

# Corporate Personhood, Again?

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*The idea of the corporate person continues to present problems for politics, especially through the framing of corporate power and responsibilities as legal questions. Meanwhile, traditional theories of liberalism and pluralism struggle to comprehend the corporation as either a participant in politics or a site where politics occur. Theorists of democracy likewise express anxiety about the impact of corporations even while theorists of business ethics invoke the notion of corporate citizenship to restrain corporations through democratic ethics. This article analyzes recent contributions to debates about the role of corporations as legal persons. The article then argues that legal debates, while important, can also serve to limit an understanding of the social and political contexts in which economic actors like corporations exercise power. Recognizing those limits reveals the need for a broader range theoretical frameworks beyond the legal to comprehend corporate power.*

*Keywords: citizenship, corporate citizenship, corporate person, corporate personhood, corporate social responsibility, corporation, ethics, business ethics, democratic theory, liberalism, legal theory*

## INTRODUCTION

In the past two decades or so, two parallel tracks of discussions regarding corporations in social and political life have developed. One follows the legal questions regarding the status of corporations before the law, in particular considering the character of corporate personhood and what the status of corporate personhood implies (or does not) about the constitutional rights corporations should be able to claim. Even though these debates enjoyed an almost two century long history prior to the infamous decision *Citizens United v. FEC* (558 U.S. 310) in 2010, they have accelerated in the decade and a half since. *Citizens United*, along with the 2014 *Burwell v. Hobby Lobby* (573 U.S. 68), propelled a volume of popular as well as in legal discussions about the proper role for corporations in politics and society. On a parallel track to this legal and political engagement, theorists of business ethics as well as practitioners have engaged in an ongoing debate surrounding the questions of corporate social responsibility and corporate citizenship. Here the debate has focused on the obligations corporations or business leaders do or do not have to society generally or to the specific communities in which they are based and in which they undertake their activities. While more sophisticated than this, one way to understanding these two tracks of thought is that one has focused on the social and political rights of corporations (the personhood debate) the other has focused on the social and political responsibilities of corporations.

While these approaches have certainly not been hermetically sealed, they have more or less run separate courses. Yet, these two tracks share one predominant, though not exclusive, theme: in the main, these discourses both reflect upon strategies for restraining the power of corporations in relation to society and

politics. While there are certainly legal scholars who defend the idea of corporate personhood and the constitutional guarantees that go along it, the weight of arguments run against a constitutional guarantee of the personhood of corporations, viewing such as a danger to politics, one that increases the political, social power of corporations that must be reined to create a politics where citizens can engage in decision making and deliberation. Similarly, the weight of discussions of corporate social responsibility/corporate citizenship is to theorize social and political responsibilities for corporations that can ameliorate their negative impact on society and reconceive them as ethical institutions that support communities and citizens instead of threatening them. While often sharing these ends, these two approaches often address the question in opposite ways. The legal scholars who are critical of corporate personhood are often also against viewing the corporations as responsible political and social actors and while the business ethicists argue for greater responsibilities for corporations to engage in social and political action.<sup>1</sup>

A limitation of the first, legal track is that it often begins and ends with the questions of corporate personhood, stopping after making an argument that denies the personhood status of corporations or warns against the ill effects of granting them constitutional rights. This leaves open the question of how to engage these entities in social and political life. The corporation social responsibility/corporate citizenship theorists, on the other hand, engage over which activities corporation and business leaders should undertake, but spend little time on what exactly these entities are. In this paper, I look at two sophisticated attempts to resolve each of these problems. Ironically, while striving for comparable ends, these two approaches propose almost opposite means. One recent comprehensive view of corporations and political theory has been David Ciepley's arguments over the past decade.<sup>2</sup> In this work he develops an approach toward corporations which suggests that traditional, liberal democratic theory and politics do not contain the modern corporation, and which then needs its own form of political theory.

