

CORPORATE IDENTITY AND GROUP DIGNITY

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ABSTRACT

Every time a decision needs to be made about corporate rights, the theoretical difficulties of corporate identity and personhood have to be overcome. In this article, I analyze these problems from the perspectives of moral philosophy and law, examining how the theories of the former inform and influence legal discourse and practices (including the recent cases of Citizens United and Hobby Lobby); my main point there is that the philosophical and legal understandings of personhood are analytically distinct and should not be confused. Based on my findings, I focus upon one particular teaching about corporate identity—the real entity theory—and expand it to develop the conception of corporate dignity, which is a useful analytical tool explaining the jurisprudential puzzles of group (corporate) rights.

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INTRODUCTION

The age-old problem of group identity and personhood looms large in law and moral philosophy when it comes to deciding on the legal rights and moral status of collectives of people. The answers to the general questions of how collectives of individuals should be identified and whether they have their own personhood and interests, which may not be the same as those of their members, inform regulations in many areas of law—from peoples’ collective right to self-determination, to legal recognition of a compelling governmental interest distinct from the interest(s) of its officials, to corporate freedom of speech and exercise of religion.

One might argue that this “age-old problem of group identity and personhood” is not a problem at all when it comes to law by virtue of a tool available in legal realms to resolve it—legal fiction. This instrument can indeed be used to regulate group personhood for the purpose of application of legal principles and rules, but the very usage of the specific legal fiction of group identities still raises a deeper question of why exactly it has or has not been applied in one situation or another. The pragmatic answer to the last question, according to which legal fictions are utilized for practical purposes (e.g., to decrease transactional costs), is, unfortunately, not always helpful, because the conception of personhood (individual or group) often goes deeper than pragmatic or consequentialist considerations. To give a rather stark example, providing adequate healthcare for the elderly brings about huge transactional costs,¹ but that

1. See Barbara S. Klees et al., *Brief Summaries of Medicare and Medicaid, Title XVIII and Title XIX of The Social Security Act, as of November 1, 2013*, 5, available at <http://cms.gov/Research->

(hopefully) does not mean that, to reduce those costs, we could introduce a legal fiction that after the age of seventy a human being loses her personhood and corresponding rights and can therefore be involuntarily euthanized. Many people would deem this consequentialist justification of the usage of “legal fiction” as a grave violation of autonomy and/or public morality—which, of course, raises the question of why the same autonomy and morality concerns are *not* apparent when group personhood is dealt with by introducing legal fiction(s) in other situations. So even from this simple example it is clear that pragmatism and consequentialism alone cannot give an adequate explanation of using legal fictions to establish or deny personhood. The problem calls for more substantial analysis.

In addition to the question of why and when legal fictions can or cannot be used to regulate identity and personhood, this analysis should resolve some other jurisprudential and related philosophical puzzles. Do corporations (and collectives in general) have identity and personhood of their own recognized by law? To what extent does the philosophical understanding of personhood and identity inform the debate about corporate (and group) rights and legal decision-making in that area, and is there an implicit recognition of corporate personhood when legislators or courts assert corporate rights? Are there any rights at all that are directly attributable to a collective as such and not as an assemblage of separate individuals? If those rights exist, what is the source of those rights?

This Article addresses these questions through the philosophical and legal analysis of the problem of group identity and personhood,² primarily drawing upon the example of corporate identity and personhood, illustrated with some prominent examples from the jurisprudence of the Supreme Court, including the cases of *Citizens United* and *Hobby Lobby*.³ To do that, I offer one observation and suggest a theoretical framework to deal with the puzzles of corporate identity, personhood, and rights.

Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/Downloads/MedicareMedicaidSummaries2013.pdf (last accessed Apr. 23, 2016).

2. For short answers to these questions, see the conclusion of this Article. It is probably redundant to say that in this Article I take for granted (rather than seek to prove) that such a thing as “identity” does exist. This philosophical assumption is largely dictated by the purpose of this work (to see how moral theories about identity fit and justify legal argument), since if a contrary assumption that there is no such thing as identity is chosen (which can be deduced, for instance, from some Buddhist teachings—e.g., the doctrine of “no-self” (*anatta*) [*see, e.g.,* DAMIEN KEOWN, *BUDDHISM AND BIOETHICS* 28, 30 (2001)]), it will rule out one hundred percent of American law, which renders the whole analytical enterprise pointless.

3. *Citizens United v. FEC*, 558 U.S. 310 (2010); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

The observation is that the philosophical and legal discussions of corporate personhood are distinct and should not be conflated: the philosophical notion of corporate personhood does not directly determine the scope of corporate legal personhood. This is because moral philosophy concerns itself with abstract questions of what personhood is and how it should be determined, while the legal aspect of the same phenomenon is different. A legal thinker preoccupied with the problem of personhood should answer the question of which rights, duties, and privileges should or should not be attributed to a given entity. Because these philosophical and legal questions are distinct they require different methods to resolve them.

The theoretical framework that I am suggesting is the conception of group (corporate) dignity—the respect for independent corporate will realizing basic group goods. This framework buttresses itself upon the real entity narrative of corporate (and, more broadly, group) identity and is a conceptual grounds to answer the question of which rights should and should not be attributable to corporations and other collective entities. The structure of this Article develops these basic ideas.

Part I of the Article provides an overview of philosophical discourse on the problem of identity and then links it with the leading theories of corporate identity in law. I start with the notion of identity because it is conceptually broader than that of personhood (we can speak of the identity of anything, but *personal* identity is attributable to only certain beings). Part II discusses the narrower philosophical problem of corporate personhood within the identity discourse, while Part III scrutinizes the legal discourse of corporate personhood and provides some illustrations from the jurisprudence of the Supreme Court to support the observation that philosophical and legal conceptions of personhood are analytically (and practically) distinct. Finally, Part IV draws upon a special view on corporate identity—real entity theory—and expands it from the notion of independent corporate will to the account of group basic goods and then develops the larger conception of group (including corporate) dignity, which has important implications on group (including corporate) rights.

I. IDENTITY IN MORAL PHILOSOPHY AND CORPORATE IDENTITY IN LAW

A. *Philosophical Approaches to Identity Determination*

At the most general level, “identity” means “sameness.”⁴ This sameness, in turn, can be understood qualitatively or numerically: qualitative identity is the sameness of things “shar[ing] properties,” while numerical identity is about absolute sameness (absolute qualitative identity) and “can only hold between a thing and itself.”⁵ For example, all watches can be said to be qualitatively identical in a sense that they all share certain properties allowing them to show time. (Of course, we can identify subcategories of watches within the broader class of qualitatively identical objects: e.g., we can speak of identities of sundials, mechanical watches, electronic watches, etc.). On the other hand (pun unintended), two watches can be numerically identical only if we are speaking of the same watch at different moments of time (e.g., now and a minute ago). Finally, it should be observed that being numerically identical does not always presuppose being qualitatively identical (and, of course, *vice versa*): if I break my watch so that it is no longer functioning, it is now qualitatively non-identical with the watch I had before the accident occurred, but it is nevertheless numerically the same watch of mine. Some changes in qualitative identity, however, can destroy the numerical identity too (e.g., suppose I deconstruct my watch into a heap of mechanical bits and pieces; this heap is neither qualitatively nor numerically identical to the watch I used to have).⁶

Now, as far as law is concerned, it operates with both kinds of identity to regulate social relations. Qualitative identity is largely used when principles and rules are formulated (e.g., securities regulation rules are applied to financial instruments and corporations—that is, classes of things sharing certain qualities and therefore being qualitatively identical).

4. Harold Noonan & Ben Curtis, *Identity*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2014 Edition) (Edward N. Zalta ed.), available at <http://plato.stanford.edu/archives/sum2014/entries/identity/> (last accessed Apr. 23, 2016).

5. *Id.*

6. See DEREK PARFIT, REASONS AND PERSONS 201, 202 (1986). The borderline between keeping and losing numerical identity in case the qualitative identity is disrupted lies, I think, with the properties based on which the identity (numerical and/or qualitative) is determined. In my example with the watch, the property for numerical identity is its mechanical integrity, whereas the property of qualitative identity is its ability to show time. Needless to say, the choice of these identity-determining properties is subjective in that there is no method that allows choosing such properties following some “objective laws” pertinent to the thing or its “essence” (since doing the latter will involve using the concept of identity, which makes the whole reasoning circular).

On the other hand, numerical identity is mostly used when a given rule or principle is applied (e.g., a person who has committed a crime and a person punished for committing that crime must be numerically identical; or a plot of land which I have purchased to build a house and the plot of land where I am now building my house must be numerically identical). As these examples demonstrate, the concept of identity can be applied to animate beings, inanimate objects, and their combinations (so we can talk about the identity of a human being, a dog, a precious gem, a disabled person using prostheses, a flamboyance of flamingoes, a religious congregation, and a corporation).

It is easy to see that the definition of identity as qualitative and numerical sameness *per se* does not establish how the latter is determined in specific cases. For the purposes of this Article, I will focus on two ways of determining identity: internal and external. Identity is determined internally when a sentient creature (call her an identifier) answers the questions of her personal identity (e.g., when I am asking myself whether I remain the same person over time, or whether certain beliefs and desires are truly mine and not just imposed upon me by the social environment).⁷ By contrast, identity is determined externally when a sentient creature (call her a beholder) identifies other creatures or objects in a certain capacity; the examples of this include me identifying another person as my family member, or a dog identifying his owner, or a buyer in a shop identifying a bottle of olive oil. The identities determined internally and externally may not always be the same⁸: for example, while a human baby or an individual in a permanently vegetative state clearly can have externally determined identities as a family member and a recipient of certain social insurance benefits, there is virtually no chance that they have the same identities determined internally.

Both internally and externally determined identities play a prominent role in the functioning of the legal enterprise. For example, a legal subject may identify herself and/or be identified by other people as such (e.g., I am identifying myself and being identified by my government as a bearer of a right to vote). The difference between internally and externally determined identities of the same subject holds in law as well. The most obvious example is a person being unaware of some of her rights or duties that she is identified with by other people (e.g., government officials).

7. See generally MARYA SCHECHTMAN, *THE CONSTITUTION OF SELVES* (1996).

8. While internally determined identity is always a personal one, externally determined identity is not necessarily personal (compare, e.g., the identity of a bottle of oil and the identity of its buyer, both determined by a cashier in a supermarket).

Regardless of this difference, however, the identity used in law is always of a narrative kind: the subjects of law are always identified as such by reference to the narratives of legal statuses available in formal sources of law (e.g., a reader of this article is legally identified as a citizen of a certain country by referring to the legal norms about citizenship and by the rights, privileges, duties, and powers they entail). The law fits all the subjects of its regulation into a story—a narrative—of their respective legal statuses.

B. Narratives of Corporate Identity in Law

Once the existence of externally determined identity in law is acknowledged, it is easy to see that corporations clearly can (and do) have one. In Anglo-American law, three theories of corporate identity—narratives about externally determined corporate identity—are available: the artificial entity theory, the aggregation theory, and the real entity theory.⁹

According to the first theory, a corporation, as famously explained by Chief Justice Marshall in *Dartmouth College v. Woodward*,¹⁰ “is an artificial being . . . existing only in contemplation of the law. . . . [I]t possesses only those properties which the charter of its creation confers upon it.” The aggregation narrative deems a corporation as “the aggregation of natural persons that have [legal] rights,”¹¹ and as a “‘nexus’ or ‘web’ of contracts between free and independent individuals.”¹² Finally, the real entity theory of corporate identity states that “groups are not explicable as the total of the individual preferences, privileges, or rights of each group’s members. . . . [A] corporation [is] real in a way that [is] not explainable as the sum of its parts.”¹³

These three narratives are dependent upon the convictions of a beholder; within American legal discourse, these convictions can be framed in terms of categories of legal arguments (to use Duncan Kennedy’s terms)—morality, rights, social utility, formal administrability, and institutional competence—and their respective underpinnings found in

9. For a helpful overview of these theories, see, e.g., Darrell A.H. Miller, *Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 914 *et seq.* (2011).

