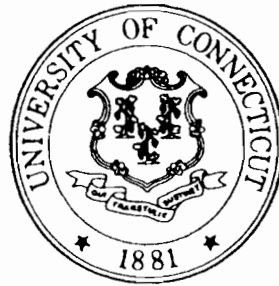


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Corporation and *Kulturkampf*: Time Culture as Illegal Fiction

JOEL EDAN FRIEDLANDER*

[Ancient law] takes a view of *life* wholly unlike any which appears in developed jurisprudence. Corporations *never die*, and accordingly primitive law considers the entities with which it deals, *i.e.* the patriarchal or family groups, as perpetual or inex-tinguishable.

Sir Henry Maine¹

Time Inc. is now, and is expected to continue to be, principally a journalistic enterprise and, as such, an enterprise operated in the public interest.

Henry Luce III quoting Henry Luce²

* Associate. Lamb & Bouchard, P.A. Wilmington, Delaware, B.S. 1988. The Wharton School of the University of Pennsylvania, J.D. 1992. University of Pennsylvania. I owe this article to the continuing guidance of Philip Rieff, whose trenchant criticism improved the article immeasurably. Chancellor William T. Allen, Vice Chancellor Jack B. Jacobs, Steven Hardy and Stephen Lamb were each kind enough to read drafts of this article and offer suggestions. My appreciation for their assistance must not be construed as their endorsement of my analysis.

1. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 122 (1986) (1864).

2. Letter from Henry Luce III to Staff of Time Inc. (Mar. 10, 1967), reprinted in HENRY R. LUCE 44 (1967) (quoting his father's will on the occasion of his father's death) [hereinafter Luce 1967 Letter]; Letter from Henry Luce III to Time Inc. Chairman and Chief Executive Officer, J. Richard Munro (July 28, 1988) (Luce Dep. Ex. 4, in Paramount Communications, Inc. v. Time Inc., C.A. No. 10866 (Del. Ch. 1989), reprinted in RICHARD M. CLURMAN, TO THE END OF TIME: THE SEDUCTION AND CONQUEST OF A MEDIA EMPIRE 162 (1992)) (quoting his father's will to explain why he will not support the merger of Time Inc. and Warner Communications, Inc.) [hereinafter Luce 1988 Letter].

INTRODUCTION

Modern corporate law permits a corporation to pursue immortality, even as it transforms itself beyond recognition. Over the past century, statutory limits on the duration, scope, and capital structure of a corporation have been removed,³ and the latitude granted directors has been widened. As Professor Ernest L. Folk, III observed, shortly after the 1967 revision of the Delaware General Corporation Law, “[a]lmost without exception the key movement in corporate law revisions is toward greater permissiveness . . . to enlarge the ambit of freedom of corporate management to take whatever action it may wish.”⁴ This trend towards limitlessness in the management of corporate affairs, and its cultural significance, are the twin subjects of this Article.

Emblematic of the modern trend is Time, Inc. (“Time”), a corporation whose original CEO, Henry Luce, declared that Time was no ordinary profit-maximizing business, but was instead “principally a journalistic enterprise . . . operated in the public interest.”⁵ A generation later, Time was again in the vanguard, when the Delaware courts allowed its directors to rebuff a proposed acquisition by Paramount Communications, Inc. (“Paramount”). Time had already agreed to combine with an entertainment conglomerate, Warner Communications Inc. (“Warner”), and to rename itself Time Warner Inc. (“Time Warner”), the new name reflecting its new directors, new owners, new businesses and new CO-CEO. Despite those changes, and despite the immediate economic benefits of selling Time to Paramount, the Delaware Supreme Court, in its *Time-Warner* decision, accepted the argument that the acquisition of Warner appropriately ensured the survival of Time and the “Time Culture.”⁶

3. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 131-38 (1934) (discussing late nineteenth century statutory revisions); E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27 (1936).

4. Ernest Folk, *Some Reflections of a Corporate Law Draftsman*, 42 CONN. B.J. 409, 410 (1968). The statutory enlargement of director discretion continues. See *B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019, 1023 (M.D. Pa. 1992) (interpreting the 1990 amendments to Pennsylvania’s Business Corporation Law as giving directors “broad authority to act as they see fit in the face of attempted takeovers”), and recently, *Norfolk Southern v. Conrail, Inc.*, C.A. No. 96-7167, transcript at 654 (E.D. Pa. Nov. 19, 1996) (“Basically the law of Pennsylvania leaves decisions such as what is best for the corporation to be that of the duly elected board of directors rather than by second guessing by the courts.”)