Contrarily, legal theorist Kent Greenfield argues that corporations can and should be understood as persons, and it is through this identity, properly understood, that corporations can be tamed as social and political actors with responsibilities (2018). While these arguments fill out the gaps of each approach, they do so in a way that highlights disagreements. I will however draw out common themes that sit below these apparent conflicts and that can be insightful for a critical democratic theory debate, and yet I also point to open questions in each that require more work for both political theory and the political actors who engage with corporate actors.

## **CIEPLEY: A POLITICAL THEORY OF THE CORPORATION**

David Ciepley's recent work on corporations marks a new stage of attention by political theorists to the questions about corporations and public life. While political theorists and philosophers have commented variously upon corporations for decades, until recently the focus on their status has been curiously minimal. Ciepley has an answer for why this may be, and at the same time he demonstrates the reason they need attention. For Ciepley, standard liberal theory (and these days, liberal means something like neo-liberal) cannot quite comprehend corporations. The individualist bent of liberal theory means that corporations can only be understood as either 1) an aggregation of individuals or 2) corporations themselves as individuals. They are either a collection of rights bearers or they are rights bearers themselves. Yet, neither of these capture the unique powers and authorities of corporations: "corporations trouble the public/private distinction that organizes so much of liberal thought and practice." (Ciepley 2013a, 153) Rather, Ciepley argues corporations are neither exclusively public nor private, or, as he entitles an article, they are "Neither Persons nor Associations"; and instead, modern business corporations are an intermediary body that need their own political theory to comprehend how they exercise power, over whom and with what authorities. His work begins to elucidate that analysis.

To begin this analysis, Ciepley delves current and past legal thought and sifts through troubling facets of the claim that corporations are persons. For him, corporations are distinct entities in important ways and as such they are best understood not by analogy with natural persons. He reviews the long history of legal arguments regarding their character and, as stated above, breaks them down into two main approaches of connecting natural persons with corporations. "Only two ways of drawing this connection have ever

suggested themselves (citing Million 1990). First, the corporation can be construed as a mere association of natural persons. The rights of the corporation, it is then claimed, are simply the rights of these persons, which may include constitutional rights. Elaboration of this metaphor produces what I call the “association” theory of the corporation. Second, the corporation can be construed as a kind of natural person. That is, the corporation can be treated, not merely as a contracting individual in the eyes of the law (which no one disputes), but as an independent entity with interests, ends, and knowledge of its own and thus deserving of at least some of the constitutional rights of natural persons.” (Ciepley 2013b, 223) His detailed analysis works to demonstrate why neither of these is sufficient. Without rehearsing those arguments in full, they are worthy of some discussion because Ciepley claims it is the failure of these two approaches that necessitates an entirely different one.

The debates about whether corporations are persons has received so much attention in the last decade and a half it is surprising to some that it has a long and contentious history in both the practice of jurisprudence and in legal theory. Ciepley examines this history and notes a few main points. First, it has happened that a legal stratagem for allowing economic growth, the treating of corporations as entities that can make contracts and sue and be sued (among other things), and using the term “person” for this convenience, has turned into a mistaken assumption that there is something like a natural rights bearing entity below the legal persona whose status needs to be recognized, thus that the legal person of the corporations represents a natural corporate entity. Instead, he argues, corporations are creations of the state, having whatever rights they do because of what the state grants them. Ciepley also reviews the historical/sociological arguments (following Gierke and Maitland) that corporations reflect some primordial corporations like the village or clan; yet, he argues, these are nothing like the modern business corporation and neither does it have a lineage back to them. Finally, even if persons in association do have some form of group personality that ought to be recognized in law, which is no less true of other associations that are not automatically granted such recognition (such as families or voluntary associations). Thus, rejecting the “entity theory” of corporate personality, Ciepley highlights three ways in which it fails: “The entity theory thus rose on the back of three errors: (1) a conflation of contracting individuals with constitutional individuals; (2) a conflation of medieval corporations with modern business corporations; and (3) a conflation of the group personality with the rights-bearing corporate entity.” (Ciepley 2013b, 237).

