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— Introduction —

CORPORATE LAW AND PRIVATE ORDERING

Eric C. Chaffee[†]

One of the eternal debates regarding corporate law is what defines the essential nature of the corporation. From this discussion, three prevailing essentialist theories of the firm have emerged. First, the artificial entity theory of the corporation, which is sometimes referred to as the concession theory of the corporation, posits that the corporation is an artificial entity created by the state that owes its existence completely to the state.[1] As a consequence, the state has complete power to define the rights and responsibilities of the corporation.[2]

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1. *See* Henry N. Butler & Larry E. Ribstein, *State Anti-Takeover Statutes and the Contract Clause*, 57 U. CIN. L. REV. 611, 618 (1988) ("The concession theory of the corporation views corporations as coming into existence only as a result of a special concession or grant made by the government."); Kayal Munisami, *The Role of Corporate Social Responsibility in Solving the Great Corporate Tax Dodge*, 17 FLA. ST. U. BUS. REV. 55, 77 (2018) ("For the artificial entity theory, the corporation owes its existence to the positive law of the state rather than to the private initiative of its members and is therefore a creature of state law and nothing else."); James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1570 ("One way to describe the corporation is as an artificial entity. At its core, the artificial entity theory posits that the corporation is a creature of positive law that owes its existence to an act of the sovereign.").

2. *See* Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1, 13 (1994) ("Under the artificial entity theory, a corporation draws all of its power and legitimacy for its actions from legislative enactments."); Atiba R. Ellis, Citizens United *and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 737 (2011) ("The earliest theory of the corporation is that it is merely a creation of the state. This 'artificial person' or 'concession' theory rested on the view that a corporation effectively exists at the sufferance of the state and, therefore, is not entitled to any rights or protections not granted to it by statute."); J. Janewa OseiTutu, *Corporate "Human Rights" to*

Second, the real entity theory of the corporation, which is also known as the natural entity theory of the corporation, suggests that the corporation is a real entity with an identity that exists separate and apart from the state and the individuals organizing, owning, and operating it.[3] As a result of this separate identity, the corporation possesses certain rights and can take on responsibilities.[4] Third, the aggregate theory, which has been refined and rebranded into the nexus-of-contract theory, provides that the corporation is merely the sum of the relationships among the individuals involved with the corporation.[5]

Intellectual Property Protection?, 55 SANTA CLARA L. REV. 1, 42 (2015) ("[T]he concession theory postulates that corporations are created by the state and have only the rights that are granted to them by the state.").

3. *See* Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 80 (2005) ("The real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state."); Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 222 n.7 (2011) ("Real entity theory posits that a corporation is an entity unto itself, bearing separate and distinct desires and needs from those of its shareholders."); Seema Mohapatra, *Time to Lift the Veil of Inequality in Health-Care Coverage: Using Corporate Law to Defend the Affordable Care Act*, 50 WAKE FOREST L. REV. 137, 162 (2015) ("The real entity theory suggests that as a corporation is separate and apart, the corporation has a 'collective consciousness' that is separate and apart from those who manage its operations."); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1062 (1994) ("The real entity theory assumes many forms, but common to them all is the claim that corporations are real, naturally occurring beings with characteristics not present in their human members.").

4. *See* Jason Iuliano, *Do Corporations Have Religious Beliefs?*, 90 IND. L.J. 47, 61 (2015) ("Under the real entity theory, corporations are *real* persons with *real* rights."); Jay B. Kesten, *Shareholder Political Primacy*, 10 VA. L. & BUS. REV. 161, 170 (2016) ("The real entity theory posits that corporations exist independently of their constituents or the statutes authorizing them, and are thus a distinct entity entitled to all (or at least most) of the rights of natural persons."); Sloan G. Speck, *The Social Boundaries of Corporate Taxation*, 84 FORDHAM L. REV. 2583, 2591 (2016) ("[T]he 'real entity' theory treats corporations as distinct legal persons with specific rights and obligations not linked to those of their owners.").