10. 17 U.S. 518, 636 (1819).

11. Miller, *supra* note 9, at 928.

12. *Id.* at 928–29.

13. *Id.* at 922.

moral and legal thought: virtue ethics, deontological ethics, consequentialism, and positivism.¹⁴ Depending on the specific way these categories are balanced against each other, different narratives of corporate identity result.

For example, the artificial entity theory primarily draws upon positivism and institutional competence, stating that “corporations could not exist but for the state grant or concession,”¹⁵ “the corporation must be created by legislative act,”¹⁶ and the “relations which are the basis of all corporate activity, are . . . always legal powers and immunities, never physical ones.”¹⁷ On the other hand, the aggregation theory with its emphasis on individuals with their deliberations, choices, and judgments realizing them in relations between each other under the proxy of corporate identity, primarily draws upon deontological ethics and its autonomy-based reasoning.

Both artificial entity and aggregation narratives are supported by social utility and underlying it consequentialism, according to which a corporation is “an important merchantile device rendered necessary by a credit economy . . . to secure the limitation of liability to the property adventured,”¹⁸ and that “entity status mimics any number of institutional mechanisms that reduce transaction costs and thus facilitate commercial activity.”¹⁹

These two narratives also find their further support from their integral part—the fiction theory of corporations which is based on consequentialism and formal administrability. As applied to the aggregation narrative, this theory states that “the corporate entity is thought of as a name or symbol which facilitates reference to a complicated group of relations, but adds nothing to them”²⁰ and

14. Duncan Kennedy, *A Semiotics of Legal Argument*, COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, Volume III, Book 2, 309, 327–28. Kennedy identifies such groups as “argument-bytes” of morality, rights, social welfare, expectations, administrability and institutional competence. Although Kennedy initially identified six types of argument-bytes, in his recent lectures he was identifying only five (excluding expectations which seem to me to be a blend of rights and morality types of arguments). Also, with regards to “social welfare,” “social utility” seems the better phrase since it is more neutral and escapes several (unnecessary) political and historical connotations.

15. Miller, *supra* note 9, at 916.

16. Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 294 (1928).

17. Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643, 652 (1932).

18. *Id.* at 653, 654.

19. Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why Non-Profit Corporations Are RFRAs*, 127 HARV. L. REV. FORUM 273, 287 (2014).

20. Radin, *supra* note 17, at 665–66.

“‘corporate person’ [is] merely a device to make reference convenient and accounting easy.”²¹ Robert Clark makes a similar argument in his seminal treatise, in which he states that “[t]he function of attributing powers to a fictional legal person is simple mechanical efficiency in the carrying out of legal acts.”²² As applied to the artificial entity narrative, fiction theory teaches that corporations can be deemed as “hav[ing] neither a body nor a will”²³ and therefore are capable of “having” only those rights that are necessary for their functioning in accordance with the “original intent” of their incorporators.

Generally speaking, the artificial entity and aggregation narratives are not mutually exclusive: it is plausible to think of a corporation as a legislative creation within which there exists a net of contractual relationships between its members. By contrast, the third narrative—the real entity theory²⁴—offers a very different vision of corporate identity incompatible with the others. It teaches that when individuals comprise a group they “check and balance” their wills and interests within that group, and the resulting interest (or choice) is a new one, different from either a choice that any individual in that group could make on her own, or a mere compilation of different individual choices.²⁵ This position was articulated by Ernst Freund, who wrote about the “corporate will” as “the product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission.”²⁶ From this example we can see how deontological ethics can be used to formulate a narrative of corporate identity very different from that of aggregation theory which emphasizes individual members and *their* relations with one another. Furthermore, the other categories of legal arguments (social utility, institutional competence, etc.) are also readily available to be organized around this deontological claim and support the real identity narrative.

21. *Id.* at 653.

22. ROBERT CLARK, *CORPORATE LAW* 19 (1986).

23. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 *YALE L.J.* 655, 665 (1926).

24. Miller, *supra* note 9, at 921.

25. *See generally* ERNST FREUND, *LEGAL NATURE OF CORPORATIONS* (1897).

26. *Id.* at 52.

The basic convictions standing behind the three narratives of corporate identity can be summarized in table form as follows:

TABLE 1: DIFFERENT POSITIONS ON CORPORATE IDENTITY AND THEIR JUSTIFICATIONS²⁷

	Moral and Legal Convictions and Types of Legal Arguments				
Narratives	Virtue Ethics (morality)	Deontological ethics (rights)	Consequentialism (social utility)	Positivism (institutional competence)	Consequentialism (formal administrability)
Artificial entity	The only corporate virtue is to excel at attaining the purposes spelled out in the corporate charter	Corporation is a proxy for the individual will(s) of its incorporator(s)	Corporation is a device to the goals, for realization of which it was created	<u>Corporation is an artificial entity created by the state and is capable of only those acts permitted by law</u>	Corporations “having” rights are legal fictions to advance the purposes of their creation
Aggregation theory	The only corporate virtue is to excel at attaining the purposes spelled out in the corporate charter	<u>Corporation is a contractual web of its members through which their wills are realized</u>	Corporation is a device to the goals of its members entering into contractual relations with each other	Corporation is a contract entered between individuals and capable only of those acts agreed between them	Corporation is a legal fiction used for the ease of reference to a web of contractual relations between individuals
Real entity theory	<u>Corporations have their group virtues that cannot be reduced to individual ones</u>	<u>Corporations have their own will and interests distinct from those of their members. Individual is a proxy to corporate will</u>	The recognition of corporate personhood results in more robust jurisprudence of rights and related institutions	Rather than “creating” corporate personhood as a pure fiction, the law merely recognizes it as an existing reality	Corporate personhood, like individual one, is real, and can entail a bundle of formal legal entitlements

27. The underlined text signifies the category of argument the narrative primarily draws upon.

II. CORPORATE PERSONHOOD: A PHILOSOPHER'S APPROACH

A. *Three Perspectives on Corporate Personhood*

The three narratives of corporate identity inform the discussion of corporate personal identity and personhood, which exists on two levels (related but distinct from one another): philosophical and legal. This section examines the philosophical discourse of corporate personhood.

Following the three theories of corporate identity, we can discern three narratives about corporate personhood. The first one, pertinent to the artificial entity and aggregation narratives, is about complete denial of the personhood of corporations. According to this view, only conscientious beings have the capacity of being persons, and since a corporation is either a mere tool to advance the purposes of its incorporators created by the state, or a net of contractual relations between individuals, it cannot sensibly have personhood of its own. Max Radin famously narrates this story in his argument about corporations when he asserts that “nothing but human beings . . . are persons in the proper sense of the term.”²⁸ The same view on corporate personhood (and its underlying narrative of corporate identity) can be traced in the criticisms articulated by some prominent authors on the Supreme Court decision in *Citizens United v. Federal Election Commission*.²⁹

The artificial entity and aggregate narratives of corporate identity can also provide for a different view on corporate personhood. According to this view, “corporate personhood” exists, but only in a limited sense: what we refer to as corporate personhood is actually the part of individual personhood determined by individual membership in a corporation (or, more generally, within any group of people—a family, a commune, a nation). This position notably results in a seemingly bipolar notion of an individual, one “part” of whose personality embraces individual interests, while another “part” includes group interests, with those two groups of interests often contradicting one another.³⁰ One way to overcome this

28. Radin, *supra* note 17, at 665.

29. See, e.g., David Kairys, *Money Isn't Speech and Corporations Aren't People*, SLATE (Jan. 22, 2010), available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html; Burt Neuborne, *Corporations Aren't People*, THE NATION (Jan. 13, 2011), available at <http://www.thenation.com/article/157720/debating-citizens-united?page=0,1>.

30. See, e.g., Matthew J. Hornsey & Jolanda Jetten, *The Individual within the Group: Balancing the Need to Belong with the Need to Be Different*, 8 PERSONALITY & SOC. PSYCHOL. REV. 248 (2004).

strange “moral bipolar disorder” is to employ the concept of relational ethics—like the Confucian one, for instance—teaching that the only way to properly understand individual interests is to integrate the collective goals into the individual’s personhood, thereby negating the contradiction between individual and collective. (Crudely put, under relational ethics an individual can fully realize herself only by absorbing the interests of other people with which she forms a distinct group—a family, a commune, or a state). The other (and probably the more familiar to the “Western” discourse) way to deal with the internal contradiction of interests is simply to assert the prevalence of one group of interests over the other (e.g., the individual over the group or *vice versa*).

One example of this kind of moral reasoning is given in a recent essay where the authors assert that “shareholders [of a corporation] are *the true source* of religious exercise by the corporation”³¹ and that corporations do not “belong to some category of things whose interests are divorced from the interests of natural persons.”³² Bryant Smith also made this claim when elaborating on the “dual personality”³³ of an individual and the feature of our thinking that “ignores the individual in the group function . . . [and] divides a single human being into different functions.”³⁴

Despite the subtle difference between the two positions on corporate personhood (its complete denial and its very limited “acknowledgment”), both of them strongly affirm the individual personhood, which, to paraphrase a famous metaphor, possesses a gravitational force so powerful that it completely strips corporations (or, more generally, groups) from their own personality independent of that of their members. Any theory of real corporate (group) personhood should therefore emancipate the collective from the individual—and this is precisely what the third narrative of corporate identity and the corresponding position on corporate personhood do.

To recapitulate, the real entity narrative assumes that corporations are capable of formulating and advancing their own will (in the forms of choices and judgments) through the interaction between their members. In this respect, the real entity theory presupposes corporations’ *personal identity* and, consequently, their personhood. The question of how the latter is to be determined immediately arises, which requires us to consider

31. Meese & Oman, *supra* note 19, at 276 (emphasis added).

32. *Id.* at 295.

33. Smith, *supra* note 16, at 291.

34. *Id.* at 286.

briefly its definitions in philosophical discourse and see which one (if any) fits corporations as collective, not individual, entities.

B. Three Positions on Personal Identity and Personhood and Their Application to Corporations

Moral philosophy knows of three major ways to determine identity with respect to persons³⁵: biological, psychological, and narrative. Under the biological criterion, personal identity is defined as biological continuity of a living organism (for example, according to this criterion an embryo, a child, an adult, and a demented elder are identical to the extent that they represent the continuity of physiological functioning of the same organism).³⁶ Under the psychological criterion, it is a unique psychological continuity (“overlapping chains of strong [psychological] connectedness”)³⁷ that determines personal identity (so under this criterion an embryo, an adult, and a person suffering from severe dementia are not identical since there are no unique psychological connections between the three). Finally, the narrative criterion of identity requires an active unification of experiences by a “narrative ego” rendering them coherent and intelligible within the context of a “story that subject tells.”³⁸ This last criterion of identity is different from the previous two in the following way: as opposed to biological and psychological criteria, each of which is trying to answer the “reidentification” question (that is, to determine whether a being is the same over time), the narrative criterion seeks to resolve the problem of self-knowledge (characterization), that is, to answer the question whether a certain property can be truly attributable to a person.³⁹

35. See generally David Shoemaker, *Personal Identity and Ethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2014 Edition) (Edward N. Zalta ed.), available at <http://plato.stanford.edu/archives/spr2014/entries/identity-ethics/>. There is also the view of nonreductionism holding that identity is determined by the Cartesian ego (also referred to as “soul”), *id.*, but since this view is non-falsifiable (the soul is a non-observable entity whose existence can be neither proved nor rejected) and cannot be consistently applied in law (a criminal might argue, for instance, that she should not be punished because since the moment she committed a crime her soul has changed), I do not focus on it in this Article.

