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ACorporation, Inc.: Corporate Form as Art Project and Advocacy

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I. INTRODUCTION

Development of the corporation was a key turning point in the institutional history of business.[1] The concepts of life beyond the existence of its founders, limited liability, and the ability to accumulate massive amounts of capital through stock ownership changed the nature of commercial practice in the United States and around the world.[2] This has not been without controversy, particularly as large corporations began to capture much of modern

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1. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 134–39 (Rev. Touchstone ed. 2005); JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970, at 13–15 (2004).

2. FRIEDMAN, *supra* note 1, at 134–39; *see generally* Alfred D. Chandler, *Organizational Capabilities and the Economic History of the Industrial Enterprise*, 6 J. ECON. PERSPS. 79, 81–83 (1992) (describing the expansion of markets and industries as firms expanded during the nineteenth century); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 634–49 (1978) (examining the interplay of national and state regulation of commerce, which enabled corporations to extend their reach during the nineteenth century). In its current state, the corporate form represents a remarkably flexible legal arrangement, allowing for a range of purposes and specific organizational needs. These include, for example, traditional C-corps, S-corps, non-profit corporations, and benefit corporations. This article primarily examines the role of advocacy in a traditional C-corp setting. We recognize that development of the corporation depended crucially on the common law business trust, which incorporated many elements of the corporation before development of the corporation as a legal entity. *See* John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2146 (2016) ("[F]rom the late Middle Ages to at least the middle of the twentieth century, the basic powers of the corporate form were also available through an underappreciated but enormously important legal device known as the common law trust."); *id.* at 2155–56 (describing how a historical company could assign property to a trustee, who could then divide profits up among beneficiaries who were essentially stockholders); Robert H. Sitkoff, *Trust as "Unincorporation": A Research Agenda*, 2005 U. ILL. L. REV. 31, 32 (2005) ("[T]he characterization of the past 200 years . . . diminishes the historic role of the business trust . . . . [B]efore the corporate form had matured, the common-law business trust . . . was a strong competitor to corporation as a mode of business organization."). While corporation-like business trusts declined relative to incorporation, modern trust law still contains attributes of the corporate form. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 179–85 (1997) (discussing "[a]ttributes of the trust that invite commercial uses").

economic life.[3] Great economic power has not always meant great responsibility, and concepts of corporate citizenship and legal "personhood" remain subjects of debate.[4] Similarly, how corporations do, or ought to, navigate social responsibility is the subject of an extensive literature, both from legal scholars and business ethicists.[5] This literature considers such diverse topics as the role of commons thinking in corporate governance,[6] reporting on social responsibility issues,[7] the interplay between economic theory and legal duties within the corporation, and so on.[8] Yet, perhaps unsurprisingly, one area has not been the subject of significant study: the potential for responsible business advocacy through the corporate form as art.

This article addresses the concept of a corporation not just as a potential creator of artistic expression, à la Disney or Netflix, but as itself an element of artistic expression.[9] It may seem curious to

3. *See, e.g.*, Patrick Barwise & Leo Watkins, *The Evolution of Digital Dominance: How and Why We Got to GAFA*, *in* DIGITAL DOMINANCE: THE POWER OF GOOGLE, AMAZON, FACEBOOK, AND APPLE 21 (Martin Moore & Damian Tambini eds., 2018).

4. *Cf.* SPIDER-MAN (Columbia Pictures 2002) ("With great power comes great responsibility."). For discussion of evolving theories of corporate personhood, *see infra* Part II.

5. For example, there is an entire journal devoted to business ethics, the aptly-named *Journal of Business Ethics*. *See generally Journal of Business Ethics*, SPRINGER, https://www.springer.com/journal/10551 [https://perma.cc/7Z2R-PRT8] (last visited Apr. 12, 2023) ("The *Journal of Business Ethics* publishes . . . original articles from a wide variety of methodological and disciplinary perspectives concerning ethical issues related to business . . . . From its inception the Journal has aimed to improve the human condition by providing a public forum for discussion and debate about ethical issues related to business.").

6. Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance, and Sustainability in the Business Enterprise*, 37 QUEEN'S L.J. 339, 340–43, 373 (2012) (noting that, e.g., "the firm is a resource which is subject to multiple, overlapping and sometimes conflicting claims on its use" in the manner of physical commons).

7. *See, e.g.*, Adam Sulkowski & Ruth Jebe, *Evolving ESG Reporting Governance, Regime Theory, and Proactive Law: Predictions and Strategies*, 59 AM. BUS. L.J. 449, 450–54 (2022).

8. *E.g.*, Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders*, 9 BUS. ETHICS Q. 273, 273 (1999) (reviewing case law and concluding that "the existence of a fiduciary duty owed to stockholders presents few practical problems for a management team that wishes to implement a stakeholder-oriented approach to business" and that the "responsibilities generated . . . are in no way 'over and above' the kind of treatment shareholders could reasonably expect to receive under a stakeholder regime.").

9. *See infra* Part IV.

consider the creation of a corporation as art, but art has never limited itself to traditional forms such as sculpture or painting.[10] Art is a broad field, one that, perhaps by definition, resists definition,[11] and the space between life and art can be extraordinarily fine, from Andy Warhol's Brillo boxes[12] to Kaz Oshiro's sculptures of everyday objects.[13] In the same manner, an artist working with law as a medium may satisfy each formality required by a Secretary of State and simultaneously incorporate, creating a new legal entity, and create art.[14]

This article examines artist Chad Erpelding's creation of ACorporation, Inc. as part of an extended art project exploring the implications of corporate personhood on social responsibility.[15] ACorporation is a legal corporation but one formed by the artist as part of, and to facilitate, advocacy-based interactions between the

10. *See, e.g.*, Brian L. Frye, *SEC No-Action Letter Request*, 54 CREIGHTON L. REV. 537, 537 (2021) (creating a law review article as "a work of conceptual art" in order to query the SEC on whether the article might constitute a security); Sarah Cascone, *Maurizio Cattelan Is Taping Bananas to a Wall at Art Basel Miami Beach and Selling Them for $120,000 Each*, ARTNET (Dec. 4, 2019), https://news.artnet.com/market/maurizio-cattelan-banana-art-basel-miami-beach-1722516 [https://perma.cc/9YSK-GU23] (discussing the positive reception to the piece *Comedian*, consisting of a supermarket banana duct-taped to the wall of an art gallery).

11. What is considered art or not is continually evolving to the point where there might not even be an object or a performance in the "art." In the mid-twentieth century, conceptual artists considered the idea to be the artpiece itself, rather than whatever visual manifestation (if any) that idea may take. More recently, artists have embraced "social practice," where the art product is a social interaction. In social practice the process takes precedence over the finished piece which is created through the interaction of a specific audience, the artist, and social systems. This interaction becomes an aesthetic in itself. *See* NICOLAS BOURRIAUD, RELATIONAL AESTHETICS 14–18 (Simon Pleasance et al. trans., 2002); Carolina A. Miranda, *How the Art of Social Practice is Changing the World, One Row House at a Time*, ARTNEWS (Apr. 7, 2014), https://www.artnews.com/art-news/news/art-of-social-practice-is-changing-the-world-one-row-house-at-a-time-2415/ [https://perma.cc/52TP-XGWJ] (noting multiple examples of social practice art). *See generally, e.g.*, GRAEME TURNER, FILM AS SOCIAL PRACTICE 109 (4th ed. 2006) (discussing the concept of social context and film).

12. *See Brillo Boxes*, PHILA. MUSEUM OF ART, https://philamuseum.org/collection/object/89204 [https://perma.cc/T3EJ-M5H7] (last visited Apr. 12, 2023).

13. *See* Rebecca McGrew, *Project Series 27: Kaz Oshiro*, BENTON MUSEUM OF ART: POMONA COLL., https://www.pomona.edu/museum/exhibitions/2005/project-series-27 [https://perma.cc/L8L2-EMXH] (last visited Apr. 12, 2023) (creating "exact replicas of appliances, cabinetry, or electronics.").