5. *See* Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1195 (2004) ("The leading academic theory about corporations, the nexus of contracts (or contractarian) theory, posits that corporations do not really exist; they are merely a convenient connection point for a bundle of relationships between shareholders, bondholders, employees, customers, and others."); Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a Māori Corporation Walk into a Bar . . .*, 39 SEATTLE U. L. REV. 353, 368 (2016) ("Aggregate theories posit that the corporation is only and entirely the pile of human people, connected through actual or implied contractual relationships, that actually make up the firm.");

Under this theory, the rights and responsibilities of the corporation derive from the rights and responsibilities of the individuals composing it.[6]

Each of these attempts to define the essential nature of the corporation reflects some of the attributes of the modern corporation, but at the same time, each is incomplete. While the artificial entity theory recognizes the role of the state in the corporation, it fails to recognize the importance of the individuals organizing, owning, and operating the entity.[7] Although the real entity theory recognizes the importance of the corporation as a device for assembling people for a common purpose, it fails to recognize the role of the state.[8] Finally, while the aggregate theory respects the importance of the relationships formed among the individuals organizing, owning, and operating the corporation, it does not emphasize the role of the state and underplays the collective nature of the firm.[9]

As a result, some scholars have suggested backing away from the debate, recognizing the indeterminacy of the firm, and regulating corporations without considering what understanding the essential nature might afford.[10] For example, in *The Historic Background of*

Martin Petrin, *Reconceptualizing the Theory of the Firm—From Nature to Function*, 118 Penn. St. L. Rev. 1, 9 (2013) ("The 'aggregate' or 'contractualist' theory asserted that corporations and other legal entities constituted aggregations of natural persons whose relationships were structured by way of mutual agreements.").

6. *See* Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and* Citizens United, 12 Fla. St. U. Bus. Rev. 1, 34 (2013) ("The aggregate theory granted no new rights to the corporation as its own entity, as the corporation was nothing more than an amalgam of the rights of individual shareholders and executives."); Catherine A. Hardee, *Who's Causing the Harm?*, 106 Ky. L.J. 751, 766 (2018) ("Under the aggregate entity theory, the corporation is viewed as a collective of individuals and the corporation derives its power and rights from them."); Saru M. Matambanadzo, *The Body, Incorporated*, 87 Tul. L. Rev. 457, 475–76 (2013) ("The corporation has also been conceptualized as the manifestation of a contract between parties. . . . [T]he corporation's legal status as a person is immaterial because the corporation is merely a nexus of contracts and that, as such, only the individual rights of the persons behind them really matter.").

7. *See supra* notes 1–2 and accompanying text (explaining the artificial entity theory of the corporation).

8. *See supra* notes 3–4 and accompanying text (describing the real entity theory of the corporation).

9. *See supra* notes 5–6 and accompanying text (discussing the aggregate theory of the corporation).

10. *See* William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 Cornell L. Rev. 407, 464 (1989) ("Whatever the future interplay of theory and power, the concepts that make up theories of the firm—entity and aggregate, contract and concession, public and

Corporate Legal Personality,[11] John Dewey wrote, "The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the 'real' personality of either 'natural' or associated persons."[12] Consequently, he argued:

> As far as the historical survey implies a plea for anything, it is a plea for disengaging specific issues and disputes which arise from entanglement with *any* concept of personality which is other than a restatement that such and such rights and duties, benefits and burdens, accrue and are to be maintained and distributed in such and such ways, and in such and such situations.[13]

Put simply, he recommended accepting the indeterminacy, tolerating the irreconcilable inconsistencies among the prevailing theories, and moving forward with regulatory choices, while being oblivious to the essential nature of the corporate form.[14]

Beyond the timidness of academic curiosity, the choice to embrace the indeterminacy of the corporation is problematic for at least two reasons. First, a better theory of the corporation is available. As the common saying goes, the truth is somewhere in the middle. Although each of the prevailing theories gets something right about the essential nature of the corporate form, they fail to provide a full definition. Elsewhere, I have developed my own theory of the firm—collaboration theory—which provides a more complete definition.[15] Collaboration theory posits that a for-profit corporation is a collaboration among the state and individuals organizing, owning, and operating the entity for

private, discrete and relational—will stay in internal opposition. This tendency toward contradiction should be accepted, not feared."); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 262 ("Confronted with important political challenges, theories of the corporation have always been fundamentally indeterminate."); Fenner L. Stewart, Jr., *Indeterminacy and Balance: A Path to a Wholesome Corporate Law*, 9 RUTGERS BUS. L. REV. 81, 85 (2012) ("[T]his article recommends focusing upon the indeterminacy of corporate legal theories.").

11. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

12. *Id.* at 669.

13. *Id.*

14. *Id.*

15. *See generally* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016); Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353 (2017); Eric C. Chaffee, *Collaboration Theory and Corporate Tax Avoidance*, 76 WASH. & LEE L. REV. 93 (2019); Eric C. Chaffee, *A Theory of the Business Trust*, 88 U. CIN. L. REV. 797 (2020).

purposes of economic development and gain. For purposes of this theory, collaboration is defined as a common effort between or among multiple entities to accomplish a task or a project. For for-profit corporations, the common project is economic development and gain. Under this theory, the government is seeking societal economic development and gain, and the individuals organizing, operating, and owning the corporation are seeking personal economic development and gain.

Second and more important for purposes of this Essay, the development of prevailing essentialist theories of the firm reflects the evolution of the prevalence of private ordering within the modern corporation. Private ordering can be defined as allowing private actors, rather than the state, to establish the regulation and policing of their own activity and behavior.[16] Although proponents of all of the prevailing theories of the corporation exist today, the artificial entity theory reached the height of its popularity during the early decades of the United States when one had to directly petition a state legislature for a corporate charter.[17] During this period, corporations were much rarer, and they

16. *See* Jorge L. Contreras, *From Private Ordering to Public Law: The Legal Frameworks Governing Standards-Essential Patents*, 30 Harv. J.L. & Tech. 211, 213 (2017) ("The term 'private ordering' refers to the use of rules systems that private actors conceive, observe, and often enforce through extra-legal means."); Niva Elkin-Koren, *Copyrights in Cyberspace—Rights Without Laws?*, 73 Chi.-Kent L. Rev. 1155, 1161 (1998) ("'Private ordering,' thus, refers to a wide range of norms created 'from the bottom up,' including norms defined by the parties to a contract, as well as standard form contracts, business practices, and norms created by communities. The shared feature of all such norms is that they are generated and undertaken by the individuals to whom they apply. . . . '[P]rivate ordering,' thus, refers to any decentralized rule-making process in which rules are not determined by the territorial state."); Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 Harv. J.L. & Tech. 203, 248 (2013) ("While public ordering is based on centralized governing bodies that generate rules, such as the legislature and the courts, private ordering refers to norms formulated by private parties using decentralized processes."); Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. Rev. 319, 319 (2002) ("The sharing of regulatory authority with private actors (i.e., private ordering) can occur in many ways.").

17. *See* Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 St. John's L. Rev. 925, 943 n.62 (2011) ("The 'concession theory' originated during a time when corporate charters were special acts of legislation and characterizes the corporation as a privilege granted by the legislature to the shareholders."); Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 Va. Tax Rev. 115, 130 (2013) ("Originally, corporations were thought of as 'artificial entities' existing solely as constructs of the state."); Virginia Harper Ho, *Theories of Corporate Groups: Corporate Identity Reconceived*, 42 Seton Hall L. Rev. 879, 892 (2012) ("The concession theory most accurately reflects the historical

were used for relatively public purposes, such as building and operating canals, bridges, and roads or operating banks or insurance companies.[18] During the nineteenth century, as the public embraced competition, markets, and private property, states passed general incorporation statutes that allowed for receipt of a corporate charter without a direct petition to the legislature, and the modern, for-profit corporation was born.[19] As a result, the need for a different conception of the corporation was recognized.[20] Corporate law theorists began to look to Europe,

origins of the corporation and was the predominant view in the United States until the late nineteenth century.").

