

University of St. Thomas Law Journal

Volume 10
Issue 4 *Spring 2013*

Article 6

2013

Is Corporate Law Experiencing Its Own "Groundhog Day"?

Leonard I. Rotman

Bluebook Citation

Leonard I. Rotman, *Is Corporate Law Experiencing Its Own "Groundhog Day"?*, 10 U. St. Thomas L.J. 1045 (2013).

This Symposium Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

IS CORPORATE LAW EXPERIENCING ITS
OWN “GROUNDHOG DAY”?

LEONARD I. ROTMAN*

Contemporary corporate law enjoys a rich, albeit contentious, discourse. Perhaps no single element of that discourse is more contentious than the discussion of corporate purpose. Its roots may be traced at least as far back as the immediate post-Depression era debate between Adolf Berle and Merrick Dodd. Yet, even after that legendary debate began eight decades ago, is contemporary corporate law any further ahead in establishing a definitive understanding of corporate purpose?

While the names have changed and the arguments have been restructured, in many ways corporate law’s antagonistic perspectives and vicious debates over corporate purpose remain mired in much the same situation that existed in the time of Berle and Dodd. This scenario is highly reminiscent of the movie *Groundhog Day*, where weatherman Phil Connors is stuck in a recurring loop where he wakes up each successive morning reliving the same day again and again. The relevance of that movie to the issue of corporate purpose lies in what Phil learned from his reliving the same day over and over again, which ultimately allowed him to exit the cycle. This article asks whether contemporary corporate law is doomed to reside permanently in its own time loop, or can it, like Phil Connors, expand its horizons and discover how to extricate itself from its (indirectly) self-imposed purgatory?

I. INTRODUCTION

Have the major failings of contemporary corporate law emanated primarily from an inability or unwillingness to learn from its own history? Has corporate law’s failure to establish and inject corrective “lessons” from its

* B.A., LL.B., LL.M., S.J.D., Purdy Crawford Chair in Business Law and Professor, Schulich School of Law, Dalhousie University, Halifax, Nova Scotia, Canada. I thank Lyman Johnson for his gracious invitation to be part of this symposium. I dedicate this paper to the memory of my beloved son, Joseph Malcolm Rotman (Z”L), who lost his battle with cancer on April 9, 2013 at the age of 13. If only his life could have remained in stasis like the events of *Groundhog Day* until a cure for his disease was found.

history into its contemporary practice resulted in its realization of Santayana's warning that "[t]hose who cannot remember the past are condemned to repeat it"?¹

Corporate law is, once again, in a state of turmoil. Corporate activity is under public scrutiny like never before. In recent years government bailouts of large financial institutions and two of the "Big Three" North American auto manufacturers have brought with them tremendous public reaction, both positive and negative. These events followed closely on the heels of the well-publicized Enron scandal of 2001, at the time the largest and most notorious corporate collapse in U.S. history. Meanwhile, media coverage of the grossly inflated salaries and bonuses paid to high ranking officers of large corporations—sometimes even when corporate "performance" has not been particularly positive—provided the public with additional insights into some of the inner workings of corporate activity that theretofore had remained relatively unknown.

Dismayed by these events and the disparity between the "haves" and the "have-nots" in contemporary Western society, public antipathy towards corporations grew. The "Occupy Wall Street" movement that spread throughout North America, Europe, and Asia was a reaction to these occurrences.² The bulk of the messages emanating from the "Occupy Wall Street" movement overwhelmingly held corporations responsible for these developments.

Collectively taking place largely within the last decade, the events described above have each thrust corporate issues directly into the public domain. But this was not the first time that corporate issues have been in the public spotlight. Indeed, the rise and subsequent disappearance of corporate issues within the public sphere has precedents dating back at least as far as the Great Depression. This is profoundly illustrated in a 1934 article written by then-Yale law professor and future Supreme Court Justice William O. Douglas:

[T]he criticism [levied at corporate practices] has been symptomatic of indignation and disapproval of many different abuses and malpractices disclosed in recent years . . . secret loans to officers and directors, undisclosed profit-sharing plans, timely contracts unduly favorable to affiliated interests, dividend policies based on false estimates, manipulations of credit resources and capital structures to the detriment of minority interests, pool operations, and trading in securities of the company by virtue of inside information, to mention only a few. These are not peculiar to re-