If the “corporations are persons” argument has generated much negative reaction since *Citizens United*, the fallback position has often been that corporations are mere associations of investors, and that whatever rights corporations have are mere extensions of the rights of those natural persons, including constitutional rights. Ciepley develops a sophisticated argument that delves into this corporate legal theory. A general problem he identifies with this approach is that it treats investors as partners— but he claims they are not. Instead, the modern business corporation is an entity created by the state in such a way the legal arrangements that produce the corporation do suture the shareholders to the corporation, but rather to separate shareholders from it. The most well-known legal feature that reflects this feature is limited liability, which famously separates the legal liability of the corporation and its debts from any shareholder in it. Beyond this, Ciepley also points to “Asset Lock-in” and “Entity Shielding” as other legal privileges that separate the investor from the corporations. In the first, investors may own shares of a corporation, but they do not own the property of the corporation. If they want to recoup their investment, they can sell their shares, but they cannot, of course, remove the furniture from the office or machinery from the shop floor in equal value of their shares—the corporation owns them, and those assets (like many others) are locked in. Next, entity shielding is like limited liability in reverse; if limited liability protects shareholders from the debts of the corporation, entity shielding protects the corporation from the debts of the investors. (Ciepley 2013b, 225-229)

The uptake for Ciepley is that corporations are unique entities that are neither natural persons themselves, which can claim constitutional rights, nor associations which bear the rights of their investors, since their legal rights are very different from those of their investors. “Corporations are wholly abstract, property-owning entities that can only be constituted by government.” (Ciepley 2013b, 240) This also reveals that while Ciepley cites Millon claiming “Only two ways of drawing this connection (of persons to

corporations) have ever suggested themselves,” in fact Ciepley refers to a third tradition, which he calls the concession or grant theory; and it is this approach, he himself argues on behalf of.

The grant or concession theory (I will refer to by the former) acknowledges corporations as having status and rights before the law. However, the basis of those rights is neither a pre-legal status (as with natural persons) nor is it the pass-through of the rights of investors; instead, the basis is the creation by the state of those sets of rights and privileges. They are a concession from the law; the state does not recognize rights of corporations, rather “the corporation receives its existence and its rights in grant from government.” (Ciepley 2013b, 224) While some of the legal advantages they have mirror those of human persons (suing and being sued) the unique collection of privileges that are distinct to the modern business corporation (specifically, asset lock-in, entity-shielding and limited liability) has no counterpart in claims by an individual against the state. Corporations are cleverly developed, historical achievements; what makes them useful and productive economic agents are the legal grants given them by the state; but very specifically they do not possess constitutional rights against the government.

Ciepley concludes: “The consequences of this for constitutional rights are entirely negative. If government is the source of corporate rights, then these cannot include constitutional rights since constitutional rights cannot be granted by government legislation or charter. They can only be granted through a constitutional process. Furthermore, if government is the source of corporate rights, and indeed of corporate existence, it makes no sense for a corporation subsequently to claim constitutional rights for itself against government as if it were a natural person or association of persons.” (Ciepley 2013b, 242)

This analysis by Ciepley characterizes what corporations are not, but it does not yet clarify what they are. It provides a legal analysis for understanding what rights and privileges are appropriate for corporations (those which are useful for economic productivity), and which are not (constitutional claims against government.) He does, however, attempt to analyze this entity that is neither person nor association; he claims, it is best understood not by analogy to persons, but to governments. Ciepley suggests “Unlike private bodies, such as families and voluntary associations, corporations cannot be formed without civil government ... However, although not simply private, corporations are also not simply public, because unlike armies and government bureaus, neither their financing, staffing, nor direction comes from government.” (Ciepley 2013a, 140) Ciepley argues that in dominant liberal political thought, there are persons and there are governments, and little in between. Yes, civil society exists, but made up from associations of individuals—and it is on this basis that liberal theorists mistakenly view corporations as associations of individuals who are their investors. Instead, if there is an analogy, corporations should instead be seen as types of governments. “Corporations are what I call ‘franchise governments’—their form and powers are delegated by the state, yet they are run on private initiative.” (Ciepley 2013a, 140) Ciepley goes further claiming that these are not just governments but “strikingly analogous to constitutional republics.” (Ciepley 2013a, 141) This character then demands what he calls a political theory of the corporation. This is necessary because they are created by governments, yet they exercise power like governments; while corporations are organized like governments, they do not automatically share in the orientation to the public good that governments presumably do. These dualities create his central questions: “How to frame corporate charters, corporate governance, and general laws so as to keep corporate powers oriented toward the public interest or at least consistent with the public interest that is, how to organize and regulate these shareholder republics so that they serve not only themselves but others—is a problem that no ordinary republican theory has had to address and one that has vexed kings and legislatures throughout the corporation’s history. Much of the political theory of the corporation revolves around this question...” (Ciepley 2013a, 142)