14. *See Register Your Business*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/business-guide/launch-your-business/register-your-business [https://perma.cc/NKX5-4KM8] (last visited Apr. 12, 2023) (explaining the steps to create a legal entity).

15. *See infra* Part IV.

corporation and policymakers across the country.[16] ACorporation thus fits within the established realm of social practice as artform, where a social interaction is the artwork itself, as compared to the creation of an art object.[17] This article explores how this union of art and corporate form can serve as a unique platform for legal advocacy.[18] It first centers the story of ACorporation, Inc. in the long history of corporate law, from early U.S. corporations that were required to have express public purposes, to modern Supreme Court decisions expanding the concept of corporate personhood to religious identity and self-expression.[19] Then, it examines the equally long history of using legal formalities for symbolic expressive and advocacy purposes.[20] Both legislatures, courts, and individuals have employed legal forms as art, whether by symbolic language in statutes, artful opinions, or contracts drafted for public consumption in the manner of an art project.[21]

With this framing in mind, it then examines the potential for advocacy embedded in Erpelding's ACorporation project.[22] ACorporation employs the corporate form as an art project advocating for social responsibility requirements for corporations that parallel those required of individuals.[23] Art has a long and substantial history of pairing expression with calls for social change, from works such as *Uncle Tom's Cabin*,[24] to Picasso's *Guernica*,[25] to contemporary efforts by artists such as the Yes Men.[26] Similarly, ACorporation has engaged in a series of social interactions in the form of written letters encouraging state officials to take elements of

16. Thus far, these interactions have taken the form of letters sent to policymakers, as described *infra* Part IV.
17. *See infra* text accompanying note 190.
18. *See infra* Part IV.
19. *E.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010).
20. *See infra* notes 168–86 and accompanying text.
21. *See infra* notes 180–86 and accompanying text.
22. *See infra* Part IV.
23. *See infra* notes 200–05 and accompanying text.
24. *See* HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (1852). While *Uncle Tom's Cabin* was a significant tool in the abolition movement, it also reinforced a number of stereotypes that have clouded its legacy. *See* Arthur Riss, *Racial Essentialism and Family Values in* Uncle Tom's Cabin, 46 AM. Q. 513, 515 (1994).
25. *See* Eugene B. Cantelupe, *Picasso's* Guernica, 31 ART J. 18, 18 (2014).
26. Ian Reilly, *From Critique to Mobilization: The Yes Men and the Utopian Politics of Satirical Fake News*, 7 INT'L J. COMM. 1243, 1246 (2013). Such works may take the form of "quietly threaten[ing] social norms with simple actions." JENNY ODELL, HOW TO DO NOTHING: RESISTING THE ATTENTION ECONOMY 64 (2019).

corporate personhood seriously.[27] Each letter has highlighted a specific aspect of natural personhood which could apply to corporate entities, bringing awareness to abuses of corporate ethics.[28] These include the potential for corporate guardians to supervise young corporations, application of selective service law to corporations, treatment of corporate "remains" after dissolution, corporate adoption of or marriage to other entities, and so on.[29] We conclude by examining the future of ACorporation and ongoing conversations about corporate identity and personhood.[30]

II. EVOLVING THEORIES OF CORPORATE DUTIES AND PERSONHOOD

Theories of corporate personhood bear directly on how we construe corporate duties and how we expect corporations to behave.[31] To contextualize the art in the ACorporation project, this section provides an overview of the evolution of corporate personhood theorizing in the United States during the nineteenth and twentieth centuries and articulates connections between those theories and views of corporate responsibilities to society.

A. Theories of Corporate Personhood

There is extensive literature on theories of corporate personhood that addresses how we conceptualize what a corporation *is*.[32] The dominant theoretical threads begin in the nineteenth century's fear of the concentration of economic power in the hands of business, especially as a challenge to the power of the state.[33] As the U.S. economy and business evolved into the twentieth century, the state relaxed power over corporate organization and behavior. New theories emerged to address the relationship between the public and

27. *See infra* Part II.
28. *See infra* Part II.
29. *See infra* notes 236–37 and accompanying text.
30. *See infra* Part V.
31. Susanna K. Ripken, *Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97, 100 (2009) (arguing that determining corporate personhood connects to corporate rights and duties).
32. *Id.* at 99–101.
33. Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1452 (1987) (noting that corporations' power to concentrate capital posed a challenge to state sovereignty); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 190–92 (1986) (describing the historic fear of the potential monopoly power of corporations).

private sectors.[34] These theories drew on developing economic theories in economics and the realities of changing business practices.[35] We explore these theories below.

1. Concession/Fiction Theory

In the early nineteenth century, many feared the potential power of accumulations of wealth in business—that fear was reflected in corporation law.[36] State legislatures strictly controlled the authority for businesses to incorporate.[37] Incorporation required a special act of the legislature,[38] and corporate charters were granted only with strict limits.[39] Incorporation was viewed as a special privilege, a concession from the state that carried with it a mandate that the corporation pursue a public purpose and further the general welfare.[40] This special grant from the government cast corporations as private institutions with public obligations.[41] Because of this, early U.S. corporations were typically used to construct roads, canals, or banks—physical or financial infrastructure projects which benefitted the states that gave them the privilege of incorporation.[42]

The concession theory of corporate personhood saw corporations as creations that owed their existence to the state rather than to the people who incorporated the business.[43] Thus, corporations were considered fictional entities that existed only in the contemplation of

34. *See* Mark, *supra* note 33, at 1441–42.
35. *See id.* at 1441.
36. *Id.* at 1441–42. Similarly, a common narrative of the post-Revolution United States notes abolishment of the entail as rejecting a landed aristocracy. *See, e.g.*, Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 L. & HIST. REV. 277, 278–79 (2015) (noting Thomas Jefferson's satisfaction of the abolishment of the entail as preventing "aristocracy of wealth," and discussing more prosaic reasons for reforming and abolishing the entail, such as increased access to credit markets for non-entailed land).
37. Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1633–34 (2011).
38. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 206 (1990) [hereinafter *Theories*]; Ripken, *supra* note 31, at 107–08.
39. *Theories*, *supra* note 38, at 207–08. Some critics of corporations called for the abolition of the corporation as a business form altogether. *Id.*
40. *Id.* at 207; Pollman, *supra* note 37, at 1633–35; Mark, *supra* note 33, at 1446.
41. Ripken, *supra* note 31, at 108.
42. *See* Jeff Lingwall, *Education Clauses in Corporate Charters: How Child Welfare Law Confronted the Industrial Revolution*, 43 J.L. & EDUC. 189, 197 (2014).
43. Pollman, *supra* note 37, at 1633–34 (identifying corporations as creatures of the state); Mark, *supra* note 33, at 1441 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636–37 (1819)).

the law.[44] The concession/fiction theory had important implications for the regulation of corporations and how they were held accountable for their actions—finding corporations to be creatures of the state-supported stricter government regulation of corporations.[45] This included restrictions on the incorporation process itself as well as on corporate charters.[46] Corporations could conduct business on behalf of their members, and the law would protect corporate acts to safeguard the property of the corporation's members.[47] But, as fictional entities, corporations generally had no rights themselves.[48]

2. Aggregate Theory

The end of the nineteenth century saw the rise of general incorporation statutes.[49] These statutes loosened the reins on incorporating and de-emphasized the importance of the state's role in the process.[50] Incorporation was no longer a function of "sovereign grace,"[51] nor were corporate activities controlled by the iron fist of state-imposed limits on their charters. Because the general incorporation statutes diluted the idea of corporations as creatures of the state, they undermined concession/fiction theory as a way to conceptualize the corporation.[52] A new concept of the corporation was needed and scholars looked to the idea of partnerships as an analogy for a new theory of corporate personhood called the

44. Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1064 (1994); Pollman, *supra* note 37, at 1635.