1. GEORGE SANTAYANA, *Reason In Common Sense*, in 1 THE LIFE OF REASON 284 (1906).

2. See OCCUPY WALL STREET, <http://occupywallst.org/about/> (last visited Feb. 10, 2014). This movement was created to highlight the huge disparity in income and resources between the so-called "haves" and "have nots" in contemporary capitalist societies, or what was often referred by the 99% of society that did not control the bulk of wealth generated therein.

cent times. They are forms of business activity long known to the law. . . . [C]onsiderable refashioning of codes of conduct – in business as well as in law – must be effected if the next cyclical trend is not to produce as many malpractices and abuses as has the current one.³

Douglas' commentary indicates that the behaviors he described were not new, but rather, contemporary versions of historic business practices. Just as Douglas illustrated how historic corporate "sharp practices" continued to reappear in the 1930s, recent events, such as the Enron scandal, demonstrate that many of the same practices that Douglas criticized in 1934 still exist and are appropriately critiqued eight decades later.

These corporate misdeeds and wrongdoings are merely part of the latest cycle of corporate scandals and errors that have occurred periodically throughout the history of modern corporate law. The fact that these events have recurred time and time again warrants an in-depth and sustained examination of their historical bases that has thus far gone unrealized. These problematic occurrences may be traced to the debate over corporate purpose that may, itself, be sourced at least as far back as the immediate post-Depression debate between Berle and Dodd.⁴ The failure to focus on these issues has resulted in corporate law's realization of Santayana's warning.

Santayana's warning may also be observed in the movie *Groundhog Day*,⁵ where weatherman Phil Connors is stuck in a time loop that sees him wake up each successive morning reliving the same day over again. The relevance of that movie to the issue of corporate purpose lies in what Phil learns from reliving the same day over and over again that finally allows him to exit the cycle. Is contemporary corporate law doomed to reside permanently in its own time loop or can it, like Phil Connors, expand its horizons and discover how to extricate itself from its (indirectly) self-imposed purgatory?

Without looking to the historical and theoretical underpinnings of the corporation, how is it truly possible to understand the practical implications of this statutorily-created juridical person? This requires us to revisit the history of the modern corporate form in order to understand it, learn from it,

3. William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305, 1306 (1934).

4. See Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931) (stating that all powers granted to corporate management should be used only for the benefit of the shareholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (arguing that anyone conducting business can do so with their own interests ahead of customer and creditor interests); Adolf A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (rebutting Dodd's position); E. Merrick Dodd, Jr., *Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?*, 2 U. CHI. L. REV. 194 (1935). The crash of the stock market in 1929 no doubt influenced this debate. See also William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation*, 34 J. CORP. L. 99 (2008).

5. GROUNDHOG DAY (Columbia Pictures 1993).

and proceed ahead rather than regard the past as unchangeable or unchallengeable. Yet, even when fundamental corporate law concepts are questioned, as occurred during oral argument in *Citizens United v. Federal Election Commission* (“*Citizens United*”),⁶ as will be shown herein, the questioning is quickly shut down.

Against the backdrop of failing to understand the practical implications of corporations and corporate behavior because of the lack of attention paid to their historical and theoretical underpinnings came the collapse of energy giant Enron Corp., one of the most successful American corporations in the 1980s and 1990s, and the seventh largest U.S. corporation in terms of revenue.⁷ It filed for bankruptcy amidst allegations of conflict of interest and other financial improprieties. Shortly thereafter, a number of other major U.S. corporations suffered similar fates and generated notable scandals of their own. However, it was Enron which came to symbolize the worst excesses of corporate corruption and became the focus of attempts to reform corporate governance standards.⁸ On July 16, 2002, the American Bar Association Task Force on Corporate Responsibility released a preliminary report, which detailed the significant impact of the Enron scandal and the Task Force’s response to it:

Few events in business history since the Great Depression have had the public impact of the stunning collapse of Enron Corp. and other major companies in the past year. . . . [Enron’s collapse] is merely one of the most notorious in a disturbing series of recent lapses at large corporations involving false or misleading financial statements and alleged misconduct by executive officers. Investor confidence in the quality and integrity of public company corporate governance is compromised, and the pace of calls by the President, Congress, the SEC, stock markets and other interested groups for regulatory reform has quickened dramatically.

. . . .