Ciepley leads us to a series of excellent questions and lays bare the limitations for political theory of common legal understanding of the corporation. His position also allows him to formulate a critique of recent rulings like *Citizens United*, in which the majority opinions oddly rely on a mixture of both association theory and the corporate personhood theory of the corporation. He can reject the constitutional status of corporations while recognizing their governmental foundations in the charters that give them their unique privileges. However, the political theory of the corporation is not yet developed. He acknowledges that “These are but initial steps in developing the category of the corporate, distinguishing corporations

from public and private bodies in their ontology, their rights, and their regulative ideals.” (Ciepley 2013a, 156) A question for the political theory of the corporation, as Ciepley has introduced it, is whether it offers analytical perspectives that allow for a democratic accounting of the corporation? In a political, social, and cultural context which has cemented corporation constitutional rights what does a political theory of the corporation offer? It can help citizens see the artifice of corporations but leaves them yet to know how to engage with their power. Is it through corporate governance boards themselves? Is it through the charters that are the legal bases for corporations? Is it through new accountability structures within the communities that corporations themselves are based? Is it through developing a new rhetoric around which citizens can restrain corporations? To address many of these questions, significant literature already exists in the world of business ethics. I turn now to an approach that on the surface seems to be the opposite of Ciepley’s approach and not only ends in many of the same places but offers answers to some of the questions asked above.

### **GREENFIELD: BUT WAIT, CORPORATIONS ARE PERSONS!**

In the introduction to this paper, I suggested there was a something of a bifurcation that separates the discussions of corporations into those that wrestle with their legal status (persons, associations, artificial being, real beings, associations, etc.) and those that focus on the social and responsibilities of corporations in the field of business ethics. The former tends to come from the world of law, jurisprudence and legal studies and the latter from the field of business ethics and include many contributions from practitioners. While these are not completely separate, there is a coherence to each set of studies. Kent Greenfield is a rare legal scholar that steps into the world of corporate social responsibility, though admittedly he does so via the debates over corporate personhood.<sup>3</sup>

Greenfield does not walk directly into the vortex of debates over what corporations are in an existential sense. He does not engage with the classic historical, sociological, legal debates of Maitland, Gierke, Machen and Dewey as does Ciepley. Instead, Greenfield focuses on what corporations are for and what they are intended to accomplish. He accepts much of what Ciepley claims regarding the status of corporations as creatures of the law, but then centers his attention on the purposes for which they are created. The initial problem that he tackles (and again he shares this with Ciepley) is that “The current conventional understanding of corporations and their obligations is that they should be managed primarily for the benefit of their shareholders. But that is not the only way a corporation can be governed ... fiduciary duties should be extended to employees and other corporate stakeholders” (Greenfield 2018, 26-27) Once again, this is a recognition that he shares with Ciepley, and each refers to an extensive literature that focuses on the obligations of corporations to stakeholders not only shareholders.<sup>4</sup> While noteworthy, none of these positions are especially innovative; what is surprising in Greenfield’s account is his claim that the governance reforms that can cause corporations to become more responsive to public concerns “make corporations more like persons, not less.” (Greenfield 2018, 27) Human persons are embedded in social, political, and moral contexts who engage in their own internal struggles over what are the right and best things to do, and also engage with others about these questions. Human persons have moral consciences; they wrestle with competing demands of self, family, career, and community; and humans struggle with balancing short term and long-term needs. The problem with corporations, however, is that they do not have, and we do not expect them to have, consciences. This missing element is why we usually reduce the expectation we have of corporate persons compared to human persons with moral consciences whom we can expect to be part of a dialogue of responsibility and care. For Greenfield then, a solution to the problems that corporations generate in society is to make them more like persons. “The best way to restrain corporations is to require them to sign onto a more robust social contract and to govern themselves more pluralistically— mechanisms designed to mimic traits of human personhood within the corporate form.” (Greenfield 2018, 27) The title of Greenfield’s book then is a little more provocative than the claim at the center of his argument. While he does maintain that corporations are persons in the law, he does not argue across the board that “Corporations are People Too,” but rather that “... corporations should be structured to be more like people.” (Greenfield 2018, 28)

