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ARTICLE

The Substantive Politics of Formal Corporate Power

MARTHA T. MCCLUSKEY†

I. CRITIQUING THE FORM VERSUS SUBSTANCE DILEMMA

A. *Changing the Question of Corporate Power*

In *Planet of the APs*, Marc Galanter gives a fascinating, important picture of the increasingly privileged legal position of artificial persons—namely corporations—in the U.S. legal system.¹ Corporations “occupy more of the legal realm”² compared to natural persons, they use a greater quantity and percentage of legal services,³ more prestigious and expensive lawyers⁴ at lower cost,⁵ and they use those

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1. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 53 BUFF. L. REV. 1369 (2006).

2. *Id.* at 1387.

3. *Id.* at 1376-86.

4. *Id.* at 1380-81.

services more effectively to win more frequently as both plaintiffs and defendants when opposing individuals.⁶ Furthermore, corporations more effectively mobilize to change the legal system⁷ through lobbying,⁸ other forms of political activism,⁹ repeat litigation,¹⁰ and through formation of their own "public interest" advocacy firms.¹¹

What might a perspective from critical legal analysis¹² add to this picture of corporate legal power? Robert Gordon explains that critical legal theories challenge the core argument of most legal thought: that nothing important can change.¹³ "The dominant message of orthodox legal training was then and still is today that a basically unalterable value consensus, a basically unchangeable system of economic and political realities, a basically frozen system of legal understandings and institutions, fix rigid outer boundaries to thinkable social change."¹⁴ For example, one way that mainstream legal scholarship helps make pervasive injustice appear intractable is by attributing it to generally benign form, not harmful function.

Consistent with that orthodox strategy, the commentary on Galanter's presentation (reprinted in this issue) discusses his picture of corporate power mostly as a problem of formal structure. That discussion presumes that because large corporations are complex, legalistic organizations capable of developing and controlling substantial economic and legal resources, they naturally

5. *Id.* at 1392 (noting that commercial artificial persons enjoy tax subsidies for their expenditures on legal services).

6. *See id.* at 1389-91.

7. *See id.* at 1398.

8. *Id.* at 1387, 1399.

9. *Id.* at 1399.

10. *Id.* at 1387-89.

11. *Id.* at 1398.

12. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); LEFT LEGALISM / LEFT CRITIQUE (Wendy Brown and Janet Halley eds., 2002); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998). *See also infra* notes 23, 50-51 and accompanying text (mentioning several branches of this critical legal scholarship).

13. Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 12, at 641.

14. *Id.* at 643.

and necessarily hold sway in a legal system dependent on costly, specialized expertise in making, applying, and interpreting formal rules. Critical legal analysis, in contrast, often starts by suspecting that unequal power may result from contingent and contested substantive policy choices linked to problematic values and interests. A critical view would aim to explore the politics masked and mystified by discussing the substantive inequality between natural and artificial persons as the product of a beneficial, essentially unalterable, corporate form in a formally neutral legal and economic system.

Galanter opens his article by noting that corporations are a tool of great social good, but that, like Frankenstein, they have also become a force of their own with more problematic consequences.¹⁵ By framing the problem this way, Galanter implicitly invites the question whether corporations are, in the end, good or bad considering their indirect and often unacknowledged substantive effects on the legal system. In his commentary on Galanter's article, David Westbrook affirms what he perceives to be an inevitably ambivalent answer to this question.¹⁶ Galanter's analogy to Frankenstein suggests that corporate dominance in the legal system is an unintended byproduct of a creation originally designed to serve important, uncontroversial public ideals. If corporations are merely technical instruments of our otherwise good socioeconomic system—a tool effectively crafted to accomplish a task—then it would be logically absurd, or even quaintly or dangerously antisocial, to conclude that corporate power is wrong.¹⁷ This view, as Westbrook approvingly suggests, reduces our

15. See Galanter, *supra* note 1, at 1370-71; see also Katie J. Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 *HAMLIN L. REV.* 203, 204-05 (2005) (arguing that, like Frankenstein, the artificially created corporation has turned into a destructive monster).

16. David A. Westbrook, Commentary, *Galanter v. Weber*, 53 *BUFF. L. REV.* 1445, 1445 (2006).

17. See Galanter, *supra* note 1, at 1370 (stating that corporations "have proved a tool for complex and coordinated action"); Westbrook, *supra* note 16, at 1449 (stating that "Corporations and other APs are designed to accomplish some task, and much of the time they do. This would seem to make corporations, in general, good.").

concerns about corporate power simply to tragic or comic discomfort with the fact that modern life is so good.¹⁸

But a critical approach would ask *which* particular corporate forms, with *which* substantive privileges, are good or bad *for which* natural persons and *for what* substantive systems of social and political power. This reframing of the question invites consideration of an answer that has been offered by progressive political movements around the world yet muffled in mainstream U.S. politics and scholarship. This answer warns that corporate power, both in and out of the courts, is not a tragic side effect of a benign, inevitable modernity where bureaucratic organizations make frustration and impersonal formality the price of large-scale growth and enlightenment. Instead, this perspective views contemporary corporate power as the devised, unjust effect of a political economy that is operating to reestablish and maintain many of the conditions and premises of colonialism and premodern feudalism for much of the world's people.¹⁹

By re-framing the question, critical legal analysis can challenge the presumption that the corporation is both natural and apolitical. Asking whether corporations are "good" or "bad" serves to *naturalize* the "artificial person" and the particular substantive shape that its formal personhood now assumes. By posing the question as how "good" or "bad" corporations "are," we reify or even deify APs as if their effects stem from some inherent, internal

18. See Westbrook, *supra* note 16, at 1445, 1449, 1451.

19. See, e.g., WILLIAM K. TABB, *UNEQUAL PARTNERS: A PRIMER ON GLOBALIZATION* 85-92 (2002) (discussing comparisons between colonialism and current corporate globalization, and the dependence of current "free market" programs on elite, antidemocratic rule); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 1, 6-9 (1999) (explaining how the international "free market" economy depends on illiberal colonial racial ideology and regimes); Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 *U.C. DAVIS L. REV.* 1451 (2000) (explaining how "free-market" economic policies can reinforce existing structural inequalities based on race and class); John A. Powell & S.P. Udayakumar, *Race, Poverty and Globalization*, May/June 2000, <http://www.globalexchange.org/campaigns/econ101/globalization072000.html>.pf (concluding that if the current process of capital-led globalism continues, "we are likely to permanently re-inscribe a subordinated, life-threatening status for people of color all over the globe and rationalize it with an invisible hand."). See also *infra* pp. 1473-84 (discussing Roy and the East India company).

character waiting to be discovered. Furthermore, asking whether this personified legal fiction is “good” or “bad” frames any substantive harm primarily as a problem of individual (and fictional) *morality* divorced from serious *politics*,²⁰ a matter of private obscure intentions—ill will or goodwill—rather than unjust public power institutionalized in law.²¹

If we instead aim to evaluate what different corporate forms and what different substantive powers *are better or worse* for whom, we keep in the foreground the fact that corporations are artificial, however real their privileges and powers under current law. This question assumes that corporations as we know them are not a fixed essence given to us by the natural or supernatural order, but are very human creations of particular, historically contingent, contested social and political systems. As legal creations dependent on human choices, the privileges and powers (good or bad) of corporations remain subject to legal change and challenge.

B. *Changing the Conflict From Form to Substance*

In his historical commentary on Galanter’s study, political scientist Gerald Berk explains that critiques of corporations’ naturalized status have a long history and vibrant present.²² But a critical re-framing of the question of corporate power highlights an additional perspective in the background of Berk’s account. Some (but not all) versions of critical legal analysis aim not just to *denaturalize substantive power*, but to *repoliticize formal law*.²³ By asking what different substantive corporate

20. See Kendall Thomas, *Racial Justice: Moral or Political?*, in LOOKING BACK AT LAW’S CENTURY 78, 81 (Austin Sarat et al. eds., 2002).

21. This is not to deny the political and intellectual importance of exploring how particular corporate legal rules shape individual moral behavior and social values. See generally LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT (2001) (analyzing recent corporate scandals as examples of how corporate law constrains and skews managers’ moral judgments).

22. Gerald Berk, *Corporate Power and its Discontents*, 53 BUFF. L. REV. 1419 (2006).

23. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 172 (1992) (arguing that there has not been enough emphasis on the

powers are better or worse, and for whom, this *politicized* critical approach foregrounds not just the *formal law* behind corporate “personhood,” but also the *substantive distributive politics* behind formal law.

Berk argues that corporations’ legal power cannot be neatly attributed to the legal advantages of their artificiality (as modern, complex, impersonal organizations) compared to their opponents’ naturalness (as human individuals embedded in traditional personal relationships).²⁴ Berk’s history shows how legal theory has *constructed* corporations as natural, and that this naturalized status may be a source of power not only for business entities, but also for opposing interests—which can also take the form of sophisticated large organizations.²⁵

That account implies that the problem of corporate power poses a dilemma not so much about *substantive power* as about *legal form* and about formal political principles.²⁶ One approach to mitigating corporate power aims to make it *more* natural, by duplicating the corporation in a pluralist system of other groups organized to promote particular interests (e.g., unions or consumers associations) that can naturally check the power of organized business in state and market.²⁷ Or, an alternative approach aims to mitigate corporate power by making it *less* natural, by stripping artificial privileges from corporations and instead cultivating public virtue capable of moderating private power.²⁸ By the mid-twentieth century, the “naturalized” vision of corporations as reified private

substantive political commitment of some strands of legal realism); Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 228 n.192 (2001) (discussing a division in legal realism between those who turned to empirical social science analysis to make law more political and those who sought to use empirical social science analysis to make law less political).

24. See Berk, *supra* note 22, at 1419.

25. See *id.* at 1420-22.

26. See *id.* at 1423-24 (contrasting the republican theory versus the pluralist theory of how to control corporate power).

27. *Id.* at 1424-25 (discussing critical reifiers and their links to interest group pluralism).

28. *Id.* at 1423-24 (discussing critical denaturalizers and their links to republican political philosophy).

beings had become widely accepted,²⁹ although some concerned about corporate power continued to doubt that countervailing groups could adequately solve the problem.³⁰

Berk concludes by presenting the renewed contemporary interest in critiquing the reified, natural status of corporations as yet another round in an age-old debate where corporate power is a persistent puzzle rather than an urgent injustice susceptible to legal solutions.³¹

Critical legal historian Dalia Tsuk adds to this picture by complicating the history of the early twentieth-century politics of corporate naturalization.³² In her analysis, the pluralist ideal of reified corporations balanced by other large organizations was part of broader ideological efforts to imagine that sociopolitical power differences are free from systematic, structural inequalities.³³ Leading early twentieth-century corporate naturalizers worked not just to mitigate corporate power, but to deny that corporate power raises questions of class and caste.³⁴ Pluralist political theorists, like John Dewey and Harold Laski, promoted a democratic state constituted by diverse, sovereign, and relatively equal collective entities not only as a moderate alternative to late nineteenth-century conservative individualism, but also to socialist claims that society is structured by pervasive class conflict.³⁵ Pluralist visions tended not only to reify the power of organized groups, but also to construct the relevant groupings of society as freely chosen, non-coercive associations involving only a narrow slice of their participants' lives.³⁶ From this pluralist perspective, corporate shareholders operated as a broad, diverse, fluid group of individuals sharing a particular,

29. *Id.* at 1425-26.