36. As Eric T. Olson puts it, “What it takes for us to persist through time [i.e., what determines our personal identities] is what I have called biological continuity: one survives just in case one’s purely animal functions—metabolism, the capacity to breathe and to circulate one’s blood, and the like—continue.” ERIC T. OLSON, *THE HUMAN ANIMAL: PERSONAL IDENTITY WITHOUT PSYCHOLOGY* 16 (1997).

37. Parfit, *supra* note 6, at 207.

38. Shoemaker, *supra* note 35; see also Schechtman, *supra* note 7, at 12.

39. Shoemaker, *supra* note 35; Marya Schechtman speaks of four such properties: “moral

Among these three criteria, the biological one makes the concept of personhood irrelevant. The proponents of this criterion do not necessarily have to *deny* that such thing as personhood exists; they are just saying that it is not necessary to determine personal identity, since all they need for that purpose is the continuous basic physiological functioning of a living organism,⁴⁰ which may or may not possess personhood. (For this reason some proponents of the biological criterion prefer to use the term “*human identity*,”⁴¹ rather than referring to a “personal” one). As far as corporations are concerned, however, the biological criterion is of no use to us anyway—a corporation is nothing like the Zergian Overmind from the fictional StarCraft universe—so even if it was helpful to define personhood, it still does not fit the real entity narrative and its strong assumption of a real corporate personality.

This leaves us with two remaining criteria of personal identity—psychological and narrative—both of which build upon the notion of personhood. Under the psychological criterion, personhood is the psychological continuity consisting of unique and strong chains of connections (like memories, intentions, and desires), so personhood is personal identity. Under the narrative account, personhood is the principle in accordance with which individual experiences are unified into a coherent and intelligible whole (which is identity), so identity is based on personhood. (Therefore, under these two criteria it is wrong to say that “[p]ersonhood is a fundamental *element* of both personal and political identity.”)⁴²

The psychological account of personal identity/personhood is of no use to us for the same reason as the biological one: corporations are collectives and therefore do not possess consciousness, and this precludes them from having the “strong chains of connections” essential for that conception of personhood. Therefore, if we are willing to offer the most sympathetic interpretation of the real entity narrative and corporate personhood, we are

responsibility, self-interest concern, compensation, and survival.” Schechtman, *supra* note 7, at 14, 80–89.

40. Olson, *supra* note 36, at 17 (“Psychological continuity is neither necessary nor sufficient for a human animal to persist through time.”); *id.* at 18 (“[A] human animal has the persistence conditions . . . not by virtue of being a person or human body.”).

41. DAVID DEGRAZIA, HUMAN IDENTITY AND BIOETHICS 8 (2005) (“Because I deny that we are essentially persons, I will sometimes speak of *our* identity or *human* identity, rather than *personal* identity.”) (emphasis in original).

42. Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 322 (2001–2002) (emphasis added).

left with the remaining criterion of personal identity, which is the narrative one.

It is important to underscore that this criterion, along with the biological and psychological ones, is available not only to human beings, but also to other sentient creatures. For example, it is correct to state that dogs or birds possess a narrative personhood in that they unify the experiences of their lives and are therefore able to recognize their masters, breeds, and homes (although the unifying principles available to them are quite different from those available to human beings). In this regard, the claim that “the definitive characteristic of human beings is precisely . . . the ability to relate one’s past and future as a single being and to construct out of the multiplicity of one’s experience and expectations an individual personality”⁴³ is dubious: humanity has no exclusive claim on narrative personhood.

Furthermore, when it comes to human beings, narrative personal identity is available not only to individual human beings but also to their collectives. Recall that at the core of narrative personal identity lies the unifying principle—the personhood—that allows uniting experiences into a coherent whole. It is certainly plausible to think of this unifying principle as being spelled out in some foundational text of a group of people. (Religious congregations with their sacred texts come to mind first, but a corporate charter, specifically in its statement of company’s mission and principles of activities, can perform the same function). It is true, of course, that the unifying principle(s) in question will be applied by the members of a group (e.g., a corporation), and sometimes their interpretations will significantly differ; however, as I demonstrate in the last part of this Article, this does not falsify the narrative account of corporate personhood.

Finally, when it comes to the question of how the law operates with respect to its subjects, the narrative view of personal identity seems like the most promising one. After all, as I have already mentioned, what the law does is attribute certain entitlements to its subjects as properly theirs, thereby responding (in a rather peculiar legalistic way) to the subject’s question of characterization. (For example, when a person enters a criminal case, she must characterize herself and be characterized by others in terms of legal entitlements attributable to her).

43. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 754 (1989), quoted in Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context*, 120 YALE L.J. 379, 393 (2010).

Therefore, it is no surprise that the (legal) real entity narrative, which must embrace the real corporate personhood in a philosophical sense, operates with a narrative kind of personhood. Now let us see whether this philosophical discussion of corporate identity and personhood determines the conception(s) of personhood in a legal sense, and if it does, then how exactly it works.

III. CORPORATE PERSONHOOD: A LAWYER'S APPROACH

A. *The General Notion of Corporate Personhood in Law and Its Connection with Corporate Identity Narratives*

The legal discussion of personhood (including corporate personhood) should not be confused with its philosophical counterpart. As noted in the introduction to this Article, moral and legal thinkers answer the question of personhood quite differently. A philosopher would provide us with general deliberations upon the problem of personhood as related to identity—the line of reasoning described in the previous section. A lawyer has to decide which rights, all things considered (including but not limited to the philosophical underpinnings), the personhood of a given entity (understood as a bundle of rights and duties) should embrace. This distinction between philosophical and legal understandings of personhood becomes clear from the following examples: Imagine a lawyer reading this Article, who assumes that corporations are only artificial entities that possess no personhood in philosophical sense; that lawyer may nevertheless accept granting to corporate entities the limited protections of personhood under the Fourteenth Amendment (the same can be said about embryos, fetuses, animals, and plants, for example). By contrast, if a philosopher reading this piece assumes that a corporation is a real entity and therefore possesses a real personhood comparable to that of a human being, the assumption she makes still tells us literally nothing about the legal status of that corporation. Imagine observing a (supposedly) healthy human being on the street and attributing a narrative personhood to her; obviously, this is still a far cry from the specific legal (civil, political, economic, social, or cultural) rights she possesses.

If a philosophical conception of corporate personhood is not determinative of its legal counterpart, then does moral philosophy determine in any way the scope of the term “person” used in legal norms? It certainly does. In order to determine the specific rights of a given legal subject, we should deduce them from different categories of legal argument (morality, social utility, institutional competence, etc.) and their

proper balancing against each other. In short, we should go back to the narrative of corporate identity. We should be cautious, however, not to overstate the matter here; the narrative about corporate identity is by no means the only determinant of legal corporate personhood in the legal equilibristics of balancing. As my further analysis of the cases before the Supreme Court makes clear, legal decision-makers can also take into account other social relations and objects of legal protection pertinent to the legal issues before them. (For example, one might well support the artificial entity theory and nevertheless protect corporate freedom of speech for the sake of the broader objective of protection of speech). On the other hand, sometimes the narrative about corporate identity is so strong that it possesses enough gravitational force within the decision to determine the argument (for example, in cases of unqualified acceptance of the artificial entity narrative and acknowledging only those corporate rights pertinent to the purposes of incorporation.)

Among those narratives, the artificial entity and aggregation ones offer a limited conception of legal corporate personhood. According to these theories, corporations have rights only to the extent required for the protection of the rights of their individual members (either the rights necessary to carry on the incorporation purposes or the somewhat broader range of individual rights exercised by individuals in their association, e.g., the freedom of speech and/or exercise of religion).⁴⁴ In this sense, the conception of legal personhood stemming from these corporate identity narratives is inherently instrumental: the presence of the “black hole” of individualism strips corporations of their own rights⁴⁵ and concentrates the legal argument on legal entitlements (rights, privileges, or duties) of their individual members. In the next subsection I will show how this view largely (with one notable exception) prevails in present-day American law.

44. It is tempting to conclude that the aggregation narrative suggests a more robust jurisprudence of corporate personhood than its artificial entity counterpart, because it refers a lawyer to a broader conception of individual rights rather than the text of a corporate statute and the purposes of incorporation. This difference in the scope of individual rights protection, however, is largely overstated: as some commentators correctly note, there is nothing in corporate law that in principle precludes the inclusion into a corporate charter the rules and principles pertinent to the exercise of various individual rights through corporate form, in which case both artificial entity and aggregation narratives offer very much the same protection of corporate members' individual rights. *See generally* Meese & Oman, *supra* note 19. Furthermore, the “purposes” of incorporation can be construed broadly or narrowly, providing for the more robust protection of individual rights in the former case.

45. Unless specified otherwise, I am using the term “right(s)” here in its broader sense to include not only rights but also privileges, immunities, powers, and other components of jural relations outlined by Hohfeld. *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

Also, in light of the limited conception of corporate personhood under the artificial entity and aggregation narratives, broad conclusions like “[o]nce a corporation is deemed a person for one right, reason demands an explanation why it is not a person for another”⁴⁶ seem a bit too mechanical. These two narratives cover only certain rights and not others, and there is no need to demand the reasonable explanation of the narratives’ selectivity about certain rights. In other words, we do not require reason to justify an exception from the general principle of that narrative, because the general principle is already selective. For yet another example by analogy, think about children’s or animals’ rights, the legal narratives of which are also inherently selective: endowing them a right to life does not imply endowing them with a right to vote.

By contrast, the real entity theory offers a more robust jurisprudence of legal corporate personhood: corporate will and, as will be demonstrated in Part IV, group dignity generally demand more inclusive protection than that granted by the narrower views on corporate personality in law. The legal corporate personhood here is not instrumental—it is intrinsic in a sense that it protects the rights of a corporation as a legal subject separate from its members. This account of “full corporate personhood” in law (corresponding to real corporate personhood in moral philosophy but not identical with it) should not mislead us into thinking that, once this view is accepted, corporations should immediately enjoy all the rights expressed or implied in the Federal Constitution and legislation, related precedents of the Supreme Court, and state law.

On the one hand, many of the rights explicitly or implicitly embraced in the seminal texts of American law are strictly individual in a sense that the “nature” of some of these rights is simply unsuitable for corporations. The rights to life, marriage, and procreation are pertinent examples here. This “nature” of rights is not, however, determined by their historical and traditional understanding in American law, as it is sometimes suggested.⁴⁷ History and tradition are processes and are therefore subject to change. (As the jurisprudence of the Supreme Court has demonstrated over and over again, there is first time for not exactly everything, but certainly for some

46. Miller, *supra* note 9, at 915.

47. See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978) (“Certain ‘purely personal’ guarantees . . . are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals.”) (emphasis added); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2795 (2014) (“No such solicitude [to the free exercise right of religious organizations] is *traditional* for commercial organizations.”) (Ginsburg, J., dissenting) (emphasis added).

things which were quite unthinkable a century or a couple of decades ago). The puzzles of suitability of certain rights to corporations (more broadly, groups) should be resolved instead by reference to the conception of group dignity which I will develop later in this Article.

On the other hand, the understanding that corporations are different from individuals and, under the real entity narrative, enjoy different rights leads not only to shrinking the pool of available corporate entitlements in some areas but also to expanding it in others. Corporations (and groups) can have rights that none of their individuals taken separately can possess. The first example that comes to mind here is the right of self-determination enjoyed by peoples and nations under the norms and principles of international law (whereas an individual representative of the same people or nation is not entitled to have the same self-determination right).⁴⁸ Again, the list of these rights uniquely pertinent to groups (corporations, nations, or governments) should be determined by reference to the conception of group dignity.