18. *See* Stephen M. Bainbridge, *Why We Should Keep Teaching* Dodge v. Ford Motor Co., 48 J. CORP. L. 77, 81 (2022) ("Into the early 1800s, moreover, most business corporations in the United States were actually quasi-public works such as canals and turnpikes. Almost all early corporations thus served public interests . . . ."); Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27, 42 (1998) ("[T]he earliest corporations were formed only upon the grant of a special charter by the crown, or in the early United States, by state charter, and these charters nearly always specified some sort of public purpose."); Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 FORDHAM J. CORP. & FIN. L. 79, 87 (2004) ("[I]n the colonial United States, the responsibility for granting charters fell to the legislature. These charters were initially granted primarily to further various public works projects and, like in England, were handed out on a case-by-case basis.").

19. *See* Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 YALE L.J. 948, 993–94 (2014) ("[G]eneral incorporation laws, which allowed firms to incorporate without the need to obtain special legislative charters and conferred no exclusive privileges, gradually became dominant after the mid-nineteenth century; by the end of the century, they were the typical basis for incorporation, rendering the corporate form easily available to entrepreneurs seeking to raise outside capital."); Liam Séamus O'Melinn, *Neither Contract nor Concession: The Public Personality of the Corporation*, 74 GEO. WASH. L. REV. 201, 216 (2006) ("By the end of the nineteenth century, . . . incorporation was freely available in most states under general incorporation acts that did not exact a quid pro quo from the corporators. General incorporation gave legal authorization to the belief that a plethora of organizations once unknown to the law were entitled to legal recognition . . . ."); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 647 (2016) ("Over the course of the nineteenth century, states moved from a system of exclusively granting charters by discretionary special acts of the legislature to a system in which such special acts were more limited, reserved for particular businesses such as for railroads and banks, and other businesses could seek a corporate charter without specific involvement of the legislature.").

20. *See* Roger M. Michalski, *Rights Come with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood*, 50 SAN DIEGO L. REV. 125, 136 (2013) ("Beginning in the late nineteenth century, natural entity theory replaced the conception of the corporation as an artificial creation of state law."); john a. powell & Stephen Menendian, *Beyond Public/Private:*

especially the work of Otto von Gierke, and the real entity theory of the corporation came into existence.[21] Proponents of this theory recognized that a shift toward private ordering had occurred in corporate law because general incorporation placed a greater emphasis on the entity emerging from individuals operating the corporate form, rather than any role the state might play.[22] This push for private ordering in corporate law later fueled the emergence of the aggregate theory, which has been refined into the nexus-of-contract theory, which is the dominant theory as of the writing of this Essay.[23]

Recognition of this evolution has significance for a myriad of different issues within the modern corporation, especially the debates over corporate governance and corporate purpose. Society's current acceptance of private ordering within the firm means defining the existence of the firm has profound implications for corporate form. Only time will tell whether this emphasis on private ordering will persist, especially with the threats to it that exist from the federalization of corporate law, as the federal government continues to push to play a

Understanding Excessive Corporate Prerogative, 100 Ky. L.J. 43, 57 (2011) ("The natural entity theory, formulated by Otto Gierke, began to eclipse the artificial entity theory of corporate personhood.").

21. *See* Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 Neb. L. Rev. 689, 718–19 (1991) ("Philosophical questions about the nature of corporations had fascinated German and French political thinkers during the nineteenth century. Otto von Gierke, in particular, advanced the idea that groups (and, therefore, corporations) are natural extensions of human society."); Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 Wm. & Mary L. Rev. 2075, 2132 n.273 (2016) ("The real entity theory is identified principally with German legal academic Otto von Gierke, whose influence spread through the work of Frederic William Maitland and Ernst Frend."); Dale Rubin, *Corporate Personhood: How the Courts Have Employed Bogus Jurisprudence to Grant Corporations Constitutional Rights Intended for Individuals*, 28 Quinnipiac L. Rev. 523, 539 (2010) ("[The] 'entity' theory had its roots in the writings of the great German legal theorist, Otto Gierke, who sought to describe the will of the group as opposed to the individuals who comprised the group.").

22. *See supra* notes 3–4 and accompanying text (describing the real entity theory of the corporation).

