1132–33 (2007).

270. See Brown, *supra* note 269.

271. Peñalver & Katyal, *supra* note 269, at 1132.

entitlements: “the simple act of taking or occupying.”<sup>272</sup> The Peñalver and Katyal reframing of property transgressions can be read to suggest that where property implicates vocational, epistemological, or ontological humanity individuals subscribe to distinct sets of norms and respond to different incentives.<sup>273</sup> Thus, an individual might engage in unlawful behavior to create or protect identity property. Traditional incentive structures might be replaced by behavior designed to advance or reinforce the identity relationship.

Although the authors do not make any claim to engage one another in the ways suggested here, the scholarship explored above establishes four steps that clearly connect corporations to property in a way that is largely undertheorized, and wholly underappreciated in the regulatory context:

(1) Reich painted an image of property as a sociolegal construct that has the meaning provided to it, which opened the doors for expansive, telological analyses of property.

(2) Radin demonstrated how Reich’s expansive notion of property is inextricably connected to any ontology and the pursuit of fulfillment according thereto.<sup>274</sup>

(3) Harris linked ontological property to less fixed concepts, like identity.

(4) Finally, Peñalver and Katyal suggest that transgression—whether of norms, expectations, or predictions—is a natural feature of identity property.

### C. Identity Property & Corporations

Following this constructed train of thought, the hypothesized alternative interpretations of the corporate capital projects of Lehman, TOMS, and Hobby Lobby—irrespective of whether they involve malfeasance, altruism, or deontology—constitute engagement with identity property. That perspective could, in turn, provide a fresh lens through which to evaluate the divergence from the *corpo economicus* standard.

In the aftermath of Lehman’s bankruptcy, the executives’ decisions to manipulate the financial statements, likely delaying the bank’s collapse by several months and deepening its ultimate debt, has been held out as an example of corporate greed, excess, and maliciousness. The *laissez faire* approach to corporations that is the normative suggestion of much mainstream corporate law scholarship was dismissed as ill-equipped to manage the agency costs inherent in the large corporation.<sup>275</sup> In contrast, the

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272. See *id.* at 1133.

273. See *id.* at 1132–33.

274. See Michael B. Kent, Jr. & Lance McMillian, *The World of Deadwood: Property Rights and the Search for Human Identity*, 20 S. CAL. INTERDISC. L.J. 489, 517–18 (2011).

275. See *supra* Part II.

identity property perspective is markedly more benign. Available accounts tend to agree that upper management of Lehman had a deep connection to the company.<sup>276</sup> It was inextricably connected to their ontological, epistemological, and vocational humanity. So, when the company faced distress the executives were unable to ameliorate, at risk were both the property—the company and its assets—and identity property.<sup>277</sup> The latter was what the executives were protecting when they manipulated the financial statements.

The identity property perspective sheds the same light on the business approach of TOMS. Widely criticized as disingenuous in their commitment to altruism or irresponsible in their responsibilities to shareholders, the concept of a company genuinely engaging in disinterested behavior is either disbelieved or decried.<sup>278</sup> That, instead, Mycoskie, TOMS's founder, is engaged in a project of identity property creation provides a more compelling narrative.<sup>279</sup> The engagement with identity property only suggested in Lehman and hypothesized in TOMS, is fairly certain in the Hobby Lobby context. The company's management self-consciously uses the company to pursue Christian identity.<sup>280</sup> Indeed, the owners identify so closely with it that they felt personally burdened by the specter of that legal person engaging, even indirectly, in behavior that conflicts with their religious beliefs.

Whatever their nature, corporations are entities organized for the purpose of the creation of wealth—ultimately, for the pursuit of property. Nonetheless, they can serve much more nuanced and critical roles in the constitution of their constituents. That role, in turn, influences the behavior of the corporation.

#### *D. Institutional Adjustment to Identity Value*

The malfeasance, altruism, and deontology narratives sketched here lend support to this Article's identity-value hypothesis. But they do not explain how the corporate form came to generate this value. This Section uses the principles of institutional adjustment outlined by J. Fagg Foster<sup>281</sup> to suggest two technological changes that were important to the evolution of the corporation to its present form as an identity producing (reproducing) mechanism, providing insight into how the present came to be.

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276. WARD, *supra* note 11, at 2–3.