The core conclusion of the Task Force, however, is that, as evidenced by recent failures of corporate responsibility, the exercise by such independent participants of active and informed stewardship of the best interests of the corporation has in too many instances fallen short. Unless the governance system is changed in ways designed to encourage such active and informed stewardship, the Task Force believes that public trust and investor confidence in the corporate governance system will not be restored.⁹

6. 558 U.S. 310 (2010).

7. *Skilling v. United States*, 130 S. Ct. 2896, 2899 (2010); *The Five Hundred Largest U.S. Corporations*, FORTUNE, Apr. 16, 2001, at F-1.

8. For this reason, “Enron” is often used as a proxy for the various corporate scandals that arose in the early stages of the twenty-first century.

9. James Cheek III et al., *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 54 MERCER L. REV. 789, 792–93, 796–97 (2003).

While the ABA Task Force paper indicates the inactive and uninformed stewardship of corporations, it fails to identify *why* this has occurred—and with it, the resultant lack of public trust and investor confidence in the corporate governance system. It is suggested that a primary reason for this failure is the historical inability to identify the appropriate foundation of corporate purpose—that is, why corporations exist and to whom they are responsible.

Is contemporary corporate law, as suggested in the abstract to this paper, any further ahead in its understanding of why corporations exist some eight decades after the legendary Berle-Dodd debate on corporate purpose began? This is not corporate law's only long-standing doctrinal deficiency. One may equally ask whether the reasons for corporate law's fiduciary underpinnings, as expressed in notable cases like *Meinhard v. Salmon*¹⁰ and *Guth v. Loft, Inc.*,¹¹ or the implications of corporate personality, have received meaningful attention or if they have stagnated as well.

Consistent with Santayana's warning, the consequence of failing to learn from corporate law's history has been the recurrence of the activities condemned by Douglas in his 1934 article. Corporate names once associated with success and wealth like Adelphia, Enron, Global Crossing, Hollinger, Parmalat, Qwest, Tyco, and WorldCom are now synonymous with scandal, greed, and corruption. Nonetheless, the dangers of ignoring history are still being experienced by corporate law. That is evident, for example, by illustrating the manner in which Justice Sotomayor's questioning of the continued relevance of the corporate personality doctrine was received in *Citizens United*.¹²

II. JUSTICE SOTOMAYOR, *CITIZENS UNITED* AND CORPORATE PERSONALITY

Justice Sonia Sotomayor's first oral argument after she was appointed to the Supreme Court of the United States came in the notorious *Citizens United* case.¹³ The key issue in *Citizens United* was whether limits on corporate contributions for political purposes imposed under the McCain-Fein-

10. 164 N.E. 545, 546 (N.Y. 1928) (“Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”).

11. 5 A.2d 503, 510 (Del. 1939) (“[P]ublic policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty . . .”).

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

13. *Id.*

gold Act of 2002¹⁴ infringed corporations' freedom of speech rights under the First Amendment. In determining the answer to this question, Justice Sotomayor inquired during oral argument whether it was juridically necessary to regard corporations as legal persons:

[W]hat you are suggesting is that the courts who created corporations as persons, gave birth to corporations as persons, and there could be an argument made that that was the Court's error to start with, not *Austin* or *McConnell*, but the fact that the Court imbued a creature of State law with human characteristics.¹⁵

In asking this seemingly benign question, Justice Sotomayor did what corporate law has largely failed to do for much of its history: question some of its most basic assumptions in order to determine whether they remain appropriate in the present day. Indeed, strict and unquestioned adherence to the doctrine of corporate personality has resulted in a host of unforeseen problems stemming from that characterization's implications. Notwithstanding this reality, Justice Sotomayor's willingness to ask what others would not ask came at the cost of challenges made to her reputation, specifically the imputation that she knew little or nothing about corporate law.

Media outlets jumped on Justice Sotomayor's query as to whether it was necessary for the courts to have granted human-like characteristics to these creatures of statute. Headlines such as "Sotomayor Issues Challenge to a Century of Corporate Law"¹⁶ and "Sotomayor's 'Provocative Comment' Questioned Corporate Law Foundations"¹⁷ sprung up immediately after she made her comments.