23. *See* Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 Iowa L. Rev. 1, 9 (2002) ("The dominant model of the corporation in legal scholarship is the so-called nexus of contracts theory."); Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. U. L. Rev. 501, 543 (2021) ("[C]ontractarianism has been the dominant theoretical framework in corporate law and scholarship for the last forty years . . . ."); Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. Pa. L. Rev. 717, 780 (2021) ("The dominant view among legal and economic scholars is that the corporation is a nexus for contracts . . . .").

greater role in regulating corporations.[24] Additionally, although private ordering currently plays an important role in the corporate form, the state still has a role to play in the regulation of corporations because corporations are creatures of state law and only given life through state law.[25] All of this makes a theory of the corporation, such as collaboration theory, important because it recognizes both the role of the government and the roles of the individuals organizing, owning, and operating the corporation within the essential nature of the firm.[26] These individuals invariably are going to engage in some amount of private ordering that will be bounded by what the state permits under its law.

The importance of the private ordering within the firm is undeniable, and as a result, the Center for Business Law at Case Western Reserve University School of Law convened a group of leading experts on November 4, 2022, as part of the George A. Leet Business Law Symposium to discuss *Corporate Law and Private Ordering.* The articles that follow are three important works that emerged from the conversations at that event.

In *Private Ordering and Contracting Out in Twenty-First Century Corporate Law*, Professor Robert B. Thompson explores the current state of private ordering in the corporate form.[27] After declaring that

24. *See* Federico M. Mucciarelli, *The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU*, 20 TUL. J. INT'L & COMP. L. 421, 438 (2012) ("While some scholars hold that federalization of corporate law is not significant because the regulation of agency relations between shareholders and the board has not been governed by federal law, others have argued that the federalization of corporate law is a significant threat to states' powers and to Delaware's dominion over corporate law matters, with the consequence that corporate regulatory competition among states is substantially restricted by actual or threatened federalization."); Mark J. Roe, *Delaware and Washington as Corporate Lawmakers*, 34 DEL. J. CORP. L. 1, 11–12 (2009) ("If Washington wanted to, it could take over all corporate law-making from the states, obliterating Delaware as a producer of state-made corporate law. It is not irrelevant that Washington considered doing so at key points during the twentieth century.").

25. *See* Matthew T. Bodie, *Holacracy and the Law*, 42 DEL. J. CORP. L. 619, 649 (2018) ("Corporations are creatures of state law: fictional entities that entitle the participants to certain rights."); J. William Callison, *Dangling Threads:* Hobby Lobby *and Corporate Law Issues*, 48 U. MEM. L. REV. 447, 456 (2017) ("Business corporations are creatures of state law and derive their powers from state law."); Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 96 (2017) ("Corporations are created by state law . . . .").

26. *See supra* note 15 and accompanying text (discussing my scholarship relating to collaboration theory and the essential nature of the corporation).

27. *See generally* Robert B. Thompson, *Private Ordering and Contracting Out in Twenty-First Century Corporate Law*, 74 CASE W. RSRV. L. REV. 13 (2023).

private ordering within the corporate form appears to have entered a "golden age,"[28] he discusses the growth of private ordering within corporate law that occurred during the nineteenth century as government-mandated corporate law gave way to greater private ordering within the firm as a result of the widespread adoption of general incorporation statutes.[29] He then examines the rise of the permissibility of contracting out of default corporate law that has occurred within closely held corporations, publicly held corporations, and startups transitioning to publicly held status.[30] Finally, he examines the macro influences that have led to permitting more contracting out, the factors that impact the permissibility of contracting out in certain instances, and the mandatory corporate law rules that can be expected to endure.[31] Put simply, Professor Thompson offers his readers a panoramic view of the corporate law landscape and points out when and how private ordering exists within it, especially in the context of contracting out of corporate law terms.

Next, in *Comparing Contract Production: Private Equity M&A Versus Corporate and Sovereign Bonds*, Professors Stephen J. Choi, Mitu Gulati, and Robert E. Scott take a focused look at how private ordering is being facilitated by lawyers in the context of mergers and acquisitions.[32] In the piece, they test an emerging view that M&A lawyers innovate more quickly and better than other lawyers by examining governing law clauses within various contexts for encrustation of obsolete and redundant terms and for innovation.[33] They begin by discussing events that should have led to revision of all of the governing law clauses being studied.[34] Based upon their hand-coded data set, they report that private equity deals with low agency costs have the highest levels of innovation but also suffer from increased encrustation.[35] They conclude that efforts to redraft the governing law clauses within these agreements often lead to lawyers importing language verbatim, which can have the result of encrusting redundant and obsolete language as well.[36] As this work evidences, the question of

28. *Id.* at 14.