Now, with all these considerations of moral philosophy and jurisprudence in mind, let us turn to the legal material, drawing upon the examples of corporations and the conceptions of their legal personhood underlying the Court's decisions⁴⁹ in order to demonstrate a few basic points I have made so far. First, philosophical accounts of corporate personhood do not play a decisive role in forming legal accounts of corporate personhood. Second, when Justices decide upon the legal scope of corporate personhood, they do that by constructing the narratives of corporate identity balancing the five basic categories of legal arguments against each other. Third, depending on the argumentative force of a given

48. The collective rights (the entitlements of a collective as a whole) should be distinguished from the subcategory of individual rights that can only be exercised in a group (Anthony Appiah calls the last category the "membership rights," see K. Anthony Appiah, *Grounding Human Rights*, HUMAN RIGHTS AS POLITICS AND IDOLATRY 112 (Michael Ignatieff et al. eds., 2001)). A classic example from the latter subcategory is a right to strike: it normally cannot be exercised by a single employee (if that's the case, an employee is violating labor laws) and requires a group of workers *each of which* is exercising her individual labor right. Within the context of this dichotomy (collective rights and individual rights that can be exercised only collectively), an interesting question arises with regard to affirmative action (to the extent that it is recognized as a legal entitlement at all)—i.e., whether it exists as a collective right (in which case only a minority as a whole has a privilege of reverse discrimination, and no individual who belongs to that minority can claim the same right for herself) or as an individual one (in which case a member of minority can bring suits to defend her individual right). Depending on the answer to this question (which is determined by balancing of different categories of legal arguments in a given legal discourse), regulations will differ.

49. I will confine the examples to those from federal constitutional law, but the legal material to illustrate the points made earlier can also be taken from state constitutional law or from federal and state regulations in other areas of law.

narrative of corporate identity, different legal conceptions of corporate personhood will follow, resulting in either broader or narrower protections of corporate rights.

B. Corporate Personhood in the Supreme Court's Jurisprudence

The jurisprudence developed by the Supreme Court is a fertile area of law to analyze legal decision-making's moral underpinnings, since the opinions of the Members of the Court often reveal their legal and moral convictions. Of course, the moral views of the Justices about corporate identity and personhood have not been decisive to the outcomes of the cases analyzed below: after all, the Members of the Court are not moral philosophers who pass their decisions based on purely philosophical considerations—they are lawyers operating within the boundaries of legal principles and rules. Nevertheless, examining selected Court opinions in light of the narratives of corporate identity and the related conceptions of corporate personhood reveals certain assumptions shared by the Justices, which are important in understanding the thrust of Court's doctrines' development in that area and help to draw a more accurate picture of legal argument.

The seminal decision of the Court that defined the corporation⁵⁰ is *Trustees of Dartmouth College v. Woodward*.⁵¹ Chief Justice Marshall found a corporation to be “an artificial being, invisible, intangible, and existing only in contemplation of law.”⁵² The Chief Justice was apparently endorsing the concession theory of the corporation, according to which it “possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence,”⁵³ balancing it with the purpose-based arguments when he added that “[the properties of a corporation] are such as are supposed best calculated to effect the object for which it was created.”⁵⁴ Chief Justice Marshall also noted along the lines of formal administrability that corporations can “hold property without the perplexing intricacies, the hazardous and endless necessity, or perpetual conveyances for the purpose of transmitting it from hand to hand.”⁵⁵

50. See 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4 (rev. ed. 2010).

51. 17 U.S. 518 (1819).

52. *Id.* at 636.

53. *Id.*

54. *Id.*

55. *Id.*

The Chief Justice also observed that corporations are established and exist so that “a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.”⁵⁶ This signals, I think, the Chief Justice’s underlying deontological view on corporations—precisely, that a corporation *per se* has no autonomy, whereas the individuals constituting the corporation do.

As the analysis makes clear, the Court’s *Dartmouth* opinion endorsed the artificial entity (corporation is an “artificial being”) and aggregation (corporation as an embodiment of a “perpetual succession of individuals”) narratives of corporations and the view on corporate personhood according to which there is no such thing as real corporate personality. To reach this result, the Chief Justice balanced all five categories of legal argument in his reasoning: morality (purpose-based corporate virtue), rights (denial of corporate autonomy), social utility (consequentialist appraisal of corporate goals as “beneficial to the country”⁵⁷), institutional competence (governmental power to establish corporations), and formal administrability (convenience of property management). For Chief Justice Marshall, the central argument, with which he harmonized the other four, was probably that of institutional competence and the concession theory arising from it. The implicit rejection of real corporate personhood in a philosophical sense, however, did not preclude the Court from finding certain corporate rights grounded in formal administrability and social welfare considerations (e.g., to manage corporate affairs and to own property), thereby endorsing the conception of instrumental legal corporate personhood.

Another seminal decision of the Court is *Santa Clara County v. Southern Pacific Railroad Company*,⁵⁸ where at the oral argument Chief Justice Waite notably declared the assumption that the Equal Protection Clause of the Fourteenth Amendment applies to corporations as persons.⁵⁹ It is important to underscore that the Chief Justice most probably used the term “person” and the conception of personhood in a strongly legalistic way. The *Santa Clara* Court seems to have been focusing on corporate property, and therefore treated corporate personhood as instrumental to bring corporations and their assets within

56. *Id.*

57. 17 U.S. 518, 637 (1819).

58. 118 U.S. 394 (1886).

59. *Id.* at 396.

the ambit of the Fourteenth Amendment.⁶⁰ In referring to corporations as “persons” Chief Justice Waite still employed the conception of instrumental corporate personhood, which was largely based on consequentialist considerations of social utility and formal administrability. True, the Court’s moral reasoning had changed—from the emphasis on institutional competence in *Dartmouth* to formal administrability and social utility in *Santa Clara*—but in both cases the Court’s opinions were still a far cry from the recognition of corporate autonomy, independent will, and dignity in any real sense (that is, detached from corporate managers and/or shareholders).

This line of reasoning about corporate identity and personhood was further developed in the case of *First National Bank of Boston v. Bellotti*,⁶¹ in which the Court spoke of the political speech of for-profit corporations unrelated to the purpose of their creation and business functioning.⁶² Despite the majority’s characterization of the concession theory, according to which “corporations, as creatures of the State, have only those rights granted to them by the State,” as being “extreme,”⁶³ the Court still adhered to the artificial entity narrative of corporate identity, as seen in the reasoning of the author of the majority opinion—Justice Powell.

First of all, Justice Powell noted that the question before the Court in *Bellotti* was not “whether corporations ‘have’ First Amendment rights.” Instead, he focused on the issue of abridgment of expression.⁶⁴ Second, Justice Powell also observed that “certain ‘purely personal’ guarantees . . . are unavailable to corporations and other organizations because the ‘historic function’ of the particular guarantee has been limited to the protection of individuals.”⁶⁵ This implicit characterization of constitutional protections available to group entities as non-personal is telling of the Court’s unwillingness to extend the conception of real

60. Cf. Gregory A. Mark, *The Personification of The Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1463–64 (1987).

61. 435 U.S. 765 (1978).

62. The analysis of this and some of the subsequent decisions of the Court is somewhat blurred by the usage of the conception of personhood in legal and philosophical senses by some of the Justices.

63. 435 U.S. 765, 778 n.14 (1978).

64. *Id.* at 776 (“The proper question therefore is not whether corporations ‘have’ First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the state law prohibiting corporate spendings intended to influence the vote] abridges expression that the First Amendment was meant to protect.”).

65. 435 U.S. 765, 779 n.14 (1978).

personhood to cover corporations. Also, although the “nature, history and purpose of the particular constitutional provision”⁶⁶ test suggested by Justice Powell, with its focus on the norms of the Constitution, is more protective of corporate rights than that articulated in *Dartmouth* and repeated by Justice Rehnquist in his dissent in *Bellotti* (a corporation has only those rights that “the charter of its creation confers upon it, either expressly, or as incidental to its very existence”),⁶⁷ it still does not suggest that this more robust protection is based on a recognition of corporations as real entities and their real personhoods. By contrast, it finds its justification in the Court’s concerns about the marketplace of ideas and speech vindicated by the First Amendment and the rights of shareholders and corporate management.

With regard to the latter, when Justice Powell discussed corporations as speakers, he wrote about “communication by corporate members.”⁶⁸ Furthermore, when he analyzed the governmental interest in protection of minority shareholders, he framed it as “the interest in protecting the rights of shareholders whose views differ from those *expressed by management on behalf of the corporation.*”⁶⁹ This understanding of corporate speech as that of managers and shareholders⁷⁰ affirms the prevalence of individual personhood over the corporate one, denies the conception of corporate personality analogous to that of human beings, and speaks of the artificial entity narrative of corporate identity offering limited constitutional protection to corporate “rights” as proxies of the individual entitlements.

Interestingly, Justice White in his dissenting opinion also wrote that an “association in a corporate form may be viewed as merely a means of achieving effective self-expression,”⁷¹ thereby sharing Justice Powell’s view of corporations as instruments to pursue individual goals. He also completely detached corporate managers and shareholders from the corporation when he asserted that “corporate expenditures designed to further political causes lack the connection with individual self-expression”⁷² and that “corporate shareholders, employees, and customers . . . would remain perfectly free to communicate any ideas which could be

66. *Id.*

67. *Id.* at 822.

68. *Id.* at 782 n.18.

69. *Id.* at 787 (emphasis added).

70. *But see id.* at 777 (“[T]he speech comes from a corporation rather than an individual.”).

71. *Id.* at 805.

72. *Id.* at 807.

conveyed by means of corporate form.”⁷³ In other words, for Justice White the “corporate expression” is simply about “corporate management . . . using the corporate treasury to propagate views having no connection with the corporate business,”⁷⁴ and these positions, being “the purely personal views of the management, individually or as a group,”⁷⁵ do not even suggest the existence of a “corporate personhood” as part of corporate managers’ personalities. This complete rejection of corporate personhood in the philosophical sense was also shared by then-Justice Rehnquist, who in his dissent argued in favor of the purpose-based concession theory of corporations based on the *Dartmouth* test.⁷⁶

The position of the majority and two dissenters in *Bellotti* reveals an interesting split within the Court. Although all the Justices seem to have shared the artificial entity narrative of corporate identity, the selectivity of specific rights protectable under this narrative led them to reach different results when it came to the precise definition of legal corporate personhood (that is, deciding which specific entitlements are protected and which are not). On the one hand, for Justice Powell and the majority, the “competing” concerns about the protection of speech and the marketplace of ideas overrode the artificial entity narrative, resulting in effectively granting a freedom of speech to corporations. On the other hand, Justice White did not see any threat in limiting corporate speech, and Justice Rehnquist limited his analysis to the precedent-based inquiry of whether freedom of speech “might be considered necessarily incidental to the business of a commercial corporation.”⁷⁷ These considerations did not compete with the artificial entity narrative at all—quite to the contrary, they supported it, resulting in the more limited conception of corporate legal personhood of the two dissenters in *Bellotti*.

Justice Rehnquist further elaborated upon his conception of corporate identity in his dissenting opinion in *Pacific Gas and Electric Co. v. Public Utilities Commission of California*,⁷⁸ where he wrote that “to ascribe to such artificial entities [as corporations] an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”⁷⁹ Justice Rehnquist also dismissed the argument based on the notion of

73. *Id.*

74. *Id.* at 803.

75. *Id.* at 813.

76. *Id.* at 823–24.

77. *Id.* at 825.

78. 475 U.S. 1 (1986).

79. *Id.* at 33.

corporate autonomy since a public utility corporation “was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.”⁸⁰ Finally, he observed that corporate speech is purely instrumental to serve the marketplace of ideas,⁸¹ and called “treating [individuals, newspaper publishers, and corporations] identically for constitutional purposes” a “jurisprudential sin.”⁸² All these assertions about corporations made by Justice Rehnquist convey his approval of the artificial entity narrative about corporate identity.