The initial claim by Greenfield, that corporate personhood is a legal fact, is not worth much debate. Even Ciepley, who argues strongly against the granting of personhood in the matter of constitutional rights, accepts that at the level of statute law it is a legal convenience. However, corporations are persons, Greenfield claims, in a more full sense than Ciepley accepts. Greenfield argues corporations are persons in at least three different ways. First, they are persons in the sense that they have legal status; they are entities with legal status, among other things, to sign contracts and own property; as noted, Ciepley has no complaint against this. Secondly, they are also primarily associations of human persons acting collectively for a purpose; Ciepley's argument differs here, wanting to note how distinct the modern business corporations are from other associations of civil society. For Greenfield, though, these first two are generally recognizable and non-controversial claims. Greenfield's third position, however, he acknowledges is more controversial: "corporations are people in the [sense] that they are holders of constitutional rights." (Greenfield 2018, 4-5) This is where the controversy lies, because it is the claim of constitutional rights, especially the sort of political and religious rights afforded to corporations in *Citizens United* and *Hobby Lobby*, that has stirred such a tempest; for those who are concerned about the increasing social and political powers of corporations (alongside their economic power) constitutional rights granted via corporate personhood are a danger to the polity itself. The argument by Ciepley against constitutional personhood for corporations is somewhat unique to him in detail, but the positions he stakes out are reflective of a broader critique of corporate personhood.

Greenfield, of course, knows this is the case, especially since it is mostly those who have been advocates of corporate power, not critics of it, that have argued for this position. Further, in detail, Greenfield is a less full-throated supporter of constitutional corporate personhood than he appears at first. "The question of corporate personhood does get tricky. Corporations do, and should, receive constitutional protections. But they do not, and should not, receive all the protections and rights as human beings. The breadth and scope of the rights of corporations will turn on both the nature of corporations and the purpose of the right. In other words, corporations are people some of the time. And sometimes they are not." (Greenfield 2018, 6) Greenfield does not want to re-litigate (theoretically or before the courts) the history of corporate personhood; rather, he acknowledges the current status of corporations and devises mechanisms for constraining corporate power given that history. For more than 150 years the Supreme Court has been granting and expanding the rights of corporations at a constitutional level. Those rulings have not always been correct or consistent and there have been steps in the opposite directions, but that is the general movement. Corporations have constitutional personhood because the court has found they do, and we have settled into legal (and political) practices that reflect this. Greenfield then does not want to push against this tradition, at least not completely, but rather use it. Instead of arguing against corporate personhood, he challenges the main claims against corporate personhood, including for constitutional rights.

Greenfield finds good reason to secure some constitutional rights for corporations. It seems obvious to him, for instance, that corporations should be secure against unwarranted search and seizure of company files and property. "If a corporation were not able to claim Fifth Amendment rights to be free of government takings, their assets and resources would always be at risk of appropriation. No one would invest in corporations, undermining the reason we have them in the first place." (Greenfield 2018, 13) Notably, this is because Greenfield agrees with Ciepley: the assets and resources of corporations are not those of shareholders; they are the assets and resources of the corporate entity, which is separate from the shareholders. This is a side of the "asset lock-in" that Ciepley referred to above. If that is the case, and the property of the corporation should be secure against unwarranted government takings, then for Greenfield, the corporation must be accorded Fifth Amendment rights.