45. Pollman, *supra* note 37, at 1635 (noting that concession theory supported government-imposed limitations on corporations); *Theories*, *supra* note 38, at 207 (arguing that concession theory led to efforts to regulate corporations' relationship to society).

46. *Theories*, *supra* note 38, at 208. Early corporations spelled out the purpose of the incorporation in very specific terms, if they acted outside of those terms, an ultra vires action could be brought against them. *Id.* at 209.

47. *See, e.g.*, *Trs. of Dartmouth Coll.*, 17 U.S. at 636; Pollman, *supra* note 37, at 1635 (citing *Trustees of Dartmouth College* for the proposition that early corporate theory was used to protect property and contract interests).

48. *See* Pollman, *supra* note 37, at 1633–39. Supreme Court cases under the concession theory recognized that corporations do have rights under the Contracts Clause of the U.S. Constitution, necessary to protect the contract and property interests of the corporation. *See id.*

49. *Theories*, *supra* note 38, at 208–09; Ripken, *supra* note 31, at 109; Horwitz, *supra* note 33, at 181.

50. Phillips, *supra* note 44, at 1065.

51. *Id.*

52. Horwitz, *supra* note 33, at 181 (explaining how free incorporation undermined the concession theory); Mark, *supra* note 33, at 1453 (arguing that general incorporation statutes changed the character of corporations).

aggregate theory.[53] The aggregate theory of corporate personhood views a corporation as a collection of individuals, rather than as a distinct entity in and of itself.[54] A corporation is a mechanism for the pursuit of business activity by individual property owners or shareholders.[55] It is empowered through the actions of its shareholders, not the state, and exists to further the financial interests of those shareholders.[56] As in a partnership, these individuals come together to form the corporation, but they do not lose their individual rights in the process.[57] Instead, they retain their own rights and interests, with the corporation acting as a collective entity existing to further the private interests of its shareholders.[58] The corporation is the sum of its human constituents[59] rather than a distinct entity.[60]

Eliminating the fictional corporate person and focusing on the interests of the natural persons behind the corporation weakened the connection between corporations and the community.[61] Because private law governed the interests of the individual shareholders, private law was now the primary mechanism to govern corporate conduct.[62] Adolf Berle and Gardiner Means argued that corporate managers should be viewed as trustees for the shareholders and the goal of regulation should be to achieve management accountability to those shareholders.[63]

53. Phillips, *supra* note 44, at 1062.
54. *Id.* at 1062.
55. *Theories*, *supra* note 38, at 222–24.
56. Ripken, *supra* note 31, at 110 (noting that the aggregate theory views corporate acts as the acts of human persons); Mark, *supra* note 33, at 1457 (describing the corporate bar's argument that corporate powers do not derive from the state).
57. Horwitz, *supra* note 33, at 182–86 (discussing the analogy to partnerships); David K. Millon, *The Ambiguous Significance of Corporate Personhood*, 2 WASH. & LEE SCHOLARLY COMMONS 39, 41 (2001) [hereinafter *Significance*] (explaining how corporations, as aggregates of persons, are like partnerships); Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 372 (2015) (describing *Citizens United* and *Hobby Lobby* as protecting the interests of persons behind the corporation).
58. Ripken, *supra* note 31, at 110–111.
59. Phillips, *supra* note 44, at 1062.
60. *Id.* at 1066.
61. Mark, *supra* note 33, at 1454.
62. Horwitz, *supra* note 33, at 204.
63. *Theories*, *supra* note 38, at 221–22. This echoes the prior, common use of the business trust to operate as quasi-corporations. Morley, *supra* note 2, at 2146.

As powerful as it was, the analogy between corporations and partnerships became strained as corporations grew larger.[64] During the last few decades of the nineteenth century, corporations attracted larger numbers of shareholders and the relationship between shareholders and the corporation grew increasingly distant.[65] The sheer number and geographic dispersal of shareholders made it impractical to leave decision-making in their hands[66] and harder to see a corporation as an aggregate of its shareholders.[67] At the same time, as corporations grew larger and more complex, they called for management expertise beyond that of shareholders.[68] This time period gave rise to the professional managerial class and shifted corporate decision-making to management.[69] Coupled with this trend was the realization that, unlike partnerships, a corporation's existence continued beyond the lifespan of its incorporators,[70] diluting the importance of the views and interests of individual shareholders. In sum, creation of big business altered the landscape of business activity while also challenging the conceptual underpinnings of the aggregate theory of corporate personhood.

3. Real Entity Theory

By the early twentieth century, the aggregate theory was no longer a tenable theory of the corporation.[71] Corporate decision-making was firmly in the hands of professional managers, and this undercut the image of shareholder-dominated corporate aggregates.[72] The corporation's existence no longer ran coterminous with the incorporators' existence, and management, not shareholders, were the true corporate decision makers.[73] The separation of ownership and management suggested that corporate actions had to be seen as the

64. *Significance*, *supra* note 57, at 44–45; Ripken, *supra* note 31, at 111–12; *Theories*, *supra* note 38, at 214–15.
65. *Significance*, *supra* note 57, at 44–45; Ripken, *supra* note 31, at 111–12; *Theories*, *supra* note 38, at 214–15.
66. *Significance*, *supra* note 57, at 44–45 (explaining that increased enterprise size transformed shareholders from active entrepreneurs to passive investors); *Theories*, *supra* note 38, at 214 (arguing that the growth in the size of corporations prevented active participation by shareholders in management of the firm).
67. Ripken, *supra* note 31, at 111–12.
68. *Significance*, *supra* note 57, at 44–45.
69. *Theories*, *supra* note 38, at 214–15.
70. Mark, *supra* note 33, at 1464–65.
71. Phillips, *supra* note 44, at 1067.
72. *Id.*
73. *Id.* at 1067–68.

product of the corporate organization rather than the shareholders,[74] supporting the view that the corporation was separate and distinct from its shareholders.[75]

The resulting real entity theory[76] recognized corporations as real beings with an existence prior to and separate from the state's corporate law[77] rather than the artificial entities of concession/fiction theory that were created by the law. Corporations are creatures of private initiative rather than state power[78] and are a natural outgrowth of collective business activity.[79] Crucially, real entity theory also saw corporations as distinct from the individuals—or their aggregates—who participate in the corporate enterprise.[80] As such, this separate being possesses attributes not present in the organization's human members.[81] This separateness suggested to some corporate theory scholars that corporations could have a group will or personality distinct from that of their shareholders,[82] as well as inherent moral rights and duties distinct from the law.[83]

Real entity theory has significant implications for business and the governance of corporations.[84] Scholars have recognized the theory as a major factor in legitimating big business in the early twentieth century.[85] From a regulatory perspective, real entity theory undercut any special basis for state regulation of corporations that derived from tying corporate existence to the state[86] and called generally for

74. *Id.* at 1068; Pollman, *supra* note 37, at 1651–52.
75. Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 QUINNIPIAC L. REV. 523, 540 (2010).
76. The theory is also referred to as the natural entity theory. *See Significance*, *supra* note 57, at 46; Horwitz, *supra* note 33, at 179.
77. Horwitz, *supra* note 33, at 218; Ripken, *supra* note 31, at 112.
78. *Theories*, *supra* note 38, at 211, 216.
79. Ripken, *supra* note 31, at 113.
80. *Id.*
81. Phillips, *supra* note 44, at 1068 (explaining that real entity theory maintains that a corporation has attributes not found among its human constituents); Pollman, *supra* note 37, at 1642 (recounting the real entity theory view that corporations are greater than the sum of their parts).
82. Ripken, *supra* note 31, at 114; *Significance*, *supra* note 57, at 46.
83. Phillips, *supra* note 44, at 1069 (noting that corporations' resemblance to natural persons under the real entity theory meant corporations could have moral rights and duties distinct from their legal obligations); Pollman, *supra* note 37, at 1642 (explaining that real entity theory suggested corporations had inherent rights).
84. *See* Horwitz, *supra* note 33, at 221.
85. *Id.*; Phillips, *supra* note 44, at 1081.
86. Horwitz, *supra* note 33, at 221; Phillips, *supra* note 44, at 1081.

reductions in corporate regulations.[87] Conceptualizing corporations as creations of private initiative changed the character of corporate law, from the public focus of concession theory to a private focus, concentrating on internal issues of corporate governance.[88] Real entity theory also played an important role in justifying the emergence of the modern limited liability rule for shareholders.[89] Conceptualizing corporations as entities separate from their shareholders allows courts to disregard the persons behind the corporate entity for purposes of liability,[90] resulting in the protection from liability for corporate actions that is a hallmark of contemporary corporate thinking.

