Corporate Human Rights Claims Under the ECHR

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ABSTRACT

Most human rights theorists argue that corporations cannot be considered bearers of human rights, either because they are not human beings or because they lack the relevant moral attributes that ground human rights. However strong the normative intuitions underpinning this argument, dismissing corporate human rights claims on a conceptual level fails to address questions that arise in the realm of human rights practice. Today's human rights regimes are beset by difficult questions about which rights, if any, corporate entities enjoy and how much weight their rights claims deserve. This paper focuses on the jurisprudence of the European Court of Human Rights (ECtHR), which accepts applications "from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties" (Art. 34). Although a cursory glance at the Strasbourg Court's case law might suggest that it takes an aggregative approach to corporate rights claims, treating the corporate entity as a placeholder for the rights of the individuals who transact through it, more complex considerations are at work in the Court's approach to these claims. For instance, the ECtHR often takes account of the broader public values implicated in an alleged violation, shifting the emphasis from the nature of the rights-bearer to the protection of these values. The paper contends that rewarding corporate human rights claims in order to further values such as the rule of law, freedom of information, or democratic pluralism is a risky strategy that may amplify corporate power.

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According to Peter Jones's sensible definition, a human right is a "right that we can ascribe universally to human beings and that rests upon their moral status as human beings."[1] Based on this understanding, Jones concludes: "Corporate rights cannot be human rights because they are rights held by corporate entities rather than by human beings. They are also rights grounded in whatever gives those corporate entities their special moral status rather than *rights grounded in the status of humanity or personhood*."[2] But the philosophical steps by which we derive rights from the status of humanity or personhood are, as ever, hotly contested, as are the normative and ontological conditions that define these attributes. As Jones allows, corporations' rights are not necessarily devoid of moral significance: if the place of worship rightfully belonging to a religious organization is summarily confiscated, we would surely decry it as an injustice.[3] At the very least, then, we are owed substantive reasons as to why this injustice should *not* be parsed in terms of human rights. When a law enforcement agency confiscates the records of a civil rights organization, or a court issues a gag order against a newspaper, or a legislature revokes the charter of a university, the infraction in question goes to the heart of interests and values protected by human rights.

1. Peter Jones, *Human Rights, Group Rights, and Peoples' Rights*, 21 HUM. RTS. Q. 80, 89 (1999). To be clear, Jones's focus is on human rights as a *moral* rather than a *legal* category: he argues that deferring to "the relevant international authority" to settle the question of what is and is not a human right is "trivial" because it fails to ask whether its conclusions are morally defensible. Below, I disagree with this view and advance a conception of fundamental rights as legal rights that enjoy weighty moral justifications.

2. *Id*. at 88 (emphasis added).

3. As this example indicates, I use the term "corporation" to refer to a broad class of entities that have a legal identity of their own. Tied to the corporation's legal status are a core set of legal rights including rights to own property, make contracts, and bring suits. In addition, corporate entities often have legal rights that individuals—either singly or in association—do not have. These include perpetual succession and limited liability, which shields individual associates from responsibility for the debts and liabilities that the corporation incurs in the course of its operation. Finally, subject to the laws of agency, corporations have formalized executive structures and enjoy the prerogative to issue norms that govern the conduct of their adherents. See especially, ERIC W. ORTS, BUSINESS PERSONS (2013); David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 141 (2013). Accordingly, a firm may be structured as a corporation (rather than as a partnership or sole proprietorship, say), but so can other bodies like universities, trade unions, churches, charities, and professional associations.

Political theorists have endlessly debated whether groups can be the bearers of human rights.[4] Typically, they have in mind groups composed either of individuals united by a common interest (such as economic development or environmental pollution) or by a shared identity (such as religious or ethnic communities or indigenous peoples). Given liberalism's commitment to the moral value of individuals, many liberal theorists attempt to explain group rights in terms of the entitlement that individual members of a given group have to a collective good.[5] As many commentators have observed, however, there are important analytical distinctions between *collective* rights claims (which can often be represented as rights enjoyed by individual members of a group)[6] and *corporate* rights claims (whose bearer is a separate legal subject in its own right).[7] Furthermore, most cultural or interest-based groups are characterized by fuzzy boundaries and/or rely on subjective identification, which makes it difficult to locate the collective subject with any certainty. By contrast, the separate legal identity of a corporate agent tends to be clearly marked in many contemporary legal systems.[8] Surprisingly few rights theorists have systematically addressed the question of whether corporate agents (as distinct from groups) should be considered the bearers of what I will call *high-priority* or *fundamental individual rights*—rights that protect morally weighty interests and are typically enshrined in constitutional documents and human rights treaties.[9]

Dismissing the possibility of corporate *human* rights as a conceptual matter is not only a missed opportunity to reflect on the nature of fundamental rights. It also leaves us without guidance for addressing a problem that arises frequently in constitutional and human rights practice. Fundamental rights regimes confront difficult questions about which rights, if any, corporate agents enjoy and how much weight their rights claims deserve. The typically vague wording of basic rights norms and the high priority they enjoy in their respective legal systems

4. Some reject this possibility altogether, e.g. "Because only individual persons are human beings, it would seem that only individuals can have human rights. Collectivities of all sorts have many and varied rights, but these are not human rights—unless we substantially recast the concept." JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 30 (3rd ed. 2013).

5. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 207-09 (Clarendon, 1986); JAMES GRIFFIN, ON HUMAN RIGHTS 256–275 (2008); DWIGHT NEWMAN, COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS 69-77 (2011).

6. BRIAN BARRY, CULTURE & EQUALITY. AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 113 (2001).

7. Jeremy Waldron, *Can Communal Goods be Human Rights*? 28 EUR. J. SOC. 296 (1987); JONES, *supra* note 1, at 87; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 91n (1977).

8. WALDRON, *supra* note 7, at 316. The landmark decision on establishing corporate identity in the domain of international law is the 1970 *Barcelona Traction* decision of the International Court of Justice, discussed below.

9. This is not to dismiss the important distinctions between constitutional and human rights. Constitutional and human rights often differ in terms of their genesis, content, functions, and normative justifications. Although I have elsewhere theorized this distinction, I consider them under a common rubric in this article. *See* Turkuler Isiksel, *The Rights of Man and the Rights of the Man-made: Corporations and Human Rights*, 38 HUM. RTS. Q. 294, 342–49 (2016).

heighten the stakes of disputes concerning both their substantive scope and the agents who may claim their protection.[10]

I argue in this paper that even if we insist as a normative matter that only human beings should be considered the bearers of human rights (for instance, because we believe that human beings have certain attributes that vest them with special moral value), there may nevertheless be good reasons to treat corporate agents *as if* they were the bearers of basic individual rights under certain conditions. I do not argue that corporations *have* human or constitutional rights in a strong sense, as such claims raise vexing issues about the nature of rights and their bearers. For the purpose of resolving questions of corporate rights, I suggest that we think of fundamental individual rights as *standards of treatment* that public institutions owe to those subject to their power by virtue of weighty moral reasons. In the first section, I propose that we shift our focus away from whether corporations have any moral rights and toward the pragmatic question of whether there are any considerations that would entitle a corporate entity to the same standards of treatment as a human being.

In the second and third sections, I distinguish between two types of moral considerations for extending fundamental rights protections to corporations. The first are *agent-based* or *agential considerations*, whereby we evaluate a rights claim with reference to morally salient attributes of the agent making the claim. As a starting point, I suggest that we retain the standard "liberal commitment to individualist moral justification or moral ontology,"[11] according to which human beings have independent moral value and corporations, derivative. This means, among other things, that most agential considerations that can sustain a corporation's fundamental rights claims will differ from those available to a human being. I evaluate three alternative sorts of agential considerations that might ground a corporation's claim to a fundamental right.