30. *See id.*

31. *Id.* at 1426 (stating that "the debate rages on").

32. *See* Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861 (2003).

33. *See id.* at 1865-68.

34. *Id.* at 1868 (giving the example of Adolf A. Berle, Jr., a leading corporate law scholar).

35. *See id.* at 1875-78.

36. *See id.* at 1907.

uniform economic interest unrelated to social and political goals.³⁷

These pluralist ideas helped construct egalitarian and cooperative relations between workers and capital owners mostly as a matter of form. This vision imagined that power imbalances would naturally ease once workers could organize in legally recognized and reified labor organizations that could participate as naturalized equals in state and market against corporations.³⁸ To the contrary, labor historians have shown that an array of substantive laws and institutions produced a system of unequal bargaining power skewed to privilege elite capital owners and penalize labor.³⁹ By the end of the century, this substantive scheme had even worked to undo workers' power of formal organization, leaving a substantial majority of workers without effective access to unions.⁴⁰ Tsuk shows how the

37. *Id.* at 1866 (discussing pluralists' understanding of groups as "neutral, voluntary and changing"); *id.* at 1898 (discussing the ideas of legal scholar Eugene Rostow).

38. *Id.* at 1866-67.

39. See James B. Atleson, *Reflections on Labor, Power and Society*, 44 MD. L. REV. 841 (1985) (explaining how changes in corporate organization since the 1950s, such as greater international capital mobility and greater concentration, have worked to give labor less bargaining power in relation to employers); Tsuk, *supra* note 32, at 1867; Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622-36 (1992) (explaining that pluralist ideals of the workplace as a mini-democracy insulated from systemic power inequalities shaped interpretations of collective bargaining laws in ways that disadvantaged workers). Tsuk notes that various subgroups, such as African American workers, were also disempowered through this understanding of workers' power as a simple matter of formal organization of homogenous economic interests rather than as a complex matter of challenging pervasive systems in which economic inequality is deeply intertwined with social and political inequality. Tsuk, *supra* note 32, at 1867 n.24 (citing Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59, 82-83, 99-100 (2003)).

40. See generally MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* (1987); James B. Atleson, *Commentary, Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463 (1994) (summarizing the data on declining unionization and analyzing the legal impediments to effective unionization as a problem interrelated with unions' unequal political power). See also Van Wezel Stone, *supra* note 39, at 578-79 (giving data on the decline in unionization, especially during the 1980s); *id.* at

ideological denial of class and caste by pluralist corporate reifiers helped construct substantive corporate law as an apolitical and technical tool for balancing the interests of owners and managers, divorced from any broader substantive questions of power over workers, communities, consumers, state, or family.⁴¹

Taking seriously the possibility that corporate power can be intertwined with systematic and pervasive inequalities, critical analysis expands the debate beyond a seemingly intractable dilemma about forms and formal principles—whether corporations should be artificial or naturalized, aggregated or individualized, controlled by state regulation or market competition, softened by pluralist diversity or republican consensus. If the basic structures of law and society normally operate to subordinate many for the benefit of a few, then the formal organization of our socioeconomic system might not only be artificial (humanly constructed), but malign (destructive of purported widely-held social values). This perspective suggests that the tough trade-offs facing those who would resist corporate power can act as double binds, supported both by legal artifice and material power.

Corporations may sometimes seem to have the power to say to many people in the world: give us your money or your life.⁴² The global corporate-dominated economy may seem to demand, for instance, that if you want to keep the job you depend on for income, you must give up the government regulations, services and benefits that protect your health, safety, environment, and leisure on and off that job.⁴³ Or, it

583-84 (explaining the weak bargaining power of unions due to their legal disadvantages as a reason for workers' negative attitudes toward unions).

41. Tsuk, *supra* note 32, at 1867-68; see also Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005) (showing how legal scholarship has reinterpreted the foundational analysis of corporations by Adolf A. Berle, Jr., and Gardiner C. Means to erase their central concern with corporate power).

42. For discussions challenging easy distinctions between "voluntary" market exchanges and coercive force, see Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 480 (1974) and Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935).

43. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 805-06 (2003) [hereinafter McCluskey, *Efficiency and Social Citizenship*] (explaining

might seem to demand that you choose between giving up much of your monthly income for skyrocketing unregulated pharmaceutical prices, or giving up the life-sustaining medication along with the research and development necessary to produce new life-sustaining drugs.⁴⁴ Or, it might demand that you choose between reducing your spending on basic social needs like health insurance, good education, retirement security, or infrastructure or sacrificing the investment capital, credit ratings and loans necessary to float your sinking businesses, governments, and families.⁴⁵

Such choices are particularly painful because, in the contemporary world of global corporate power, money (in a dominant currency) tends to be necessary but increasingly insufficient to secure most people's jobs, health, environment, leisure, community, personal freedom, and dignity. Indeed, the demand made to much of the world's population often seems to be more accurately stated as: give us your money *and* your life. Dig yourself further into debt, danger, and desperation in pursuit of low wages⁴⁶—and get a

and criticizing how neoliberal ideology and policy creates a double bind that makes social spending cuts and employment benefits necessary but impossible for preserving jobs); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER, SOC. POL'Y & LAW 115, 133-35 (2000) [hereinafter McCluskey, *Subsidized Lives*] (discussing how neoliberal structural adjustment policies abroad and economic "growth" policies in the U.S. have induced cuts in social services, wages, and reduced leisure).

44. See, e.g., Editorial, *A Shortsighted Path to Cheaper Drugs: Drug Reimportation Will Curtail Research*, ROCKY MOUNTAIN NEWS, July 21, 2004, at 34A (arguing that importing cheaper drugs from countries with price regulation will stifle innovation by the American pharmaceutical industry, which is "saving lives left and right"). For a critique of the argument that drug companies use their high U.S. profits to maximize development of innovative, life-saving drugs, see Katharine Greider, *Offering hope—at a price*, THE NATION, June 9, 2003, at 26.

45. See, e.g., ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003) (analyzing data on the dramatic rise in U.S. bankruptcies as a problem of impossible choices between costly necessities and costly credit for families relying on two full time incomes to maintain middle class status).

46. For discussion some of the problems facing workers in a global economy structured to encourage low-wage work, see generally *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* (Joel F. Handler & Lucie White eds., 1999) and *LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY* (Frank Munger ed., 2002). See also Isabel Wilkerson, *Angela Whittaker's Climb*, N.Y. TIMES, June 12, 2005, at

society more dependent on assuring wealthy investors that their welfare and warfare comes before your wages, job, long-term economic and political security, health, family, environment, and freedom.⁴⁷

But corporations require human guns (literally and figuratively) to extend and enforce these bitter choices⁴⁸— and politically organized human hands and minds can use human laws to insist on better choices. It is not the natural, neutral, or random forces of modern law or modern markets, but rather it is systematic political and moral actions (though not necessarily conscious or coordinated) by self-interested human beings that offer and rationalize these bad choices.

A1, A23 (reporting experience of woman who made herculean efforts to work and study her way off welfare, only to land a high-stress, low-wage job as a nurse that leaves her little time to spend with her family and little money for basic needs).

47. On the harmful impact of global "development" debt to citizens of both North and South, developing and developed nations, see SUSAN GEORGE, *THE DEBT BOOMERANG: HOW THIRD WORLD DEBT HARMS US ALL* (1992); on the bad choices and "race to the bottom" created by relying on investments from multinational corporations for global economic development, see James Crotty, Gerald Epstein, & Patricia Kelly, *Multinational corporations in the neo-liberal regime*, in *GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY* 117-146 (Dean Baker et al. eds., 1998); on the similar race to the bottom that drains U.S. local governments of money for social spending in the interest of job creation at the same time as it leaves communities with more job insecurity and less effective development, see generally GREG LEROY, *THE GREAT AMERICAN JOBS SCAM: CORPORATE TAX DODGING AND THE MYTH OF JOB CREATION* (2005); on the "global pincer movement" produced by wealthy international capital owners to the detriment of most of the world's people, see HANS-PETER MARTIN & HARALD SCHUMANN, *THE GLOBAL TRAP: GLOBALIZATION & THE ASSAULT ON DEMOCRACY & PROSPERITY* 7 (Patrick Camiller trans., 1997).

48. See, e.g., *Tentative Settlement of ATCA Human Rights Suits Against Unocal*, 99 AM. J. INT'L L. 497 (2005) (describing settlement of lawsuit claiming that the multinational Unocal violated human rights laws by working with the military in Burma/Myanmar to use murder and forced labor to advance corporate interests in building and profiting from a pipeline); Jeremy Scahill, *Blackwater Down*, THE NATION, Oct. 10, 2005, at 18 (reporting that major corporations and their allied political leaders have used private, sometimes illegally operating, paramilitary forces to engage in vigilante violence or threats of violence as a way of enhancing corporate power in the reconstruction of New Orleans); Naomi Klein, *The Rise of Disaster Capitalism*, THE NATION, May 2, 2005, at 9 (discussing how corporate profiteering is linked to military policy); *Political Economy of War and Imperialism*, in *REAL WORLD GLOBALIZATION* 189-219 (Amy Offner et al. eds., 8th ed. 2005) (collecting essays from progressive economists on the relationship between corporate power and warfare).

C. Challenging Formalism's Inevitable Substance

This shift in question—from the objective merits of the corporate form to the particular substantive values and political interests and orderings that the form incorporates—is a classic example of critical legal method. Legal liberalism, the broad political philosophy that includes both liberal and conservative politics, often frames legal questions as inevitable choices between the competing values of formal neutrality and substantive individual fairness.⁴⁹ Within this general framework of liberalism, both political “liberals” and political “conservatives” agree that a complex, heterogeneous society with conflicting views of substantive fairness requires prioritizing formal neutrality in law (and market) to achieve justice. Furthermore, within this framework there is a common consensus that the generally preferable formal neutrality often has harsh effects that sometimes merit substantive intervention (at least temporarily and at the margins), especially when there are (temporary or marginal) substantive breaches or imperfections in the ostensibly formal neutrality of law or market (like America’s history of racial slavery). In this scheme, political “liberals” tend to weigh substantive fairness a bit more heavily (based on judgments of greater substantive flaws in the formally neutral systems) than “conservatives.”

But rather than take sides in this balancing of form and substance, some critics aim to upend the dichotomy. Some strands of early twentieth-century legal realism and late twentieth-century critical legal studies, critical race theory, and critical legal feminism offer a view of a different choice: not between competing abstract principles of formalism and substantive fairness, but between competing particularized, contingent interests in particular forms with particular substantive effects (despite the complexity and difficulty of predicting these effects).⁵⁰ This choice inevitably involves

49. See Jeremy Paul, *Changing the Subject: Cognitive Theory and the Teaching of Law*, 67 BROOK. L. REV. 987, 987-991 (2002) (summarizing most of jurisprudence and liberal political theory as a conflict between formalism and antiformalism, though problematically putting critical feminist and race theory at the margins of this debate).