Justice Sotomayor's inquisition was controversial because corporations had been considered, for more than one hundred years prior to *Citizens United*, to be distinct legal individuals, separate and apart from their directors, officers, shareholders, employees, creditors, etc., under what is known as the doctrine of corporate personality.¹⁸ Indeed, there is little, if any, contemporary debate over the corporation's existence as a legal person separate and apart from the personality of its management or shareholders. This doctrine was articulated early in the twentieth century by the legendary constitutional and administrative scholar A.V. Dicey, who stated:

14. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (amending the Federal Election Campaign Act of 1971 to provide bipartisan campaign reform).

15. Transcript of Oral Argument at 33, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205).

16. Jess Bravin, *WALL ST. J.*, Sept. 17, 2009, <http://online.wsj.com/news/articles/SB125314088285517643>.

17. Debra Cassens Weiss, *A.B.A. J.*, Sept. 17, 2009, http://www.abajournal.com/news/article/sotomayors_provocative_comment_questioned_corporate_law_foundations/.

18. *See* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819); *Providence Bank v. Billings*, 29 U.S. 514 (1830); *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394 (1886); *Salomon v. Salomon*, [1897] A.C. 22 (H.L.).

When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but by the very nature of things, differs from the individuals of whom it is constituted.¹⁹

The reason for the sensational response to Justice Sotomayor's comments was premised on nothing more than that she had the "audacity" to question whether it was truly necessary to regard corporations as legal persons notwithstanding such a long-standing, well-recognized, and foundational corporate law doctrine. The reality, however, is that the doctrine of corporate personality has resulted in a host of unforeseen problems stemming from that characterization's implications.

The relative ease with which incorporation is achieved creates the potential abuse of a corporation's independent legal existence by using the corporate vehicle as a means to shield the socially or economically inappropriate conduct of its investors. This may include, for example, the intentional undercapitalizing of a corporation or the use of the corporate vehicle to commit fraud. In such scenarios, individuals having *bona fide* claims against corporations incorporated as a result, or in the face, of such fraudulent backdrops may be unable to obtain relief, insofar as incorporation shields shareholders from financial responsibility for the corporation's actions.

Rather than looking to re-examine the corporate personality doctrine, judicial reaction to the perceived inequity of such scenarios led to what is commonly referred to as "piercing the corporate veil."²⁰ In scenarios where judges deem it necessary to "disregard the corporate entity or personality, and instead to consider the economic realities behind the legal facade,"²¹ they may exercise their discretion to look beyond that facade and foist liability upon sufficiently "deep pocketed" corporate shareholders rather than restricting claims to the assets of the corporation itself.²²

19. A.V. Dicey, *The Combination Laws as Illustrating the Relation between Law and Opinion in England During the Nineteenth Century*, 17 HARV. L. REV. 511, 513 (1904).

20. This notion has a lengthy history, being traceable certainly to decisions of the early parts of the nineteenth century. *See, e.g.*, *Bank of United States v. Deveaux*, 9 U.S. 61 (1809) (stating that the characteristics of individuals within corporations can be examined to assess jurisdictional issues).

21. *Clarkson Co. v. Zhelka*, (1967) 64 D.L.R. 2d 457, 469 (Can. Ont. H.C.J.). Note also I. Maurice Wormser, *Piercing the Veil of Corporate Entity*, 12 COLUM. L. REV. 496, 499 (1912) ("[C]ourts of law do not tolerate any attempt to hinder, delay, or defraud creditors by means of a resort to 'the veil of corporate entity.' The ingenuity of the rogue, with his arsenal of scholastic sophistry, was met and overwhelmed by the sane and stern refusal to be bound by the entity theory.").

22. This principle is one of universal application. *See Clarkson Co. v. Zhelka*, (1967) 64 D.L.R. 2d 457; *Stockton v. Cent. R.R. Co.*, 24 A. 964, 973 (N.J. Ch.1892) ("It must not be thought that courts are powerless to strip off disguises to thwart the purposes of the law. Whenever such disguises in fact appear, they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear."). Note also *Littlewoods Mail Order Stores Ltd. v.*

The exercise of judicial discretion to circumvent the doctrine of corporate personality is not unlimited, however. It has been restricted to circumstances where it would be inequitable, such as where “it would be flagrantly opposed to justice,” where “a company is formed for the express purpose of doing a wrongful or unlawful act, or if when formed, those in control expressly direct a wrongful thing to be done,” or where “the company is the mere agent of a controlling [in]corporator.”²³ Notwithstanding such limitations, many questions still surround when the corporate veil may be pierced, making its status as an exception to the corporate personality doctrine uncertain at best.²⁴