The second set of relevant considerations are what I call *public policy or public interest considerations*, where we evaluate a rights claim from the point of view of the values and principles that frame a liberal democratic society (rather than with reference to the attributes of its purported bearer). Each set of considerations, I will argue, may be used to justify *and* to limit corporate rights. I hope to show that the fundamental rights protections to which a corporate claimant is entitled are likely to be considerably narrower than those enjoyed by human beings. However, it is only by working out the reasons and circumstances capable

10. GRIFFIN, *supra* note 5, at 16.

11. JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM 54 (2015). There are myriad different approximations of this idea, e.g. Raz's "humanistic principle": "Rights, even collective rights, can only be there if they serve the interests of individuals." RAZ, *supra* note 5, at 208. Buchanan speaks of "moral individualism in the justificatory sense," which entails that "all justifications for ascriptions of moral and legal rights (and duties) must be grounded *ultimately* on consideration of the well-being and freedom of individuals." ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS IN INTERNATIONAL LAW 255 (2003).

of justifying corporate rights claims that we can contain the inflationary and opportunistic use of rights discourse by corporations.[12]

To develop these claims, I turn to the jurisprudence of the European Court of Human Rights (ECtHR), which hears individual claims that arise under the European Convention of Human Rights (ECHR). In thinking through a series of normative questions with the help of existing human rights law, this article adopts a *practical approach* to human rights. The practical approach has emerged in response to foundationalist theories of human rights, which invoke certain purportedly universal qualities as making human beings worthy of respect. The latter attract criticism for espousing essentialist views of humanity that inadvertently exclude or misrepresent their intended subjects.[13] Practical conceptions seek to circumvent such objections by taking the existing law and politics of human rights as the starting point for normative reflection.[14] A practical conception is a "theory that rationalizes, that corrects, and that extends the accounts of human rights in the various declarations and conventions—to extrapolate from what political leaders have actually accepted to what all individuals could reasonably accept."[15] As Wenar explains, "The goal here is to find the theory that lies beneath the lists of rights, to give these rights congruity, and to explain why some rights should be on the list while others should not be."[16]

So stated, the practical approach poses some difficulties of its own. First, as an epistemological matter, why should we assume *a priori* that there *is* a coherent normative theory that subtends rights documents? Second, if legal documents like human rights conventions and constitutional bills of rights are artifacts of expediency, bargaining, and asymmetries of power, doesn't extrapolating a philosophical posture from them risk rationalizing the facts of domination? I believe that these problems can be mitigated by framing the practical approach as a *critical* enterprise designed to expose the tensions of human rights practice and correct its flaws. This is the way I approach ECtHR's case law on corporate rights.

That said, rights claims by corporations raise a tougher problem for practice-based accounts. If we refrain from justifying the rights that moral agents deserve with reference to some morally salient feature(s) they have, as proponents of this

12. ISIKSEL, *supra* note 9.

13. Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?* 12 J. POL. PHIL. 190–213; JOE HOOVER, RECONSTRUCTING HUMAN RIGHTS: A PRAGMATIST AND PLURALIST INQUIRY INTO GLOBAL ETHICS (2016).

14. As Beitz writes: "We do better to approach human rights practically, not as the application of an independent philosophical idea to the international realm, but as a political doctrine constructed to play a certain role in global political life." CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 49 (2009). For some well-known examples, see JOHN RAWLS, LAW OF PEOPLES (1999); Joseph Raz, *Human Rights Without Foundations*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010); ALLEN BUCHANAN, THE HEART OF HUMAN RIGHTS (2013); PATRICK MACKLEM, THE SOVEREIGNTY OF HUMAN RIGHTS (2015).

15. Leif Wenar, *The Nature of Human Rights*, *in* REAL WORLD JUSTICE: GROUNDS, PRINCIPLES, HUMAN RIGHTS, AND SOCIAL INSTITUTIONS 291 (Andreas Føllesdal & Thomas Pogge eds., 2005).

16. *Id*. at 292.

approach urge, then we lack a principled way to circumscribe the set of possible rights-bearers.[17] In other words, it becomes difficult to delimit the scope *ratione personae* of human rights law. More to the point, if we fail to stake any claims about what gives human beings special (perhaps paramount) moral value, we have difficulty distinguishing the treatment owed to a human being from that owed to an endangered plant species, a geological formation, or a business firm. The further corporations insert themselves into the protective orbit of human rights law, the more we need to adjust our understanding of the appropriate subjects of human rights.[18] Because it takes existing practices of human rights as its starting point for deciding moral controversies, the practical approach may lack the resources to discern developments that *corrupt* those practices. In sum, corporate rights claims not only pose difficult normative puzzles, but also bring up meta-theoretical questions concerning the soundness of different approaches to human rights.

The jurisprudence of the ECtHR offers an important opportunity to engage with these issues. First, as a long-standing, influential human rights institution, the Convention has been a touchstone for the practice-based approach. Second, the traction that corporate human rights claims have found in the ECtHR's case law provides a useful point of comparison with the US Supreme Court's controversial case law affirming the constitutional rights of corporations. The Convention recognizes that certain organizations and groups can be the victim of rights violations, and the Court has received a wide variety of applications from corporate entities ranging from business firms, churches, and charities to political parties and media organizations.[19] Legal persons have invoked provisions including the freedom of expression (Art. 10),[20] the freedom of religion (Art. 9),[21] the right to a fair trial (Art. 6),[22] and the right to respect for the home and private

17. Jean L. Cohen, *The Uses and Limits of Legalism: On Patrick Macklem's* The Sovereignty of Human Rights, 67 U. TORONTO L.J. 512–543 (2017).

18. Isiksel, *supra* note 9, at 342–49; Cristina Lafont, *Should We Take the 'Human' Out of Human Rights: Human Dignity in a Corporate World*, 30 ETHICS & INT'L AFF. 233, 252 (2016).

19. In 1975, the European Commission of Human Rights affirmed the standing of a legal person to claim protection under the Convention for the first time. *See* Times Newspapers Ltd v. United Kingdom App. No. 6538/74 2 Eur. Comm'n H.R. Dec. & Rep. 90 (1975), http://hudoc.echr.coe.int/eng?i=001-75068 [https://perma.cc/C4XJ-HU7G]. The Court upheld this finding in its 1979 decision in *Sunday Times v. United Kingdom* (The Sunday Times Case) App. No. 6538/74 30 Eur. Ct. H.R. (ser. A) (1979), http://hudoc.echr.coe.int/eng?i=001-57584 [https://perma.cc/Z3BT-7U93].

20. Autronic AG v. Switzerland, App. No. 12726/87 178 Eur. Ct. H.R. (ser. A) (1990), http://hudoc.echr.coe.int/eng?i=001-57630 [https://perma.cc/X8HB-UUXE].

21. X. v. Sweden, App. No. 7805/77 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979), http://hudoc.echr.coe.int/eng?i=001-73995 [https://perma.cc/QQ4A-AUPA]; Metro. Church of Bessarabia v. Moldova, App. No. 45701/99, 2001-XII Eur. Ct. H.R. 81 (http://hudoc.echr.coe.int/eng?i=001-59985) [https://perma.cc/BL39-RLNC].

22. Agrokompleks v. Ukraine, App. No. 23465/03, Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=001-106636 [https://perma.cc/H7VS-XJ6P]; Sacilor-Lormines v. France, App. No. 65411/01, 2006-XIII Eur. Ct. H.R. 163 http://hudoc.echr.coe.int/eng?i=001-77947 [https://perma.cc/NX6Y-W95V]; Capital Bank AD v. Bulgaria, App. No. 49429/99, 2005-XII Eur. Ct. H.R. 37, http://hudoc.echr.coe.int/eng?i=001-71299 [https://perma.cc/5XKJ-4Z62]; Regent Co. v. Ukraine, App. No. 773/03 Eur.

correspondence (Art. 8).[23] In this paper, I make no attempt to impose doctrinal coherence on the relevant case law, not only because I cannot present a comprehensive analysis of this ample jurisprudence here, but also because such coherence is often elusive in ECtHR case law. Instead, I use the ECtHR's decisions as an occasion to assess the strengths and limits of competing justifications for according fundamental rights protection to corporations.

I. PROLEGOMENON: *HAVING* VERSUS *CLAIMING* RIGHTS

A certain way of thinking about rights makes the debate about corporate rights claims more contentious than it needs to be. When we argue about whether or not someone *has* a right to something, we thingify rights. But rights are not material possessions or objects,[24] and treating them as such obscures their political and discursive roles. Rights involve normative claims about how human relationships should be structured. They are instantiated not in their possession by a subject, but in practices aimed at generating intersubjective validity—not least in the form of legal recognition—by appealing to shared values.[25] Since they are discursive constructs, rights lack the constancy of matter. Their content changes with social and political institutions and the availability of resources.[26] Everyday use of basic rights discourse recreates rights—subtly building on, shifting, expanding, or narrowing their meaning.[27]

When we debate whether rivers or corporations *have* human rights, we often replicate the misconception about rights as material possessions. A better question to ask is whether, given the significant body of norms and the plurality of justifications about why the treatment of human beings ought to meet certain standards, there are good reasons for extending some or all of these standards of treatment to certain non-human agents or entities. To conclude that a church is entitled to religious freedom or that a newspaper is entitled to the freedom of expression, we need not assume that the entity in question shares the moral or ontological characteristics that entitle human beings to constitutional or human rights. We can spare ourselves this ontological detour if we can specify *other*, equally valid considerations that might entitle corporations, under specific circumstances, to the same standards of treatment as human beings. We can refuse to ascribe dignity or independent moral standing to corporations and still

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Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-85681 [https://perma.cc/S2ZH-TABX]; OAO Neftyanaya Kompaniya YUKOS v. Russia, App. No. 14902/04 Eur. Ct. H.R. (2011), http://hudoc.echr.coe.int/eng?i=001-106308 [https://perma.cc/2H6F-9HWT].

23. Niemietz v. Germany, App. No. 13710/88 251 Eur. Ct. H.R. (ser. A) (1992), http://hudoc.echr.coe.int/eng?i=001-57887 [https://perma.cc/3URJ-WQHW]; Verein Netzwerk v. Austria, App. No. 32549/96, Eur. Ct. H.R. (1999), http://hudoc.echr.coe.int/eng?i=001-4670 [https://perma.cc/Z34K-QL9S]; Buck v. Germany App. No. 41604/98 2005-IV Eur. Ct. H.R. 1 (2005), http://hudoc.echr.coe.int/eng?i=002-3922 [https://perma.cc/STX6-EQSR].