50. See, e.g., AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991); Critical

contested political and moral visions about whose personal views deserve to be institutionalized as public power. In this critical view, the democratic rule of law does not require the tragic (or comic) balancing (or bungling) of irreconcilable noble ideals, but instead involves responsible, and responsive, political and legal commitments to correcting a system where undemocratic, antisocial values are all too normal.⁵¹

In an example of this critical deconstruction of the form/substance divide, feminist jurisprudence has argued that the problem of persisting gender subordination is not simply that the law has adopted a formal standard of equality (treating likes alike) rather than a substantive standard (ending gender subordination).⁵² More pointedly, feminist theory argues that the law's formal standard of equality is *not* in fact formal (and cannot be).⁵³ Formal equality necessarily requires a substantive baseline for measuring sameness and difference.⁵⁴

Race Feminism: A Reader (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002); I FEMINIST LEGAL THEORY: FOUNDATIONS AND OUTLOOKS (Frances E. Olsen ed., 1995). For a discussion of how critical race theory rejects the false promise of transcendence in formalism without giving false objectivity to substantive justice, see Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2436-38 (2003).

51. In contrast, Marc Kelman offers a less political view of critical legal studies, asserting that it rejects formalism on the grounds of inevitable, and inevitably indeterminate, conflicts between principled norms. See KELMAN, *supra* note 12, at 12-13.

52. See McCluskey, *Subsidized Lives*, *supra* note 43, at 122 (explaining the equal treatment/special treatment dilemma); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1142-44 (1986) (summarizing the equal treatment/special treatment debate as a problem of formal versus substantive equality).

53. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 221 (1989) (critiquing the choice between substantive and formal equality, or "sameness" and difference"); McCluskey, *Subsidized Lives*, *supra* note 43, at 124-25 (discussing the feminist critique of the formalist/substance debate and applying it to the efficiency/redistribution debate).

54. See MARTHA MINOW, MAKING ALL THE DIFFERENCE 50-53 (1990); McCluskey, *Subsidized Lives*, *supra* note 43, at 128-29.

In the traditional equality framework, the principle of "formal equal treatment" requires employers to be generally gender blind, treating women in the workplace the same as men.⁵⁵ This formalism avoids the problem that substantive protections for women's "difference" historically have disguised and legitimated substantive subordination: for instance, work restrictions purportedly protecting women's health or family demands served to reserve higher income jobs for men.⁵⁶ On the other hand, such a formal neutrality standard will fail to protect women's particular needs and interests in the workplace (e.g., pregnancy leave).⁵⁷

To address this shortcoming, the mainstream framework offers the alternative of deviating from formal neutrality out of concern for substantive fairness. That approach might allow for "special treatment" of women in the workplace (gender consciousness) to correct and accommodate the historical (or biological) assignment to women of primary responsibility for home and family—so that women who are pregnant, breastfeeding, or caring for family members are not disadvantaged in the name of sex equality.⁵⁸ The problem, however, is that particularly feminized needs and interests will be protected by this substantive fairness standard only as deviations from a neutral norm—and therefore are likely to be stigmatizing and limiting.⁵⁹

Critical feminists rejected liberalism's tragic choice between formal and substantive gender equality. By revealing the form as substance, we can see that the choice is not so much tragic (or comic) as unjust. The apparently tough dilemma between form and substance stems from its

55. See Finley, *supra* note 52, at 1142-45.

56. See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 870 (1997) (giving the "mommy track" as an example of the problems with adopting a substantive standard of equality to address women's "differences"); McCluskey, *Subsidized Lives*, *supra* note 33, at 124-25 (discussing the problems with the substantive equality approach).

57. See Finley, *supra* note 52, at 1142-48.

58. See *id.*; JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

59. See Finley, *supra* note 52, at 1146 (explaining that feminist advocates of formal sex equality argued that such needs could be better addressed outside the framework of equality, through legislation granting broad disability benefits, for instance).

covert assumption of a substantive standard favoring men: being treated “equally” means being treated not formally neutral, but substantively the same as (privileged white) men; being treated “specially” means being treated by a substantive measure that makes being the same as a man the “normal” and normative ideal.⁶⁰

The lesson from this example can be applied to other debates, like the debate that appears to pit a neutral corporate form against questions of substantive fairness. Critical jurisprudence teaches that “formalism” is always substantive,⁶¹ and that substance is always enforced through particular forms that mask and legitimize substantive values that would be suspect if stated more overtly. Rather than engage the form versus substance debate, some critical analysis aims to shift the debate to the inevitably political and moral questions of *which* substance, institutionalized through *which* forms, are preferable for *which* human interests and values.

II. DENATURALIZING AND RE-POLITICIZING CORPORATIONS

A. *The Artificial Corporate Form as Natural Economics*

The corporate form endows organized capital with particular status and rights as a legal and market “being” separate from its human owners. The conventional scholarly wisdom recognizes that corporations are not truly “natural,” but instead are “legal fictions” dependent on a sophisticated human-crafted legal system (and complex

60. See MACKINNON, *supra* note 53, at 221 (both versions of equality hold women to a substantively male standard); Finley, *supra* note 52, at 1152-59 (analyzing the assumption of a male norm in traditional formal equality analysis). Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001) (explaining that neither formal equality nor targeted protections for pregnancy or family leave have sufficiently protected many women from employment discrimination due to their family caregiving).

61. Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1109 (1996) (discussing the substantive judgments underlying Plessy's formalism).

market bargaining among competing human interests)⁶² for their creation and sustenance. Nonetheless, mainstream discussions of corporate power tend to naturalize and depoliticize the corporate form by presenting it as an organic outgrowth of the operation of natural laws of economics in modern, complex society.

In conventional legal economics, this general corporate structure is deemed “economically efficient”—meaning that it does not simply enrich particular classes or interests, but instead maximizes overall societal welfare by reducing the aggregate costs of providing capital for production without reducing aggregate benefits.⁶³ The conventional legal and economic wisdom presumes that the corporate form rewards not only wealthy investors, but also society in general by providing and organizing large pools of capital to drive large-scale development.

One theory (now less fashionable), roughly stated, explained that dividing capital ownership from business operation allowed specialized managers to reduce waste by expertly, rationally, cooperatively, and hierarchically coordinating large-scale production.⁶⁴ In particular, this managerial theory explained that the corporate form arose because technological and economic changes made centralized, integrated planning (by private firms) less costly than competitive markets.⁶⁵ More recently, prevailing theories have conceptualized the corporate form as a “nexus of contracts” created through voluntary market bargaining by

62. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 642-43 (1990).

63. Technically speaking, this is the Kaldor-Hicks version of efficiency, where aggregate gains outweigh aggregate costs (despite losses for some individuals). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14-17 (5th ed. 1998) (explaining the Kaldor-Hicks version of efficiency).

64. See William H. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 413-14 (1989) (discussing the managerialist theory of the corporate firm).

65. See generally ALFRED D. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977). For a discussion and critical analysis of this argument, see WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 7-8 (1997).

self-interested individuals.⁶⁶ Part of this theory involves the idea that the contractual arrangements that best reduce the “agency” costs of organized business relationships will be the ones that survive the competitive market process.⁶⁷ These economic theories generally explain the “artificial” corporate form as a creation of private, voluntary actions (despite its public legal institutionalization) by actors who follow “natural”—and naturally beneficial and apolitical—laws of economics.⁶⁸

This prevailing economic theory is basically a tautology, or a literary device (a metaphor or narrative), not a hypothesis susceptible to empirical evidence.⁶⁹ How do corporate law scholars know that any given corporate form indeed fulfills its promise of saving costs overall rather than escalating or redistributing them? Or, how would legal theory, informed by prevailing economics, know that whatever the problematic effects of the contemporary corporate order, it produces societal benefits that outweigh any harm? The prevailing theory presumes the current corporate form arises from a generally free market that generally maximizes societal benefits over costs.

If the corporate form was instead presumed to be the product (and producer) of legal and political *barriers* to the ideal free market, then the particular distribution of risks and responsibilities that the form now embodies could instead be logically characterized as inefficient redistribution. In fact, in their foundational book on corporate law,

66. See Bratton, *supra* note 64 at 415-19 (discussing the basic theory and summarizing its neoclassical and institutionalist variants); see also Galanter, *supra* note 1, at 1371.

67. See Bratton, *supra* note 64, at 417-18.

68. See *id.* at 422-23 (explaining the assumptions common to the varying economic theories of the corporate form). For a critique of how neoclassical economic ideas in legal theory have more generally presented some “artificial” governance of the economy as natural, see generally Martha T. McCluskey, *Deconstructing the State/Market Divide: The Rhetoric of Regulation from Workers’ Compensation to the World Trade Organization*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 147 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

69. See Bratton, *supra* note 64, at 410 (noting labelling it as such does not necessarily imply a critique). For discussions of how, in general, neoclassical economic analysis of law deploys rhetorical strategy disguised as science, see DEIRDRE N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* (2d ed. 1998) and McCluskey, *supra* note 68, at 147.

Adolf Berle and Gardiner Means emphasized that corporations are political actors analogous to the state or to the medieval church in their power to coerce and control the economy and undermine competitive markets.⁷⁰

Following conventional economic (or moral) logic, the separation of ownership and control in corporations can be analyzed as a problem of inefficient moral hazard destructive of overall economic well-being, not an optimal reduction of agency costs.⁷¹ In the standard theory, moral hazard is the problem that when otherwise efficient contracts insulate decisionmakers from the direct costs of their actions, those decisionmakers will have an incentive to engage in excessively costly actions—particularly where the contractual behavior of the decisionmakers cannot be perfectly enforced.⁷² Moral hazard is especially likely to occur when contracting goes beyond simple exchanges to involve more complex, long-term, and bureaucratic relationships between parties with specialized skills or knowledge.⁷³ Indeed, the older managerial economic theory spurred extensive agonized analysis of how law might solve the problem of moral hazard in the corporation.⁷⁴ Moral

70. See Tsuk, *supra* note 41, at 192 (quoting ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 352 (1932)); *id.* at 216-18 (discussing and arguing that legal and economic scholars have distorted the message of the Berle and Means book).

71. See Galanter, *supra* note 1, at 1373-74 (noting that economists address the problem of "agency costs" inherent to the corporate form); Tsuk, *supra* note 41, at 186-87 (explaining how early twentieth century corporate law scholars Adolf Berle and Gardiner Means argued that the separation of ownership and control in corporations "severed the tie between self-interest and efficiency").

72. See PAUL MILGRAM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION & MANAGEMENT* 166-167 (1992) (describing moral hazard as "postcontractual opportunism"). For an extensive discussion of the insurance origins and contemporary economic and legal uses of moral hazard, see generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237 (1996). For a critique of the indeterminacy—and politics—of the concept of moral hazard, see Martha T. McCluskey, *Illusion of Efficiency in Workers' Compensation Reform*, 50 *RUTGERS L. REV.* 657, 742-50 (1998).

73. See MILGRAM & ROBERTS, *supra* note 72, at 167 (explaining that in "simple exchanges of goods with specific, well-understood, observable attributes, . . . parties to a transaction can costlessly verify whether the terms of the transaction are being met").