Viewing corporations as separate persons affects how we think about their rights and duties.[91] Real entity theory supports an argument that corporations should be entitled to the same rights and privileges that are afforded to natural persons, including the protection of property rights[92] and some constitutional liberty rights.[93] Under this theory, corporations, like natural persons, should be viewed as private entities, and should be "free from heavy state regulation" of their activities.[94] However, real entity theory can also support an argument for a more public view of corporations.[95] If the corporation is a real person in society, it should bear the same responsibilities and duties of a citizen.[96] Because business activity affects the public, business is not just a matter of private concern and should be regulated to benefit the public.[97]

87. *Theories*, *supra* note 38, at 211 (contending that real entity theory would impose less regulation on corporations); Horwitz, *supra* note 33, at 183 (explaining that, under real entity theory, corporations were entitled to the same privileges as other individuals and groups).
88. *Theories*, *supra* note 38, at 213.
89. Horwitz, *supra* note 33, at 185 (noting the justification under real entity theory for limited liability).
90. Piety, *supra* note 57, at 374.
91. *See infra* text and accompanying notes 92–94.
92. Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 580 (1989).
93. Ripken, *supra* note 31, at 116 n.68 (reviewing Supreme Court cases recognizing corporate constitutional rights).
94. *Id.* at 117.
95. *See infra* notes 96–97 and accompanying text.
96. Ripken, *supra* note 31, at 117.
97. *Id.*

4. Nexus of Contracts Theory

Real entity theory meshes well with our "common conceptions about corporations."[98] However, the theory waned by the 1920s as scholars moved away from the philosophical view of corporations to a more economic focus.[99] The rise of neoclassical economic theory led corporate law scholars to update aggregate theory to include an economics perspective in what is called the nexus of contracts theory.[100] This theory sees the corporation as the center of a collection of reciprocal arrangements between individual parties who engage with the corporation to get the benefit from a bargain.[101] Under the theory, the corporation arises as a natural product of the private economic activity of individuals.[102] There is no separate corporate entity; rather, the corporation is just the sum of the agreements among the individual participants.[103]

Conceptualizing corporations as a nexus of contracts significantly altered how scholars viewed the relationship between corporations and society.[104] This theory took an internal, private view of corporate activity, arguing that the purpose of a corporation was to maximize wealth for its shareholders through their contractual relationships.[105] Government should establish laws to facilitate and enforce contracts between corporations and other parties, including shareholders[106] but

98. Pollman, *supra* note 37, at 1662; Ripken, *supra* note 31, at 115 (noting that real entity theory corresponds with common sense).

99. Phillips, *supra* note 44, at 1070, 1091 (describing the rise of an antitheoretical approach to corporate personhood).

100. *Theories*, *supra* note 38, at 229 (describing the nexus of contracts theory as "aggregate" centered); Phillips, *supra* note 44, at 1071 (calling the nexus of contracts theory a variation of aggregate theory); Ripken, *supra* note 31, at 160 (referring to the nexus of contracts theory as a modern variant of aggregate theory).

101. Ripken, *supra* note 31, at 158–59 (describing the corporation as the center of a mass of contracts between multiple parties using market forces to bargain with each other); Phillips, *supra* note 44, at 1071 (depicting the corporation as a connected group of contracts among the firm's participants); Pollman, *supra* note 37, at 1666 (explaining that this view sees the corporation as the party that contracts with the firm's inputs and outputs).

102. Ripken, *supra* note 31, at 160.

103. Phillips, *supra* note 44, at 1071; *Theories*, *supra* note 38, at 229. Participants in these contracts can include shareholders, suppliers, employees, and creditors. Phillips, *supra* note 44, at 1073.

104. *Theories*, *supra* note 38, at 231 (explaining that the nexus of contracts theory is a novel economic theory that places emphasis on the welfare of shareholders rather than the welfare of society).

105. Ripken, *supra* note 31, at 163–64.

106. *Theories*, *supra* note 38, at 231.

should not otherwise interfere in those relationships.[107] Further, because it is not an entity or person, the corporation can have no moral or social responsibilities beyond that of generating returns to shareholders.[108] The legal fiction that is the corporation does not possess the characteristics of a moral actor and, therefore, cannot be seen to have moral responsibilities.[109]

B. Personhood and Corporate Purpose

Examination of these theories of the corporation reveals two competing conceptions, what Nesteruk and Risser term corporations-as-person and corporations-as-property.[110] As they note, characterizing corporations as persons or property yields different interpretations of the relationship between corporations and community[111] and different interpretations of the purpose of a corporation.

The aggregate and nexus of contracts theories represent the corporation-as-property characterization.[112] Specifically, under those theories, the corporation represents the property interests of those who participate directly in the corporation.[113] Corporate purpose has a private focus and consists of protecting those property interests.[114] This task is complicated by the separation of ownership and decision-making.[115] If managers did not own shares in the corporation, they would have little incentive to do what the corporation's shareholders wanted and would shirk their responsibilities.[116] Management might ignore their duties or ignore the shareholders' interests, if they diverged from management's, all to the detriment of the

107. Ripken, *supra* note 31, at 162–63.

108. Phillips, *supra* note 44, at 1091–92 (querying whether a non-existent entity can have moral responsibilities); Ripken, *supra* note 31, at 163 (arguing that the corporation as a nexus of contracts has no responsibilities to non-shareholder constituents).

109. Phillips, *supra* note 44, at 1092 (arguing that moral actors must possess the intent and ability to act). Not all modern scholars agree with the nexus-of-contracts theory. *See* Marens & Wicks, *supra* note 8, at 277 (criticizing the view that the relationship between various entities of the corporation is contractual in nature).

110. Jeffrey Nesteruk & David T. Risser, *Conceptions of the Corporation and Ethical Decision Making in Business*, 12 BUS. & PRO. ETHICS J. 73, 76 (1993).

111. *Id.*

112. *See id.* at 77.

113. *See id.*

114. *Theories*, *supra* note 38, at 220–24, 231.

115. *Id.* at 214–15.

116. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 312–13 (1976).

shareholders' property interests.[117] Berle's answer to this dilemma was to impose a duty on management to make shareholder welfare the sole focus of corporate decision-making, with corporate powers held in trust for shareholders.[118] Berle's shareholder focus was subsequently echoed in the agency cost problem.[119] The agency cost problem referred to Berle's contention that managers' and shareholders' interests diverged,[120] and that managers might act to further their own interests at the expense of the shareholders. Agency theory provided the antidote to this situation. Shareholders, the theory contends, are the principals of the corporation who hire managers to act as their agents.[121] Under agency law, the agent must act only for the principal, meaning that the corporate purpose must be to maximize shareholder wealth.[122]

Berle's idea of corporate purpose as shareholder protection received a major boost in 1970 with the publication of an opinion essay by neoclassical economist Milton Friedman titled "A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits."[123] Freidman's article reflected the property characterization of the corporation.[124] He argued that the only objective of a corporation is to increase profits for shareholders, regardless of the impact of corporate actions on other stakeholders.[125] While Friedman recognized that corporations must abide by the law, he argued that

117. *Id*. at 308–09.

118. *See generally* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1073–74 (1931) (comparing corporate law to the law of trusts and arguing that all corporate powers be utilized with the welfare of shareholders in mind). Other commentators would argue that a solution to the agency problem was to include company stock as part of directors' and officers' compensation packages. Ralph Gomory & Richard Sylla, *The American Corporation*, DAEDALUS, Spring 2013, at 102, 108–09.