24. JACK DONNELLY, THE CONCEPT OF HUMAN RIGHTS 31 (1985).

25. JAMES NICKEL, MAKING SENSE OF HUMAN RIGHTS 3 (2d ed. 2007).

26. *Id*. at 129.

27. SEYLA BENHABIB, ANOTHER COSMOPOLITANISM 49 (2006).

conclude that at least some of them are entitled to protections normally reserved to human beings at least some of the time. Put differently, we can speak in pragmatic terms about a corporate agent 'having' these rights *if* we can give a good justification for why it merits the same standard of treatment that a human being would enjoy in the like circumstance.

In this paper, I interpret the question of whether or not someone *has* a right as an invitation to discuss the kind of treatment which he, she, or *it* is entitled to expect from public institutions.[28] From the point of view of the bearer, a right is shorthand for the kind of treatment to which she stakes a moral claim, that is to say, for which she can provide moral justifications. From the point of the addressee (that is to say, the agent who bears the corresponding duty), a right is a standard of treatment owed to the rights-bearer. From the point of view of the observer, the question of whether an agent does or does not have a right is a question of assessing the moral reasons for and against according her the kind of treatment she demands. When we ask about whether a right has been violated, therefore, we are asking whether the agent has been denied the treatment that is his, her, or its due.

The ECtHR's case law on corporate rights claims is instructive partly because it evinces this sort of approach. Rather than reflect on the abstract question of whether corporations can be the bearers of human rights, the Court evaluates whether a standard codified by the Convention has been breached by a signatory state in its treatment of a particular applicant. Two features of the Convention system help the Court sidestep the deeper ontological issues about the nature of corporate agents. First, Article 34 explicitly instructs the Court to hear applications from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation" of the rights enumerated in it.[29] Since certain kinds of collectives are listed *in addition to* "persons," the Court has been spared abstruse ratiocinations on the meaning and essence of personhood and group agency. Second, since it is a forum that complements domestic judicial mechanisms, the Court can rely on municipal law to define the attributes and facilities of legal persons, limiting its assessments to whether the treatment of these agents violates Convention protections.[30] In most cases, the Court finds it

28. Following Nickel, I understand *treatment* in a comprehensive sense as a "freedom, power, protection, or benefit" that accrues to a subject. *See* JAMES NICKEL, *supra* note 25, at 29. Although "treatment" usually connotes an *act* rather than an omission (e.g. 'treatment' versus 'control' groups in experimental studies), failing to create the institutional conditions that ensure an agent's access to a fundamental freedom, power, protection, or benefit also falls under *treatment* (albeit of a deficient sort). A state that fails to provide the means of subsistence to its citizens (assuming the availability of resources) or fails to protect them against pervasive racial discrimination is failing to meet the standard of treatment to which its citizens are morally entitled.

29. Protocol Number 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, May 11, 1994, 155 E.T.S.

30. This is particularly the case with regard to the commercial corporate form. MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES. EXPLORING THE STRUCTURE OF ECHR PROTECTION 11 (2006).

possible to adjudicate claims without having to define the legal concept of personhood *de novo*.

On the one hand, rephrasing the question "do corporations have human rights?" as "is [corporate agent C] entitled to the standard of treatment we normally associate with [right *r*]?" is a pragmatic move. It focuses our attention on the values and interests at stake and away from philosophical disputes about the nature of rights and agents. On the other hand, casting rights as standards of treatment is not to collapse into a morally empty sort of legalism that regards corporations as bearers of high-priority rights just because certain legal systems treat them as such. Fundamental rights are standards of treatment that enjoy moral justifications. Their violation amounts to a moral wrong (sometimes an egregious moral wrong). We still need to justify, with resort to myriad principled and pragmatic reasons, why a corporation's appeal to a human rights norm may or may not be warranted, and which standard of treatment is owed to whom. Moral considerations cannot be cut out of this debate.

In adjudicating corporate rights claims, moreover, we cannot wholly avoid staking claims about the nature of the agent in question and the duties they may legitimately impose on others.[31] In the next section, I examine the first of two kinds of considerations that are wrapped up in determining whether agent A is entitled to right *r*. I will call these *agent-based* (or *agential*) *considerations* and *public policy* or *public interest considerations*, respectively. Agent-based arguments latch onto certain morally salient characteristics of an agent to justify why that agent is entitled to certain rights. For instance, foundationalist theories invoke a range of attributes like sentience, rationality, dignity, or the ability to form a plan of life in order to determine who counts as a bearer of which rights.[32] By contrast, public interest considerations pertain to the relationship between a particular agent's rights claims and the fundamental values, principles, and ends espoused by a liberal democratic society. Such considerations are familiar from, but by no means exclusive to, consequentialist theories of human rights, which consider "how well [basic rights norms] work in producing societies in which the average level of welfare is high."[33] These two sets of considerations are not necessarily mutually exclusive, and different theories of rights differ in terms of how much emphasis they place on each.

II. ASSESSING CORPORATE RIGHTS CLAIMS (1): AGENT-BASED CONSIDERATIONS

Although agent-based considerations come into play in assessing corporate rights claims, many of the justifications that might sustain a human being's claim to right *r* (such as dignity or sentience) are unavailable to a corporate subject.

31. *Cf*. Steven Walt & Micah Schwartzman, *Morality, Ontology, and Corporate Rights*," 11 L. & ETHICS HUM. RTS. 1 (2017).

32. *See, e.g*., GRIFFIN, *supra* note 5; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); PABLO GILABERT, HUMAN DIGNITY AND HUMAN RIGHTS (2018).

33. NICKEL, *supra* note 25, at 59.

This makes their claims to high-priority rights contentious even when the treatment they demand is already enshrined in a rights document. As I pointed out at the beginning of this article, notwithstanding the dangers of essentialism, the morally salient attributes of the rights-bearing agent are important to consider if we wish to keep the emphasis of human rights on the special worth of human beings. In this section, I will consider three different ways of framing the agential considerations raised by corporations' fundamental rights claims. The first derives the rights of corporations from the status of personhood. The second argues that corporations acquire the rights of their members. I will then propose a third approach, according to which the agential attribute most relevant to evaluating a corporation's fundamental rights claims is the corporation's role as a vehicle through which individuals pursue joint purposes. However, instead of identifying the corporation with these individuals and approximating its rights to theirs, this approach focuses on whether the standard of treatment sought by a corporate entity is warranted in view of the substantive values, goods, or interests that it helps individuals advance.

Agential considerations by themselves are not sufficient for assessing corporate rights claims, however. In the final section, I will argue that we also need to consider how affirming or denying a corporation's claim to a particular set of rights fits with broader social values, goals, and ends. While no generalizable metric is available for either type of assessment, together they capture what I believe to be the most salient considerations for assessing corporate rights claims.

Option 1: Personhood

The fact that the law treats corporations as *persons* suggests a straightforward agent-based argument for why corporate entities are entitled to basic rights. Like a human person, a corporation is a legal subject capable of suing and being sued, owning property, entering into contracts, and the like. Since corporations share the (legal) attribute of personhood with human beings, so the argument goes, they are presumptively entitled to the same rights.[34] To be sure, some of the rights personhood confers on human beings are inapplicable to corporate entities (e.g. the right to marry, the right against involuntary servitude, the right to bodily integrity) *and* vice versa (e.g. the right to perpetual succession). In the US, however, corporate litigants have successfully leveraged the status of personhood to claim many constitutional rights.[35] Viewed through a historical lens, this is less novel than it seems. In many jurisdictions, corporations such as cities, guilds, overseas trading companies, and churches enjoyed legal recognition as persons long before

34. On a thicker version of this argument, the personality of corporations is not merely a legal matter; rather, corporations share in the ontological traits that mark personhood. *See, e.g.*, W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L. Q. REV., 365, 379 (1905); Harold Laski, *The Personality of Associations*, 29 HARVARD L. REV. 404, 426 (1916).

35. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. 577 (1990).

married women, propertyless men, enslaved individuals, colonial subjects, and members of racial minorities did.

However, arguing for corporate rights on the basis of personhood is vulnerable to several important objections. First, personhood is a contested concept whose legal, moral, and metaphysical dimensions are hopelessly entangled.[36] For instance, does the fact that the law treats corporations as persons mean that their interests command the same moral weight as those of human beings? Showing that corporate personhood is more than a mere legal fiction and that it is instead predicated on deeper attributes like autonomy, intentionality, will, or spirit calls for ontological and metaphysical heavy-lifting.[37] Furthermore, what various ontological claims about personhood mean for delineating the scope of corporate rights is at best indeterminate.[38]

Others contend that personhood is merely a convenient legal device that conveys little about the underlying moral worth of the entity in question.[39] This deflationary approach also runs into difficulties. Conceiving of personhood as a mere label implies that "molecules, or trees or tables [are] just as fit candidates for legal attributes as singular men and corporate bodies."[40] The grant of legal personhood has more purchase when it tracks qualities that are not themselves legal.[41] According to one influential interpretation, the "capacity condition"[42] for personhood and attendant rights is agency.[43] An entity can be considered a person only if it can be understood as a moral agent in its own right.[44] This, in turn, generates thorny questions about the nature of collective agency. According to List and Pettit, aggregates qualify as agents if they can form attitudes, beliefs, and motivations that are not necessarily "a systematic function of the attitudes of

36. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207–215 (1979).