74. See *id.* at 181 (discussing the arguments of the path-breaking corporate law book, ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932)); Tsuk, *supra* note 32, at 1882

hazard can be controlled through various regulatory devices (in private contract, corporate governance, and public regulatory law), but these mechanisms themselves are likely to be costly and cumbersome, leading to further costly bureaucracy producing further opportunities for costly moral hazard which in turn need further costly control, in a downward spiraling drain of societal resources. Of course, if we start by presuming a corporate form that reflects an efficient market, we can conclude that its particular arrangements instead incorporate the optimal strategy for avoiding and correcting moral hazard, happily producing a corporate form that we can trust to maximize societal resources.⁷⁵

If, in any given legal and political context, capital investors or managers (or the nebulous contractors of the nexus theory) can increase their personal gain through the corporate form, then how do we know that this gain reflects overall benefit to society rather than simply temporary opportunism at the expense of long-run aggregate societal well-being? That is, are any possible reduced risks to corporate transactors from our current corporate system the result of market incentives for optimally cutting costly waste?⁷⁶ Or are these savings the result of some market actors taking advantage of protections from normal market competition to cut corners essential to ensuring good long-term decisions about investment, management, and economic development?

For corporate law (or law in general), there is no scientific economic measure, or political and moral consensus that can neatly separate a necessary cost in a transaction (a price) that reflects the optimal performance of the "efficient" market from the peripheral, unnecessary, "transaction costs"—like moral hazard—that get in the way

(noting that since Berle and Means published their famous book, "corporate law scholarship has been obsessed with its exegesis of the potential economic risks associated with the separation between ownership and control in large business corporations.").

75. See Tsuk, *supra* note 41, at 183 (explaining how corporate law scholars reinterpreted early critiques of the problem of corporate power as discussions of corporate efficiency, thereby turning the problem into a solution).

76. See Bratton, *supra* note 64, at 420 (explaining that the nexus of contract theory rebuts the managerialist concern by presuming a competitive market producing optimal sharing of risk among parties to the corporate transaction).

of efficient market transactions.⁷⁷ The transaction of capital investment in railroads, from a neoclassical economic perspective, (roughly stated) might involve maximizing the returns to railroad investors and managers while minimizing the costs to railroad operators and users (among others). But what profits, and what costs, we assign as legitimate to that capital investment is much more complicated, contested, and contingent than it might first appear.

Imagine, for example, that we want to evaluate a given substantive system of corporate law. Imagine that this system's corporate form produces a railroad that brings us not just more railroad investment and more railroad profits than it would have otherwise, but also more dead railroad workers, more fires destroying neighboring property, and more concentrated political, economic, and military power. Imagine that this power leveraged by the corporate form, in turn, allows those investors to further advance their interests in maximizing railroad investment returns at the expense of other goals—and even at the expense of long run economic viability of the railroad business. Are these effects costly moral hazard—opportunistic gain-seeking external to efficient transaction? Or are they the necessary price of the efficient railroad transaction designed to optimally minimize moral hazard and other costs overall—part of the facts of life of a nationalized industrial economy that operates to the long run benefit of society, despite occasional losers?

Economics provides no objective, apolitical basis for distinguishing whether any results of any given corporate structure are costs rather than benefits, or whether any costs accompanying this corporate structure are the result of natural market forces or unnatural market failures. Any calculation of the benefits versus costs of a given corporate structure requires substantive decisions about distributive justice: we must decide whose interests, according to whose measurement, should stand for society's interest; we must decide which harms law should require society to systematically recognize and redress, and which harms law should require society to systematically accept or ignore.

77. See Mayer, *supra* note 62, at 650 (criticizing the Supreme Court's similar "operationalism" that begs the question of the purpose of corporations by defining the purpose to be whatever a given corporation does).

Moreover, that substantive judgment requires evaluating not simply whether the general idea of the corporate form is good or bad, but *for whom* and *for what distributions of power* the form is good, and *what particular substantive rights* are good and bad to include in that corporate form. If the evidence of injustice and harm from the current configuration of the corporate substance merits only ambivalent criticism in most scholarship and politics,⁷⁸ the reason may be less that most are persuaded about the morality and justice of contemporary corporate power⁷⁹ and more that most are dissuaded from questioning the economic essentialism and determinism that excuses corporate irresponsibility for widespread social and economic insecurity and suffering.

B. *The Corporation as Historical Legal Substance*

Critical analysis of corporations has particularly turned to history to show that the legal idea of the corporation has been shaped not simply by nature, consensus, or noble principle, but by deeply contested political interests embedded in broader structures of power. To counter the mainstream tendency to take the corporate form for granted as an essential feature of a modern legal and economic system, scholars and activists have detailed the wide variations in its substantive content over time and across different states and different firms, and they have examined the particular political and legal contingencies that ground the current corporate form.⁸⁰

In response to such attempts to denaturalize the corporation by reducing it to a creature of political history, tautological economic conviction can reduce any variation or any phenomenon (including law and politics) to the necessary, natural consequence of neutral market forces. Nonetheless, a historical denaturalizing analysis of

78. See Westbrook, *supra* note 16, at 1445.

79. See MITCHELL, *supra* note 21, at 3 (arguing that "no thoughtful person" really believes in the morality or economic soundness of the corporate behavior produced by the current legal structure, which pressures managers to maximize short-term stock prices above all else).

80. See, e.g., ROY, *supra* note 65, at 24-26 (explaining that, during the period when the corporate form became dominant, incorporation was clustered in a few industries and in certain firms within those industries).

corporate substance can challenge such economic fundamentalism at another level. Close historical analysis can show not only that the corporation's substance is the contingent and artificial result of quirky, seemingly irrational and random, decisions. It can also show how particular corporate substantive choices reflect and produce systematic, far-reaching, long-lasting, and non-random structures of power. That power in turn helps to make corporations (as currently configured) appear more rational, natural, and necessary, even as their harmful impact increases.

Economic sociologist William G. Roy explains in his history of the "corporate revolution," that the question is not just whether today's particular corporate form was a rational response by corporate owners, managers, and others to changing conditions, but what substantive, structural politics shaped the choices those market actors faced and the consequences of each choice.⁸¹ Roy's historical account shows how nineteenth-century railroads led the movement to incorporation not because their successful economic or societal results proved the corporate form to *be* superior, but because the railroad industry's owners and managers had the power to reshape industrial and financial markets as well as political and legal structures to help *make* the corporate form particularly advantageous for business interests in subsequent decades.⁸² Roy explains that larger firms particularly created and adopted the corporate form during the late nineteenth and early twentieth centuries because these larger businesses had more substantive power, not because the corporate form was "naturally" or "efficiently" more suitable for big business or big economies.⁸³

If we adopt a critique that examines systemic *power* as well as *formal law*, the problem is not so much that the current situation of corporate legal power might be irrational or unnatural, but that its substance might have been shaped to rationally and "naturally" reproduce and reinforce a particularly problematic distribution of power.

81. See *id.* at 14 (comparing a "power theory" of corporate history to the conventional "efficiency theory.").

82. *Id.* at 78-114.

83. See *id.* at 35.

This critical denaturalizing and re-politicizing history helps show that the advantages of large corporations in the current legal and political system are not mainly the result of its superior *substantive* merits—the optimal adaptation to our contemporary environment, like the economic theory suggests. But neither are the advantages of large corporations mainly the results of their particularly *formal* and *formalized* nature—the superior ability, as Galanter explains, of large, impersonal, rule-oriented, repeat players to negotiate a contemporary large, formal, impersonal, rule-oriented legal system.⁸⁴ Instead, that critical historical perspective analyzes the current context of corporate power as the product of some persons' superior substantive power to institutionalize their shared interests in formal mechanisms capable of further shaping, solidifying, and strengthening that substantive power.⁸⁵

1. *The Structural Politics of Corporations as Public Privileges.* In his comment on Galanter's analysis of corporate power, Gerald Berk briefly contrasts today's naturalized, privatized understanding of corporations with the public theory of the corporation that originally prevailed in antebellum United States.⁸⁶ Elaborating on this denaturalizing historical comparison is useful not just to show the artificial nature of the contemporary corporate form, but also to suggest the connections between its substantive political nature and structural inequality in society.

Briefly highlighted, the normal legal power to establish corporations was once held not by private individuals but by public legislatures. For much of the first century of American law, state legislatures typically conferred corporate charters as special privileges for limited periods and for limited public purposes.⁸⁷ Through the mid-nineteenth century, U.S. law often treated the corporate charter as a

84. See Galanter, *supra* note 1, at 1387-89.

85. See ROY, *supra* note 65, at 13-14.

86. See Berk, *supra* note 22, at 1420.

87. See Richard L. Grossman & Frank T. Adams, *Taking Care of Business: Citizenship and the Charter of Incorporation*, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY AND STRATEGY* 59, 61 (2001); HORWITZ, *supra* note 23, at 109-133; Berk, *supra* note 22, at 1420.

public benefit and the corporation as a quasi-government agency, not private property.⁸⁸ Corporate charters typically granted a monopoly over some particular enterprise (typically related to infrastructure development) to a group of persons who agreed to share its financing and operation.⁸⁹ Charters were seen as delegations of public sovereignty,⁹⁰ and often included, for example, eminent domain authority or public funding.⁹¹

As a special government "subsidy," not a private "entitlement," charters required owners and managers to satisfy reciprocal public responsibilities.⁹² Legislatures, for example, sometimes established public rights to corporate property and profits in exchange for issuing a corporate charter.⁹³ State legislatures enforced many substantive conditions on the operation of ongoing corporations. For example, states sometimes regulated the business's prices and the investors' rate of return. Furthermore, during this period American corporations commonly operated under extensive public oversight,⁹⁴ with substantive requirements enforced through legislative revocation of the charter and

88. See ROY, *supra* note 65, at 3.

89. See HORWITZ, *supra* note 23, at 116-30; ROY, *supra* note 65, at 49.

90. See ROY, *supra* note 65, at 52.

91. *Id.* at 51, 62.

92. A similar idea of private reciprocity for government largesse has been central to contemporary welfare reform debates. Amy Wax claims consensus norms and even science explain welfare reforms requiring welfare recipients to take "personal responsibility" to work for others (rather than care for their own children). See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257 (2000). But Wax's analysis begs the crucial antecedent question of how we decide what counts as a government benefit and what counts as a natural right. Whether parental care for children and basic subsistence or doing business as a corporation count as personal rights or public privileges is a question of contested politics and morality that has been answered differently in different social and historical contexts.

93. See Grossman & Adams, *supra* note 87, at 62 (explaining, for example, that the New Jersey legislature retained the right to take ownership and control of corporate property and that Pennsylvania and other states required corporations to fund the state purchase of utilities).

94. See *id.* (noting that some legislatures had authority to review corporate accounting books).

dissolution of the corporation.⁹⁵ Some legislatures bought shares in their chartered corporations to better maintain control.⁹⁶

The story of the shift of the corporation from public charter to private property can be told as a dispute about institutional form or formal political principles—for example, the relative merits of state and market governance, public versus private investment, legislative versus judicial control, or the relative merits of republican or free-market theory. Or it might be told as a political conflict between competing substantive interests, like agrarians or small craftspersons versus industrialists.

But this period of public control of corporations involved not just a substantive conflict over competing economic interests, or over public versus private control of the economy, but also a substantive conflict over whether to publicly control the economy in a way that would help resist and undo the class structures that grounded colonial American society. The public control state legislatures exercised differed from today's structures of corporate regulation not just in its different institutional form, but in its potentially different distribution of substantive power. State legislatures sometimes approached corporate law as an opportunity to systematically restructure society to promote more democratic and egalitarian distributions of economic power.