Some may have thought Justice Sotomayor could only have made such an inquiry because they assumed she possessed a limited background in corporate law. But that is not the case. While she began her legal career as an Assistant District Attorney in Manhattan, prior to her appointment to the United States District Court for the Southern District of New York in 1992, she was practicing commercial litigation as a partner at a firm whose “typical clients were significant corporations doing international business.”²⁵ Justice Sotomayor’s question as to whether corporations need to be regarded as separate legal persons in law was thus not a question borne out of ignorance. Instead, it was a legitimate query about the concept of corporate personality, a topic that has caused a host of problems in the law since its origins in nineteenth century academic commentary and jurisprudence.²⁶

The doctrine of corporate personality is fundamental to corporate law and holds that the corporation is to be understood by analogy to a naturally born person. Like a natural person, a corporation is “born” and can “die” (although it need not do so). It may sue and be sued in its own name. It may be killed or it may commit suicide. The corporate personality doctrine, as with the doctrine of corporate purpose discussed above, is a long-standing assumption of contemporary corporate law that is generally deemed to be off-limits to questioning by judges and corporate law scholars. While the

Inland Revenue Comm’rs, [1969] 1 W.L.R. 1241 (A.C.) at 1254 (Eng.), where Lord Denning M.R. states:

The doctrine laid down in *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22, has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit.

23. *Clarkson*, 64 D.L.R. 2d, at 470.

24. See the discussion in LEONARD I. ROTMAN, *FIDUCIARY LAW* 429–432 (2005).

25. Press Release, The White House, Announcement of Sotomayor’s Supreme Court Nomination (May 26, 2009), available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor.

26. Justice Sotomayor is not the only U.S. Supreme Court justice to have openly questioned whether it is necessary to ascribe characteristics of personhood to corporations pursuant to the Fourteenth Amendment. See *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85–90 (1938) (Black, J., dissenting).

corporation's separate legal existence from its management and shareholders is well-accepted, the further implications of this separation remain contentious. Is the corporation merely a funnel through which profit maximization for shareholders is the ultimate goal? Alternatively, are shareholders merely one of a number of stakeholder groups whose interests must be accounted for in the conduct of corporate management?²⁷

In order to exist, corporations incorporate some rather significant assumptions—assumptions that would not necessarily flow organically from the desire to create a more sophisticated business entity than the partnership. Without first asking the types of questions posed above and proffering answers to them, how are we to understand whether these assumptions are valid, not to mention the various reasons why corporations exist? Secondly, without determining whether these assumptions remain valid or understanding why corporations exist, how can we ascertain whether contemporary corporate practices remain consistent with the rationales for their existence or whether the corporate vehicle has “run off the rails” and taken on an identity inconsistent with its historical foundations? If the latter has, in fact, occurred, perhaps a reigning in of corporate behavior is appropriate. Yet, without asking some necessary and important questions, we are unable to make this vital determination. Instead, we are obliged to trudge along with the status quo intact, unable to do anything to prevent that status quo from causing major disturbances or disruption to modern economies.

III. GROUNDHOG DAY AND ITS MEANING FOR CONTEMPORARY CORPORATE GOVERNANCE

The situation illustrated above, whereby corporate law continually revisits the same type of scandals and controversies that have dogged it for decades, is reminiscent of the plot in the movie *Groundhog Day*. In that movie, comedian Bill Murray portrays Phil Connors, a television weatherman from Pittsburgh who travels to Punxsutawney, Pennsylvania to film the town's famous Groundhog Day celebration with his executive producer, Rita (Andie MacDowell) and cameraman, Larry (Chris Elliott).²⁸ This is an annual event for Phil, who is less than enthusiastic about participating in it yet again.

Misanthropic Phil is narcissistic and egocentric. He actively disdains Punxsutawney and what he perceives as the town's tacky celebration. He cannot wait to leave, so after filming a news spot about whether the town's groundhog, Punxsutawney Phil, sees his shadow, weatherman Phil rushes

27. For further discussion on the issue of corporate purpose, see Leonard I. Rotman, *Debunking the “End of History” Thesis for Corporate Law*, 33 B.C. INT'L & COMP. L. REV. 219 (2010).