By contrast, Justice Powell, writing for the plurality of the Court in the *Pacific Gas* case, observed the similarity between corporations and individuals on several occasions.⁸³ Regrettably, he did not elaborate further on this similarity, so it is uncertain whether, eight years after *Bellotti*, his views had changed from the artificial to the real entity theory.⁸⁴

The landmark decision of the Court in which an “ideological clash” over different conceptions of corporate identity and personhood was most apparent was the case of *Citizens United v. Federal Election Commission*,⁸⁵ where Justices Kennedy, Scalia, and Stevens and other Members of the Court joining their respective opinions demonstrated different approaches to conceptualizing corporate identity and personhood.

The reasoning offered by Justice Kennedy writing for the majority of the Court⁸⁶ included a number of important arguments about corporate identity and personhood that reflect the real entity narrative of corporate

80. *Id.* at 34.

81. *Id.* at 33 (“[C]orporate free speech rights . . . are recognized as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government.”).

82. *Id.* at 35.

83. *See, e.g.*, 475 U.S. 1, 8 (1986) (“Corporations and other associations, *like individuals*, contribute to the [discussion] that the First Amendment seeks to foster.”) (emphasis added); *see also id.* at 16 (“For corporations *as for individuals*, the choice to speak includes within it the choice of what not to say.”) (emphasis added).

84. Interestingly (and somewhat puzzlingly), Justice Powell adopted the approach of Justice Rehnquist discussed earlier when he wrote for the Court in the case of *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69 (1987), where he observed that corporations’ “very existence and attributes are a product of state law.” *Id.* at 89. *See also* Mark, *supra* note 60, at 1442 n.3. This inconsistency demonstrates either the fluctuating character of views of some of the Court Members on corporate personhood, or that when drafting their opinions they did not pay much attention to the philosophical conception of corporate personhood, focusing instead on an analytically distinct question of corporate rights.

85. 558 U.S. 310 (2010).

86. In parts of his opinion pertinent to the discussion of corporate identity and personhood, Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

identity, according to which corporations have their own personality independent of their members. First of all, the language of Justice Kennedy’s opinion strongly suggests the similarities between corporations and individuals when it comes to speech: he asserted that “corporations and other associations, like individuals, contribute to the [discussion] that the First Amendment seeks to foster,”⁸⁷ and he observed that “[c]orporations, like individuals, do not have monolithic views.”⁸⁸ Notably, Justice Kennedy also found that the Court had rejected the view articulated by Justice Rehnquist that corporate speech should be treated differently than that of natural persons because corporations were not the same as individuals.⁸⁹

The similarity between corporations and individuals found by Justice Kennedy is further supported by his factual assertions about “corporations . . . presenting both facts and opinions to the public”⁹⁰ and the “voices” of entities, including corporations.⁹¹ In other words, according to Justice Kennedy’s account, the views expressed by corporations may not be monolithic, but what is monolithic are corporations—not their managers, shareholders, or customers—as speakers. The opinion of Justice Kennedy, vociferously declaring corporations as speakers independent of their members, strongly suggests the existence of a corporate personhood with its own ideas, beliefs, and values that make the very act of corporate speech possible. From the perspective of balancing different legal arguments, the focal point of Justice Kennedy’s opinion seems to be the deontological category of rights—corporations are independent subjects with rights and interests distinguishable from those of their members. Other arguments are balanced against it: corporations can excel in their speech and message to the public (virtue ethics/morality), which should be supported by law, because otherwise the abridgement of speech will harm speech and the marketplace of ideas (consequentialism/social utility). Accordingly, corporate freedom of speech exists not as a legal fiction for the convenience of protecting individual speakers (formal administrability)

87. 558 U.S. 310, 343 (2010) (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986)).

88. *Id.* at 364.

89. *Id.* at 343 (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”).

90. *Id.* at 355.

91. *Id.* at 339, 354.

and as such must be recognized (as opposed to being merely “invented”) by the government (institutional competence).

This conception of corporate narrative personhood was fiercely rejected by Justice Stevens and, interestingly, it was not supported in full by the three members of the Court who concurred in the result—Justices Scalia, Thomas, and Alito. So the conception of real corporate personhood implicit in the Court’s opinion was not actually shared by the majority; to the contrary, if the split between the majority and concurrences can be of any guidance here, it was shared only by Chief Justice Roberts and Justice Kennedy.

Justice Scalia’s approach to corporate personhood can be distilled from his contention about group speech, which in his view is only an extension of an “individual person’s right to speak . . . *in association with other individual persons*.”⁹² For example, Justice Scalia described the speech of political parties as “the speech of many individual Americans.”⁹³ He also noted that a “spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association.”⁹⁴ This, I believe, is indicative of Justice Scalia’s (and of two other Justices who joined him) view of corporate personhood as either non-existent (which is hard to square with the underlying assumptions of the opinion of Justice Kennedy in which Justice Scalia joined),⁹⁵ or as existent as a product of the individual personalities of members of a corporation. This, together with Justice Scalia’s veneration of originalism, speaks of the traditional artificial entity narrative of corporate identity shared by him and other Members of the Court who joined his concurrence.

Interestingly, Justice Scalia shared this (probably half-consciously articulated) conception of corporate personhood and corporate identity with Justice Stevens (and Justices Ginsburg, Breyer, and Sotomayor who joined the dissent) who, among all the authors of opinions in *Citizens United*, expressed his position on corporate personality in the clearest and least ambiguous way. In particular, Justice Stevens described corporations as “not actually members of [American society],”⁹⁶ as entities “different

92. *Id.* at 392 (emphasis in original).

93. *Id.* at 391.

94. *Id.* at 392 n.7.

95. *Id.* at 316.

96. *Id.* at 394.

from human beings”⁹⁷ and having “no consciences, no beliefs, no feelings, no thoughts, no desires.”⁹⁸ He also observed that “corporate ‘personhood’ often serves as a useful legal fiction”⁹⁹ and he spoke of “flesh-and-blood persons” as “actual”¹⁰⁰ and found corporations to be “not real people.”¹⁰¹

In response to Justice Kennedy’s strong assumption of the real entity narrative, Justice Stevens asked the important question of “‘who’ is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate.”¹⁰² Notably, when answering this question, Justice Stevens himself rejected the answers pointing to a corporation’s customers, employers, shareholders, officers, directors, and “[s]ome individuals associated with the corporation [who] make the decision to place the ad.”¹⁰³ If we assume that corporate speech does exist (be it a university’s statement about affirmative action programs or a corporation’s press release after an environmental accident), then the plausible answer to the question seems to be that it is the corporation itself that speaks through the proxy of its spokesperson—but this, of course, is plainly at odds with what Justice Stevens asserted about corporations as a matter of their “basic descriptive features.”¹⁰⁴

The argument forcefully advanced in the *Citizens United* dissent is indicative of the artificial entity narrative shared by Justice Stevens, and his approach to corporate personhood, under which no real corporate personality exists. The dissenting Justices clearly endorsed the biological criterion of personal identity (“flesh-and-blood persons”) which falsifies the whole narrative about the reality of corporate personhood, and supports only a fictional form of corporate personality. Needless to say, this moral argument could not have been further from the one underlying the opinion of Justice Kennedy.

Interestingly, from the perspective of the corporate identity narrative and its relation to the legal conception of corporate personhood the split of the Court in *Citizens United* is very much the same and yet very different from that in *Bellotti*. The similarity is that once again the opinions in both cases demonstrated the analytical distinctiveness of the moral and legal

97. *Id.* at 465.

98. *Id.* at 466.

99. *Id.*

100. *Id.* at 467.

101. *Id.* at 473.

102. *Id.* at 467.

103. *Id.*

104. *Id.* at 465 n.72.

aspects of the problem of corporate personhood. While in *Citizens United* both Justice Scalia and Justice Stevens shared the artificial entity narrative of corporate identity, they took radically different positions on whether freedom of speech followed from it, resembling the back-and-forth between Justices Powell and White in *Bellotti*. The difference is that while Chief Justice Roberts and Justice Kennedy demonstrated their approval of a real entity narrative very different from the narrative to which Justices Scalia, Thomas, and Alito subscribed, the five right-leaning Members of the Court reached the same opinion that legal corporate personhood is broad enough to include freedom of speech.

This division among the Justices with respect to corporate identity narratives has again played out in an interesting way in the most recent case where the problem of corporate legal personhood loomed—*Burwell v. Hobby Lobby*.¹⁰⁵ In that case, much as in *Bellotti*, all Justices (possibly with an exception of Justice Kennedy) seemed to have agreed on the artificial entity narrative, thereby abandoning the real entity “promise” of *Citizens United*, but again the majority and the dissenters split along the lines of specific visions of corporate legal personhood—the right of business corporations to exercise religion.

The majority’s opinion in *Hobby Lobby* was written by Justice Alito, who had joined the concurrence in *Citizens United* affirming the artificial entity narrative, so it was no surprise that his opinion presented a defense of that theory of corporate identity. For example, Justice Alito found inclusion of corporations under the term “person” to be a mere legal fiction to protect individuals;¹⁰⁶ he also pointed out that corporations “cannot do anything at all” apart and separate from their members;¹⁰⁷ finally, he forcefully argued that it is the owners and managers of closely held corporations—not corporations themselves—whose religious beliefs are being violated.¹⁰⁸

This complete denial of corporate personhood in philosophical sense was not even disputed in a brief concurrence penned by Justice Kennedy, where he also focused on individuals “exercis[ing] their religious beliefs within the *context* of their closely held, for-profit corporations.”¹⁰⁹ Notice the change of vocabulary: the corporations are no longer entities (not even

105. 134 S. Ct. 2751 (2014).

106. *Id.* at 2768.

107. *Id.*

108. *Id.* at 2775.

109. *Id.* at 2785 (emphasis added).

to speak of their personhood)—their identity is that of “contexts” within which individuals realize their freedoms. This identification of corporations as kind of a background against which individuals live their lives is hard to fit with any of the three corporate identity narratives in American law; the closest one would probably be aggregation theory, if it is the “context” of various social relations that Justice Kennedy had in mind.

Interestingly, Justice Ginsburg—the dissenter in *Hobby Lobby*—also embraced the artificial entity narrative of corporate identity when she referred to corporations as “artificial legal entities” and cited the famous lines of the *Dartmouth College* opinion about beings “invisible, intangible.”¹¹⁰ Logically speaking, under this theory the characteristic of artificiality should be shared by all organizations, for-profit and non-profit ones, including religious organizations. Justice Ginsburg, however, distinguished between the latter ones and business corporations based on another powerful narrative in American legal discourse—the one about individual rights and freedoms. In particular, she explained that the Court’s “solicitude” (that is, the extension of First Amendment protections of free exercise of religion) for religion-based organizations is traditional because “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.”¹¹¹ This concern about individual religious views, in Justice Ginsburg’s opinion, overrides the general artificial entity narrative about organizations. In the case of for-profit corporations, however, there is nothing, Justice Ginsburg believes, to counter that corporate identity narrative stemming from the *Dartmouth College* opinion: while “religious organizations exist to serve a community of believers,” “[f]or-profit corporations do not fit that bill,”¹¹² since they are communities “embracing persons of diverse beliefs.”¹¹³

Both Justice Alito and Justice Ginsburg in their *Hobby Lobby* opinions speak within the framework of the artificial entity narrative. This

110. *Id.* at 2794. Notably, Justices Breyer and Kagan did not join the dissent as to part III-C-1 of it, where Justice Ginsburg explains her views on corporate identity and personhood. This “split” between the dissenters in *Hobby Lobby* does not, however, seem to be indicative of Breyer and Kagan’s divergent view on the problem of corporate personhood—as both Justices have explained in their short separate dissenting opinion, the reason why they did not join Justice Ginsburg as to part III-C-1 is that they “need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993.” *Id.* at 2806.

111. *Id.* at 2794 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment)).

112. *Id.* at 2796.