For example, in conferring the privileges of incorporation, state legislatures tended to balance corporate investors' interests against other stakeholding groups, like labor and local communities, often denying corporate charters to business enterprises opposed by other interests or insufficiently focused on the public interest.⁹⁷ Sometimes states required super-majorities of state legislatures or

95. *See id.* at 64 (“New York State’s 1828 corporation law specified that every charter was subject to alteration or repeal.”).

96. *Id.* at 62.

97. *See id.* at 62, 65; ROY, *supra* note 65, at 48 (telling the story of how in 1833 the Pennsylvania legislature denied a coal company a corporate charter on the ground that it could attract private capital without it (citing LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* (1968))).

public referenda to create or renew charters.⁹⁸ Some legislatures structured corporations to ensure equal voting power for smaller investors; to require favorable treatment of the poor; or to ensure that investors and managers retained private individual responsibility for corporate debts and liabilities.⁹⁹

The contemporary view tends to suggest that opposition to corporate power stems from backward-looking agrarians unable to accept the reality of modern industrialism, or now from backward-looking manufacturing workers unable to accept the reality of post-modern post-industrialism.¹⁰⁰ But early American opponents of corporate power often construed it as an anachronistic vestige of unenlightened medieval and colonial European tradition—a continuation of a system characterized by medieval guilds and the imperial East India Company.¹⁰¹ In that view, the corporation continued a system of special sovereign privileges conferred through special entitlements that organized society into hierarchical groups with broad powers to control individual lives.¹⁰² The nineteenth century anticorporate movement arguably was quite forward-looking in its predictions that corporations would facilitate a concentration of power and wealth that would come to dominate not just business, but electoral politics, the state, and the media.¹⁰³ Current opponents of corporate power have revived and updated this substantive argument by presenting the history of corporate power, and its resistance, as a continuing struggle over how far democracy and human rights should be allowed to encroach on

98. See Grossman & Adams, *supra* note 87, at 64-65 (giving an example of New York in the 1840s, Wisconsin, and four other states).

99. See *id.* at 63.

100. See, e.g., Susan Tiefenbrun, *Free Trade and Protests: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257 (2000) (characterizing protestors as "ancients" resisting modernity).

101. See Grossman & Adams, *supra* note 87, at 61; ROY, *supra* note 65, at 46; Tsuk, *supra* note 32, at 1870.

102. See ROY, *supra* note 65, at 46 (citing William H. Sewell, *A Theory of Structure: Duality, Agency, and Transformation*, 98 AM. J. SOC. 1 (1992)).

103. See *id.* at 53. For a discussion of corporate political power today, and its effect on creating and maintaining a "superclass," see ROBERT PERRUCCI & EARL WYSONG, *THE NEW CLASS SOCIETY* 60-64 (1999).

authoritarian hierarchical traditionalism and on new consolidations of class and caste.¹⁰⁴

2. *The Structural Politics of Corporations as Private Entitlements.* By the late nineteenth century, however, as businesses increasingly adopted the corporate form, a change in prevailing ideology solidified a competing private view of corporations.¹⁰⁵ In the middle of the century, in response to populist pressure, states had adopted general incorporation laws that turned corporate charters governing public infrastructure projects into administrative formalities.¹⁰⁶ At the end of the century, this practice of general incorporation was expanded to include manufacturing businesses.¹⁰⁷

Again, this change is not just a simple story of growing preference for private versus public form, or even for business interests versus their opponents. Neither is it simply a tragic¹⁰⁸ story of the inevitable tradeoffs between formal equality and substantive equality, where the populist effort to control big business by popularizing the corporate form ended up facilitating the rise of corporate robber barons and today's multinational corporations. Instead, this story might show the limits of attempts to control corporate power as a problem of legal form or narrow substantive economic interests divorced from a more systemic analysis of state and market class and caste.

Roy explains that the movement to privatize and generalize the right to incorporate was primarily driven by corporate opponents, not by business leaders seeking newly efficient ways of organizing capital. The nineteenth-century

104. See generally DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY, *supra* note 87; World Social Forum Charter of Principles, http://www.forumsocialmundial.org.br/main.php?id_menu=4&cd_language=2 (last visited Nov. 20, 2005) (stating their goal of achieving "a new stage in history" where governments will rest on human rights and international democratic institutions, rather than the interests of large multinational corporations). See also, e.g., CorpWatch, <http://www.corpwatch.org> (last visited Oct. 15, 2005); *What Would Democracy Look Like?*, YES!, Winter 2003, available at <http://www.futurenet.org/default.asp?ID=47>.

105. See ROY, *supra* note 65, at 5-6.

106. See *id.* at 73; Berk, *supra* note 22, at 1420.

107. See ROY, *supra* note 65, at 221-58.

108. Or comic, depending on one's politics and morality.

anticorporate movement split into two factions, an antistatist movement that argued public control was inadequate to protect against aristocratic and antidemocratic corporate power; and a more statist branch that supported greater public accountability and regulation.¹⁰⁹ The antistatist faction turned to general incorporation laws as a solution to the shortcomings of public control of corporations, on the theory that corporate power would be better controlled by eliminating special public privileges than by increased public oversight.¹¹⁰ In contrast, in France, nineteenth-century anticorporate movements were more optimistic about public accountability and established increased (and arguably more successful) regulation of railroads and other major corporations.¹¹¹

Roy argues that antistatist opponents of corporate power in the U.S., concerned about state debt from failed canals and other infrastructure projects, shortsightedly blamed public investment in economic development, not private mismanagement of that development under insufficient public control, for the economic failures of the mid-nineteenth century.¹¹² Antistatist corporate opponents may have been right in fearing that aristocrats could use corporate powers to systematically capture the state against the interests of the rest of society, resulting in widespread economic devastation.¹¹³ But perhaps this history suggests those corporate opponents were wrong to hope that by formally protecting the market from the state, or individuals from groups, they could effectively address that problem of systematic skewing of state power to control the economy against the public interest.

Despite its antistatistism, this populist anticorporate movement did not really shift legal power over corporations from an inegalitarian, captured state to a potentially free market or from groups to individuals, but instead left in place a regime of substantive legal privileges for corporations (e.g., limited liability)—with less countervail-

109. See ROY, *supra* note 65, at 72.

110. See *id.* at 72-74.

111. *Id.* at 74.

112. See *id.* at 74-75.

113. See *id.* at 74 (discussing how the depressions of 1837 and 1857 "sealed the doom" of the public corporation).

ing public control. Roy points to three particular areas of state substantive law that helped construct the current context of corporate power. Examining these substantive corporate privileges is important not just for showing how the artificial, contingent nature of the corporate form, but also for showing how the particular choice of form facilitated far-reaching, comprehensive substantive changes in the distribution of systematic power in state and society.

First, limited liability is one of the central features that currently defines the corporate form.¹¹⁴ Roy explains that this supposedly essential right was in fact strongly contested and varied widely among states throughout the nineteenth century.¹¹⁵ Indeed, limited liability was often criticized through the end of the nineteenth century not just by agrarian opponents of corporate power, but by wealthy investors and corporate law scholars concerned that decreased personal responsibility would lead to corporate mismanagement, inefficiency, and instability as well as to an unfair, undemocratic shift in societal power.¹¹⁶

By definition, expansive protection from liability directly redistributes risk between capital owners and creditors—including consumers, workers, and other potential tort plaintiffs. That redistribution of risk not only shifts costs to those outside the capital class, but it also sets in motion the institutional dynamic that is the focus of Galanter's study. When "natural persons" challenge business wrongdoing, they typically sue large institutions—with the attendant structural advantages Galanter and his commentators discussed—not the natural human beings who "own" the business.¹¹⁷ It is not the inevitable and inherent superiority of large formal organizations in the courts, but a particular substantive right of corporations that grounds the systemic inequality Galanter describes.

114. *Id.* at 158.

115. *Id.* at 158-59.

116. *See id.* at 161; *supra* text accompanying note 72 (discussing the corporate form as inefficient moral hazard). For a further discussion of the moral hazard effects of corporate limited liability, see Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 *YALE L.J.* 857, 873-74 (1984).

117. Galanter, *supra* note 1, at 1394 (noting that defendants in civil litigation are increasingly corporations sued by natural person plaintiffs).

Furthermore, the right to limited liability helped put in motion other indirect institutional and ideological incentive effects that served to increase corporate (and capital class) powers. That right helped naturalize the corporation by providing another incentive to operate it as an individual legal entity with independent agency and responsibility instead of as a passive instrument of its associated capital owners.¹¹⁸ That idea of corporate individuality later became reinforced by further legal rules, particularly judicial interpretation of the Fourteenth Amendment, which in turn set the stage for new redistributions of legal rights, giving new economic and political powers to corporations and their owners.¹¹⁹

Roy identifies the state establishment of corporate boards of directors as a second nineteenth-century substantive policy that shaped future corporate power.¹²⁰ This particular, contingent choice of governance structure gave directors substantive powers greater in the U.S. than in many other industrialized nations,¹²¹ although many states maintained sharp restrictions on directors powers through the early twentieth century.¹²² More importantly for the questions of corporate power that Galanter discusses, this substantive structure enhanced the power of larger investors over small investors¹²³ and facilitated intra-firm coordination through shared directors.¹²⁴ Interlocking directorates have been an important means for solidifying and advancing corporate bargaining power and capital class interests not just in particular markets and industries but in the state, legal system, academy, and society more generally.¹²⁵

118. See ROY, *supra* note 65, at 163-64.

119. See generally Mayer, *supra* note 62.

120. See ROY, *supra* note 65, at 154-55.

121. See *id.* at 155.

122. *Id.* at 156.

123. See *id.* at 154-55.

124. See *id.* at 155.

125. *Id.* at 155; see G. William Domhoff, Power in America: Interlocking Directorates in the Corporate Community, http://www.sociology.ucsc.edu/whorulesamerica/power/corporate_community.html (last visited Dec. 4, 2005) (arguing that such social and economic ties mean nonprofits are not a "third sector" or civil society independent from market and state, but are strongly tied

Third, Roy analyzes the impact of the late nineteenth-century decision by a few states (led by New Jersey) to enact statutes changing the common law rule that corporations could not hold property in other firms.¹²⁶ This legal right to intercorporate stock ownership, a right not available to other enterprises, gave investors new legal power to form large multistate organizations capable of controlling competition in particular markets¹²⁷—and among particular state regulatory systems.¹²⁸ Again, this seemingly technical legal change, with little attention in even the business press,¹²⁹ reinterpreted what once were combinations in restraint of trade into combinations that legitimated concentrated commercial power,¹³⁰ thereby potentially producing a systemic change in the distribution of power between business, labor, and consumers (among others) in both market and state politics. Large conglomerations now could be achieved through the purchase of individual stock, which (unlike mergers) more easily allowed large combinations to evade regulation by states attempting to restrict concentrated ownership and foreign control of their markets.¹³¹

In retrospect this corporate right (and the resulting power) might seem the inevitably superior outcome of state experimentation with different approaches, or the result of rational consensus about the needs of a modern economy. Roy argues, to the contrary, that most states resisted adopting the change through the 1920s,¹³² and that it was strongly condemned for producing inefficient business structures not just by populists but by some in mainstream

to corporate control); *see also* They Rule, <http://www.theyrules.net> (last visited Dec. 4, 2005) (database of corporate and nonprofit interconnections).