28. See generally THE PUNXSUTAWNEY GROUNDHOG CLUB, <http://www.groundhog.org/> (last visited Feb. 11, 2014) (providing information as the official Punxsutawney Groundhog Day website).

his team back into their van to return to Pittsburgh. Unfortunately for Phil, a blizzard has shut down the highway and all other forms of travel and communication. The crew is then forced to return to Punxsutawney, although Phil's extreme reluctance to go back is evident in the following exchange with a state trooper:

Phil: Hey commander, what's going on?

State Trooper: There's nothing going on. We're closing the road. Big blizzard moving in.

Phil: What blizzard? It's a couple of flakes.

State Trooper: Don't you listen to the weather? We got a major storm here.

Phil: I make the weather! All of this moisture coming up out of the Gulf is gonna push off to the east and hit Altoona.

State Trooper: Pal, you got that moisture on your head. Now you can go back to Punxsutawney, or you can go ahead and freeze to death. It's your choice. So what's it gonna be?

Phil: [pauses] I'm thinking . . .²⁹

Phil reluctantly decides not to travel and returns to the same bed and breakfast residence he stayed at the previous night. The next morning, Phil wakes up to the same song followed by the same disc jockey banter on the radio that he heard on Groundhog Day. When he looks outside, he sees a host of people walking towards Gobbler's Knob, the home of Punxsutawney Phil. Phil quickly discovers that it is Groundhog Day all over again.

Phil is initially in disbelief. How could he possibly be reliving Groundhog Day? Incredibly, he finds himself forced to experience that same day, in exactly the same way, *ad nauseam*, while the others in the town remain blissfully unaware of this strange phenomenon and live out the day as if for the first time.

Phil initially reacts narcissistically to the Groundhog Day time loop. He takes advantage of the situation without fear of long-term repercussions, becoming gluttonous, lecherous, thieving, irresponsible, and reckless. He eats and drinks to excess. He tricks a woman he previously did not know into sleeping with him by learning all about her on successive days and then using that information to seduce her by pretending he was a former high school classmate of hers. He steals money from an armored car by memorizing the incompetent guard's daily pattern. He drives drunk and recklessly. However, his attempts to win the affection of his producer Rita by tricking her into liking him repeatedly fail.

Once the novelty of self-indulgence wears off, Phil becomes despondent. He becomes abusive to the townsfolk and to Larry the cameraman. He mocks the Groundhog Day celebration by recording ludicrously offensive

29. IMDb, *Groundhog Day (1993) – Quotes*, http://www.imdb.com/title/tt0107048/trivia?tab=qt&ref_=tt_trv_qu (last visited Feb. 11, 2014).

reports on the festival and offending the other participants. He then endeavours to stop the time loop by numerous attempts at suicide, yet wakes up each successive Groundhog Day morning as before.

In perhaps the ultimate attempt to end the time loop he is trapped in, Phil kidnaps Punxsutawney Phil in an unsuccessful attempt to prevent Groundhog Day from recurring. His logic: there can't be a Groundhog Day without the groundhog. He drives a vehicle carrying himself and Punxsutawney Phil off of a cliff and into a rock quarry, exploding the vehicle on the rocks below. However, as always, Phil wakes up the very next morning on Groundhog Day. Eventually, Phil realizes that, like his groundhog namesake, he cannot control his fate; rather, he can only alter how he responds to it.

Resigned to his inability to escape the cycle of successive Groundhog Days and with the advice of Rita, Phil eventually uses the opportunity provided by his plight to improve himself. He learns, *inter alia*, to play jazz piano, speak French and become a master ice sculptor. Phil also uses his knowledge of the day's events to assist others. He changes a flat tire for a group of older women, saves an engaged couple's marriage plans and prevents death and injury, but he is not omnipotent and cannot save the life of an old beggar as much as he tries.

As Phil gets to know himself better, he changes from a self-obsessed jerk into a selfless and giving individual who is much appreciated and beloved in Punxsutawney. Finally, after a great many years,³⁰ and an equal number of attempts to win Rita's heart, Phil finally succeeds and is then able to leave Punxsutawney. He finally wins over Rita by being true to her, as well as to his own feelings, instead of trying to manipulate her into sleeping with him. However, the town and its people had ingratiated themselves