113. *Id.*

striking unity of their views on corporate identity, however, does not mean a unity of results from their analysis of the legal conception of personhood. Where Justice Alito found uniformity of business owners' religious beliefs and, to protect the exercise of those beliefs, used the "legal fiction" attributing the right of religious exercise to corporations as proxies of individual autonomy, Justice Ginsburg found a diversity of religious beliefs of workers and saw the "legal fiction" of attributing religious freedom to corporations as a dangerous tool not protecting but restricting the autonomy of employees and their dependents by inhibiting their access to contraception coverage.

Like the other cases analyzed in this subsection, *Hobby Lobby* also demonstrates that Justices consult with the corporate identity narratives they share when making legal decisions, balancing them against other factors determining their ultimate views on legal personhood (specific rights) of corporations. What almost all of this jurisprudence also shows is that artificial entity and aggregation narratives are "weak" in terms of protecting corporate rights, since both of them presuppose that corporate rights can only be legal fictions to protect the "real" rights of individual members, and legal fictions are open to much legal compromise in favor of individual rights and their desired social effects. By contrast, the real entity theory of corporate identity cannot be balanced against other legal factors so easily—instead, it can itself become one of the gravitational points of legal reasoning, as the case of *Citizens United* proves, therefore demanding compelling reasons to override it. This last narrative along with its theory of real corporate personhood, however, has been the subject of wide condemnation in the literature—in my view, quite undeservedly. In the next and final part of this Article I defend and develop the real entity narrative and explore the conception of group dignity arising from it.

IV. FROM CORPORATE IDENTITY TO CORPORATE DIGNITY

A. *The Real Entity Narrative and Its Implications for Group Dignity*

As I have already mentioned, every narrative about corporate identity (and, generally speaking, every other narrative in law) can be disentangled from the perspective of five categories of legal arguments and their underpinnings in moral philosophy and legal theory. As I have also mentioned, the real entity theory of corporations primarily draws upon deontological ethics and its autonomy teachings, and it crystallizes in law in the form of legal arguments about rights, around which the other four

categories of arguments are then balanced. In particular, the real entity narrative teaches that when individuals come together the will of their collective can be distinct from the will of any of its separate members or a “sum” of their wills. Simply put, when we come together, our choices, deliberations and judgments are not merely summed up—they are being argued, counterargued, and coordinated against each other, transforming into choices and judgments that individually none of us has. The most obvious example is probably that of military service: none of us in sober mind wants to kill and/or be killed, but yet in a state of war this is precisely what the society and the state can demand from us.

Another example familiar to everyone who has studied American constitutional law is that of “compelling governmental interest.” The federal government can correctly be described as “a vast bureaucratic edifice, comprising hundreds of agencies and thousands of offices”¹¹⁴—and millions of employees.¹¹⁵ This huge collective of individuals, according to the vast jurisprudence of the Supreme Court, as a whole possesses a “compelling interest,” which is often at odds with the rights and liberties claims of individual citizens and the interests of individual governmental officials, and the advancement of which is the seminal purpose of governance. It is quite implausible, I think, to suggest that this interest is only a legal fiction invented by lawyers. Taxation and public health, for example, are quite real goals that the government pursues in its daily activities, and it is also quite implausible to suppose that the judiciary of this country has for centuries been limiting rights and liberties of legal subjects for the sake of a legal fiction.

The acknowledgment of a compelling governmental interest, however, immediately poses the question of whom this interest belongs to. Clearly not always individual officials. For instance, in the Supreme Court case of *United States v. Windsor*¹¹⁶ the individual high-ranking officials of the federal government refused to defend the statute enacted by the Congress.¹¹⁷ This testifies to the fact that individual members of a group can (and do) have their own interests distinct from those of the collective they belong to, and *vice versa*. Answering the question of “who has

114. LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 213 (2014).

115. Historical Federal Workforce Tables, in FEDERAL EMPLOYMENT REPORTS, available at <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/>.

116. 133 S. Ct. 2675 (2013).

117. *Id.* at 2683.

compelling governmental interest” is in this sense similar to answering the Justice Stevens’s puzzle of “‘who’ is even speaking” when corporate speech occurs.¹¹⁸

The only plausible response to these two questions lies with identifying a collective—the government or the corporation—with a bearer of an interest or a speaker, where a member of that collective (articulating and defending the interest or speaking on behalf of a corporation) acts as its proxy (and not the other way around, as strongly suggested by Justice Alito in his opinion in *Hobby Lobby*). This response also implies a real group personhood of a narrative kind—that is, the existence of a narrative principle according to which a collective organizes itself, formulates its ideas and interests, and continues to exist (the Federal Constitution, the Bible, and a corporate charter are examples). Needless to say, since under the real entity theory groups are different from individuals, the narrative principles of those groups are different from individual ones, both procedurally and substantively.

The procedural differences between the narrative personhood of individuals and groups are as follows. First, unlike individuals, whose narrative of personality is often “hidden” in the debris of one’s consciousness, a group’s personality narrative is out there in a formal source open for reference of the group’s members. Second, the narrative principles of group personhood are less stable than those of individuals. A given group can change its narratives, sometimes quite dramatically (think of a collective of the same employees living under different corporate charters or a government functioning after its constitution has been amended). A group narrative is also open to interpretation and reinterpretation by members of that group and outsiders—that is, several interpretations can exist within the same narrative principle of a group (think of originalism and the living constitution theories of the Constitution).

In addition to these procedural differences between individual and group narrative personhood, there are also substantive ones, which flow not so much from deontological ethics and its teaching about group autonomy but from virtue ethics and its theory of basic goods. The teaching of the new natural law school of thought that all individuals share a certain set of basic goods, excelling in which leads to their flourishing and human fulfillment, can be extended to collectives of individuals,

118. *Citizens United*, 558 U.S. at 467.

resulting in the notion of group basic goods.¹¹⁹ The detailed description of those goods could well take a whole separate article, so here I will just sketch their basics.

A group basic good is a quality pertinent to a collective as a whole and excelling in which is essential to its existence and flourishing. The first category is institutional group basic goods, such as administration structures, norms, and sanctions; the second category is ideological goods, such as ideological stability—the continuity of a group’s interests uniting its members around a certain ideological message; the third category is membership goods, that is, the attraction of new members to the group, replacing the ones who have left and keeping the number of members administrable. Generally speaking, a fruitful methodology of describing group basic goods could be to draw from socio-anthropological literature on seminal characteristics of certain social groups and then reformulate those characteristics in the language of group basic goods.

These procedural and substantive differences should not lead to the denial of a group narrative personhood, for the mere fact that it is different from that of individual humans does not mean that it cannot exist. Furthermore, the two-component group narrative personhood (independent collective will aimed at the realization of group basic goods) is a useful analytical tool in answering some of the jurisprudential puzzles. First, it does answer the “‘who’ is even speaking” question of Justice Stevens in *Citizens United*. Second, and probably more importantly, it gives an idea of which rights spelled out in the Constitution and the Supreme Court’s jurisprudence are appropriate for collective legal subjects and which are not by referring a legal decision-maker to group basic goods. The tradition-and-history-based test, suggested by Justices Powell and Ginsburg in *Bellotti* and *Hobby Lobby* respectively, is not always helpful for this purpose. As I have already mentioned, legal traditions and history do change, and the Justices of the Supreme Court probably know this better than anyone else. The group basic goods test (as a part of the real identity narrative), in contrast, gives us a conceptual ground to stand on when deciding which rights are pertinent to collective legal entities and

119. The group basic goods should not be confused with the notion of “common good” (as developed by new natural law theorists): while the former is about the goods of a collective as a whole, the latter is “the factor or set of factors . . . which, as considerations is someone’s practical reasoning, would make sense of or give reasons for that individual’s collaboration with others, and would likewise, from their point of view, give reason for their collaboration with each other and with that individual.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 154 (2d ed. 2011) (emphasis added.) It is easy to see that the definition of common good given by the famed new natural law scholar is about individual interests as “considerations of practical reasoning.” *Id.*

which are not. The freedoms of speech and of exercise of religion, for example, pass this test as group rights since they square nicely with ideological group basic goods. The right to corporate privacy, understood, as some commentators suggest, as a right to maintain a certain identity,¹²⁰ also fits that category of group basic goods.¹²¹ On the other hand, a right to life and a right to procreation are clearly out of the scope of group basic goods and therefore should not be granted to collective legal entities as a matter of the real entity narrative (but may be granted once it is overridden by other legal factors in a given case).

The two-component group personhood as a part of a real entity narrative also provides a foundation to the conception of group dignity—that is, respect for corporate will and a collective’s development of certain basic group goods—which comports with the general message that “not all dignity is *human* dignity.”¹²² Group dignity, once conceptualized and accepted (more on this in the next section), can serve a basis for recognition of group entitlements and serve as a powerful counter-balance to their abridgment, thereby resulting in a more robust jurisprudence of collective rights.

B. Defense of the Real Entity Narrative

The real entity narrative of corporate identity with its underlying twofold conception of corporate/group narrative personhood and the idea of group dignity may seem utterly implausible to many readers. By far, most legal and political thinkers have been quite skeptical about it, so it is appropriate to address some of the most frequent and powerful critiques in

120. TRIBE & MATZ, *supra* note 114, at 223.

121. Notably, when the question concerning the privacy of corporations came before the Supreme Court, it has unanimously (in the opinion by Chief Justice Roberts) acknowledged that “[the] case [did] not call upon [the Court] to pass on the scope of a corporation’s ‘privacy’ interests as a matter of constitutional or common law.” *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1184 (2011). Although the Chief Justice might not be sympathetic to the conception of privacy as a collective entitlement (notice the term “privacy” used in scare quotes), I still believe it is important that the Court in that case did not shut the door on the development of corporate privacy jurisprudence and did not, at the moral level, treat privacy as “uniquely human good,” as some commentators have (mistakenly) suggested. *See, e.g.*, Scott A. Hartman, *Privacy, Personhood, and the Courts: FOIA Exemption 7(C) in Context*, 120 YALE L.J. 379, 393 (2010).

122. MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 1 (2012) (emphasis in original). *See also* Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* 409, 410 (2008) (acknowledging that “there are different types of dignity, in each case the word refers to a property or properties different ones in different circumstances—that cause one to *excel*, and thus elicit or merit respect from others.”).

order to prove the conceptual viability of the two components of the narrative.

1. Defending Real Corporate and Group Personhood

Many critics have focused on the real corporate personhood in its philosophical sense as an integral part of real entity narrative, so let me first respond to some of the main objections to it. Once it is plausible that groups have a personhood of their own, the whole real entity narrative might start sounding much more persuasive.

The first objection to the philosophical conception of real corporate personhood that has often been articulated in critical literature boils down to the fact that corporations are artificial entities created by law and exist only within a given legal framework, and therefore cannot be “persons” in any “real” sense of that word.¹²³ This objection is inaccurate for several reasons.

First of all, the artificial status of an entity does not necessarily mean that the entity does not and cannot possess personhood. A clone of a sentient being (be it a sheep or a species of *Homo sapiens*) is artificial in the sense of being “born” as a result of processes that do not naturally occur in Mother Nature; this artificiality, however, does not mean that clones have no personhood.¹²⁴

Second, if by “artificial” we mean “something created by law,” the objection still does not hold. The President of the United States, for example, is a purely artificial entity in this legalistic sense. Had it not been for the Federal Constitution, there would be no such thing as the President; the same can be said, of course, about Congress or the Supreme Court.¹²⁵

123. I underscore again that this objection is philosophical rather than legal. It is totally appropriate to consider an entity a “person” for the purposes of the Fourteenth Amendment and the Religious Freedom Restoration Act, for instance, as a matter of legal fiction while completely denying the real personhood of that entity (this approach can apply to individuals in a permanent vegetative state, animals, and plants, to name just a few examples).

124. I would not venture to engage here in a theological dispute about whether clones of human beings have the Cartesian “soul”—primarily because the existence of a soul is unfalsifiable and cannot therefore be a proper subject of an academic discussion.