126. *See* HORWITZ, *supra* note 23, at 83; ROY, *supra* note 65, at 148-49.

127. *See* ROY, *supra* note 65, at 150.

128. *Id.*

129. *Id.* at 152.

130. *Id.* at 153; *see also* HORWITZ, *supra* note 23, at 83 (noting that this law was drafted by corporate lawyers seeking to evade antitrust law).

131. *See* ROY, *supra* note 65, at 150.

132. *See id.* at 152 ("It was not until the 1920s that as many as 30 states had passed similar laws allowing intercorporate stock ownership.").

corporate law.¹³³ This change (and resistance to it) reflects not just a conflict about form—a debate between those who favored more personal market relationships and those who preferred a market benefits of big formal organizations. Instead, it reflects a conflict over whether power within and without the corporation would be distributed more broadly or concentrated more narrowly. Roy notes that the right to establish large conglomerations not only helped concentrate control among a few large shareholders.¹³⁴ More importantly, Roy argues that this new corporate ownership right changed the distribution of power *outside* of the corporation to facilitate greater upper class control over the market and state more generally.¹³⁵

3. *The Structural Politics of the Corporation as Constitutionally Protected Individual.* Corporations owe their current substantive powers not simply to the evolution of nineteenth-century state law, but to particular, and particularly contested, judicial constructions of the federal Constitution. These legal constitutional legal rights, shaping the distribution of power between capital owners and others in society, continue to be developed in ways that expand substantive corporate powers, as Galanter notes.¹³⁶

In 1819, the Supreme Court used the Constitution's Contracts Clause to erode state control over corporations by assigning private property rights to the corporate entity, thereby opening the door to privatization of the corporate form¹³⁷—and perhaps partly closing the door to a more democratic and egalitarian approach to higher education.¹³⁸ After the Civil War, the Supreme Court ruled, without

133. *Id.* at 153-54 (citing comments of legal scholar Theodore Burton in 1911).

134. *See id.* at 173.

135. *See id.* at 174.

136. *See Galanter, supra* note 1, at 1404-05.

137. *See Alfred S. Konefsky's* discussion of *Bd. of Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in *THE OXFORD COMPANION TO THE SUPREME COURT* 217 (Kermit L. Hall et al. eds., 1992).

138. *See Peter Kellman, You've Heard of Santa Clara, Now Meet Dartmouth, in* *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY, supra* note 87, at 89 (explaining that this case involved an effort by the state legislature to use Dartmouth's charter to open up public colleges across the state).

explanation or precedent, that corporations were “persons” protected from state regulation by the Equal Protection Clause.¹³⁹ Looking back at the impact of this case, Justice Hugo Black commented that for the first fifty years after the adoption of the Fourteenth Amendment, more than fifty percent of the Supreme Court cases applying that Amendment involved corporations seeking its protection; in contrast, less than one-half of one percent involved protection of African Americans from race discrimination.¹⁴⁰ The Court soon extended constitutional due process protection to corporate property.¹⁴¹ Those decisions in favor of corporate constitutional personhood, combined with the *Lochner* era doctrine of fundamental economic liberties, allowed corporations to spend several decades invalidating a large number of state regulations designed to protect the interests of labor, consumer, and competitors.¹⁴² In addition, reversing a longstanding doctrine to the contrary, in 1910 the Supreme Court established a corporate right to do business across state boundaries—which helped give corporations the political and economic power to “strike” or “boycott” for more favorable state regulations in a race to the bottom.¹⁴³

These decisions were important not only as particular instances of courts favoring corporate “artificial persons” at the expense of the democratic power of “natural persons.” More importantly, these rules have helped to build an institutional framework that today makes it more difficult and costly for individual judges, legislatures, or litigants to counter that power, regardless of how good their intentions or arguments.¹⁴⁴

139. *Santa Clara County v. S. Pac. R.R.*, 118 U.S. 394 (1886); see HORWITZ, *supra* note 23, at 66-67 (linking *Dartmouth College* and *Santa Clara*).

140. *Conn. Gen. Life Ins. Co. v. Johnson* 303 U.S. 77 (1938).

141. See *Noble v Union River Logging R.R.* 147 U.S. 165 (1892), *discussed in* Mayer, *supra* note 62, at 590.

142. See Mayer, *supra* note 62, at 588-90. Mayer discusses a 1936 *Fortune* magazine article praising the 1886 personhood decision for giving corporations great freedom from state regulation. *Id.* at 591.

143. See HORWITZ, *supra* note 23, at 79 n.66.

144. See ROY, *supra* note 65, at 14-16 (discussing the role of institutions in the dynamics of corporate power).

After 1960, the Supreme Court extended many of the protections of the Bill of Rights to corporations. This timing was not coincidental but instead was the outcome of a substantive struggle for re-asserting public and egalitarian control over the corporation (perhaps driven by the failure of competing interest groups to fulfill the pluralists' promise of countervailing power).¹⁴⁵ Legal scholar Carl Mayer explains this new wave of constitutional rights as strategy for resisting the development of the late twentieth-century regulatory regime aimed at protecting consumer, labor, social, and environmental interests (among others) against harm from business interests.¹⁴⁶ The Supreme Court ruled in 1977 that the Fourth Amendment protected corporations from warrantless regulatory searches.¹⁴⁷ In 1976 and 1980, the Court interpreted the First Amendment to protect corporate speech, including both commercial speech and political speech.¹⁴⁸

These general rights have been applied to give corporations specific protection against regulatory attempts to include participation of others interests;¹⁴⁹ to protection against disclosure requirements;¹⁵⁰ and to protect a corporate right to spend money to influence elections.¹⁵¹ In addition, expanding Fifth Amendment protections to include more personal rights, in 1962 the Court gave

145. See *supra* text accompanying notes 23-38; see also CHARLES NOBLE, *LIBERALISM AT WORK: THE RISE AND FALL OF OSHA* 114-19 (1986).

146. See Mayer, *supra* note 62, at 601-03.

147. See *id.* at 606-07.

148. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), *discussed in* Mayer, *supra* note 62, at 611-13 (changing precedent to decide that advertising is no longer outside the reach of the first amendment); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), *discussed in* Mayer, *supra* note 62, at 611-13.

149. See *Pac. Gas & Electric v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (holding that corporate rights to freedom of association prohibited state regulatory strategy that would have given ratepayer advocates access to billing envelopes).

150. Mayer, *supra* note 62, at 617-18 (discussing the invalidation of the SEC's disclosure requirements governing corporate takeovers and stock offerings).

151. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), *discussed in* Mayer, *supra* note 62, at 615-16.

corporations protection against double jeopardy.¹⁵² And in 1980, the D.C. Circuit Court ruled that corporations have not just property but liberty interests protected under the Fifth Amendment Due Process Clause—including the corporation's interest in protecting its *reputation* from regulators.¹⁵³

In his article analyzing these corporate Bill of Rights cases, Carl Mayer argues that their cumulative effect affords corporations bold new powers to resist regulation. Moreover, these rulings, which have little clear grounding in constitutional text, original intent, precedent or widely accepted structural principles, have helped create a political and legal context that gives corporations more power to enhance their economic advantages in the civil litigation with natural citizens. Speech protections, for instance, may enhance corporate power to influence jurors' opinions, to select judges, and to change the substantive provisions that govern civil litigation to better favor corporate defendants (through tort reform, for example). Or, for example, restrictions on government agencies' or citizens groups' access to corporate information may increase the costs of gathering evidence for plaintiffs challenging corporate defendants.

As Justice Rehnquist argued in one dissent, such decisions in part revive the *Lochner* tradition¹⁵⁴ by constitutionalizing the economic interests of capital owners over competing legitimate social interests.¹⁵⁵ And just as corporations in the *Lochner* era appropriated and undermined the racial justice and human rights protections in the post-Civil War reconstruction era Constitution, corporations in the post-Warren Court era appropriated and undermined the new fundamental rights to personal

152. See *Fong Foo v. United States*, 369 U.S. 142 (1962), discussed in Mayer, *supra* note 62, at 619.

153. See *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir.1980), discussed in Mayer, *supra* note 62, at 618-19.

154. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 589 (Rehnquist, J. dissenting).

155. See Mayer, *supra* note 62, at 612-18 (discussing *Cent. Hudson Gas & Elec. Corp.*); see also TABB, *supra* note 19 at 246-47 (explaining that the purpose of international trade policies favoring global corporate power is not "free trade" but to free capital from democratic social protections that favor workers, the environment, and human rights).

freedom and equality that grew out of the mid-twentieth-century racial justice movement.¹⁵⁶ This development of expansive corporate constitutional individual rights against the state does not necessarily flow automatically from a theory that corporations should be formally treated as reified legal entities constitutive of the modern state. To the contrary, leading corporate law scholar Adolf Berle explained in 1952 that his pluralist vision of corporate power required that certain Bill of Rights protections be applied to protect natural persons not just against the state, but also against corporations.¹⁵⁷

Taking further the reverse position favoring corporate protection *against* democratic accountability, the 1990s arguably marked a new era of fundamental rights for corporation personhood through the development of a newly strengthened international governance system working to protect multinational corporations from government regulations favoring labor, environmental, social welfare and consumer interests. The World Trade Organization and the International Monetary Fund, for example, enhance the freedom and security of the wealthiest corporate financiers while limiting the power of national and local governments to enforce socioeconomic policies that advance alternative interests and values.¹⁵⁸ This new regime has repeated at the international level the pattern of corporate appropriation and undermining of non-wealthy natural persons' legal struggles for freedom and equality. The human rights rules

156. Thanks to Athena Mutua for pointing out this connection.

157. Tsuk, *supra* note 41 at 203 (discussing A. A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 643 (1952)).

158. See, e.g., LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (1999) (analyzing the potentially far-reaching impact of international trade agreements designed to enhance "corporate economic globalization"); Martha McCluskey, *Rhetoric of Risk and the Redistribution of Social Insurance*, in EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 146, 158-166 (Tom Baker & Jonathan Simon eds., 2002) (describing these international institutions as a new social security system for wealthy global capital owners that is displacing social welfare programs for nonrich persons); Ute Pieper & Lance Taylor, *The Revival of the Liberal Creed: The IMF, the World Bank, and Inequality in a Globalized Economy*, in GLOBALIZATION AND PROGRESSIVE ECONOMIC POLICY, *supra* note 47, at 37 (stating that "Half the people and two-thirds of the countries in the world lack full control over their own economic policy" because of regulation by the IMF and World Bank).

enshrined in the international covenants and national constitutions that grew from post-World War II anticolonial and antifascist movements arguably have been drained of much of their substantive power as corporations have instead mobilized international law on behalf of upper class elites resisting democratic control.

4. *The Structural Politics of State Farm's New Constitutional Corporate Protections.* Finally, in the twenty-first century, the U.S. Supreme Court has continued to expand substantive constitutional protection of corporate personhood and corporate power against state regulation. In 2003, *State Farm Mutual Automobile Insurance Company v. Campbell*¹⁵⁹ invoked an insurance company's right to constitutional substantive and procedural due process to strike down a state court decision awarding punitive damages for the insurer's bad faith refusal to settle. This case is particularly revealing for the light it sheds on the structural and theoretical underpinnings of the growth of systematic corporate power over natural persons in civil litigation.