37. *See* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L. J. 655, 658–59 (1926).

38. *See id*. at, 655–73 (1926); *see generally* Richard Schragger & Micah Schwartzman, *Some Realism about Corporate Rights*, THE RISE OF CORPORATE RELIGIOUS LIBERTY 362 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2016); Walt & Schwartzman, *supra* note 31, at 29.

39. Eric Posner, "Stop Fussing Over Personhood," *Slate*, Dec 11, 2013, http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/12/personhood_for_corporations_and_chimpanzees_is_an_essential_legal_fiction.html [https://perma.cc/QW5B-K5L5].

40. Dewey, *supra* note 37, at 660.

41. This excludes instances where the grant of personhood is either symbolic or establishes special rights of stewardship, such as the New Zealand Parliament's 2017 decision to give the Whanganui river standing as a legal person. Functionally, this means that the leadership of the Iwi community gets greater influence over decisions likely to affect the river, i.e. expands the scope of autonomy of an actual group agent. For scholarship on the drawbacks of advancing environmental protection through the granting of personhood, see Mary Warnock, *Should Trees Have Standing?*, 3 J. HUM. RTS. & ENV'T 56–67 (2012).

42. Leslie Green, *Two Views of Collective Rights*, 4 CAN. J. L. & JURIS. 315, 320 (July 1991).

43. Adina Preda, *Group Rights and Group Agency*, 9 J. MORAL PHIL. 229 (2012).

44. *Cf*. French, *supra* note 36, at 210. French argues that the attribution of legal personhood implies nothing about moral agency, since fetuses and the dead can be the subjects of legal rights (although not the administrators of them).

members."[45] Furthermore, a group agent must be "capable of operating in the space of obligations";[46] that is to say, it must be "positioned to make normative judgments" and "have the necessary control to make choices based on those judgments."[47]

Even if we regard agency as its defining characteristic, however, personhood is still unhelpful as a shortcut for justifying corporate rights in two respects. First, insofar as it implies that corporations should be treated like human beings, it moots the very questions that we should be debating, namely, why and under what circumstances corporate entities *deserve* the protection afforded by basic rights norms. Second, it fails to distinguish *amongst* corporate entities, which differ in terms of the values they represent, the interests they advance, the goods they control, the power they exercise, and on whom they exercise it. Given this variety, there is no *prima facie* reason for according all corporations the same capacious set of rights (much less the same set of rights we accord human beings).[48] If we abandon personhood as a criterion for assessing the scope and weight of corporate rights, what considerations should guide such an assessment?

On this front, the ECtHR's case law offers at least two alternatives. On the occasions when it takes the first, aggregative approach, the Court treats corporations as placeholders for the rights of the people who associate under their auspices. Under the second, what I will call the purposive approach, the Court takes the separate legal identity of the corporation seriously and attends to the nexus between the rights claims of a corporation and the ends, values, interests, and goods that it allows people to pursue. These two conceptions are in tension with one another. In the spirit of rational reconstruction, I will argue that the second approach, although only embryonic in the ECtHR's case law, is more promising, and I will flesh out its implications beyond what the Court has so far decided.

Option 2: The Aggregative Approach

A second straightforward way to reason from the rights of individuals to those of corporations is to construe the corporate entity as nothing more than an aggregation of individuals.[49] Because corporations are composed of natural persons, this view goes, they accede to their rights. A well-known example of this approach is United States Supreme Court Justice Samuel Alito's declaration in the *Hobby Lobby* decision that: "A corporation is simply a form of organization

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45. CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS 10 (2011). For an account of collective agency as grounded in intentionality (which justifies the attribution of moral personality to corporations), see French, *supra* note 36, at 10.

46. LIST & PETTIT, *supra* note 45, at 176.

47. *Id.* Clearly, of course, the law may justifiably withhold its recognition from some group agents that fit these criteria.

48. Tamara Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 365 (2015) ("[It does not] seem that there should be any philosophical, moral or political necessity for a commitment to the equal treatment of all fictional entities.").

49. *See, e.g.*, Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

used by human beings to achieve desired ends. . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."[50] In the legal theory literature, this is known as the *group* or *aggregative theory* of corporate agency.[51] In its simplest form, it frames the corporation as simply a convenient appellation for the people who constitute it. By the same token, rights tailored to human beings can be attributed to collective agents insofar as the latter espouse the rights of the former. Conversely, restricting the rights of a corporation is treated as tantamount to a rights violation against the people who make it up.

Among theorists of the firm, the group theory finds expression in the "nexus of contracts" view, according to which firms are "simply legal fictions which serve as a nexus for a set of contracting relationships among individuals."[52] A business firm is "nothing more or less than the product of individual actors freely contracting according to their own utility calculations."[53] Furthermore, this conception denies that the state or public law have any necessary role in corporate agency: "Whether the terms are supplied by actual bargaining or by the standard-form provisions of state corporate law, market forces and individual choice determine the outcomes."[54] If the corporation is the outcome of individuals exercising their freedom of contract, it is a purely private endeavor that owes little to sovereign discretion.[55] As such, the state's attempt to regulate its activities is presumptively an infringement on individual liberty.

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50. Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 707 (2014).

51. An early proponent of the aggregative view is Wesley Newcomb Hohfeld, whose typology of rights remains vastly influential. According to Hohfeld, "[t]he only conduct of which the state can take notice by its laws *must* spring from natural persons." Accordingly, "In reality when we say that the so-called legal or juristic person has rights or that it has contracted, we mean nothing more than what must ultimately be explained by describing the capacities, powers, rights, privileges (or liberties), disabilities, duties and liabilities, etc., of the natural persons concerned or of some of such person." Wesley Newcomb Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts*," 9 COLUM. L. REV., 285, 289–90 (1909).

52. Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976). Jensen and Meckling consider business corporations as a subspecies of organization, so their nexus theory is explicitly formulated to apply to universities, foundations, certain governmental bodies like cities or states, and government agencies, alongside firms. The distinguishing feature of the business enterprise is not that it is a contractual nexus, they write, but "the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals." *Id*. at 311. Further, as the passage quoted above indicates, Jensen and Meckling use the phrase "nexus *for* contracts," which has subsequently been interpreted as a more accurate way to conceptualize the role of corporate law insofar as it allows "the firm to serve as a single contracting party that is distinct from the various individuals who own or manage the firm." REINIER KRAAKMAN, ET AL., THE ANATOMY OF CORPORATE LAW. A COMPARATIVE AND FUNCTIONAL APPROACH 6 (2nd ed. 2009).

53. David Millon, *Theories of the Corporation*, 2 DUKE L.J. 201, 231 (1990).

54. *Id*.

55. An early critic of this conception writes: "corporations . . . have been able to a considerable extent to ignore their public law origins and duties, while taking advantage of constitutional immunities and legal devices which were intended to inure to the benefit of private individuals only." Sigmund Timberg, *Corporate Fictions: Logical, Social and International Implications*," 46 COLUM. L. REV. 533, 555 (1946).

We would expect a human rights court that is committed to this conception of corporate rights to allow only a narrow margin of appreciation to state parties (in U.S. constitutional terminology, to apply strict scrutiny) in evaluating measures that curtail corporate autonomy. No such generalization can be made of the ECtHR's case law. Nonetheless, one strand of the Court's jurisprudence construes the corporation as a mere placeholder for the individuals who associate under its auspices. In a 1979 case, the European Commission on Human Rights (a forerunner of today's court) was asked to rule on a freedom of religion claim brought by the Church of Scientology. It held:

> the distinction between the Church and its members under Article 9 (1) is essentially artificial. When a Church body lodges an application under the ECHR, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members.[56]

Despite its equivocal formulation, this statement suggests an aggregative understanding of corporate rights. When a religious community brings a claim "in its own capacity," the Commission reasons, it does so "as a representative of its members" or "on behalf of its members." This seems like a way of saying that the church is capable of exercising the rights in question only insofar as it borrows them from its members.

In this sense, the aggregative approach contains a key normative insight, which is that corporations acquire their claim to moral consideration from the individuals to whom they are instrumental. As a baseline, individual liberty requires that:

> persons should be free to form any associations or institutions that they wish, to structure and govern them however they wish, and to live according to the rules and norms that the associations generate. Their freedom to create associations and institutions means that the associations and institutions then take on a moral and legal existence of their own.[57]

The corporate form affords an important (sometimes even essential) medium for individuals to pursue certain ends, particularly those that require a formal and lasting institutional framework, mechanisms of collective decision-making, and secure commitment of resources. As the ECtHR has held, the ability "to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that

56. X. v. Sweden, App. No. 7805/77 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979), http://hudoc.echr.coe.int/eng?i=001-73995 [https://perma.cc/QQ4A-AUPA].