277. *See id.* at 202.

278. *See* Russell Reed, *One-for-None: Aid Dependency and the "TOMS Model"*, Harv. Pol. Rev. (Mar. 22, 2017), <https://harvardpolitics.com/world/one-for-none/>.

279. *See id.*

280. *See Our Story*, *supra* note 139.

281. Foster is recognized as among the foremost modern contributors to the field of economic inquiry commonly known as (old) institutional economics, MARC R. TOOL, VALUE THEORY AND ECONOMIC PROGRESS: THE INSTITUTIONAL ECONOMICS OF J. FAGG FOSTER (2000), which is an interdisciplinary, heterodox approach to economics that emphasizes the study of institutions and the process of institutional change as the central concern of economic social science, *see* Geoffrey M. Hodgson, *The Approach of Institutional Economics*, 36 J. ECON. LIT. 166, 166 (1998).

All human activity is organized in institutions. All human activity that involves changes involves changes in institutions.<sup>282</sup> To understand corporate change, then, it is necessary to understand institutional change.<sup>283</sup> Foster's principles posit that for an institution to change there must be a movement of ceremonial behaviors with respect to instrumental ones, or vice versa.<sup>284</sup> Comprised of the following three elements, the principles of institutional adjustment, simply, provide a heuristic to reveal this process in real phenomena:

(1) *Technological determination, or instrumental primacy*, means "that social problems can be solved only by adjusting the institutional structures involved in the problem so as to bring them into instrumentally efficient correlation with the technological aspects of the problem[.]"<sup>285</sup>

(2) *Recognized interdependence* is the functional requisite of turning a new action into habit through conscious performance. The adjustment is bounded by the pattern of interconnectedness and interdependency of the members affected by the change.<sup>286</sup>

(3) *Minimal Dislocation* is essentially a frontier of possibilities; it "discloses the limits of adjustment in terms of rate and in terms of degree and area"<sup>287</sup> The operational idea is that adjustments must be compatible with the existing institutional structure.<sup>288</sup>

A dizzying array of technological changes took place in the twentieth century to transform the corporation.<sup>289</sup> Among other things, identity property, at least for its core stakeholders (i.e., managers), became the byproduct of the corporation's productive activity. This Article outlines just two: the advent of Taylorism and the neoliberal privatization movement (which included financialization as a component).

### 1. Taylorism or Scientific Managerialization

Taylorism is a theory of management that became endemic in the United States in the early 1900s. Its goal was to create a new form of workplace authority that was scientifically grounded (in time/motion efficiency) and rationally, objectively evaluable.<sup>290</sup> "No longer was

282. John Fagg Foster, *The Theory of Institutional Adjustment*, 15 J. ECON. ISSUES 923, 924 (1981).

283. *See id.*

284. *See id.*

285. *Id.* at 932.

286. *See id.* at 933.

287. *Id.* at 933-34.

288. *See id.* at 934.

289. Tsuk, *supra* note 61, at 179. This phenomenon prompted Berle and Means to introduce their seminal work. *See id.* at 179-180. It is also, arguably, the catalyst of the debate that motivated Milton Friedman to write his now canonical *New York Times Magazine* article, "The Social Responsibility of Business is to Increase its Profits." *See id.* at 180.

290. Peter Miller & Nikolas Rose, *Production, Identity, and Democracy*, 24 THEORY & SOC'Y, June 1995, at 432.

managerial power merely the blind, arbitrary, or willful exercise of authority.”<sup>291</sup> Rather, authority was exercised to govern the workplace systematically by scientifically studying the manufacturing process, determining how the worker would best perform his tasks, providing the tools and training for him to do just that, and creating productivity standards to reflect this method.

The advent of Taylorism manifests each of Foster’s principles of institutional adjustment: the new approach created significant change in the preceding management practices, adding to the “warranted stock of knowledge.”<sup>292</sup> For example, the piece-rate system through which workers were paid for their output, not their time. Its implementation required a conscious adoption to become habit.<sup>293</sup> In fact, the first principle is the replacement of rule-of-thumb methods of working, which is essentially the codification of this conscious, coordinated principle.<sup>294</sup>

Finally, Taylorism was minimally dislocative. That is, the changes it produced could be integrated into the existing social fabric. Although Taylorism marked a significant departure from the previous *status quo*, it was also clearly within the limits of existing managerial capacity. Previous institutional adjustments laid the groundwork.<sup>295</sup> The industrial revolution had been underway for nearly one hundred years before Taylorism was introduced. Key developments during this period of machine evolution also involved evolutions in the machine process that led to larger firms, with increasing numbers of wage laborers, being managed by a foreman, who was employed by the manufacturer. Without this segmentation of the machine process, Taylorism adjustment would not have been feasible.