Expanding the holding in another recent case involving punitive damages against a corporation,¹⁶⁰ *State Farm* defied the post-*Lochner* principle that substantive due process should protect basic, personal human freedoms, but not property interests, from majority decisions about society's welfare. Punitive damages are uncommon in civil litigation against corporations,¹⁶¹ but this case nonetheless has broad significance because of how it personifies the "artificial" business defendant—and how it naturalizes that defendant's disproportionate power to evade tort liability.

159. 538 U.S. 408 (2003).

160. See *BMW of North America v. Gore*, 517 U.S. 559 (1996); *State Farm*, 538 U.S. at 438 (Ginsburg, J., dissenting) (noting that this case takes a less moderate approach than *Gore* to limiting punitive damages).

161. See, e.g., Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633-34 (1997) (finding that punitive damages are awarded in about three percent of all jury trials and in about six percent of jury trials in which plaintiffs prevailed); see also Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2037-38 (2004) (explaining that *State Farm* is a rare case not only because it awarded punitive damages, but because the punitive damages were so much greater than the compensatory damages awarded).

Why did the defendant insurance company deserve this new federal constitutional protection from the risks of substantial economic loss in state civil courts—on top of whatever “normal” advantages such large “artificial persons” otherwise enjoy in the civil justice system? The case involved a question of competing economic interests. The defendant’s side of the dispute in *State Farm* was concerned with the interest of multistate corporate defendants in being free from the risk of large punitive damage awards used in state tort law to deter (rather than compensate) wrongdoing.

The plaintiff’s side involved the interest of individual consumers of liability insurance policies (especially those with low coverage likely to be purchased by relatively non-wealthy natural persons). Policyholders face the economic problem that insurers often have an incentive to violate their contractual obligation to appropriately defend the consumer in liability suits. Low levels of liability coverage mean a large nationwide insurer often has little money to lose, and much money to gain in the aggregate, by taking actions that expose those policyholders to the risk of huge uncovered economic losses. In *State Farm*, for instance, the trial court found that the insurer failed to accept a reasonable settlement offer that would have avoided the risk of a high damage award, and gave false information to the policyholders about their risks and rights.¹⁶² The trial in that case produced evidence that State Farm’s top management had implemented a nationwide program that explicitly aimed to “us[e] the claims-adjustment process as a profit center.”¹⁶³ This program allegedly involved systematically and unlawfully denying policyholders their contractual benefits “in order to meet preset, arbitrary payout targets designed to enhance corporate profits.”¹⁶⁴ If states enforce contractual obligations by penalizing such multistate business defendants only enough to compensate and deter the harm of one of such denial of a consumer’s rights, a multistate business with many similarly situated consumers may still have an economic incentive to continue

162. See *State Farm*, 538 U.S. at 413-14 (facts presented by the majority opinion); *id.* at 435-36 (Ginsburg, J., dissenting).

163. *Id.* at 431 (Ginsburg, J., dissenting).

164. *Id.* at 431-32 (Ginsburg, J., dissenting).

the same multistate wrongdoing. In the aggregate, the risk of loss to the "artificial person" defendant may be very low compared to the risk of gain (and compared to the risk of loss to the individual plaintiff).

The problem that Galanter's study raises lies at the heart of this case: the very status of "artificial personhood" for large business defendants contributes to particular systemic substantive problems for civil tort actions by natural persons. The large multistate (or multinational) business is legally constituted as a single entity—an individual "person"—and therefore for legal purposes acts as a single whole with unified interests, narrowly (though imperfectly) confined by law to maximizing shareholder profits. Unlike the typical natural person, subject to limitations of time, space, mortality, and fluid or conflicting goals, the artificial business person's actions can normally include high volumes of small actions occurring in many jurisdictions at once for an indefinite time aimed at a relatively clear goal. As a result of its nature as a single business unit comprised of a large aggregation of interests and actions, this artificial person's calculations of what actions are rational will normally be based on highly aggregated (and narrowly focused) costs and benefits.¹⁶⁵

The corporation's aggregated nature substantively affects its calculations of what behavior is reasonable—a calculation at the core of the tort system's deterrence principle and at the core of the problems of corporate advantage Galanter describes. An individual instance of wrongdoing that would be unreasonable for an actor when taken in isolation (more costly than beneficial to the actor) might become reasonable when taken in the aggregate because of risk-pooling. Actions with a small likelihood of very high losses at some later point, but with a high likelihood of small immediate gain, might not appear rational if those costs and benefits are calculated individually. But taken in the aggregate, such actions—like the alleged wrongdoing by the insurer in *State Farm*—might become more rational because aggregation can

165. Galanter notes empirical data suggesting that jurors award higher damages to corporations than other parties (even though juries find more frequently in favor of corporations than other parties) because they recognize "their greater capacity to foresee and prevent harm." Galanter, *supra* note 1, at 1392.

facilitate better prediction, mitigation, and spreading of the risk, while possibly magnifying the benefits of any gain.

In addition, wrongdoing that might be particularly ineffective or risky when performed by a human individual might produce more benefits with less risk when engaged in by large impersonal aggregates where the risk of personal penalties like imprisonment can be decreased by spreading the wrongdoing over large numbers of disaggregated actors. The *State Farm* trial court heard evidence that the insurance company systematically stigmatized policyholders who attempted to file insurance claims by attacking their personal character, and that the company systematically falsified, withheld, and destroyed evidence to deter wronged policyholders from pursuing legal action.¹⁶⁶ If such wrongdoing is a systematic national practice based on rational profit maximization rather than an isolated, individual occurrence based on malevolent actors, plaintiffs may more likely perceive challenging that wrongdoing as a low-gain, high-risk proposition. Moreover, large aggregates are likely to be able to reduce the costs of defending against claims of wrongdoing by aggregating the costs of legal services—for instance, by creating and controlling specialized legal services.¹⁶⁷ With enough aggregation, it may even be possible to reduce legal risks by creating and influencing specialized judges, specialized laws, specialized legislators, and specialized legal scholars whose information and interests are shaped to legitimate or excuse this wrongdoing.

These substantive characteristics of artificial persons and corporations are not exclusive to that status. Natural persons can control large aggregations of resources and can exert control over other actors in differently constituted aggregate relationships. Nonetheless, these substantive characteristics of certain artificial persons in the aggregate can produce incentives for more wrongdoing, and less accountability, compared to the average natural person.

The Court's decision in *State Farm* can be understood as a moment when the question of artificial persons' disproportionate power comes out of the background of the civil justice system to be affirmed or reversed as a matter of

166. See *State Farm*, 538 U.S. at 433-35 (Ginsburg, J., dissenting).

167. See Galanter, *supra* note 1, at 1380-81.

substantive policy. The Court in effect decided to constitutionalize one aspect of this power advantage by ruling that states have no legitimate reason for tailoring deterrence measures to address the particularly aggregated nature of multistate wrongdoing by large business entities. The Court insisted that any wrongdoing in other states to other policyholders “bore no relation” to the individual plaintiffs’ harm in *State Farm*, despite the evidence that the wrong resulted from the corporation’s systematic nationwide policy.¹⁶⁸ “A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”¹⁶⁹ This reasoning presents the multistate company as a single unit—like a real person—but imagines its decision making as a process of multiple distinct and disaggregated actions toward each affected natural person—as if it were more like a single real person repeating consecutive actions or a group of real persons acting separately. Instead, the Court might have recognized that corporate behavior toward individuals often is (and apparently was in this case) substantially determined by generalized rules simultaneously governing large numbers of similarly situated persons.¹⁷⁰

The Court also explained that the goal of regulating this specific problem of aggregate wrongdoing of multistate business was not a legitimate state purpose because state authority is confined to a single jurisdiction.¹⁷¹ The Court’s image of the defendant again de-emphasized its unified, integrated nature. The Court disaggregates the decision making punished by the state into a series of separate actions in separate jurisdictions each properly addressed by a separate state. Despite its conclusion that any wrongdoing by the defendants to policyholders nationwide is unrelated to this case and too hypothetical to merit consideration,¹⁷² the Court explained that this single state could not fairly award damages deterring general

168. *State Farm*, 538 U.S. at 422.

169. *Id.* at 422-23.

170. *Id.* at 437 (Ginsburg, J., dissenting) (arguing that the evidence of out-of-state conduct in this case was probative of the in-state wrong).

171. *Id.* at 421-22.

172. *Id.* at 422-23.

wrongdoing without including in that adjudication the potential out-of-state plaintiffs who may have been similarly wronged.¹⁷³

If a state can only regulate corporate activity that is confined to its boundaries on a disaggregated basis, when the aggregated, multistate perspective of the corporate decision-making is precisely the cause of the in-state harm to be regulated, then states will not have the power to address a substantial problem of wrongdoing occurring within their states to their citizens. The Court ignores this state sovereignty problem in favor of the competing concern for out-of-state residents affected by the regulating state.¹⁷⁴ To support this choice of federalism concerns, the Court emphasizes the state citizenship rights of out-of-state plaintiffs who also want to challenge that wrongdoing. It seems unlikely, however, that a high punitive damage award based on nationwide wrongdoing would hurt such plaintiffs' interests. The more obvious interest at issue was the corporate defendant's desire to avoid having one state set a punishment based on nationwide wrongdoing that would encourage litigation in other states, or even that it would be subjected to multiple and redundant punitive damage awards for the same conduct—as the Court reasons later in its opinion.¹⁷⁵ If this corporate interest had been the example the Court highlighted in its discussion of the state sovereignty issue, however, its concern would have appeared weaker.

The artificial nature of the out-of-state multistate defendant affects the citizenship concerns. Unlike the natural person in another state, the large nationwide corporation may have as much of a voice in a foreign jurisdiction as in its resident jurisdiction, since it cannot vote as an artificial person, since its residence is nominal, and since its governing owners and managers may live anywhere. Moreover, unlike the average natural persons likely to be harmed by the wrongdoing in this case, the artificial persons at risk of being subject to multi-state

173. *Id.* at 421-22.

174. "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion" and should be decided according to their own states' laws. *Id.* at 421-22.

175. *Id.* at 423.

adjudications also are likely to have far more power to use the political process to procure federal regulatory protection against such a risk, if the risk is a real problem.

In a federal system, wrongdoing driven by multistate costs and benefits by multistate actors might in theory be better addressed by federal rather than state governments.¹⁷⁶ But that does not mean constitutional *protection from* the political process is the best way to achieve that goal. By constitutionalizing the corporate interest in being free from overlapping state authority despite the overlapping multistate nature of its personhood and actions, the Court helps naturalize corporate power as part of the *structural ground* of politics instead of as a substantive issue contestable *within* politics.