5. See *supra* note 2.

6. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990), *aff’g* Para-

This "Time Culture" was a concept designed to impress upon the courts the authority of Luce's enduring legacy. In their brief in the Delaware Court of Chancery, Time's lawyers agreed with Paramount that "the [Time] board's concern over the 'Time Culture' 'permeates every aspect of this case.'"⁷ The section of their brief devoted to "Time and the 'Time Culture'" quoted the following congressional testimony by Time's CEO: "[i]n the six decades of its existence Time Inc. has never wavered from Luce's vision of excellence."⁸ Time also argued that its directors were properly concerned for "the possible loss of 70 years of journalistic independence."⁹ Time's brief in the Delaware Supreme Court spoke of the directors' concern for the erosion of Time's "tradition of editorial integrity."¹⁰

The Delaware Supreme Court did not endorse Time's claimed historical continuity; it defined the Time Culture only as Time's "perceived editorial integrity in journalism."¹¹ However, the Delaware Supreme Court recognized implicitly the existence of the Time Culture and the legitimacy of defending it.¹² The Court acknowledged that Time's managers and directors had acted zealously "in seeing to the

mount Communications, Inc v. Time, Inc., C.A. No. 10866, slip op. (Del. Ch. July 14, 1989). Time had decided to merge with Warner, and as originally devised, both Warner's and Time's shareholders had to approve the transaction by majority vote. Shortly before the Time shareholders were to vote, Paramount offered to buy Time at a significant premium, \$175 per share, an offer which Time's directors considered a threat to the "retention of the 'Time Culture.'" 571 A.2d at 1148. Time rejected Paramount's offer and recast its transaction with Warner as an acquisition, thereby avoiding a vote by Time's shareholders "while retaining the Time identity and culture." *Id.* at 1149. Paramount raised its bid to \$200 per share, which Time's board also rejected, in part because the bid "pose[d] a threat to Time's survival and its 'culture.'" *Id.* Paramount and various Time shareholders brought suit to prevent the Time-Warner transaction from going forward and to allow Paramount to acquire Time. Both courts rejected plaintiffs' claims.

7. Brief for Time Defendants at 30, *Paramount Communications, Inc.* (C.A. No. 10866) (quoting Brief for Plaintiffs at 1).

8. Brief for Time Defendants at 15, *Paramount Communications, Inc.* (C.A. No. 10866) (quoting Joint Testimony of J. Richard Munro and Steven J. Ross before the Subcommittee on Economic and Commercial Law, Committee on the Judiciary, U.S. House of Representatives 2 (March 14, 1989) [hereinafter "Munro and Ross Testimony"]).

9. Brief for Time Defendants at 147, *Paramount Communications, Inc.* (C.A. No. 10866).

10. Answering Brief of Time Appellees at 8, *Paramount Communications, Inc.*, 571 A.2d 1140.

11. *Paramount*, 571 A.2d at 1152.

12. The call for an explicit endorsement has since been made. See John W. Teague, *Does Corporate Culture Justify Defensive Measures to Takeover Attempts?*, 42 BAYLOR L. REV. 791 (1990). Teague argues that the Time-Warner decision was based on deference to Time's strategic plan, not the Time Culture. However, as noted repeatedly by the Court, Time's directors justified the plan on the ground that it preserved the Time Culture

preservation of Time's 'culture.'"¹³ The Court also found that Time's directors favored an acquisition of Warner over acquisition by Paramount in part because the former alternative maintained the Time Culture through the negotiated succession of a Time CEO.¹⁴ These findings, combined with the outcome of the case, form an implicit legal rule. So long as management desires to perpetuate the corporation, and maintains an orderly succession of CEOs to lead it, the corporation is deemed to possess a culture, an elixir rendering the corporation impervious to death, even if the corporation's form and purpose have been transformed beyond recognition.¹⁵

The Delaware Supreme Court may have recognized the existence of a Time Culture, but no other business corporation had undergone as profound a cultural transformation. Not only had Time reorganized internally, it had changed sides in the perpetual war amongst world cultures, or *Kulturkampf*, leading Time to invert the historic relationship between corporations and culture.

The concepts of culture and *Kulturkampf* require definition. In the normative theory of culture I employ in this Article, that of the sociologist Philip Rieff, culture is a matrix of institutions and symbols that translate the commands of invisible sacred orders into habitable social orders. Each culture constantly recreates its own symbolic world and, in doing so, disarms its competitors. This process is known as *Kulturkampf*, a German conflation loosely translated as culture struggle or culture war. Chronologically, the *Kulturkampf* has been fought within and among cultures of three world types. The first worlds were the various pagan cultures that once covered the globe but no longer exist in the West. The second worlds are the monotheistic cultures that arose out of Jerusalem—Judaism, Christianity, and Islam. The third worlds are the ideological movements of modernity, which reject sacred order and the mediating function of culture. Third worlds assert their own authority, recycling pagan motifs of primordality to manifest their opposition to sacred order and its derivative authorities.¹⁶

13. 571 A.2d at 1152.