57. LEVY, *supra* note 11, at 42–43.

right would be deprived of any meaning."[58] In other words, a corporation's legal status is not merely a discretionary act of recognition by the state; rather, it is entailed by the individual right to free association.[59] The Court has observed that there are myriad substantive rights whose enjoyment presupposes or is facilitated by a legally recognized collective agent.[60] For instance, political parties are arguably necessary for fulfilling the right to democratic self-rule, churches and faith associations for expressing religious freedom, and newspapers for ensuring freedom of expression and information. But for the corporate form, these rights would be imperfectly enjoyed, if at all.

From here, however, proponents of the aggregative approach take an additional step, concluding that because corporations are made up of people, they have the rights of people. However, this move creates some normative and conceptual problems. For a clear illustration, let us turn to a line of ECHR cases where legal persons have claimed compensation for non-pecuniary losses sustained as a result of a substantive rights violation (such as the right to a fair trial). In the *Comingersoll* decision, the ECtHR stirred controversy by awarding compensation to a business firm for non-pecuniary damages it had sustained due to delayed judicial proceedings. These delays, the Court observed, had affected "the company's reputation," and caused "uncertainty in decision-planning" and "disruption of the management of the company."[61] Although the Court classified these as non-pecuniary damages, all of them are—owing to the commercial nature of the agent sustaining them—emphatically *pecuniary* in nature. A business corporation is defined by "the primacy of the profit motive" to its operations.[62] Although the evils of delayed justice may well result in non-pecuniary or "intangible" losses for other kinds of legal persons (e.g. a political party that loses an election due to interference with its free speech rights), the interests of a business firm are, by definition, capable of being denoted exclusively in pecuniary terms (even if a

58. Sidiropoulos v. Greece, App. No. 26695/95, 1998-IV Eur. Ct. H.R. 1594, http://hudoc.echr.coe.int/eng?i=001-58205 [https://perma.cc/M7WK-C38H].

59. This contrasts with most versions of concession theory, according to which corporations are creatures of sovereign fiat and only enjoy such rights as the state grants them. In David Ciepley's pithy formulation, "Having been constituted by government, the corporation cannot properly assert constitutional rights against it." David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J. L. & CTS. 221 (2013).

60. As the Court held in *Hasan v. Bulgaria*, App. No. 30985/96, 2000-XI Eur. Ct. H.R., http://hudoc.echr.coe.int/eng?i=001-58921 [https://perma.cc/GV3U-RGRN], and *Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99 2001-XII Eur. Ct. H.R 81, http://hudoc.echr.coe.int/eng?i=001-59985 ("[T]he autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords.") [https://perma.cc/BL39-RLNC].

61. Oferta Plus S.R.L v. Moldova, App. No. 14385/04, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-78585 [https://perma.cc/YGU2-QCXT]; Sovtransavto Holding v. Ukraine, App. No. 48553/99 Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/eng?i=001-61330 [https://perma.cc/YGU2-QCXT]; Comingersoll S.A. v Portugal, App. No. 35382/97, 2000-IV Eur. Ct. H.R. 355, http://hudoc.echr.coe.int/eng?i=001-162516 [https://perma.cc/D4DW-ENWD].

62. Tamara Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008).

precise calculation is not always possible).[63]

To these, however, the Court added another sort of damage: it said it was taking into account, "albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team."[64] This finding is puzzling because in earlier case law, the ECtHR had followed the International Court of Justice's finding in the *Barcelona Traction* decision that "even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore, the interests of the shareholders are both separable and indeed separated from those of the company."[65] By taking account of the distress suffered by the firm's management in addition to the losses suffered by the firm, the Court ignored the "independent existence" that was supposed to make the company's interests "separable and indeed separate" from those of individual people associated with it. This move was particularly question-begging since no member of Comingersoll's "management team" had joined the application. Even if they had, it is doubtful that the personal injury they incurred as a result of the delayed judicial proceedings targeting their employer would rise to the level of human rights violations. (What white-collar worker has been spared the anxiety of delayed paperwork?)

Subsequent decisions have heightened these contradictions. In a decision chiding Italy's monopolistic approach to allocating broadcasting frequencies, the Court argued that Centro Europa 7, a private TV channel, was entitled to compensation for non-pecuniary damages suffered as a result of administrative processes that unfairly excluded it from the airwaves. As in *Comingersoll*, the Court considered the disruption of management and job-related stress suffered by the management team as one aspect of the non-pecuniary damages sustained by the firm. In addition to construing the corporate applicant as a proxy for the management team's psychological distress, the Court took the metaphysical leap of attributing emotional strain to the firm itself. The violation of the applicant's rights under the Convention, the Court held, "must have caused the applicant company . . .

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63. ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS 52 (1897).

64. Oferta Plus S.R.L v. Moldova, App. No.14385/04, Eur. Ct. H.R. (2008), http://hudoc.echr.coe.int/eng?i=001-78585; Sovtransavto Holding v. Ukraine, App. No. 48553/99 Eur. Ct. H.R. (2003), http://hudoc.echr.coe.int/eng?i=001-61330 [https://perma.cc/YGU2-QCXT]; Comingersoll S.A. v Portugal, App. No. 35382/97, 2000-IV Eur. Ct. H.R. 355, 365, http://hudoc.echr.coe.int/eng?i=001-162516 [https://perma.cc/D4DW-ENWD]. In a prior decision, the Court had considered the possibility of awarding non-pecuniary damages to a firm and found it "unnecessary to examine whether a commercial company may allege that it has sustained non-pecuniary damage through anxiety." Immobiliare Saffi SRL v. Italy, App. No.22774/93, 1999-V Eur. Ct. H.R., http://hudoc.echr.coe.int/eng?i=001-58292 [https://perma.cc/9NH9-8SY5].

65. The ICJ reasoned that "It is a basic characteristic of the corporate structure that the company alone . . . can take action in respect of matters that are of a corporate character," and that "the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation." *See* Barcelona Traction, Light & Power Co. Ltd. (Belgium v. Spain), Judgment, 1970 I.C.J. 3 ¶ 42–45 (Feb. 5). Accordingly, the ICJ rejected the plaintiff's argument that "a company represents purely a means of achieving the economic purpose of its members, namely the shareholders." *Id.*

feelings of helplessness and frustration."[66] Readers familiar with classical theories of the corporation will hear in this passage strong echoes of organicist or natural entity accounts of the corporation,[67] which are often criticized for making precisely such questionable metaphysical assumptions as imputing to a company the capacity to experience "feelings of helplessness and frustration."[68]

In the final section of this essay, I will propose a more compelling basis for the Court's reasoning in the *Comingersoll* and *Centro Europa 7* decisions. For now, however, the cases illustrate that when it comes to fleshing out the rights of corporate agents, the anthropomorphic metaphor can bear only so much weight. The fact that corporations, as a legal matter, share important attributes with human persons does not mean they share all of their vulnerabilities. Awarding companies compensation for non-pecuniary damages implies a troubling moral equivalence between two very different kinds of loss, namely that which commercial entities are capable of sustaining on the one hand, and that which human beings are capable of suffering, on the other. Between the two kinds of agents, human beings are uniquely capable of "physical pain and suffering;" "mental anguish;" "humiliation;" "loss of enjoyment of life;" "loss of companionship, comfort, guidance, affection and aid;" "suffering, sadness and humiliation caused by disfigurement, loss of amenities, loss of recreational ability, loss of any of the five senses, [or] inability to enjoy sexual relations;" and other kinds of "damage to the enjoyment of life."[69] The Strasbourg court has held that the Article 2 guarantee of the right to life is "an inalienable attribute of human beings."[70] And it has wisely noted on other occasions that a legal person cannot be tortured or psychologically abused.[71] Likewise, a company most certainly cannot experience "feelings of helplessness and frustration." Even if we justify the rights of legal persons with reference to the individuals who associate under their auspices, we must not assume that they acquire the moral status or other morally relevant attributes associated with the latter's humanity.

The aggregative logic, then, founders on a conceptual problem. The defining feature of the corporate form is the creation of a legal subject separate from the individual associates.[72] As List and Pettit argue, this is no mere legal formality:

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66. Centro Europa 7 SRL v. Italy, App. No. 38433/09, 2012-III Eur. Ct. H.R. 339, http://hudoc.echr.coe.int/eng?i=001-111399 [https://perma.cc/43AB-BMTM].

67. *See, e.g.*, Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181–82 (1985); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 567 (1986).

68. Felix S. Cohen, *Transcendental Nonsense and the Functionalist Approach*, 35 COLUM. L. REV. 809, 811 (1935); Timberg, *supra* note 55, at 553.