The Court masks this substantive support for corporate power by partly casting its ruling as a *procedural* protection that prohibits punishment without notice and by individual whim or caprice rather than by generalized legal rule.¹⁷⁷ But the Court's reasoning shows how the privileged position of artificial persons in the courts is not simply a problem of Court's general institutional focus on a proceduralism that substitutes abstract forms and principles for the more personalized and empathetic judgments familiar to relationships among natural persons.¹⁷⁸ Instead, the judicial system's proceduralism has power to selectively—and systematically—naturalize and personalize certain interests to encourage empathy not just in the courts but in politics and public opinion. The history of the judicial expansion of corporate personhood is an example.¹⁷⁹

State Farm's majority opinion embellishes that personhood with sensitivity toward corporate defendants' artificial dignity (while giving little attention to natural persons' experiences of harm from the corporate

176. See *id.* at 422 (discussing the problem as an issue of federalism).

177. See *id.* at 417-18.

178. See Westbrook, *supra* note 16 at 1449-50 (attributing corporate power to legal proceduralism).

179. For another example, see *Goldberg v. Kelly*, 397 U.S. 254 (1970), where procedural protections for welfare recipients may have helped identify welfare recipients to the public as property owners victimized by government wrongdoing, countering tendencies to see welfare mothers as outside the mainstream of society.

wrongdoing at issue).¹⁸⁰ Rejecting the state's justification for the punitive damage award as a rational and legitimate deterrence measure, the Court instead worries that such an approach might go beyond punishing harmful *conduct* to creating a stigmatizing status—"being an unsavory individual or business."¹⁸¹ The Court supports its scrutiny of state reasoning about punitive damages by quoting an earlier case's warning about the danger that "juries will use their verdicts to express biases against big business."¹⁸²

This reasoning seems to place *State Farm* in line with Fourteenth Amendment decisions such as *Romer v. Evans*¹⁸³ and *Cleburne Living Center*,¹⁸⁴ where the Court subjected state decisions not involving suspect classifications or fundamental rights to unusual scrutiny on the ground that the state action was based on hostility toward a particular group. Although those cases involved equal protection, not due process doctrine, the structural issue is the same: the Court intervenes to protect persons harmed by state decision-making when prejudice against a specific group makes the pluralist political process likely to be unresponsive to their needs. *State Farm's* decision that the danger of prejudice against large corporate defendants in state courts justifies special federal intervention suggests a picture strikingly at odds with the facts Galanter describes.

The Court's inverted reasoning not only implies that a legal system privileging large corporate "APs" over most natural persons reasonably advances the rule of law. More disturbingly, it implies that efforts to hold corporations more accountable to generally applicable legal rules go beyond legitimate politics to *violate* the rule of law. *State Farm* argued (in part) that the state was driven by

180. The Court notes this harm not by affirmatively describing it, but simply by acknowledging that "State Farm's handling of the claims against the Campbells merits no praise." *State Farm*, 538 U.S. at 419. The Court alludes to this harm by mentioning that the insurer told the plaintiffs to put a for-sale sign on their house, but gives no detail on the emotional or other distress the plaintiffs alleged resulted. *Id.*

181. *Id.* at 423.

182. *Id.* at 417 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

183. 517 U.S. 620 (1996).

184. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

irrational prejudice or emotional whim¹⁸⁵ when it designed damages to correct a particular problem of corporate power to evade the law. Regardless of the actual combination of personal feeling and principled reason that in fact led to the state's damage award at issue in *State Farm*, the Court did not discuss the likelihood that large corporate defendants might have more power in the current political context than virtually any other group targeted for political or personal criticism to use normal politics and ideological debate to counter any irrational judgments. Instead, in the Court's logic, opposition to corporate power becomes not simply one political and ideological view among many to be rationally debated in a pluralist interest competition, but an irrational "animus" that must be purged from normal politics and ideology to protect the system's fundamental unfairness.

State Farm turns the structural reasoning of the famous Carolene Products footnote four on its head.¹⁸⁶ The *State Farm* majority intervened in the democratic political process not to free a "discrete and insular minority" from systemic political weakness due to subordinated class

185. See *State Farm*, 538 U.S. at 418 (expressing concerns that high punitive damage awards will be based on inflamed "passion or prejudice").

186. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (stating that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). In an article criticizing recent Supreme Court interpretations of the Eighth Amendment's protection against cruel and unusual criminal punishment, Larry Kupers makes a similar argument that *State Farm* "has turned . . . that famous footnote on its head." Larry Kupers, *The Woeful Tale of the United States Supreme Court and Disproportionate Punishment—Constitutional Protection for Large Corporations, Not Human Beings*, 62 GUILD PRAC. 12, 22 (2005). Beginning in 1991, a series of Court decisions have repudiated a previously established rule that the Eighth Amendment protected criminal defendants from disproportionate punishment. See *id.* at 13-16 (discussing, for example, *Harmelin v. Michigan*, 501 U.S. 957 (1991)). Many commentators have contrasted this line of cases rolling back criminal defendants' rights with the line of cases (also beginning in 1991 and leading to *State Farm*) that have created and expanded constitutional protection for corporate tort defendants from disproportionate punishment. See Kupers, *supra*, at 16-20; see also Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1054-57 (2004) (noting that the Court has made no attempt to justify this contrasting doctrine of disproportionate punishment); Pamela S. Karlan, Lecture, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 904-912 (2004).

status. Instead, the majority opinion used the Constitution to protect a class singularly capable of controlling the political and legal process from political opposition. For this reason, *State Farm's* remarkable constitutionalization of corporate resistance to meaningful accountability for wrongdoing offers a grim window into the antidemocratic, antiegalitarian political substance of the current context of corporate power.

CONCLUSION

This critical picture of the problem of corporate power suggests it is not a problem simply of form in either corporations or courts, but instead is a problem of broader political substance that has institutionalized class-based inequality in the legal and political system as a whole. By shifting the view from formal technicalities to systemic power, critical analysis might make the problem seem more intractable, rather than more amenable to substantive change. If both judicial neutrality and majoritarian democracy are pervasively subject to the corporate power we might hope they regulate, then how can any contrary substantive change occur?¹⁸⁷

Though this corporate power is real, extensive, and multifaceted, the rationalizations and formal structures that sustain it are "artificial" in that they are designs of interested humans negotiated in complex, changing social and political contexts. But these rationalizations and structures are also "substantive" in that they reflect not just generalized principles and problems, but a political and economic system that has been structured to maintain an inequalitarian distribution of power. This critical perspective points to the need for those whose interests and ideals are harmed by the growth of corporate legal power and privilege to direct their attention to the structures and theories that ground that corporate power. It is insufficient to contest the substantive issues of particular harms to society from the current economic and legal order—like the subordination of workers, racial inequality, the antidemocratic control of developing nations by interna-

187. See Westbrook, *supra* note 16, at 1450 (arguing that more judicial control of corporations will not be a good strategy for remedying judicial privileging of corporations).

tional financial institutions, or the destruction of the environment.¹⁸⁸ Instead, if the current power imbalance is unjust, it needs to be confronted at the level of its underlying *form*.

The last decade or so has seen burgeoning political movement organizing around the globe to change the substance of this form. This movement has been caricatured and condemned (especially by the corporate controlled media and corporate funded intellectuals) as an anachronistic or authoritarian effort to replace “capitalism” with “communism,” or an isolationist, anarchic, or luddite effort to escape from an interdependent modern global economy. Though this movement is diverse and includes many different and openly debated perspectives, a major strand focuses on reordering local, national, and transnational institutions to better promote the substance of democracy and socioeconomic prosperity rather than any particular formal economic dogma. And many in this movement target change in formal institutions as a key to building this democratic order.

In the United States, groups such as the Program on Corporations, Law & Democracy (POCLAD) and the National Lawyers Guild are working to re-conceptualize the corporation not out of preference for state authority over market competition, or naturalness over artificiality, or smallness over bigness, but as part of a broader movement for a state and society with different substantive values.¹⁸⁹ POCLAD, for example, has mobilized labor unions, environmentalists, and other groups in an effort to publicize, analyze, and counter substantive changes in state corporate law that typically get enacted with little debate as simple technicalities necessary for “modernization.” For

188. See Jane Anne Morris, “*Help! I’ve Been Colonized and I Can’t Get Up!*”, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY*, *supra* note 87, at 8-12.

189. See National Lawyers Guild, *National Lawyers Guild Resolution*, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY*, *supra* note 87, at 252-53 (explaining that Guild’s agenda to control corporate power as part of its historical effort to advance democracy and human rights; POCLAD, *Some Lessons Learned*, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY*, *supra* note 87, at 294, 296 (explaining POCLAD’s strategy to discuss corporate law as part of a broad examination of property, liberty, and sovereignty by an international coalition of democratic movements).

example, a coalition mobilized in Vermont to try to block legislation eliminating some of the vestiges of the public control era, asking such questions as: "Why shouldn't states revoke the charters of harmful corporations? Why shouldn't employees, shareholders, and corporate neighbors have as many rights as corporate directors and managers?"¹⁹⁰ Progressive groups organized and mobilized to help defeat the Multilateral Agreement on Investment (MAI), which would have formalized and substantively increased multinational corporate power to override national rights protecting the environment and labor. The continuing challenges to substantive rules in the World Trade Organization are an example of how progressive global organizing has helped to denaturalize and change the substantive politics driving what corporate interests presented as tedious technical changes that necessarily foster global economic growth.

To change the substance of the formal grounds of corporate power it will also be necessary to analyze and change the substantive ground rules that structure the barriers to formalized power facing large organizations (or potential organizations) of interests often opposed to corporations, like unions, racial justice groups, or the impoverished citizens of the Global South. As this Article has argued, the current system of corporate power is not the result of inherent features of large interest groups. Walmart, for example, has substantial power to shape labor and consumer markets to favor cheap labor not simply because the millions of workers, consumers, and citizens it employs and sells to form a substantial unified power block—or because its bigness is inherently alienating or awe-inspiring to individual workers and local communities. Instead, the particularly problematic substance of its power stems from its formal organization in a way that concentrates control in the hands of a relatively few wealthy capital owners and managers who can employ formal legal rules (governing unionization and trade, for instance) to protect their interests from the potentially huge organized power of workers, small businesses, and local communities.

190. See Richard L. Grossman, *The Corporate Crunch in Vermont*, in *DEFYING CORPORATIONS, DEFINING DEMOCRACY: A BOOK OF HISTORY & STRATEGY*, *supra* note 87, at 116.

Contemporary procedural rules often make some organized generalized interests other than corporate profit-maximization, like the general interest in promoting racial equality, too abstract and insubstantial to permit systematic legal mobilization.¹⁹¹ Labor laws restricting secondary boycotts by unions are another example of how labor interests face restrictions on forming and asserting power on a large scale capable of counterbalancing corporate power.¹⁹² Or, for another example that Galanter notes, tax laws give public financial support for formal legal advocacy by organized commercial interests but not for groups organized to advance other interests.¹⁹³

The critical insight that form is substance offers both caution and promise for those concerned about the situation that Galanter describes—a legal system skewed to advance corporate power against unorganized natural persons. The caution is that no formal protections can guarantee substantive results: the surface neutrality of the courts, state, and economy is saturated with unequal power. The promise is that this substantive power is not a natural force out of human control, but an artifice that depends on a complex system of myriad formal and institutional rules that indirectly and imperfectly uphold that power and that indirectly, and gradually could be reformed to shift that power. The capacity of a modern global political economy to empower large formal organizations includes the capacity to formalize and organize a different substantive politics and morality that does a better job of systematically responding to and advancing the interests of most of the world's natural persons.

191. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984).

192. See James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 *BUFF. L. REV.* 85 (2004) (arguing that cross-national collective action for and by workers is increasingly necessary to their economic interests and basic human rights, but that such action is often unlawful).

193. See Galanter, *supra* note 1, at 1392.