29. *Id.* at 15–18.

30. *Id.* at 18–32.

31. *Id.* at 33–45.

32. *See generally* Stephen J. Choi, Mitu Gulati & Robert E. Scott, *Comparing Contract Production: Private Equity M&A Versus Corporate and Sovereign Bonds*, 74 Case W. Rsrv. L. Rev. 47 (2023).

33. *Id.* at 49–50.

34. *Id.* at 56–70.

35. *Id.* at 70–88.

36. *Id.* at 88–89.

how much private ordering ought to be incorporated into the corporate sphere is not the end of the analysis. In addition, complex and thoughtful empirical scholarship—such as the work of Professors Choi, Gulati, and Scott—is needed to discover how this private ordering can be made more effective and efficient.

Finally, in *The Hidden Cost of Contracting for ESG: A New Perspective on Private Ordering*, Professor Juliet P. Kostritsky, Jillian T. Fox, and Blake Spiller explore the ability and impact of private ordering incorporating Environmental Social Governance (ESG) goals into corporate governance.[37] After providing background regarding the ESG movement,[38] the authors examine when and how ESG governance can violate the fiduciary duties of directors.[39] They then explore when and how private ordering can be used under Delaware law to render such governance based upon ESG factors permissible,[40] and they analyze the issues created by the ambiguity in the meaning of ESG, the agency costs associated with ESG provisions, and the interpretation of these provisions as well.[41] In determining whether an ESG provision should be allowed within a corporation's charter, bylaws, shareholder agreement, or other organizing documents, they write:

> States should not permit a private agreement or contract on ESG which does not include a mechanism for determining (1) whether stakeholder or shareholder value will be primary; (2) metrics for assessing how accounting for ESG would affect risk and, therefore, the future income stream to shareholders, including the uncertainty of damage calculations such as the present value of future income streams of positive and negative returns (with probabilities) associated with firms addressing climate change and ESG; and (3) how to manage ESG when one set of claimants disagrees with another set of claimants.[42]

They discuss what role required SEC disclosures might play as well.[43] As with the piece by Choi, Gulati, and Scott, the piece by Kostritsky, Fox, and Spiller demonstrates that the decision to honor and nurture private ordering within the firm is only the beginning of the analysis.

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37. *See generally* Juliet P. Kostritsky, Jillian T. Fox, and Blake Spiller, *The Hidden Cost of Contracting for ESG: A New Perspective on Private Ordering*, 74 Case W. Rsrv. L. Rev. 91 (2023).

38. *Id.* at 106–12.

39. *Id.* at 112–20.

40. *Id.* at 120–31.

41. *Id.* at 131–40.

42. *Id.* at 99.

43. *Id.* at 146–52.

The piece also evidences that private ordering may offer solutions when the rigidity of a corporate law system does not.

The rise of private ordering within corporate law tracks an evolution in how the majority of corporate law theorists think about the essential nature of the firm. Although proponents of all three of the prevailing theories exist today, one can view the rise of the artificial entity theory, then the real entity theory, and finally the aggregate theory as a story of emergence of a strong preference for private ordering within the firm. My own work in developing collaboration theory is a reminder that the state should not be forgotten in contemplating the corporate form because the corporate form has both publicly created and privately created attributes.[44] To be crystal clear, the privately created attributes of corporations should be nurtured and valued because they fuel innovation in regard to the corporate form and allow those organizing, owning, and operating the corporation choice in the entity with which they choose to associate themselves. As a result, understanding how private ordering functions and malfunctions within the corporation is certainly a worthwhile task. The three articles that follow are excellent vehicles to pursue that understanding.

44. *See supra* note 15 and accompanying text (discussing my scholarship on collaboration theory).