119. Jensen & Meckling, *supra* note 116, at 327.

120. *Id.* at 308–10.

121. *Id.* at 309–10.

122. Richard Marens and Andrew Wicks note significant problems with agency theory as applied to the relationship between shareholders and corporate management, such as the lack of a "two-way relationship in which the principal can direct or override the agent and the agent can . . . legally bind or create liabilities for the principal." Marens & Wicks, *supra* note 8, at 276.

123. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/UWX2-F7R5].

124. *Id.*

125. *See id.*

corporations owed no responsibilities to anyone other than their shareholders and went so far as to characterize other corporate activities as violating agency principles that, in his view, controlled the relationship between shareholders and managers.[126]

In contrast to the corporation-as-property view, real entity theory construes corporations as persons.[127] Under the corporations-as-persons conception, corporations are real entities in society with moral and social responsibilities analogous to those of individual humans.[128] This view sees corporations as citizens, rather than merely engines for shareholder wealth accumulation.[129] The law permits creation of the economic entity of a corporation because the creation of goods and services benefits the community, not merely to make profits for shareholders.[130] Thus, corporations have responsibilities to the community because they are members of that community and receive benefits from it.[131] The corporation-as-person view gives corporations a public character with management serving as fiduciaries for the corporation itself, not the shareholders.[132]

The notion of citizenship suggests what Millon calls "other-regarding obligations" and requires that corporations be sensitive to the impact of their activities on those whose lives they affect.[133] Just as people balance a range of obligations as members of society, so too can and should corporations.[134] These obligations include those owed to shareholders, but also those owed to employees, consumers, creditors, and "the larger society in which [they] operate[].'"[135] This idea is not new. For example, Gomory and Sylla note that, following World War II, business recognized the claims of a variety of stakeholders and pursued a mix of goals.[136] A 1981 statement from the Business Roundtable also captured this idea in stating that the

126. *Id.*
127. Ripken, *supra* note 31, at 112.
128. Nesteruk & Risser, *supra* note 110, at 77; Ripken, *supra* note 31, at 117.
129. E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1149 (1932) (contending that corporations are permitted because they are of service to the community and not just profit to shareholders); *Significance*, *supra* note 57, at 48 (articulating the view that corporations should be viewed as citizens).
130. Dodd, *supra* note 129, at 1149; Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 322 (2015) (arguing that there is broad consensus that corporations are created for the purpose of benefiting society).
131. Nesteruk & Risser, *supra* note 110, at 77.
132. Dodd, *supra* note 129, at 1154, 1160.
133. *Significance*, *supra* note 57, at 48.
134. *Id.*
135. *Id.*; Ripken, *supra* note 31, at 117.
136. Gomory & Sylla, *supra* note 118, at 107.

long-term viability of business is linked to fulfilling the responsibilities it has to the societies of which it is a part.[137]

Scholars advocating the corporation-as-person view see the role of the law as regulating corporate activities to benefit others and to promote the public good.[138] Viewing the corporation as a real entity—as a person—serves as a mechanism to hold corporations accountable for their conduct,[139] and to judge them by their contributions to the community's quality of life.[140] Requiring corporations to be more like people, thus, would make them better citizens.[141]

Courts have, at least indirectly, strengthened this corporations-as-people view in recent decades by extending the rights of corporations to more closely match those of natural persons.[142] Decades of U.S. law established that corporations have, for example, rights to contract and own property,[143] rights against unreasonable searches and seizures,[144] and rights to equal protection vis-à-vis natural persons.[145] More recently, in *Citizens United*, the Supreme Court held that corporations hold expressive political rights under the First

137. *Id.*

138. Ripken, *supra* note 31, at 117.

139. Greenfield, *supra* note 130, at 315.

140. Nesteruk & Risser, *supra* note 110, at 77.

141. Greenfield, *supra* note 130, at 312, 329.

142. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 441 (2010) (Thomas, J., concurring in part) (noting the differences in prior history of cases distinguishing corporations from natural persons).

143. Bank of U.S. v. Deveaux, 9 U.S. 61 (5 Cranch), 80 (1809), *overruled on other grounds by* Louisville, C. & C. R.R. Co. v. Letson, 43 U.S. 497 (1844).

144. Hale v. Henkel, 201 U.S. 43, 76 (1906) ("[W]e do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises." (internal citation omitted)), *overruled on other grounds by* Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52 (1964).

145. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 394 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment . . . applies to these corporations. We are all of opinion that it does.") (quotation from Justice Waite in headnote to case).

Amendment.[146] The broad holding of the Court specifically refused to create a narrow rule which would have required case-by-case determinations of what speech could be banned, consistent with the rights of political expression held by natural persons.[147] Similarly, in *Hobby Lobby*, the Court allowed a corporation to legally assume (through the individuals associated with it) what many would have considered part of the identity of natural persons only: religious viewpoints.[148]

To summarize, legal theories have tended to read *into* corporations what the moment appeared to require.[149] How courts and legal scholars considered the corporation has changed substantially over the history of law in the United States, with a variety of theories suited to the scope of then-current corporate practice, economic theory, and the particular views of the Supreme Court.[150] The next section transitions to explore what can be read *out of* law—that is, how law can serve as a medium for expression rather than solely as a source of doctrinal rules—before the fourth section combines the concept of corporate personhood with law as expression.

III. JURISPRUDENCE AS AN EXPRESSIVE MEDIUM

The primary purpose of "law" is to create sets of enforceable rules which govern society, such as the ability to create the business entities considered in the prior section.[151] This is the main reason law is created, the way law is typically taught, and the way law is

146. *Citizens United*, 558 U.S. at 372 ("Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.").

147. *Id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.").

148. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) ("A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people . . . who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these *people* . . . . And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies."). *See also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2399 (2020) (noting that the federal government "allow[ed] even publicly traded corporations to claim a religious exemption" on legal requirements for provision of contraceptive coverage (citation omitted)).

149. *See supra* text accompanying notes 61–77.

150. *See supra* text accompanying notes 136–48.

151. *See* Joseph W. Bingham, *What Is the Law*, 11 MICH. L. REV. 1, 2 (1912).

generally conceptualized.[152] For instance, a simple dictionary definition of the word "law" defines it as "the whole system of rules that everyone in a country or society must obey."[153] This definition encompasses the basic concept: law exists to regulate actions, by the force of a sovereign (country or society in the definition).[154]

However, this is not the only reason law exists. To take just a small sampling of related meanings, law may exist as an economic coordinating mechanism,[155] as a means of preserving power structures,[156] as an expression of moral reasoning,[157] and as an expression of philosophic ideals such as justice or social ordering.[158] It can also extend past these realist, economic, or philosophic concepts.[159] For instance, the preamble to the United States Constitution contains moving language about forming a "more perfect Union," yet this language has not been used as a significant source of positive constitutional law.[160] In other words, part of the document most foundationally considered "law" in the United States mainly and merely serves as a source of inspiration. This is not limited to the Constitution. Statutes may, and often do, serve similar functions. An example of this type of symbolic law is the United

152. *See id.* at 2–3 (discussing common conceptions of the word "law").

153. *Law*, OXFORD LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/law [https://perma.cc/RCQ8-XSXH] (last visited Apr. 12, 2023).

154. This idea holds constant even if the concepts of "county" or "society" are extended broadly. For instance, international law exists so far as we allow community to encompass an international grouping of countries, and we allow enforcement to include such mechanisms as outcasting rather than more typical methods used under national law, such as employment of armed police forces. *See* Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 303, 348 (2011).

155. *See* Anna Grandori, *Governance Structures, Coordination Mechanisms and Cognitive Models*. 1 J. MANAG. & GOV. 29, 34 (1997).

156. *See* János Kornai, *The Affinity Between Ownership Forms and Coordination Mechanisms: The Common Experience of Reform in Socialist Countries*, 4 J. ECON. PERSPS. 131, 137 (1990).