14. *See id.* at 1145, 1148-49.

15. This rule is consistent with *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), which held that a corporation is no longer inviolable once its management relinquishes the power to appoint future CEOs.

16. *See* Philip Rieff, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Burt's Legal Fictions*, 3 *Yale J.L. & Human.* 315-17, 326 (1991) [hereinafter Rieff, *Newer Noises of War*]. *See also* PHILIP RIEFF, *FELLOW TEACHERS: OF CULTURE AND ITS SECOND DEATH* xiv-xvii (2d ed. 1985) [hereinafter RIEFF, *FELLOW TEACHERS*]; PHILIP RIEFF, *THE*

For example, the God of second worlds prohibits murder and profanity. These prohibitions are transmitted, or mediated, by cultural institutions, chiefly the corporate bodies of family, church, and school. Second world business corporations perform a subordinate cultural role, seeking economic benefits for their individual members, but doing so without transgressing boundaries of conduct established by the surrounding culture.¹⁷

Time Warner is no such second world corporation. Controversies surrounding it since its creation attest to the *Kulturkampf* itself and Time Warner's place in it. Most recently, in the spring of 1995, then-Senate Majority Leader Robert Dole and former Secretary of Education William Bennett each attacked the entertainment industry generally, and Time Warner specifically, for polluting American culture.¹⁸ Only three years earlier, Time Warner had come under attack when its subsidiaries released Ice-T's record album, *Body Count*, containing the self-explanatory "Cop Killer" and the sexually explicit "KKK Bitch,"¹⁹ and Madonna's photojournalistic *Sex*.²⁰

Charlton Heston denounced "Cop Killer" at Time Warner's annual shareholders' meeting,²¹ Philadelphia's municipal pension fund an-

TRIUMPH OF THE THERAPEUTIC xii-xiii (2d ed. 1987) [hereinafter RIEFF, TRIUMPH OF THE THERAPEUTIC]; Philip Rieff, *Aesthetics of Authority: Sacred Order/Social Order Before Tocqueville and After* (1990) (manuscript at 3-5, on file with the author) [hereinafter Rieff, *Tocqueville*]. Rieff's unpublished magnum opus is entitled *Sacred Order/Social Order*, the "I" symbolizing the mediating function of culture.

17. EDWARD SHILS, *TRADITION* 175 (1981). Shils' concept of "substantive tradition" resembles the Rieffian definition of culture; both terms describe a mediating matrix of institutions. See *id.* at 184-85. Unlike Shils, Rieff specifies that culture mediates sacred order, the commands of highest authority.

18. See generally the following articles in an issue of *Time* magazine devoted to "America's Cultural Revulsion": Richard Lacayo, *Violent Reaction*, *TIME*, June 12, 1995, at 25; *Tough Talk on Entertainment*, *TIME*, June 12, 1995, at 32; Richard Zoglin, *A Company Under Fire: Targeted as the Chief Cultural Offender, Time Warner Struggles to Define Itself*, *TIME*, June 12, 1995, at 37.

19. Lyrics to "Cop Killer" include: "I got my brain on hype/Tonight'll be your night/I got this long-assed knife/and your neck looks just right/ . . . /Die, die, die pig, die/F— the police!" "KKK Bitch" contains the lyrics "I love my KKK Bitch, love it when she sucks me. I love my KKK bitch, love it when she f— me So what we really tryin' to say is Body Count loves everybody If you from Mars and you got a pussy, we will f— you." ICE T, *BODY COUNT* (Warner Records 1992).

20. See generally Richard M. Clurman, *Pushing All the Hot Buttons*, *N.Y. TIMES*, Nov. 29, 1992, at C1 (discussing the two controversies, in addition to those over Oliver Stone's *J.F.K.* and Spike Lee's *MALCOM X*, both produced by Warner Brothers).