125. With respect to the Supreme Court, some scholars have expressed the view that in order “[t]o understand what the [Supreme] Court has done in the past and is likely to do in the future” it should be treated as “a ‘they,’ not an ‘it.’” See, e.g., RICHARD FALLON, *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* xii (2d ed. 2013). I believe this line of analysis of the Supreme Court’s jurisprudence is compatible with what I have said about the collective will: to understand it, we should take into account individual viewpoints and see how they interact with each other, being argued and counter-argued, and how the compromise (the “Opinion of the Court”) is then reached. That being said, it is quite wrong, I believe, to treat the resulting collective

However, the President of the United States does have personality—and usually quite an outstanding one. To this, one could respond that it is not the President *qua* President who has personhood. Rather, it is the natural person holding the office of the President who has. The obvious implication from this line of reasoning, however, is that behind a corporation there also stands a very real group of people, and the account of “artificiality-in-law” does not explain why a natural person standing behind a legal institution can have a real personhood, whereas a real group cannot—after all, both individual and group as conceptualized in law are capable only of actions specified in law (explicitly or implicitly).

Another objection to group personhood and the real entity narrative holds that groups (including corporations) do not and cannot have personhood because they are not human beings. This “flesh-and-blood” account of personality, familiar from the dissent in *Citizens United*, bases itself upon the biological or psychological accounts of personal identity—and fails for precisely that reason.

First of all, as I already mentioned, the biological account of personal identity is simply indifferent to personhood—it does not deny it, but states that it is not necessary to identify a living organism with itself at different moments of time. Therefore, arguing that only people can be “persons” just because they are living creatures is, to say the least, strange from philosophical perspective.

Second, even if we somehow manage to use the biological criterion of personal identity to establish that only “flesh-and-blood” organisms have a claim on personhood, the questions associated with this account will still persist, and the most prominent one is as follows. If all we rely on to determine identity is biological continuity of a living organism, which in turn depends upon the organism’s basic physiological functioning (breathing, blood circulation, etc.), then where should we draw the line between “normal functioning” (where the biological continuity is intact) and “abnormal functioning” (where the biological continuity is lost)? This question is pertinent not only with regard to illnesses, accidents, and resulting disabilities that might lead to the loss of one personhood and

will of the Court (or, for that purpose, any collective body) as a mere proxy of an individual will of a given Justice—that view would inevitably undermine the Court’s legitimacy and the very purpose of its functioning. In other words, the Court (or any other collective) is “a ‘they,’ not an ‘it’” when its will is being formulated, but it becomes “an ‘it,’ not a ‘they’” when that will has been formulated and is being enforced. When Justice Alito writes the opinion of the Court in the *Hobby Lobby* case, it is Justice Alito who acts as the proxy of the Court’s (collective) will, and not the other way around (it is the concurring and dissenting opinions that reflect the individual interests, concerns, and wills of certain Justices).

creation of a different one, but also with regard to physiological enhancements (from using hi-tech prostheses to walk or participate in the Paralympics, to subjecting an individual to high doses of hormones to treat infertility, to putting a patient on a ventilator to support her breathing function). The biological criterion of identity does not tell us where to draw these lines between different levels of basic physiological functioning (and it is doubtful that clear lines can be drawn at all), and therefore fails to inform us when exactly an individual is (or is not) identical to her past and future “self.”

As far as the psychological criterion is concerned, it is both over- and underinclusive for legal purposes. First, the unique psychological connection, which is seminal to determination of personhood there, can (and very often does) include individuals, which we commonly refer to as “others.” For example, I have a unique and strong psychological connection with some of my family members, but that does not mean that I share my personhood with my dear aunt (to be honest, that would take a heroic intellectual effort even to imagine). At the same time, the criterion is underinclusive for practical purposes: imagine me committing a murder and then having a brain trauma that causes amnesia so that I completely forgot what I did before the accident. Under the psychological criterion, a person before amnesia and after amnesia are not personally identical (the personhoods are different) because the unique strong connection between them is disrupted. But does that mean that after trauma I (I?) still should not be liable for what I (I?) did before? To many people, including legal scholars and judges, the discontinuity of psychological identity is not sufficient reason to exonerate an offender.¹²⁶ Arguing that we could simply assume here for the purpose of regulation that the two persons are (fictitiously) the same still begs the question of what makes this situation so special that the psychological criterion must be abandoned in this instance. And the answer to this last question lies with the narrative theory of externally determined personal identity, which is widely used in law and which happily accords with the account of group personal identity, as I have explained previously. Groups do not have to have “consciences, beliefs, feelings, thoughts and desires” to possess personhood—all they need to have are principles unifying their experiences into coherent wholes available for interpretation by their members.

126. See generally Walter Sinnott-Armstrong et al., *Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility*, 10 S. CAL. INTERDISC. L.J. 277 (2001).

This last conclusion seems to support yet another objection to real group personhood—this one of a reductionist kind—which holds that the interests and actions of any group always boil down to those of its members. The objections seems to buttress the argument of Justice Alito in *Hobby Lobby* (corporations are incapable of doing anything unless their members do something) and finds its support from individualism in moral philosophy, an example of which is found in Leonard Wayne Sumner’s argument that “collectivities have no interests to be promoted beyond those of individuals.”¹²⁷

As far as actions are concerned, the correct factual claim of Justice Alito about the performer of an action (always an individual or individuals and never a corporation) can be explained in two ways: (1) a corporation is only a proxy for individuals and their choices, deliberations, and judgments, so an individual is the only real actor with personhood; or (2) an individual is a proxy for a corporation and its collective will, and the group is as real an actor and has as real a personhood as an individual is and does. The first interpretation supports the artificial entity and aggregation narratives, while the second one supports the real entity theory of corporate identity. The first interpretation seems to prevail in the cases where, for example, a dictator uses the government as a means to his ends; the second one prevails where a judge enforces a law she personally deems utterly unfair for the sake of the collective good of “social justice.” Both interpretations are possible, and the only reasons why law should categorically rule out the second one seems to be those of traditional distaste toward collectivism and fear of group (corporate) power. But those are reasons based in the realm of consequentialism, and they are different in kind from the initial deontological objection. This change of argument from deontology to utility testifies to the implausibility of the reductionist objection which cannot stand on its own but has to ultimately rely upon the consequentialist ally. Therefore, it is incorrect to assert the absence of corporate personhood in its philosophical sense based on a factual claim that is open to different interpretations.

With respect to collective and individual interests and beliefs, I have already touched upon this point when discussing corporate will. A couple of additional points: First, every viable group or society has to reproduce itself not only in “tangible” form (that is, economically, politically, and legally) but also in “intangible” terms of shared beliefs and ideologies; this ideological-goods-based interest is uniquely pertinent to collectives and

127. L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 180 (1999).

not to individuals (the same holds for the institutional-goods-based interest in administration). Second, these interests are not necessarily contradictory to individual ones—for instance, the interest in public administration and the interest in procreation are not opposite, they are just different. Third, group and individual interests are mutually dependent and derivative: the collective ones arise from coordination of individual wills, while the individual ones are formulated within the context of a social environment with its collective values in which an individual is brought up.¹²⁸

Finally, there is one other implicit objection to the real entity narrative and its account of real group personhood: Some people are afraid that those are some “metaphysical” substances as opposed to familiar and traditional understandings of identity and personhood attributable to human beings. In response to that, first of all, I am not sure what is wrong with a certain substance being of metaphysical nature (that is, being “beyond physics” and attributable to ideal—including moral—realms), especially when it comes to such an inherently ideal substance as personality. Second, if the word “metaphysical” is used here not in its classical meaning but as synonymous with “fanciful” or “illusory,” then the account of narrative group personhood and the real entity theory of corporate identity are not unfalsifiable like teachings about souls of human beings—to the contrary, they conceptualize processes that happen in the real world, ready for measurement and analysis by an impartial observer.

2. *Defending Group Dignity*

There are two main reasons why many people find the conception of group dignity (respect for the autonomous collective will realizing and excelling in group basic goods) implausible. The first one is a general skepticism about the very notion of dignity. According to this view, dignity is only “the shibboleth of all perplexed and empty-headed moralists”¹²⁹ that bears no actual meaning of its own and is at best just a paraphrase of the principle of respect for autonomy. The second skepticism about group dignity is narrower and goes like this: even if we assume that such thing as dignity does exist, it has traditionally been

128. See, e.g., Jeremy Waldron, *The Dignity of Groups*, ACTA JURIDICA 66, 82 (2008) (“To see [group values] as simply instrumental to [individual values], may neglect all the ways in which individual values may be partially constituted by group values.”).

129. ARTHUR SCHOPENHAUER, *THE BASIS OF MORALITY* (A.B. Bullock trans., 2005), quoted in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. OF INT’L L. 655, 656 (2008).

closely bound to individuals, so we can speak of human dignity, but not the dignity of collectives.

As far as the first (more general) skepticism about dignity goes, it should be noted that the authors who have expressed it in the past were largely concerned with the conception of human (individual) dignity. For example, Schopenhauer penned the famous line cited in the previous paragraph with respect to the “expression of ‘human dignity.’”¹³⁰ Similarly, Ruth Macklin criticized the concept of individual dignity as applied in medical ethics in her 2003 editorial,¹³¹ and Steven Pinker was referring to personal dignity when he asked, “[s]o, is dignity a useless concept?” And he then described it as a “phenomenon of human perception.”¹³² It is this concentration on human dignity that has led many prominent thinkers (certainly Macklin and Pinker) into reductionism, boiling down the conception of dignity to that of autonomy. Therefore, strictly speaking, none of these criticisms directly applies to the conception of group dignity.

The general skepticism about dignity, however, can be extended toward group dignity. It could be stated, for example, that what “group dignity” is really all about is the notion of respect for independent corporate will; this would bring us to the familiar grounds of deontological ethics and its emphasis on autonomy, and the whole “dignity” terminology would appear to be redundant. The obvious response to this line of “criticism by analogy” is that group dignity is not reducible to the notion of respect for collective will/autonomy, since it also involves group basic goods that are different from autonomy and not wholly derivative from it. It is true that the institutions, the membership, and the ideology of a particular group may be considered the products of its collective autonomy: after all, it is the collective will that formulates and adopts the corporate charters, provides for the institutions and the sanctions for not following them, and defines who can be the members of a given group.

But at the same time these relations between group autonomy and group basic goods are not a one-way street. One could equally well argue that it is the corporate will that originates with group members centered around a certain ideological message within the framework of existing group institutions and norms (so that it is group autonomy that is

130. *Id.* at 661.

131. Ruth Macklin, *Dignity Is a Useless Concept: It Means No More Than Respect for Persons or Their Autonomy*, 327 *BRITISH MED. J.* No. 7429 (Dec. 20–27, 2003), 1419.

132. Steven Pinker, *The Stupidity of Dignity*, *THE NEW REPUBLIC* (May 28, 2008), available at <http://www.newrepublic.com/article/the-stupidity-dignity>.

derivative from the group basic goods). This mutual influence of the two components of the real entity narrative demonstrates their incommensurability and the importance of paying close attention to both of them; missing one element by reducing it to another one will result in a narrative that lacks explanatory force.

Some people also say along the lines of the first objection that the concept of group dignity (even if we assume for the sake of argument that it does exist) is just too vague and indefinite a concept to be of any use. The proponents of this view teach that the word “dignity” can be (and has been) used to signify almost anything—from a certain rank of an individual or institution in society,¹³³ to an “inner transcendental kernel of inalienable value,”¹³⁴ to not “being reduced for a moment to a passive object,”¹³⁵ to many other things. Steven Pinker, for example, argues that “dignity is relative” and its “ascriptions . . . vary radically with the time, place, and beholder.”¹³⁶

As with any other concept, “dignity” can embrace a number of meanings, some of which may fall quite apart from each other; the same can be said about every other term used in moral philosophy and law. Steven Pinker, for example, suggests employing the concept of autonomy instead of dignity—but the former is, of course, no less “relative” than the latter, open to various interpretations and misinterpretations. So if one were to rule out the concept of dignity (individual or group) based on its relativity, one would need to exclude from legal and philosophical vocabulary such terms as “order,” “right,” “autonomy,” “freedom,” and dozens of other general concepts.