157. *See* Joshua J. Knabb et al., *Neuroscience, Moral Reasoning, and the Law*, 27 BEHAV. SCI. L. 219, 227 (2009).

158. *See* JOHN RAWLS, A THEORY OF JUSTICE 258 (1971).

159. This broader conception of the purposes of law may conflict with a realist definition of law that would define law in terms of what is actually enforced, but it fits well within the broader social conception of law as defined above. *See, e.g.*, Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 719 (2010).

160. *Id.* at 719, 721 ("[T]he U.S. preamble is not, by and large, a decisive factor in constitutional interpretation. Its relatively meager use in constitutional adjudication has been criticized.").

States Flag Code.[161] The statute both prescribes and proscribes an extensive series of behaviors regarding the United States flag.[162] This includes how the flag should be hung,[163] whether the flag can be used on other materials,[164] whether the flag can be "festooned,"[165] and so on.[166] Despite these extensive lists describing appropriate behavior surrounding the flag, Supreme Court precedent would render much, if not all, of the statute unenforceable as an undue restriction on First Amendment expressive rights.[167] The Flag Code thus creates no actionable rules, as required by the typical definition of law, yet remains codified as a source of aspirational advocacy for treatment of the flag.

Law may also extend from aspiration to expressiveness itself. Well-crafted statutes and cutting court opinions are sources of law that double as sources of art, broadly speaking.[168] There are numerous examples.[169] Consider just a few.[170] The famous case of *Stambovsky v. Ackley*, concerning allegations around a supposedly haunted house, led the court to write that although "the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcised from the body of legal precedent and laid quietly to rest,"[171] an "exception to the doctrine of caveat emptor set forth herein, is entirely appropriate to relieve the unwitting purchaser from the consequences of a most unnatural bargain."[172] The dissent engaged in the same wordplay: "if the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist.[173] The existence of a poltergeist is no more binding upon

161. *See* 4 U.S.C. § 8.
162. *See id.*
163. *Id.* § 8(b).
164. *Id.* § 8(d).
165. *Id.*
166. *Id.* These include restrictions on using the flag as advertising or as part of costumes or athletic uniforms.
167. Texas v. Johnson, 491 U.S. 397, 418 (1989).
168. *See generally* MARK W. KLINGENSMITH, LYRICS IN THE LAW: MUSIC'S INFLUENCE ON AMERICA'S COURTS 1–2 (2019).
169. *See generally id.* (cataloging numerous examples of courts relying on song lyrics in their written opinions).
170. As what is or is not art resists precise definition, we do not offer an "IRAC" style analysis formally presenting and then analyzing each example here. To the authors, these works are sufficiently creative or performative that they might qualify as art. Others may disagree, which only continues the long debate over what constitutes art.
171. Stambovsky v. Ackley, 169 A.D.2d 254, 257 (N.Y. App. Div. 1991).
172. *Id.* at 260.
173. *Id.* at 262 (Smith, J., dissenting).

the defendants than it is upon this court."[174] Here, artful language softened the holding by highlighting the unusualness of the case and is as much art as any literary prose from authors in other fields.[175]

Law doubling as art can also help advocacy. When *The Onion* wished to weigh in before the Supreme Court on the scope of parody, it submitted a parodic, but serious, brief to emphasize its points.[176] After noting that "*The Onion* is the world's leading news publication, offering highly acclaimed, universally revered coverage of breaking national, international, and local news events,"[177] it noted that "'Ohio Police Officers Arrest, Prosecute Man Who Made Fun of Them on Facebook' might sound like a headline ripped from the front pages of *The Onion*—albeit one that's considerably less amusing because its subjects are real."[178] By connecting its own parody to the Court's subject matter, *The Onion* crafted a brief which few other news organizations would be capable of producing.[179]

Similarly, contracts can be written not just as sources of legal rights flowing from an agreement but as performance pieces, such as writing done for an audience beyond that of the contractual parties or created to persuade someone not to take legal action. When law professor Amy Chua wished to bind family members in an agreement concerning use of a New York apartment, she published the contract as part of an op-ed in the Wall Street Journal.[180] The contract was drafted with an eye towards comedically showing the scope of contract law, noting that requirements to greet guests "in a respectable state" and "with enthusiasm" are "totally valid and legally enforceable."[181]

174. *Id.* (Smith, J., dissenting).

175. *See generally id.* at 257.

176. Brief of *The Onion* as Amici Curiae Supporting Petitioner at 1, Novak v. City of Pharma, 33 F.4th 296 (2022) (No. 21-3290) (presenting the publication's general understanding of parody and its application).

177. *Id.*

178. *Id.* at 2.

179. Conservative comedy group *The Bablyon Bee* submitted a similar brief. Brief of *The Babylon Bee* as Amici Curiae Supporting Petitioner at 1, Novak v. City of Pharma, 33 F.4th 296 (2022) (No. 21-3290).

180. Amy Chua, *The 'Tiger Mother' Has a Contract for Her Cubs*, WALL ST. J. (June 10, 2016), https://www.wsj.com/articles/the-tiger-mother-guide-to-renting-to-your-children-1465570914 [https://perma.cc/F7Z3-7BEC].

181. *Id.* On a less humorous note, the many contracts minors are asked to sign, such as release waivers at summer camp activities, constitute this same notion of contract as performance. *See* Kelly v. United States, 809 F. Supp. 2d 429, 434 (E.D.N.C. 2011). Nor can parents typically sign these on behalf of their children. *Id.* at 435. These contracts may be easily voidable by the minors who agree to them, but minors

Trial lawyers similarly find expansive scope for performative art.[182] Convincing a legal audience to act often requires connecting to their emotions as well as crafting persuasive legal arguments.[183] Cicero, whose name has been synonymous with rhetoric for centuries, crafted his reputation while working as a lawyer in Roman courts.[184] In modern law, statements delivered before a jury can be highly honed art pieces, relying on the emotive skill of the attorney as much as any stage piece, and with higher stakes than a play.[185] Lawyers may take lessons from drama coaches, rehearse in front of mock juries, and put as much craft into persuasive rhetoric as a playwright might for stagecraft.[186]

In sum, because law aims to regulate human behavior, it has long relied on performance and expressiveness to meet that aim, in areas as diverse as constitutional law, statutes, contracts, and courtroom practice. In other words, art has long functioned as part of legal practice.

IV. LAW, ART, AND ADVOCACY THROUGH ACORPORATION, INC.

With this background on corporate personhood, law, and art in place, this section combines these concepts. It explores a unique art project that uses corporate identity as social practice art to advocate for corporate social responsibility through creation of ACorporation, Inc.

To begin, it is instructive to consider the way that art can interface with the world. In 1964, philosopher and art critic Arthur Danto saw Andy Warhol's Brillo box sculptures of wood in a gallery in New

unaware of their legal privileges may take these agreements as binding. *E.g.*, *id.* at 434 ("Having disaffirmed the waiver by filing complaint, [plaintiff's] own contract purporting to waive her personal injury claims is not enforceable."). In this sense, the true purpose of these contracts is not to create or restrict legal rights but to create the *impression* of legal rights to avoid litigation. They thus function more as performance pieces—contractual theater—than fonts of legal rights and duties.

182. Richard C. Dahl, *"Soak Your Mind in Cicero": A Bibliographical Essay*, 1979 ARIZ. ST. L.J. 269, 275 (1979) ("One of the most striking lessons a lawyer may learn from the study of Cicero is the importance and value of continual effort to better one's performance.").

183. Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1613–14 (2007).

184. *See* Dahl, *supra* note 182, at 269, 274.

185. *See generally* James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 56 (1995) (comparing closing arguments to "the first two bars of Beethoven's Fifth or the opening organ chords from *Phantom of the Opera*").

186. *See id*. at 55–56 (noting techniques for persuasive closing arguments).