30. While the movie never reveals precisely how long Phil Connors remains mired in the recurring events of successive Groundhog Days, according to *Groundhog Day* director Harold Ramis on the movie DVD commentary, Phil spent approximately 10 years trapped in Punxsutawney. One article discussed this and other pieces of evidence in calculating that Phil spent "3176 repeated Groundhog days, or 453 weeks, or 105 months, or 8.7 years. Precisely, 8 years, 8 months, and 16 days" in Punxsutawney. WOLF GNARDS, *How Long Does Bill Murray Spend In Groundhog Day?*, <http://www.wolfgnards.com/index.php/2009/06/16/how-long-does-billy-murray-spend-in-grou> (last visited Feb. 11, 2014). However, director Ramis, responding to that article, said the following:

I think the 10-year estimate is too short. It takes at least 10 years to get good at anything, and allotting for the down time and misguided years he spent, it had to be more like 30 or 40 years. . . . People [like the blogger] have way too much time on their hands. They could be learning to play the piano or speak French or sculpt.

WOLF GNARDS, *Harold Ramis Responds to the Wolf Gnards*, <http://www.wolfgnards.com/index.php/2009/08/18/harold-ramis-responds-to-the-wolf-gnards> (last visited Feb. 11, 2014). What is clear is that Phil has stayed in Punxsutawney long enough to, *inter alia*: (1) get to know all of the townsfolk by name and learn their stories; (2) sequentially memorize all the events of Groundhog Day; (3) learn French; (4) become a classically trained pianist; (5) become an expert ice sculptor, and; (6) learn how to consistently flick playing cards into a hat (something Phil himself indicates in the movie that takes about 6 months to master: "Six months. Four to five hours a day, and you'd be an expert.").

to him over the years he remained in the time loop. Consequently, rather than leaving Punxsutawney, he chooses to live there with Rita.³¹

Why is a paper on the topic of corporate law, history, and theory discussing a movie about a weatherman who hates Groundhog Day and is, ironically, forced to continually relive it? *Groundhog Day* is a tale of introspection and self-improvement. The process Phil goes through emphasizes his need to discover what is truly important rather than the superficialities of fame, gluttony, and lechery he is initially preoccupied with. His existence was empty, much like the calories of the donuts and alcohol he consumed in excess. Further, he learned that the answer to ending his misery was not suicide, but the process of self-reflection and awareness. The Phil Connors who first set foot in Punxsutawney—the man who actively disdained the town’s Groundhog Day festival and the people who celebrated it—was not the same Phil who grew to love the charm of the sleepy little town, its inhabitants, and its quirky annual festival so much that he did not want to leave. After spending years in Punxsutawney, Phil eventually realizes that true satisfaction in life comes not from focusing inward upon one’s own desires, but from turning outward and being concerned with the needs of others. Corporate law could stand to learn the lessons that Phil Connors learns in *Groundhog Day*. At a minimum, it would benefit from engaging in the same process of introspection and self-improvement that Phil does.

For a good chunk of the movie, Phil, like many people, regards himself as a victim of fate, a person who is unable to control his own destiny. But he has one important advantage the rest of us do not: he gets to replay his life over and over again until he learns from his mistakes and finds his truth. Once Phil figures things out and “gets it right,” he is then able to escape his purgatory. Ironically, at that point he no longer finds the need to escape, since his purgatory has become his place of salvation.

The relevant question for the larger issues herein is whether corporate law is able to accomplish the same thing that Phil Connors did in *Groundhog Day*. It may also be asked whether, assuming corporate law is potentially able to accomplish what Phil did in *Groundhog Day*, it, in fact, even wants to attempt such a feat. This paper asks whether corporate law is destined (or merely wants) to reside permanently in its own Punxsutawney or if it, like Phil Connors, can be sufficiently introspective to critically examine the bases for the difficulties it has repeatedly encountered. This process of critical introspection is what will enable corporate law to extricate itself from its (indirectly) self-imposed purgatory and make it better equipped to avoid the problems and scandals that have continually plagued it over the years.

31. While Phil chooses to live in Punxsutawney, he still seeks to maintain his ability to leave easily by saying that rather than buying a house, they should start by renting.

In order to move beyond the limitations that corporate law has imposed upon itself and left largely unquestioned for decades, greater attention must be paid to the implications of foundational corporate law concepts, such as corporate purpose and corporate personality to discover whether, in the contemporary setting, those implications remain appropriate and effective. The media's reaction to Justice Sotomayor's questioning in oral argument in the *Citizens United* case is illustrative of the considerable reluctance and resistance to raising such issues within the realm of corporate law. Further, what happened to Justice Sotomayor illustrates that where such issues are, in fact, raised, they do not come without potential costs.