The more fruitful approach lies not with categorically excluding some terms but with ascribing specific meanings to them. In this respect, once group dignity is understood as the respect for collective will realizing certain basic group goods, the vagueness of the concept largely dissipates. (Of course, there remains some uncertainty due to the high level of generality of the concept, but this uncertainty is tolerable in light of the same property of other basic moral and legal terms).

133. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715(1999) (“The States thus retain . . . the dignity, though not the full authority, of sovereignty.”); *id.* at 802 (discussing the “royal dignity”).

134. ROSEN, *supra* note 122, at 70.

135. Patrick Lee & Robert P. George, *The Nature and Basis of Human Dignity*, in HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS 409, 410 (2008).

136. Pinker, *supra* note 132.

The second—and more nuanced—skepticism about dignity would affirm human (individual) dignity but still reject the group (collective) one. This view is expressed, for example, by Michael Ignatieff, who writes that “[t]here seems no way around the individuality of dignity, however socially defined it may be.”¹³⁷ Jeremy Waldron also describes this position (without necessarily committing himself to it) when he writes that “the sense of dignity we apply to groups may not be a foundational sense,”¹³⁸ because once we accept that the sole purpose of a group’s existence is to “contribut[e] to the well-being and rights of its individual members . . . then the dignity of the group is bound to be derivative, not inherent.”¹³⁹ Finally, an intriguing view on the problem of individual and group dignity is presented by Joseph Raz, who, on the one hand, describes the position holding that “collective goods have instrumental value only”¹⁴⁰ as that of “individualistic morality”¹⁴¹ and criticizes it. On the other hand, within the framework of my analysis, Raz’s position can itself be classified as “individualistic,” since it assumes individuals are the ultimate beneficiaries of the collective goods¹⁴² and draws the justification for collective rights from the interests of individuals.¹⁴³

To my mind, this concept of exclusively-human dignity depends upon two premises, each of which is not convincing. The first premise is that any collective is only a sum of its individual members and can therefore be adequately explained in terms of those members (their interests and preferences), and we therefore do not need the concept of “group dignity,” which is necessarily parasitic upon the “real” human dignity. In light of what I have already said, this line of argument seems quite extraordinary: collectives are systems and, just like any other system, they cannot be correctly explained in terms of their parts only; any adequate understanding of how a system works should embrace the principles of interaction between its elements (e.g., mutual coordination and

137. Michael Ignatieff, *Dignity and Agency*, in *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 161, 166 (Michael Ignatieff et al. ed., 2001). Notably, Ignatieff also forcefully argues in favor of the traditional view that personal identity can be that of individuals only and that group rights boil down to individual subjects exercising them, which probably reflects his implicit denial of the real entity narrative. *Id.* at 166, 168.

138. Waldron, *supra* note 128, at 75.

139. *Id.*

140. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 198 (1986).

141. *Id.*

142. *Id.* at 198–99.

143. *Id.* at 208.

compromise) and the resulting product (e.g., collective will), which are different in kind from their isolated counterparts.

The second premise upon which the “service-account of group dignity”¹⁴⁴ is based says that collectives exist only to the extent they adequately serve their individual members. As I have already mentioned, this is a virtue-ethics-based view that can be found within the artificial entity and aggregation narratives of corporate law, but this is clearly not the only plausible view of collectives and their basic goods and goals. Another view, which seems the more realistic to me, teaches instead that collectives do not necessarily exist to serve the interests of their individual members (think about compelling governmental interests in taxation, military service, and public health, which often go at odds with individual claims of the members of a given society). At a certain point of a collective’s life cycle its ideology and institutions start to prevail over the individual interests of its members (hence the fears about the totalitarian rule of the collective over an individual—but this, again, is a consequentialist, not a virtue-based objection).

All this, of course, does not mean that the real entity theory with its conception of group dignity is one hundred percent unproblematic—quite to the contrary, it faces some serious methodological and substantive challenges. These challenges, however, are not fatal flaws in its construction: instead, they are rather stimuli for its further development. In the last section I briefly turn to these issues.

C. The Challenges to the Real Entity Narrative

The real entity narrative inherits one of its methodological problems from its virtue-ethics-based component of group basic goods. To remind the reader, basic goods are defined in virtue ethics in an axiomatic way—that is, they are presented as given, as “self-evident first principles of practical reasoning [which] are not inferred from prior theoretical principles.”¹⁴⁵ In this respect, virtue ethics requires from its proponent a certain quantum of moral faith in those basic goods as “self-evident . . . and indemonstrable.”¹⁴⁶ Now, many people might find this axiomatic,

144. Waldron, *supra* note 128, at 76 (emphasis omitted).

145. ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 13 n.15 (1993). See also FINNIS, *supra* note 119, at 64 *et seq.* I draw upon the new natural law theory here, which, albeit not being representative of the whole school of virtue ethics, nevertheless shares with its other representatives (e.g., Catholic social thought) the idea of basic human goods being revealed (or given to us not as a result of logical reasoning from some more basic premises).

146. GEORGE, *supra* note 145, at 12.

faith-based approach in basic goods, to put it mildly, not exactly convincing—and may understandably be quite suspicious about the account of group basic goods.

This distrust of the moral axioms of group and corporate identity, however, can be largely dispelled by two considerations. On the one hand, generally speaking, *all* moral theories ultimately rely on axioms (unfalsifiable moral intuitions) of some sorts; the difference between those theories lies rather in the kinds of axioms they use, not in the fact that one theory takes some contentions as undisputable while the others don't. Deontological ethics, for instance, asserts (rather than seeks to prove) that autonomy belongs to the list of basic goods—a point fiercely rejected by virtue ethics; consequentialism, in turn, also relies on some moral assumptions it draws from deontological and virtue ethics to make a second-order judgment of whether given consequences are good or bad and then, based on that, makes a first-order judgment about moral permissibility of an action producing those consequences.¹⁴⁷ Finally, moral skepticism also requires a good deal of moral faith: making self-contradictory assertions that there are either no moral truths in this world or that we are unable to find them (I believe that there are no moral truths, but I nevertheless think that *this* second-level moral judgment about moral truths is correct) strongly resembles the famous *credo quia absurdum*. In this regard, the virtue ethics of group basic goods is hardly an outlier in the realms of moral philosophy, and if a reader is skeptical about it, her skepticism should consistently extend to other moral theories as well.

Furthermore, the account of group basic goods is not as axiomatic as that of individual basic goods. As I suggested earlier, one way to formulate basic goods is to take knowledge from social sciences (such as sociology and anthropology) and reformulate its main theses in terms of group basic goods (e.g., if sociology teaches us that every viable social group must have its structure, this can be translated into the language of institutional group basic goods). If this methodology proves itself sound (which I believe it will), then the group basic goods cease to be “self-evident and indemonstrable”—quite to the contrary, they will become falsifiable and measurable.

The second challenge that emerges with the real entity narrative is not about the theory itself but about the social and legal consequences it might produce. The most obvious concern it can raise is about the relation between individual human dignity and group dignity. As I have already

147. See, e.g., SUMNER, *supra* note 127, at 200 *et seq.*

stated, the real entity narrative is a “strong” one in legal discourse in that it possesses its own gravitational force that is not easily overridden by traditional concerns of individual rights. If this narrative and the concept of group dignity become law, they will inevitably collide with individual rights and dignity. A pertinent example here would be the problem of dignity of religious institutions in relation to individual human dignity,¹⁴⁸ which loomed in the case of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,¹⁴⁹ where the Supreme Court unanimously held that the interests of religious groups to determine their membership (membership group basic goods) prevail over the interests in enforcement of anti-discrimination laws. If the logic of this example extends to non-religious collectives (such as corporations), then there might be cases (as Justice Ginsburg warned in her dissent in *Hobby Lobby*) where group dignity and rights can prevail over their individual counterparts. While some people might be fearful of this consequence of real entity theory, I believe it’s only fair to introduce it to legal discourse so that legal decision-makers have a more complete picture of competing legal ideals when passing their judgments.

The third challenge to the acceptance of the real entity narrative and, more specifically, its conception of corporate dignity might seem too extraordinary to be persuasive to many people. Once the real entity narrative establishes itself within law, it would require some radical changes—a shift from attempts to fit individual entitlements reflected in the Bill of Rights to corporations, to rethinking the rights jurisprudence as properly reflecting the entitlements uniquely pertinent to collectives (such as corporations and religious congregations). One obvious response to this last challenge is “time will tell,” but I believe that the change is probably not going to be so revolutionary. For example, a collective right of peoples and nations to self-determination is already in American law by virtue of the Charter of the United Nations that has been ratified by the United States and has become, pursuant to Article VI of the Federal Constitution, “the supreme Law of the Land.” Also, American constitutional law has developed in the direction of broader recognition of rights both quantitatively (more individual rights) and qualitatively (more rights to

148. See, e.g., Frederick Mark Gedicks, *Dignity, History, and Religious-Group Rights*, 21 J. CONTEMP. LEGAL ISSUES 273 (2013).

149. 132 S. Ct. 694 (2012).

more subjects), and the real entity narrative of group identity clearly falls within that trend.

CONCLUSION

In the introduction to this Article I wrote that it was motivated by five questions about corporations and groups, their identity and personhood, their rights and dignity. In conclusion, here are the answers:

1. What is the basis of using legal fictions with respect to corporate personhood? It lies with the corporate identity narrative, as well as other factors a lawyer can consider when addressing the problem before her. According to some narratives, corporate personhood is only a fiction used to protect individual rights; those narratives are weak in that they can be overridden by other considerations. There is also the other narrative, which states that corporate personhood is not fictitious at all.
2. Do corporations (and collectives in general) have an identity and personhood of their own recognized by law? Corporations clearly have an externally determined identity within legal realms, and three narratives of this identity are available: artificial entity, aggregation, and real entity theory. Only the last one, however, presupposes the existence of real corporate personhood of a narrative kind determined also internally; the other two either deny corporate personhood in the philosophical sense altogether, or suggest that “corporate personhood” is in fact individual personhood determined by membership in a certain collective.
3. To what extent does the philosophical understanding of personhood and identity inform the debate about corporate (and group) rights and legal decision-making in that area, and is there an implicit recognition of corporate personhood when legislators or courts assert corporate rights? A philosophical conception of personhood (psychological or narrative) has no direct bearing upon the legal understanding of personhood—that is, whether a given entity is a “person” and has certain rights, privileges, and duties. Personhood understood legally is non-exclusively determined by a narrative of corporate identity; under the weak narratives (artificial entity and aggregation theories), corporations will have lesser rights than under the strong one (real entity theory). As for the “reverse engineering” of deducing personhood in its philosophical sense from its legal counterpart, it is a treacherous exercise: very often,

considering an entity as a “person” under the law is dictated not by recognition of that entity’s personhood in any real philosophical sense but by a legal fiction employed for the sake of social utility or formal administrability.

4. Are there any rights at all that are properly attributable to a collective as a whole and not as an assemblage of individuals? Under the real entity narrative, yes (the other two identity theories are concerned with individual members of groups).

5. If those rights exist, what is the source of those rights? If the real entity narrative controls, the source lies with group dignity—the respect for a collective will (separate from members’ individual wills) realizing group basic goods. Accordingly, group (or collective) rights are the entitlements necessary and sufficient to excel in those goods. Finally, some of these entitlements are shared between individuals and collectives, and some belong to only one side of this jurisprudential equation.