Similarly, Greenfield argues, while there has been much upset with the recognition of First Amendment Rights for corporations when it comes to political speech, the Court has also been lauded for recognizing the First Amendment rights of media corporations. "For example, in 1971, the government sought to stop the *New York Times*, a for-profit, publicly traded media company, and the *Washington Post* ... from publishing the leaked *Pentagon Papers*. The Supreme Court correctly decided that the newspapers had a First Amendment right to publish." (Greenfield 2018, 12-13) The central question for Greenfield is not whether corporations are persons with rights, but rather which rights they should have. He reviews a series

of choices regarding freedom of religion, freedom of speech among others and makes a general observation followed by a two-step procedure for determining those answers to which should be secured. Initially he makes a general observation, implied from the argument above: “sometimes it is essential to offer corporations constitutional protections ... Corporations’ rights are not always coextensive with those of human beings ... but both because of the nature and importance of these rights and the nature of corporations themselves, it is important to use these constitutional tools to constrain government’s power.” (Greenfield 2018, 100) Thus, while it is possible to recognize constitutional rights for corporations, they need not be assumed to be same as those for natural persons. But how then to decide which do and which do not? Here then is his two-step procedure: “First, we need to look at the purpose of the right in question and ask whether such a purpose is furthered by extending it corporations.” (Greenfield 2018, 103) In the example above, corporations’ ability to claim rights against seizure of their assets, Greenfield claims, is within the purpose of the Fifth Amendment to “constrain government power;” whereas the same amendment’s “right to be free from self-incrimination is a distinctly human right.” (Greenfield 2018, 103) The second of the two-step analysis suggests “we look at whether the right is important for the corporation to achieve its institutional purpose of building wealth by producing goods and services.” (Greenfield 2018, 104) Here he contrasts the differences between due process rights that corporations ought to enjoy because they protect corporations “from government arbitrariness” which is different from the “protection of religious exercise” for corporations, since the latter is “neither here nor there for protecting most companies’ economic endeavors.” (Greenfield 2018, 104)

### **CIEPLEY AND GREENFIELD: FUNDAMENTAL DIFFERENCES, AND YET, ...**

The interpretation above reveals some stark differences between Ciepley and Greenfield. Ciepley answers the question of which constitutional rights corporations should have by writing them out of the Constitution. This, however, leaves it to the varying assurances of the states and federal law to work out the sorts of protections against arbitrary government power Greenfield highlights above. On the other hand, Greenfield introduces a complex question of political and legal deliberation to determine which constitutional right corporations should have; for him, there is no simple means for differentiating which constitutional rights should accrue to corporations. Instead, he invokes a deliberative set of principles by which to judge which those should be. Yet even Greenfield himself admits that this approach “is especially difficult in the area of free speech because of the vast disagreement about the purpose of the free speech right and the vagary of the nexus between speech and a corporation’s purpose.” (Greenfield 2018, 104) Thus, this solution pushes back to the courts the need to determine which rights should and should not be held by corporations.

However, as different as Ciepley and Greenfield seem, their arguments share important similarities. Most importantly, for each, corporations have whatever rights and powers they have because of whatever public purpose they serve and whatever legal allowances/powers they are granted. Ciepley wants to argue that whatever these are, they should not be based upon constitutional corporate personhood; and Greenfield argues that constitutional corporate personhood is the means to secure important rights and also to determine how they are limited. Yet each understands that whatever powers and rights they should have, corporations still rely upon legal and political purposes and considerations, not on the pre-legal status of the entities themselves. Further each also wants to argue against the idea of shareholder primacy and even the idea that shareholders own the corporation. As Greenfield writes, “We must cease thinking of corporations as pieces of property owned by shareholders.” (Greenfield 2018, 212) Finally, each finds in corporate charters and in their governance laws the sites for the possibility of reforming corporate behavior. Ciepley suggests the fundamental challenge is “to frame corporate charters, corporate governance, and general laws so as to keep corporate powers oriented toward the public interest or at least consistent with the public interest.” (Ciepley 2013a, 142) While Greenfield claims, “The best hope for constraining corporate power and legitimizing corporations’ participating in the public square is not an adjustment in constitutional doctrine but an adjustment to corporate governance within corporate law.” (Greenfield 2018,

170) Notably, this last suggestion by Greenfield is not reliant upon his initial claims about personhood, but about the character of corporate governance and purpose as embedded in corporate law.