If corporate law can overcome such initial resistance to asking some difficult questions and gazing critically into its own soul, it is well equipped to deal with the potential effects of these foundational investigations. One of the chief attributes of the common law has always been its ability to evolve with changing social attitudes and mores. That requires corporate law, like other areas of law, to constantly reassess the vitality and usability of its foundational concepts. Unless it can be demonstrated that challenging these foundational concepts is inappropriate, corporate law must adapt and evolve. That will enable it, like Phil Connors, to become more meaningful and relevant within its sphere of influence. Yet, assuming corporate law is theoretically able to accomplish what Phil did, it remains to be seen whether: (a) it is interested in attempting to achieve such a feat; and (b) if it is interested, how long it will take for corporate law to accomplish that feat.

IV. CONCLUSION

Questioning the existence of a long-standing—or even foundational—theory need not necessarily emanate from the desire to overturn it, nor must it necessarily lead to that result. Rather, the objective may simply be to learn from the developments of the past, to both help us in the present and to move more positively towards the future. This requires us to continually reevaluate whether the contemporary understanding of law and its theoretical underpinnings remain both necessary and appropriate in the modern day. That is what Justice Sotomayor was attempting to do in *Citizens United*, which is consonant with what Phil Connors was forced to do in order to leave Punxsutawney in the movie *Groundhog Day*.

At this point in the post-Enron, post-bailout, and post-2008 financial collapse era, corporate law has yet to substantively address issues it has largely neglected throughout much of its history. For quite some time, society has not seriously addressed the implications of the foundational questions: why do corporations exist?; why are corporations separate legal individuals?; and for whose benefit do corporations exist?³² During that

32. Until the rise of progressive corporate law scholarship in the 1980s as a response to the law and economics movement, it could be suggested that these types of investigations had not

time, corporate law has suffered damage to its reputation and has lost the public's confidence in its ability to effectively govern corporate actors. Corporate law is consequently in desperate need of a sustained, self-reflective process. What will come of such a process will depend largely on how seriously it is advanced and the extent to which it is meaningfully sustained.

Self-reflection is a necessary part of anything that changes or evolves over time. The reinvigoration or rejection of foundational corporate law concepts brought on by the process of self-reflection is a vital part of maintaining corporate law's contemporary relevance. We need not reinvent history, but, as Phil Connors learns in *Groundhog Day*, accept history's realities and heed its lessons. This is consistent with the sentiments expressed by President Barack Obama in his inaugural speech characterizing the challenges that lie ahead for America as a result of the then-current economic climate, the effects of which are still being felt:

That we are in the midst of crisis is now well understood. . . .
Our economy is badly weakened, a consequence of greed and irresponsibility on the part of some, but also our collective failure to make hard choices and prepare the nation for a new age. . . .
. . . .

Nor is the question before us whether the market is a force for good or ill. Its power to generate wealth and expand freedom is unmatched, but this crisis has reminded us that without a watchful eye, the market can spin out of control – and that a nation cannot prosper long when it favors only the prosperous. . . .
. . . .

Our challenges may be new. The instruments with which we meet them may be new. But those values upon which our success depends – hard work and honesty, courage and fair play, tolerance and curiosity, loyalty and patriotism – these things are old. These things are true. They have been the quiet force of progress throughout our history. What is demanded then is a return to these truths.³³

For this type of self-reflective examination to have the kind of substantive effect required for corporate law to initiate a new era of understanding of corporate purpose and function, it must heed Santayana's warning and

been undertaken in any substantive way since the Berle-Dodd debate ended in the late 1930s; see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 583 (1992) (stating "the confluence of the law and economics scholars' deconstruction of the corporate form and the age of takeovers has stimulated the most systematic and searching questioning of the legitimacy of corporate law in over fifty years"); see also *id.* at 583 n.17 (stating "[t]he last great wave of intellectual interest in corporate theory occurred during the 1920s and 1930s.").

33. *Obama's Inaugural Speech*, CNN POLITICS.COM <http://edition.cnn.com/2009/POLITICS/01/20/obama.politics/index.html> (last visited Feb. 11, 2014).

take necessary steps to avoid the implications of that warning by not ignoring the lessons of the past. Then, and only then, may contemporary corporate law depart its own Punxsutawney for a brighter future.