York.[187] The sculptures were visually indistinguishable from the real thing, erasing the space between art and life.[188] As Danto stated, "What in the end makes the difference between a Brillo box and a work of art consisting of a Brillo Box is a certain theory of art. It is theory that takes it up into the world of art, and keeps it from collapsing into the real object which it is . . . ."[189] Since 1964, the art world has evolved to include works that can be classified as "social practice," in which the art product *is* a social interaction.[190] Artists engaged in social practice are interested "in the creative rewards of participation as a politicized working process."[191] An example of this is Thomas Hirschhorn's *Gramsci Monument*.[192] Built outside of Forest Houses in the Bronx's Morissania section, this temporary monument to the Italian Marxist philosopher Antonio Gramsci consisted of a library, newspaper office, a computer lab, an exhibition of some personal effects of Gramsci, a radio station, a meal bar, and a stage for performances.[193] The temporary complex, built by and for the local community, functioned as a participatory artwork that was rooted in the social interactions created by the piece.[194]

Additionally, there is a long history of art for social change. Examples include the painting *The Death of Marat* by Jacques-Louis David regarding the French Revolution in 1793;[195] Pablo Picasso's

187. Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580 (1964).

188. *Id.*

189. *Id.* at 581.

190. *See* TURNER, *supra* note 11, at 4 ("Film is a social practice for its makers and its audience: in its narratives and meanings we can locate evidence of the ways in which our culture makes sense of itself."); ODELL, *supra* note 26, at 6 ("A more recent project that acts in a similar spirit is Scott Polach's *Applause Encouraged*, which happened at Cabrillo National Monument in San Diego in 2015. On a cliff overlooking the sea, forty-five minutes before the sunset, a greeter checked guests in to an area of foldout seats formally cordoned off with red rope. They were ushered to their seats and reminded not to take photos. They watched the sunset, and when it finished, they applauded.").

191. CLAIRE BISHOP, ARTIFICIAL HELLS: PARTICIPATORY ART AND THE POLITICS OF SPECTATORSHIP 2 (2012).

192. *See* Luisa Valle, *Object Lesson: Thomas Hirschhorn's* Gramsci Monument*: Negotiating Monumentality with Instability and Everyday Life*, BLDGS & LANDSCAPES: J. VERNACULAR ARCHITECTURE F., Fall 2015, at 18, 19–20, 30–31.

193. *Id.* at 18–20.

194. *Id.* at 18–19, 28–29, 31.

195. Alicja Zelazko, *The Death of Marat*, ENCYCLOPEDIA BRITANNICA (Feb. 23, 2023), https://www.britannica.com/topic/The-Death-of-Marat [https://perma.cc/EW93-RC7G].

Guernica in 1937 in response to the bombing of Guernica, Spain, preceding the Second World War;[196] the illustrations by Emory Douglas in the 1960s and 1970s for The Black Panther newspaper;[197] and the anti-Pinochet murals of the Brigada Ramona Parra and the Brigada Elmo Catalán in Chile in the 1980s.[198] Socially engaged art is nothing new, but the tactics have continued to evolve.[199]

Continuing this tradition, artist Chad Erpelding founded ACorporation, Inc. in November 2019, an art project that is a duly authorized corporation under the laws of Idaho.[200] ACorporation, Inc. itself is the art piece where the social interactions created by the corporate entity are the art materials and aesthetics. Just as Warhol's Brillo boxes collapsed the space between life and sculpture for tangible objects, Erpelding's project collapsed the space between social practice and legal practice for corporate entities, using this fused space as a platform for unique corporate advocacy.[201] ACorporation, Inc. embraces the real entity theory, arguing that the corporation is a real and non-imaginary person independent of those who created it.[202] The project follows the trajectory of Supreme Court decisions that have established greater personhood rights for corporations but approaches it with the question: if corporations are

196. *See* Cantelupe, *supra* note 25, at 18–19.

197. *See* Joe Street, *The Historiography of the Black Panther Party*, 44 J. AM. STUD. 351, 357 (2010) ("[A]rt [was] a key element of the BPP's modus operandi."). *See also* Carolyn R. Calloway, *Group Cohesiveness in the Black Panther Party*, 8 J. BLACK STUD. 55, 63 (1977).

198. *See* RODNEY PALMER, STREET ART CHILE 9–11 (2008).

199. *See supra* notes 195–99 and accompanying text.

200. *See Business Search: ACorporation Inc.*, IDAHO SEC'Y STATE'S OFF., https://sosbiz.idaho.gov/search/business/ [https://perma.cc/M2WX-87J2] (last visited Apr. 12, 2023); *Curriculum Vitae*, CHAD ERPELDING, https://www.chaderpelding.com/curriculum-vitae [https://perma.cc/6WNG-5TM7] (last visited Apr. 12, 2023).

201. *Cf. Becoming Better People*, ACORPORATION INC., https://acorpincorp.com/index.html [https://perma.cc/3J96-7JJA] (last visited Apr. 12, 2023) (collaborating with corporations on creative problem solving so that the corporation can become a better person through good citizenship); *About Us*, ACORPORATION INC., https://acorpincorp.com/about.html [https://perma.cc/ADN5-Q86V] (last visited Apr. 12, 2023) (helping corporations become better people through recognizing responsibilities); *Services*, ACORPORATION INC., https://acorpincorp.com/services.html [https://perma.cc/7U2K-CDH7] (last visited Apr. 12, 2023) ("Our strategic plans include creative and realistic steps that will address specific issues in your growth towards good citizenship.").

202. SUSANNA KIM RIPKEN, CORPORATE PERSONHOOD 35 (2019); *see About Us*, *supra* note 201 ("[A]ssisting corporations in recognizing their personal responsibilities and in achieving a better future.").

people, what *does* it mean to be a good corporation?[203] For instance, what expectations and laws do we place on natural persons, and should these be placed on corporations as they continue to gain civil rights?[204] Or, does society tolerate behavior from corporations that it does not tolerate from natural persons?[205]

Art has the ability to ask difficult questions and to bring new perspectives that are not as accessible through conventional methods.[206] By probing the answers to questions of corporate identity and personhood, ACorporation, Inc. attempts to use its unique status to facilitate corporations becoming better people by embracing corporate social responsibility principles, assisting fellow corporations in their growth toward becoming more productive and better *people*.[207]A corporation that *is* an art project is free to take different approaches to issues like corporate behavior or structure because the project sits on the liminal space between business and art.[208]

One of the initial acts of ACorporation, Inc. is focused on advocating on behalf of a corporation's personhood to various political bodies.[209] As CEO and under consultation with counsel,[210]

203. *See* Nina Totenberg, *When Did Companies Become People? Excavating The Legal Evolution*, NPR (July 28, 2014, 4:57 AM), https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution [https://perma.cc/HB9K-4YBU]; *see generally* Robert J. Samuelson, *The Good Corporation: R.I.P.*, *in* IS THE GOOD CORPORATION DEAD?: SOCIAL RESPONSIBILITY IN A GLOBAL ECONOMY 3, 3–6 (John W. Houck & Oliver F. Williams eds., 1996) (discussing the good corporation's history as a business and social phenomenon in America); *see also About Us*, *supra* note 201 ("ACorporation Inc.'s mission is to facilitate corporations becoming better people by embracing responsibility and good citizenship.").

204. *See* Jeremy Moon et al., *Can Corporations Be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, 15 BUS. ETHICS Q. 429, 431 (2005) (discussing whether corporations should be treated "like" citizens or whether they "actually 'have' the legal and administrative status of citizens").

205. *See generally* Thomas L. Carson, *Self–Interest and Business Ethics: Some Lessons of the Recent Corporate Scandals*, 43 J. BUS. ETHICS 389, 389–93 (2003) (discussing how existing theories of corporate behavior do not constrain unethical conduct).

206. *See* Mary-Ellen Boyle & Edward Ottensmeyer, *Solving Business Problems Through the Creative Power of the Arts: Catalyzing Change at Unilever*, 26 J. BUS. STRATEGY 14, 14–18, 20–21 (2005) (noting that "[l]eading organizational change requires creativity and invites experimentation" and discussing "arts-based learning" in "the workings of a business firm").