In this paper I have focused upon two recent contributions to the debates about corporate personhood. Each looks carefully at the challenges that corporations set for democratic politics. They differ in diagnosis, yet each comes to similar conclusions and proposes similar ways to address the problems. There is an extensive literature that each draws upon and to which each speaks; yet each also raises questions that need further elaboration. Ciepley suggests that standard liberal theory cannot quite understand corporations and so he rejects a claim of constitutional corporate personhood because unlike natural persons, there is no pre-constitutional status for corporations. I suggest this is a problematic claim because it takes for granted the assumption that there is an obvious distinction between what is a natural entity, and thus should receive constitutional rights, and that which is not.

This assumption presents two at least difficulties. First, it returns us to the unproductive debates in the late nineteenth and early twentieth century about whether corporations are natural and real or artificial constructs. Secondly, returning to this fruitless debate risks reifying the category of the natural as the substrate of the political. The troubled history of recognition is reflected in the political struggle to achieve acknowledgement of entities to be persons deserving rights. The question has not been “is that a natural person or not?” but “is that entity (single or group) a person to be recognized as a rights bearer?” Matrices of political, social, legal, economic, linguistic (et al.) practices create some entities as recognizable rights bearing beings and others as not; the deployment of the category of “natural” is just one more matrix. When the category of “the natural” is recognized itself as a social construction, it no longer serves as a distinguishing element between who can and cannot claim constitutional rights. Liberal theory may fail when it comes to corporations and their rights, but not because of this.

Greenfield suggests that corporations need to be seen as persons in the eyes of the Constitution to achieve protections against government interference and abuse that the Constitution is intended to secure. He finds examples of protections for due process or the freedom of the press rights to be prima facie cases where constitutional rights obviously accrue to corporations. He does not, however, sustain the argument for why these must be constitutional rights and cannot be secured at the federal statutory level or the state level. It is at the state level that the corporate characteristics identified by Ciepley exist (asset lock-in etc.) so may these other guarantees exist there as well? We can be convinced that corporations need the protections of the sorts he connects to personhood without needing to be convinced that these need to be assured at the level of the Constitution. Using this approach would leave open further deliberation that is mostly closed off with constitutional guarantees. When a corporation has a new constitutional right assured, it somehow existed previously without it, so must it exist going forward? To put his own words back to him, if we can achieve “an adjustment to corporate governance within corporate law,” is it necessary to have the Constitution as the basis as well?

In conclusion, two concerns with the broader approaches are revealed in these arguments of two authors, and these concerns reflect on how these questions are approached in the analysis of corporations more generally. The first problem is that each is anchored primarily, almost exclusively, with the American legal history and political experience. To be fair, both do refer to theorists from different traditions and experiences in other especially industrialized states. Ciepley, for instance, points to an example of how German laws mandate that workers possess seats on corporate governance boards. (Ciepley, 2013a, 150) However, the anchors of their concern and writing are the peculiarities of the American business corporation and questions about its rights. While worthy of focus, it also limits the applicability of these analyses, especially given the global character of corporate power. While a primary concern with American politics is appropriate for American writers, it is also important not speak in terms that assume that whatever a corporation is in the United States is the case throughout the globe. The purpose and character of a corporation will reflect the embedded legal, economic, and social practices of where that corporation operates. This does not prohibit comparative and global analyses, rather it requires them; however, such analyses to reflect the care as found in the studies of comparative economics and comparative politics, international relations and international political economy, and other such disciplines.