Indeed, it is this final point—the elevation of the managers to scholars—can also be seen as an indispensable adjustment toward the identity value production for these managers. While before they had power, now the power had new status implications. The status implications of management took on greater meaning still in the late twentieth century, which culminated the evolutionary process that led to the production of identity value by the corporation.

## 2. Privatization & Financialization

The movement now known as neoliberalism,<sup>296</sup> which was fully constituted in the 1980s, has among its central features wide-scale

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291. *Id.*

292. James I. Sturgeon, *The Social Fabric Matrix, the Principles of Institutional Adjustment, and Individual Action*, in *INSTITUTIONAL ANALYSIS AND PRAXIS: THE SOCIAL FABRIC MATRIX APPROACH* 39, 43 (Tara Natarajan, Wolfram Elsner, & Scott T. Fullwiler eds., 2009).

293. *See id.* at 43–44.

294. *See id.*

295. *See Foster, supra* note 282, at 924.

296. Neoliberalism is not used to evoke disapprobation. Rather, it is used to describe nothing more than “a theory of political economic practices that proposes that human well-being can best be

privatization, and the formalized, drawn out process of financialization. Privatization is the process through which previously public goods and services are remanded to the control of private enterprise in the name of efficiency and competition. Financialization “is the growth of the financial sector, its increased power over the real economy, the explosion in the power of wealth, and the reduction of all of society to the realm of finance,”<sup>297</sup> which is effected through legal and informal innovations like the shareholder primacy principle in corporate law and management.

An abundance of literature lays out both the institutional process by which these technological changes were instituted and their impact on the business enterprise and corporations, specifically. Among the key features of these processes was a new social cachet of the managerial class. Moreover, privatization also meant new avenues to deploy the identity value extracted from the corporation, which serves to assimilate corporate identity over other identities.

### 3. Open Questions?

The preceding is nothing more than a suggestion of institutional adjustments that transformed the role of the corporation. Foster’s institutionalism dichotomizes (per Veblen) every institution as (a) an instrumental role that serves to facilitate the contribution to and participation in the life getting process and, dialectically, (b) an invidious role that serves to differentiate among people and groups. Institutional problem solving demands the amplification of the instrumental functions of an institution and the diminution of the ceremonial functions. This poses a dilemma for the preceding analysis. Is identity as an institution primarily instrumental or invidious?

### CONCLUSION

Friedman, Veblen, and Commons all center profit in their understandings of the nature and aim of the corporation. However, corporations persistently defy the expectations of profit motive (whether it be to maximize or satisfice). This Article explains the disconnect between theory and reality by hypothesizing that identity is an unrecognized byproduct of the productive activities of the modern corporation, which was unveiled by putting property, corporate, and economic theory into conversation. Corporations serve a key role in the development of identity property for their constituents, a category that is not amenable to the standard incentives and norms imposed on corporations. Recognizing patterns of identity property can shed light on the persistence of examples of corporations deviating from the standard understandings of corporate behavior. The

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advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

297. MIKE KONCZAL & NELL ABERNATHY, ROSEVELT INSTITUTE, DEFINING FINANCIALIZATION 4 (2015).

Article also outlined two institutional adjustments that had to occur to engender the identity property function of the corporation.

The scope of the implications of this observation is unclear. Nevertheless, a robust understanding of the relationship among property, identity, and the nature of corporations suggests that laws that fail to address the role of corporations in the identity of their agents will be of limited value in preventing the kinds of market failures against which those laws are meant to shield and in promoting the kinds of value creation seen uniquely suited to the corporate form. Indeed, this enriched perspective has explanatory power with respect to recurring conundrums like corporate malfeasance, altruism, and deontology. Understanding these connections facilitates prospective institutional adjustment to promote or eliminate nonpecuniary corporate behavior.