69. This list is adapted from DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 347 (3d ed., 2015).

70. K-HW v. Germany, App. No. 37201/97, 2001-II Eur. Ct. H.R. 495 (2001), http://hudoc.echr.coe.int/eng?i=001-59352 [https://perma.cc/AU69-MQP7].

71. Verein Kontakt-Information-Therapie (KIT) v. Austria, App. No.11921/86, 57 Eur. Comm'n. H. R. Dec. & Rep. 81 (1988), http://hudoc.echr.coe.int/eng?i=001-217 [https://perma.cc/78Y7-AHR4].

72. David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139, 155 (2013); *see also*, Ciepley, *supra* note 59, at 226–28.

corporations are worth taking seriously because their agency is not necessarily reducible to that of the individuals that compose them.[73] In a different line of jurisprudence, moreover, the ECtHR amply acknowledges the distinction between the corporate entity and the people who transact under its auspices. Consider a case in which three firms claimed, *inter alia*, that the seizure of the data stored on their joint server in the course of a tax audit by Norwegian authorities had violated *their employees'* respective rights to private life as guaranteed under Article 8 of the Convention.[74] The seized data included the private correspondence of employees as well as other personal data such as family pictures.[75] While the Court recognized that companies "had legitimate interests in ensuring the protection of the privacy of individuals working for them and such interests should be taken into account in the assessment of whether the conditions in Article 8 § 2 were fulfilled in the instant case,"[76] it refused to allow the companies to *stand in for* their employees and claim the rights they held individually. Likewise, the Court has taken pains to emphasize the separate legal identity of the corporation in cases involving intra-corporate strife, observing that congruence of interests between the shareholders and the corporation cannot be assumed.[77] For instance, in the case of a bankrupt company, the Court held that conflicts of interest between shareholders and liquidators assigned to discharge the firm's assets might create difficulties in identifying who is entitled to apply for Convention protection on behalf of the company.[78] In such cases, the aggregative argument for assigning rights to legal persons provides little help.

As the Court has acknowledged in these decisions, the separate legal identity of the corporation *matters*. At the very least, it means that a corporate complainant cannot normally avail itself of the *personal* rights of the people who associate under its auspices. We can go further: the fact that certain individual purposes require a corporate vehicle (i.e. an association with a legal identity and capacities separate from the individuals who compose it) *reinforces* the veil between the rights of these people and the corporation through which they transact. In other words, while the aggregative approach yields a convincing *normative basis* for corporate rights claims, it errs in deriving the substantive scope of corporate rights from the individualistic basis of their justification. Instead, we need to distinguish between the moral standing of the individuals who power a corporation's claim to legal protection from their personal (legal and moral) rights. This is one key advantage of the alternative approach I outline below.

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73. Christian List and Philip Pettit, *Group Agency and Supervenience*, 44 S. J. PHIL. 85 (2006); French, *supra* note 36, at 211–15.

74. Bernh Larsen Holding AS v. Norway, App No. 24117/08, Eur. Ct. H.R. (2013), http://hudoc.echr.coe.int/eng?i=001-117133 [https://perma.cc/L3V5-PZK7].

75. *Id*.

76. *Id*.

77. Agrotexim Hellas v. Greece, App. No. 14807/89, 330 Eur. Ct. H.R. (ser. A) (1995), http://hudoc.echr.coe.int/eng?i=001-57951 [https://perma.cc/DHF2-8577].

78. *Id*. at 24.

Option 3: The Purposive Approach

While the aggregative approach can give us insight into why corporations are entitled to some degree of moral consideration, it provides little guidance concerning *which* rights they ought to enjoy and how much weight these rights should be accorded. And because it resolves the corporation's rights into the rights of the people who associate under its auspices, it cannot take account of differences *between* corporations that are salient for determining the kind of fundamental rights protection to which they are entitled.

In principle, corporate agents are capable of claiming protection under many provisions of the ECHR. In practice, there is no *prima facie* reason why every corporate agent might be entitled to every applicable Convention guarantee. For instance, while a business firm and a religious organization can both claim the right to property under Article 1 of Protocol 1, it is not obvious why a business would be entitled to the Article 9 guarantee of religious freedom. Likewise, although the guiding purposes of some corporate entities might fall under specific provisions of the Convention (such as the religious mission of a church and the guarantees enshrined in Art. 9), these protections need not extend to all of their activities. Take a case brought by a religious organization against restrictions on its marketing of a psychometric device.[79] Swedish authorities had determined that the organization was using misleading advertising in marketing the product to the public and refused to exempt it from the relevant consumer protection measures. The applicant decried this as a violation of its freedom of religion.[80] The European Commission of Human Rights ruled that the protections granted to the organization in respect of its religious purposes did not automatically extend to its commercial activities (in this case, to its expression of "commercial ideas").[81] In other words, being subjected to the same market rules as secular merchants did not significantly hinder the church from fulfilling its core religious purpose. Furthermore, its right to religious freedom did not exempt the church from generally applicable laws governing market exchange.

This ruling points towards a more promising approach to delimiting the scope of corporate rights compared to the personhood and aggregative approaches. Rather than approximating the rights of corporations to those of human beings, this approach grounds a corporation's rights on its role in allowing individuals to pursue, express, and realize their ends, values, and life plans in association with one another. This does not mean that corporate agents absorb the rights of the

79. X. v. Sweden, No. 7805/77 16 Eur. Comm'n H.R. Dec. & Rep. 68, 69 (1979), http://hudoc.echr.coe.int/eng?i=001-73995 [https://perma.cc/YK7G-8QRL].

80. *Id.* at 71.

81. *Id.* at 73. The Court rendered a similar judgment in *Mouvement Raelien Suisse* v. *Switzerland*, where it considered a billboard advertisement on behalf of a fringe religious group to be "closer to commercial speech than to political speech per se." Even though it did not seek to market a particular product, the Court held that the billboard was intended to drive traffic to the group's website. App. No. 16354/06, 2012-IV Eur. Ct. H.R. 373, 399, http://hudoc.echr.coe.int/eng?i=001-112165 [https://perma.cc/TN7L-G2RX].

individuals who act through them. The legal rights that a corporate entity needs to carry out its principal purpose(s) do not necessarily mirror or reproduce the rights of individual associates, whose interests as human beings are typically far more varied than the objectives pursued by the particular organization(s) to which they adhere. In other words, the purposive justification extends only as far as those rights that a corporation needs to pursue the goods, interests, values, and ends for the sake of which it exists.

Of course, the mere fact that a corporation has certain purposes does not automatically make these purposes worthy of protection, much less generate well-founded fundamental rights claims.[82] In some instances, the ends pursued by a corporation may be justified with direct reference to the basic individual rights it advances, such as a newspaper's role in disseminating information or a church's role in enabling the exercise of religion. In other cases, a corporate entity's purposes may not instantiate any of the fundamental human or social interests protected by rights norms. In such instances, its activities may nevertheless enjoy certain protections by virtue of the catch-all freedom of association that its members enjoy. In all of these instances, moreover, the presumptive right of individuals to pursue their ends through the corporate vehicle must be weighed against countervailing rights, values, and interests.

This argument, which I call the *purposive approach*, is based on an important distinction between human beings and legal persons in their respective capacities as rights bearers. Corporations owe their existence to the pursuit of a designated purpose (or purposes) that their individual members acting singly cannot achieve (or achieve as effectively).[83] Accordingly, the most important agent-based consideration for delineating the rights of corporations is neither that they *are* persons nor that they are *made up of* people. Rather, the corporate form is valuable to the extent that it allows people to pursue, express, and realize their ends, values, and life plans in association with one another. Consequently, the primary agent-based consideration for assessing a particular corporation's rights claims is what that it allows individuals to do.

Although I cannot fully develop or defend the purposive approach here, some of its implications for a human rights organization like the ECHR are important to note. The fact that modern fundamental rights documents like the Convention *leave open* the choice of what constitutes a fulfilling human life creates a fundamental mismatch between the legal safeguards that individual autonomy requires on the one hand, and those that corporate autonomy warrants on the other. Such documents seek to accommodate as wide a range of life plans, beliefs, values, practices, and modes of self-realization as the human condition allows (so long as these are compatible with an equally wide scope of freedom for others in society). They avoid, as far as possible, assuming any single *ergon* or *telos* of humanity.

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82. As Griffin points out, the fact that something is the good of a group doesn't mean the group has a right to it. GRIFFIN, *supra* note 5, at 260.

83. *See* MICHAEL OAKESHOTT, ON HUMAN CONDUCT 114 (1975).

For this reason, modeling the rights of corporations on those of human beings gives them a gratuitously broad array of protections. This, in turn, can hinder legitimate regulation of their activities in the public interest. Equipping corporations with rights that are not warranted by their purposes not only lacks a clear normative justification, it can also amplify the power they wield over individuals.