A second concern regards the focus upon law. While Ciepley suggests the need for a political theory of the corporation, his primary focus is upon how best to understand corporations' legal status. Greenfield, similarly, focuses on the legal questions of corporate personhood as a method for addressing corporations' social and political responsibilities and rights. The two disagree about what type of law and at what level, federal or state, constitutional or statutory, but the approach is primarily through the lens of law. Recall, for instance, that Ciepley suggests the main questions he approaches are "How to frame corporate charters, corporate governance, and general laws so as to keep corporate powers oriented toward the public interest or at least consistent with the public interest that is, how to organize and regulate these shareholder republics so that they serve not only themselves but others..." This approach is reflected in his 2018 article where he pursues answers to the question asks in the title, "Can Corporations Be Held to the Public Interest, or Even to the Law?" His analysis takes a similar approach to his earlier discussion and arrives at the conclusion "that punishment, while indispensable, is insufficient to keep corporate misconduct to acceptable levels. We must also look to reform corporate governance to lower the incentives to misconduct." (Ciepley, 2018 1016) Without question, corporate governance reform could potentially ameliorate corporate behavior. However, this review and approach misses ways in which corporations change their behavior also based upon social expectation, as well as demands from employees, customers, and other stakeholders.

Of course, the law is a central structure of power; yet this focus on law does not address the many other ways in which corporations exercise power beyond their role as producers and marketers of goods within the confines of their legal corporate authority. Many corporations in the United States, for instance, have not altered their public actions in term of LGTBQ issues because of legal requirements, but because of a judgment of what was expected of them by a variety of stakeholders. This the social and ideological context affects their behavior and thus needs analysis as well. In narrowing their focus to law, these authors do not provide insight on how citizens can engage, restrain, reject, or participate in the power that corporations exercise. The challenge to political scientists and political actors is to acknowledge the legal questions, including the effects of personhood, and what insights they can offer while also moving beyond the law to examine a broader political understanding of corporations and to create means for holding their power and authority accountable to those over whom they exercise it.

## ENDNOTES

1. The centuries' long debate about the character of corpore personhood is too extensive to recount here; however, Pollman & Thompson, (2021), *Research Handbook on Corporate Purpose and Personhood* provides a good recent account of those debates.
2. David Ciepley has published many works on corporations and politics in the last decade. This article will focus upon three: "Beyond Public and Private: Toward a Political Theory of the Corporation" (Ciepley 2013a), "Neither Persons nor Associations," (2013b), and "Can Corporations Be Held to the Public Interest, or Even to the Law?" (2019).
3. Lynn Stout (2012) also approaches these questions though the lens of law, but primarily to demonstrate that even if corporate social responsibility or attending to stakeholders does not privilege shareholders, that is both good practice and acceptable in law. Greenfield is unique in connecting this directly to an argument in favor of the corporate person.
4. While the idea of share holder primacy is still pre-eminent, the argument against the idea and debate about it has grown over the past decade, especially since the 2012 publication of Stout's *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*.

## REFERENCES

- Burwell v. Hobby Lobby. (573 U.S. 68, 2014).
- Ciepley, D. (2013a). Beyond Public and Private: Toward a Political Theory of the Corporation. *American Political Science Review*, 107(1), 139–58. Retrieved from [https://www.cambridge.org/core/product/identifier/S0003055412000536/type/journal\\_article](https://www.cambridge.org/core/product/identifier/S0003055412000536/type/journal_article)
- Ciepley, D. (2013b). Neither Persons nor Associations: Against Constitutional Rights for Corporations. *Journal of Law and Courts*, 1(2), 221–45.
- Ciepley, D. (2019). Can Corporations Be Held to the Public Interest, or Even to the Law? *Journal of Business Ethics*, 154(4), 1003–18.
- Citizens United v. FEC. (558 U.S. 310, 2010).
- Greenfield, K. (2018). *Corporations Are People Too: And They Should Act like It*. New Haven; London: Yale University Press.
- Pollman, E., & Thompson, R.B. (Eds.). (2021). *Research Handbook on Corporate Purpose and Personhood*. Edgar Elgar Publishing Limited; Edward Elgar Publishing, Inc.
- Stout, L.A. (2012). *The shareholder value myth: How putting shareholders first harms investors, corporations, and the public* (1<sup>st</sup> Ed). Berrett-Koehler.