207. *See supra* notes 201–06 and accompanying text.

208. *See supra* note 206.

209. *See Becoming Better People*, *supra* note 201.

Erpelding has written letters on behalf of ACorporation, Inc. advocating for the equal and consistent treatment of corporations as people.[211] The first was to Lawerence Denney, the Idaho Secretary of State, that requested that all Idaho corporations under the age of eighteen be appointed a legal guardian who would be held personally responsible and strictly liable for the actions of the corporation until they are old enough to be considered an adult and have shown the appropriate level of mental capacity to make their own decisions.[212] The state prohibits minors from having the legal capacity to make decisions regarding basic care, residence, maintenance, being bound by contracts, and responsibilities for personal effects.[213] Since a corporation is a person, ACorporation, Inc. believes the same laws and concerns should be considered.[214] While a corporation does have a Board of Directors, the letter claims that a guardian is distinctly different due to the limitations of the business judgment rule which does not hold boards to strict standards of socially responsible conduct.[215]

The second letter requested Utah Senator Mitt Romney to introduce legislation that requires all corporations between the ages of 18 and 25 to register with the Selective Service System.[216] As stated in the letter, this "would result in more of our corporations giving back to this remarkable country that has made their lives possible, as well as better support the military in the event that a national crisis occurs. Requiring corporations to serve in this capacity would continue to bring us closer to equality for all persons."[217] A distinction is drawn between the Defense Production Act (DPA), which allows the president to direct the resources of corporations for the sake of national security.[218] While there are some similarities, the DPA falls short of a draft in the way it is authorized (the president can choose which corporations to enlist as compared to the random

210. Consulting with professional services through attorneys Jeffrey R. Bernstein, Esq. and the authors again collapses the space between life and art.
211. *See Becoming Better People*, *supra* note 201.
212. Letter from ACorporation, Inc. to Lawerence Denney (Sept. 24, 2021) (on file with the authors).
213. *E.g.*, IDAHO CODE ANN. § 32-1010(2) (West 2021) (giving parents power to make decisions for upbringing of children).
214. *See Becoming Better People*, *supra* note 201.
215. IDAHO CODE ANN. § 32-29-831(a)(2)(iii)(B).
216. Letter from ACorporation, Inc. to Mitt Romney (Nov. 5, 2021) (on file with the authors).
217. *Id.*
218. The Defense Production Act of 1950, 50 U.S.C. § 4531 (1950).

lottery system of a draft) and how it is enforced.[219] The letter also emphasizes the deeper psychological effects registering with the Selective Service can have on a person.[220]

> Oftentimes, registering is the first instance where a man becomes fully aware of the civic responsibility he has to his country. It can change the way someone thinks about their role in the greater society and their obligations to participate and protect it. Requiring corporations to register would allow them to experience the same benefits and will hopefully instill a similar sense of duty, moral obligation, and civic responsibility in them as well.[221]

The third letter was sent to Governor Eric Holcomb of Indiana in 2021, and requests that corporations that are dissolved have the sanctity of their lives recognized in the same manner as other persons who die.[222] Indiana was the first state to pass legislation that required the burial or cremation of fetal remains within ten days of a miscarriage or abortion.[223] Since the Supreme Court upheld this aspect of the law in *Box v. Planned Parenthood*,[224] other states are now introducing similar legislation.[225] ACorporation, Inc. is hoping that Indiana will also lead the way and be the first state to require an equal recognition of the sanctity of a corporation's life.[226]

The fourth letter was addressed to Jeffrey W. Bullock, Delaware's Secretary of State, requesting that all corporations seeking to merge their corporate entities obtain a marriage certificate and otherwise abide by all legal requirements related to marriage in the state.[227] As Delaware is considered a national leader in corporate law, ACorporation, Inc. reached out to the state in the hopes they would also be a leader in a broader consideration of corporate

219. *See generally* Harry N. Stein, *The Enforcement Program*, 38 IOWA L. REV. 321, 321–22 (1953).
220. Letter from ACorporation, Inc. to Mitt Romney, *supra* note 216.
221. *Id.*
222. Letter from ACorporation, Inc. to Eric Holcomb (Nov. 29, 2021) (on file with the authors).
223. IND. CODE § 16-34-3-4 (West 2022).
224. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (per curiam).
225. *See* Erin Heger, *Here's Why Fetal Burial Legislation is Surging in the States*, REWIRE NEWS GROUP (Dec. 2, 2019), https://rewirenewsgroup.com/2019/12/02/heres-why-fetal-burial-legislation-is-surging-in-the-states/ [https://perma.cc/MG2D-5M5U].
226. Letter from ACorporation, Inc. to Eric Holcomb, *supra* note 222.
227. Letter from ACorporation, Inc. to Jeffrey W. Bullock (Mar. 11, 2022) (on file with the authors).

personhood.[228] "It is in the state's interest to ensure that corporations are not forced into mergers [(marriages)], that the safety and legality of the union is upheld in each instance and that all persons are treated equally."[229]

V. CONCLUSION

The journey of corporations in the United States from special-purpose, public-benefit institutions to the crisis-ridden behemoths that govern modern economic life has left significant space for advocacy.[230] Reforming the corporation has been the mission of numerous ethicists, legal scholars, and business-school seminars over time, yet Enron[231] was followed by Theranos,[232] which was followed by FTX,[233] which will be followed by another synonym for corporate scandal in the future. One unexplored source of activism in this area is the potential for artistic endeavors to shed light on paradoxes inherent in corporate personhood.[234] By combining corporate form with the art of social practice, the ACorporation project represents a meaningful new perspective on the purpose of corporate law.[235]

Currently, ACorporation, Inc. is developing additional letters, including a request that states require corporations who are acquiring another company to follow the laws governing adoptions and another in consideration of the "heartbeat" laws surrounding abortion services. Each of these projects tugs at the idea of corporate personhood, asking why natural persons are often held to much different, and often higher, standards than the entities states give life to through the incorporation process.[236] By asking authorities to take the concept of corporate personhood seriously, art has the potential to

228. *See id.*
229. *Id.*
230. *See* discussion *supra* Section II.A.
231. *See* Paul M. Healy & Krishna G. Palepu, *The Fall of Enron*, 17 J. ECON. PERSPS. 3, 3–4 (2003). We note only several of the major corporate scandals in the last two decades.
232. *See* Clare Fiala & Eleftherios P. Diamandis, *The Meteoric Rise and Dramatic Fall of Theranos: Lessons Learned for the Diagnostic Industry*, 56 CLINICAL CHEMISTRY & LAB'Y MED. 1443, 1443–45 (2018).
233. *See* Lawrence J. Trautman, *The FTX Crypto Debacle: Largest Fraud Since Madoff?* 30–33 (Soc. Sci. Rsch. Network, Working Paper No. 4290093, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4290093 [https://perma.cc/JAR6-RUC9].
234. *See supra* notes 209–29 and accompanying text.
235. *See supra* notes 200–08 and accompanying text.
236. *See supra* notes 209–29 and accompanying text.

bring new perspectives on long-running debates about what corporations are and how they should be regulated.[237]

As with many art projects based in social practice, the ultimate response of elected officials to this advocacy is uncertain.[238] As of now, none of the officials have responded to the letters. What *can* be said with some certainty is that just as legal doctrines of corporate personhood have changed apace with economic institutions over time, they will continue to change.[239] As in the past, economists, jurists, and historians will each contribute to this discussion.[240] The ACorporation project shows that artists and art-based corporations, while not traditionally sought out for these conversations, may also contribute to our evolving understandings of corporate personhood, rights, and responsibilities.[241]

237. *See supra* notes 206–08 and accompanying text.
238. *See supra* notes 209–29 and accompanying text.
239. *See* discussion *supra* Section II.A.
240. *See supra* Part II.
241. *See supra* Part IV.