III. ASSESSING CORPORATE RIGHTS CLAIMS (2): PUBLIC INTEREST CONSIDERATIONS

So far, I have argued that the personhood and aggregative conceptions draw the scope of substantive rights that corporations may claim too widely, allowing corporations to exercise rights that are not strictly necessary to fulfil the core purposes that make them valuable to individuals. However, in some instances, the aggregative approach may draw the scope of corporate rights too *narrowly*. In deriving the rights of legal persons from those of the individuals who associate under their auspices, we overlook any interests that the public may have in their activities. The public may have reasons for protecting a church, civil liberties organization, or media corporation beyond the private interests of its adherents, employees, or shareholders. Here, too, the ECtHR's jurisprudence is instructive. The Court often justifies the rights of collective actors not with reference to the interests of the individuals who constitute them, but with reference to broader public values and objectives protected by the Convention. Under an orthodox conception of fundamental rights as "trumps" wielded over the interests of the collective, this may seem like an illogical way of grounding rights.[84] Be that as it may, the Court's case law on corporate rights leans more heavily on public interest considerations (including the principles that guide a democratic society) than the agent-related considerations intimated above.[85] In such instances, the corporate applicant may even be described as an "indirect beneficiary" of the right in question.[86]

Part of the reason for the ECtHR's emphasis on "objective" or systemic considerations in adjudicating corporate rights claims has to do with the Convention's historical origins and mission. The ECHR is part of a broader constellation of post-war international institutions designed to "lock in" constitutional democracy in Europe.[87] Its parent organization, the Council of Europe, seeks to advance democracy and the rule of law in its 47 member states. Although the tools at the ECtHR's disposal are of a retail nature (whereby most complaints are made on an

84. *See, e.g.*, DWORKIN, *supra* note 7.

85. D.J. HARRIS, ET. AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 18 (3d ed. 2014); EMBERLAND, *supra* note 30, at 68, 102. VANESSA WILCOX, A COMPANY'S RIGHT TO DAMAGES FOR NON-PECUNIARY LOSS, 32 (2016); George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 509–41 (2010).

86. Elizabeth Foster, *Corporations and Constitutional Guarantees*, 31 LES CAHIERS DE DROIT 979, 1125–52 (1990).

87. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217–52 (2000); JAN-WERNER MÜLLER, CONTESTING DEMOCRACY: POLITICAL IDEAS IN TWENTIETH-CENTURY EUROPE 149 (2011).

individual basis and redress takes the form of monetary compensation awarded to individual victims), its concerns can be described as wholesale.[88]

The Court's case law on the freedom of expression (Art. 10) provides a good illustration of how this specific institutional mission bears on the adjudication of corporate rights claims. According to Van Kempen,

> the [ECtHR] regards the press's and political parties' right to freedom of . . . expression as of even greater fundamental importance than such general interest speech from an ordinary citizen. The reason is not that the Court regards human rights protection of legal persons as of more importance than that of individuals. It just seems that the value of the media and political organizations for democratic society, and thus for the individuals as a collective, is afforded greater significance than the value of a single person's speech.[89]

While it would take a more thorough empirical analysis than that offered here to substantiate the claim that the Court affords a wider scope of protection for media and political organizations' free speech rights relative to private individuals, Van Kempen is certainly right that media corporations have successfully used Article 10 as a shield against government interference.[90] Furthermore, the Court often construes the primary danger of such interference *not* in terms of the freedom of expression of members of media organizations (as the aggregative approach might suggest), but in terms of the deleterious effects that censorship of the media would have on democracy, pluralism, and transparency. In the *Handyside* decision (where the applicant was a natural person), the Court explicated this nexus:

> Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the

88. The wholesale/retail metaphor is adapted from Daniel Halberstam, who applies it to a different doctrinal context. *See* Daniel Halberstam, *It's the Autonomy, Stupid: A Modest Defense of Opinion 2/13 on EU Accession to the ECHR and the Way Forward*, 16 GERMAN L. J., 105–46 (2015).

89. Piet Hein Van Kempen, *Human Rights and Criminal Justice Applied to Legal Persons*, 14 EUR. JOURNAL J. OF COMPARATIVE COMP. LAW, 21 (2010).

90. Some notable decisions that found violations of Art 10 in applications by media organizations include: *Times Newspapers Ltd v. United Kingdom* App. No. 6538/74 2 Eur. Comm'n H.R. Dec. & Rep. 90 (1975), http://hudoc.echr.coe.int/eng?i=001-75068 [https://perma.cc/B288-X4NR]; *Handyside v. UK*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) (1976), http://hudoc.echr.coe.int/eng?i=001-57499 [https://perma.cc/6WED-VYNB]; *Financial Times Ltd. v. UK*, App. No. 821/03, Eur. Ct. H.R. (2009), http://hudoc.echr.coe.int/eng?i=001-96157 [https://perma.cc/R3FE-GNP8]; *Axel Springer AG v. Germany*, App. No. 39954/08, Eur. Ct. H.R. (2012), http://hudoc.echr.coe.int/eng?i=001-109034 [https://perma.cc/DYD6-M7XT]; and *Centro Europa 7 SRL v. Italy*, App. No. 38433/09, 2012-III Eur. Ct. H.R. 339, http://hudoc.echr.coe.int/eng?i=001-111399 [https://perma.cc/Q5AM-C7X].

> demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[91]

Guided by these considerations, the Court surveys whether restrictions imposed on a given expressive act are "proportionate to the legitimate aim pursued" and "necessary in a democratic society." By the same token, it allows states a wider margin of appreciation in regulating speech of a primarily commercial nature, which is understood as speech "inciting the public to purchase a particular product."[92] As the Commission held in an early decision:

> Although the Commission is not of the opinion that commercial 'speech' as such is outside the protection conferred by Article 10(1), it considers that the level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned.[93]

The Court has since upheld this logic, reasoning that a wider "margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition."[94] By contrast, the Court gives wider berth to political speech acts given their essential link to the systemic values that the Convention system champions. In the *ÖZDEP* case, the Court rejected the Turkish Constitutional Court's rationale for dissolving a political party on the basis of the aims expressed in its manifesto, observing that "It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself."[95]

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91. Handyside v. UK, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) (1976), http://hudoc.echr.coe.int/eng?i=001-57499 [https://perma.cc/6WED-VYNB].

92. VgT Verein gegen Tierfabriken v. Switzerland, App. No. 24699/94, 2001-VI Eur. Ct. H.R. 243, 261, http://hudoc.echr.coe.int/eng?i=001-59535 [https://perma.cc/36LW-LW27]. In that decision, the Court ruled that inciting the public *not* to purchase a particular product could be regarded as "political" rather than commercial speech and was consequently entitled to a wider scope of protection. In a similar, earlier case, the Court had held that forms of expression that affect a given individual's "participation in a debate affecting the general interest" must be protected through the narrower margin of appreciation appropriate to political statements even if such pronouncements also have implications for market competition. *See* Hertel v. Switzerland, App. No. 59/1997/843/1049, 1998-VI Eur. Ct. H.R. (1998), http://hudoc.echr.coe.int/eng?i=001-59366 [https://perma.cc/M9XG-MAMF].

93. X. v. Sweden, App. No. 7805/77 16 Eur. Comm'n H.R. Dec. & Rep. 68 (1979), http://hudoc.echr.coe.int/eng?i=001-73995 [https://perma.cc/MVP7-VGLZ].

94. Markt Intern Verlag GmbH v. Germany, App. No. 10572/83 165 Eur. Ct. H.R. (ser. A) 19–20 (1989), http://hudoc.echr.coe.int/eng?i=001-57648 [https://perma.cc/Y3ZR-43UU]. *See also* Mouvement Raëlien Suisse v. Switzerland, App. No. 16354/06 2012-IV Eur. Ct. H.R. at 399 (2012) http://hudoc.echr.coe.int/eng?i=001-112165 [https://perma.cc/9DXD-94W7]. For an evaluation, see Christoph B. Graber, *The Hertel Case and the Distinction between Commercial and Non-commercial Speech*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier, Joost Pauwelyn, & Elisabeth Bürgli Bonanomi eds., 2005).

95. Freedom and Democracy Party v. Turkey, App. No. 23885/94, 1999-VIII Eur. Ct. H.R. 293, 315 (1999), http://hudoc.echr.coe.int/eng?i=001-58372 [https://perma.cc/K8JE-PY8X].

The Court's emphasis on the nexus between freedom of expression and a democratic society also explains why agent-based considerations (for instance, whether the applicant is a commercial firm or a media organization) take a back seat to the content of the message in adjudicating corporate free speech cases. In the divisive *markt intern Verlag* decision, the Court classified an article featured in a consumer affairs periodical as commercial speech even though the speaker was a non-profit organization, giving the government a wider margin to regulate it.[96] In the famous *Autronic* case, the circumstances were almost the reverse.[97] Swiss authorities had denied a commercial vendor of satellite receivers permission to channel a Soviet television signal at a trade fair. Since the content of the Soviet broadcast was more or less incidental to the firm's aim of demonstrating the capabilities of its product for marketing purposes, the Swiss authorities argued that its claims did not implicate the Article 10 guarantee of free speech.[98] The Grand Chamber rejected this argument, finding that the firm's freedom to receive information "regardless of frontiers" fell within the scope of Article 10, "without it being necessary to ascertain the reason and purpose for which the right is to be exercised."[99] The commercial identity and motives of the speaker did not vitiate its right to broadcast speech of potential political and cultural relevance (in *Autronic)*, while commercial speech restrictions imposed on a consumer interest periodical were deemed permissible despite the latter's non-profit status (in *markt intern Verlag*). In terms of the distinction developed in this article, agent-related considerations (such as whether the corporation's purposes were purely commercial) took a back seat to public policy considerations at stake—most notably, the social value of the expressive act and the dangers of its suppression within the framework of a democratic society.[100]

Viewed through this lens, the Court's metaphysical turn in the *Centro Europa 7* decision, reviewed above, is less the product of faulty logic than a veiled rebuke of Italy's infractions against liberal democratic principles. To recall, this application was prompted by the Italian authorities' (arguably politically motivated) failure to reallocate TV frequencies that exceeded concentration quotas written into Italian law.[101] Centro Europa 7 was a private broadcasting network seeking to break the Berlusconi-owned Mediaset corporation's monopolistic control of the

96. Markt Intern Verlag GmbH v. Germany, App. No. 10572/83 165 Eur. Ct. H.R. (ser. A) 19–20 (1989), http://hudoc.echr.coe.int/eng?i=001-57648 [https://perma.cc/Y3ZR-43UU].

97. Autronic AG v. Switzerland, App. No. 12726/87 178 Eur. Ct. H.R. (ser. A) (1990), http://hudoc.echr.coe.int/eng?i=001-57630 [https://perma.cc/X8HB-UUXE].

98. *Id*.

99. *Id*. at 23.

100. Caroline Kaeb, *Putting the "Corporate" Back into Corporate Personhood*, 35 NW J. INT'L L. & BUS. 591, 636 (2015); EMBERLAND, *supra* note 30, at 153. Winfried H.A.M. van den Muijsenbergh and Sam Rezai, *Corporations and the European Convention on Human Rights*, 25 GLOBAL BUS. & DEV. L. J. 43, 55–56 (2012).

101. Centro Europa 7 SRL v. Italy, App. No. 38433/09, 2012-III Eur. Ct. H.R. 339 (http://hudoc.echr.coe.int/eng?i=001-111399).

airwaves.[102] It had successfully obtained injunctions from Italian courts directing the national broadcasting authority to license its broadcasts, but in each instance, the latter had found ways of protecting Mediaset's privileges and thwarting Centro Europa 7's launch. Democratic considerations of the highest order (including the rule of law, media freedom, and pluralism) were lined up on the applicant's side. These considerations offer a more compelling basis for the Court's decision to award damages for non-pecuniary loss to a corporate entity than appealing to "feelings of helplessness and frustration" that such an entity is, in any case, incapable of experiencing.

Likewise, the Court's puzzling reliance on the anxiety suffered by the management team to justify an award of non-pecuniary damages to a commercial entity in *Comginersoll* may be secondary to its concern with the rule of law as a general principle. In justifying this controversial award, the Court argued that it would help render Convention rights "practical and effective" rather than "theoretical or illusory."[103] Given that the "principal form of redress which the Court may order is pecuniary compensation," it reasoned, "if the right guaranteed by Article 6 of the Convention is to be effective," then the Court must be empowered "to award pecuniary compensation for non-pecuniary damage to commercial companies."[104]

These examples show that the ECtHR often treats corporate rights claims as a vehicle by which to advance broader liberal democratic values. Is this a good reason for interpreting corporate rights liberally? Is it wise? According to Marius Emberland, author of the most comprehensive survey to date of firms' rights under the ECHR, the Court should treat applications by corporations as so many occasions to ensure "the protection of underlying Convention values, such as equality, rule of law, and democracy."[105] However, this line of reasoning does not apply to corporate rights claims across the board. It has admittedly strong purchase in relation to Convention provisions whose primary function is structural or procedural.[106] The agential attributes of applicants invoking the right are less relevant when the right at stake instantiates a categorical principle. Consider the right to a fair and public hearing before an impartial and independent tribunal (Art. 6). This norm protects the rule of law and is intended to ensure that no subject of the law is treated arbitrarily or capriciously. Unsurprisingly, the ECtHR appears to

102. For background on this litigation, see *Litigation: Centro Europa 7 s.r.l. v. Italy*, OPEN SOCIETY FOUNDATIONS, (January 13, 2015), [https://perma.cc/46SF-DHT7].

103. The principle that the Convention must be interpreted so as to render its guarantees "practical and effective" rather than "theoretical or illusory" was first set out in *Airey v. Ireland*, App. No. 6289/73, 32 Eur. Ct. H.R. (ser. A) (1979), http://hudoc.echr.coe.int/eng?i=001-57420 [https://perma.cc/C47G-8SCF].

104. Comingersoll S.A. v Portugal, App. No. 35382/97, 2000-IV Eur. Ct. H.R. at 365, http://hudoc.echr.coe.int/eng?i=001-162516 [https://perma.cc/6Y2J-TXSL].

105. EMBERLAND, *supra* note 30, at 153.

106. Paul Lemmens, *The Right to a Fair Trial and Its Multiple Manifestations: Art 6(1) ECHR*, *in* SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS 304 (Eva Brems & Janneke Gerards eds., 2013).

apply Article 6 protections to natural and legal persons alike, without distinguishing between the social aims of claimants in the latter category.[107]

In other instances, however, interpreting a corporation's rights claims generously will come at the expense of the rights, interests, and freedoms of other individuals and groups. For instance, maximizing the freedom of commercial expression can burden consumers by allowing monopolistic behavior to go unchecked and deceptive business practices to flourish. Similarly, interpreting corporate free speech rights expansively can jeopardize political equality and impair mechanisms of political accountability. U.S. First Amendment jurisprudence provides a cautionary tale. The U.S. Supreme Court has long assumed that more speech is better, and it has held that "speech restrictions based on the identity of the speaker" "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[108] Varying the scope of free speech rights in accordance with the relevant attributes of the speaker (that is, in light of what I called agential considerations) runs contrary to an approach that views all speech as potentially beneficial for democracy. However, this approach obscures obvious and troubling differences between speech by corporations and individual speakers, as well as between expressive and commercial associations.[109] These differences include—but are not limited to—the fact that powerful corporations can use their resources to drown out countless citizens in the political arena.[110]

In the free speech domain, then, broadening the scope of corporate rights would not necessarily further the democratic values that subtend the right in question. In fact, it can jeopardize the ability of public authorities to regulate powerful

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107. That said, the Court has been willing to adjust the scope of some 'objective' provisions on the basis of the claimant's identity. For instance, in a dispute involving the principle of legality enshrined in Article 7, it held that "the scope of the notion of foreseeability depends to a considerable degree on. . .the number and status of those to whom it is addressed." Accordingly, "physical or legal persons carrying on a business activity" can "be expected to take special care in assessing the risks" inherent in business activity and may have to bear a greater burden in ensuring that their conduct is in conformity with the latest laws and regulations. Fortum Oil v. Finland No.32559/96, Eur. Ct. H.R. (2002), http://hudoc.echr.coe.int/eng?i=001-22846 [https://perma.cc/Q8WC-M4F8]; *cf.* Sud Fondi Srl v. Italy, App. No. 75909/01, Eur. Ct. H.R. (2009) (finding a violation of Article 7), http://hudoc.echr.coe.int/eng?i=001-90797 [https://perma.cc/QJ9H-4U5E].

108. Citizens United v. FEC, 558 U.S. 310, 314 (2010). Michael Kagan argues that the U.S. Supreme Court is moving towards a standard of protection that prohibits identity discrimination in free speech cases. For some of the reasons outlined here, I think this is a bad idea. Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. UNIV. L. REV. 765 (2015).

109. Roberts v. United States Jaycees 488 U.S. 609, 633–38 (1984).

110. As the U.S. Supreme Court observed in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990), "We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for §54 [of the 1976 Michigan Campaign Finance Act, which prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." This logic was overruled by *Citizens United v. Federal Election Comm'n*, 588 U.S. 310 (2010).

corporate entities in the public interest and allow the latter to distort the democratic process.[111] In other words, treating corporate human rights claims as proxies for advancing broader public values may, in the long run, frustrate those very values. Our appetite for expanding the scope *ratione personae* of human rights to corporations should therefore be tempered by considering the long-term consequences that such expansion is liable to generate.

As discursive constructs, human rights norms are as strong or as weak as the practices that instantiate them. Accordingly, the more institutions such as the ECtHR ascribe human rights to corporations that lack human vulnerabilities, the more they clothe the latter's material losses in anthropomorphic metaphors, the more they allow companies to usurp the humanity of the professionals who are only contractually obligated to them, the more they risk depreciating the moral currency of human rights in the long run.

111. For an overview of the impact of corporate spending on the policy process in the US, see LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015). *See also* KAY LEHMAN SCHLOZMAN, ET. AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012).