21. Mr. Heston's statement was reprinted in Charlton Heston, *Just A Song?*, *NATIONAL REVIEW*, Aug. 17, 1992, at 37.

nounced plans to sell \$1.6 million of Time Warner stock,²² a Texas law enforcement association protested the inclusion of the song on the album, and Vice President Dan Quayle called for the removal of *Body Count* from record stores.²³

More significant than the products or the attacks was Time Warner's reaction. Time Warner removed "Cop Killer" from the record album²⁴ and ultimately released Ice-T from his recording contract.²⁵ But before taking those steps, Time Warner Chairman Gerald Levin defended Ice-T by delivering the following corporate credo: "Whatever the medium—print, film, video, programming, or music—we believe that the worth of what an artist or journalist has to say does not depend on preapproval from a government official or a corporate censor or a cultural elite of the right or of the left."²⁶ Levin proclaimed a similar Time Warner credo when defending Madonna: "Time Warner is a home for journalists and artists who have significant messages to tell. They do it with journalistic and artistic integrity. Time Warner will finance, support and disseminate their work. That's what the company is."²⁷ In proclaiming Time Warner's obligation to resist censorious cultural elites and propagate Ice-T's imaginings of a world in which criminals are agents of racial justice, Gerald Levin declared that the world's largest media corporation stood squarely with the third world in the present *Kulturkampf*.²⁸

22. *Time Warner's Hard Line Takes Hits*, WALL ST. J., July 23, 1992, at B2.

23. J. D. Considine, *Changing Their Tunes*, BALT. SUN, July 5, 1995, at 1D.

24. Sheila Rule, "Cop Killer" To Be Cut From Ice-T Album, WALL ST. J., July 29, 1992, at C15.

25. Sheila Rule, *Ice-T and Warner are Parting Company*, WALL ST. J., Jan. 29, 1993, at C6. Controversy over Time Warner's involvement in producing gangsta rap remained, however. After disassociating itself from Ice-T, Time Warner increased to \$100,000,000 its investment in a record label that distributed gangsta rap, leading former Secretary of Education Bennet and Chairwoman of the National Political Congress of Black Women, C. Dolores Tucker, to organize protests against Time Warner. Eben Shapiro & Jeffrey A. Trachtenberg, *Ads Denounce Time Warner for Rap Music*, WALL ST. J., May 17, 1995, at B1. Soon after the protests Time Warner sold its investment in the record label, but also announced that it would continue to produce gangsta rap through Warner Music. Jeffrey A. Trachtenberg, *Time Warner Sells Its 50% Interest in Record Label Under Fire for Rap*, WALL ST. J., Sept. 28, 1995, at B-9; Mark Landler, *Time Warner to Sell Stake in Rap Label*, N.Y. TIMES, Sept. 28, 1995, at D-20.

26. *Art, Ideas, and Ice-T*, NATIONAL REVIEW, Aug. 17, 1992, at 17 (quoting Gerald Levin).

27. Clurman, *supra* note 20, at C1 (quoting Levin).

28. Time Warner did not stand alone. The Recording Industry Association of America, Inc., representing sixty-four record companies, took out an advertisement supporting Time Warner's position. See USA TODAY, July 17, 1992, at A14. Of nine chief executives whose views were summarized by *The Wall Street Journal*, five condemned Time Warner. See *Time Warner's*

A mere generation ago, Time Inc. engaged the *Kulturkampf* on behalf of the second worlds. Then, Time was publishing the words of Winston Churchill²⁹ rather than images of Madonna,³⁰ and the corporation was led by Henry Luce, a faithful Presbyterian who silently prayed every morning as he rode alone in the elevator taking him to his office atop the Time/Life building.³¹ Luce had enlisted Time's editors and managers in a fight against a third culture foe: "I propose to you that we of Time Inc. now register in our minds and wills that from here on out the dominant aim of Time Inc. shall be the defeat of the Communist movement throughout the world."³² Luce did not permit journalists to write what they pleased. Luce saw Time's mission as mediating sacred truth: "the truth will be made plain by wrath if not by reason [but] it is our job to help the truth prevail by reason"³³ As he summarized his personal philosophy, and thus that of Time Inc.:

I am a Protestant, a Republican and a free-enterpriser. . . which means I am biased in favor of god, Eisenhower and the stockholders of Time Inc.—and if anybody who objects doesn't know this by now, why the hell are they still spending 35 cents for each magazine?³⁴

Luce understood that he was using the corporation to wage a *Kulturkampf*, a war which is fought first with words: "Now of course we . . . do not have the means to wage war as Francis Drake did. . . . However, unlike the 16th century, ours *is* an age of journalism—and at least on that battleground we can do some service."³⁵ Luce also understood that the courtroom was another battleground for a *Kulturkampf*.³⁶ In a speech given to lawyers, Luce proclaimed that "the laws of this country and of any other country *are* invalid and will be in fact inoperative except as they conform to a moral order which is universal in time and space."³⁷ Since Justice Holmes would have found that state-

Hard Line Takes Hits, *supra* note 22.

29. See W.A. SWANBERG, *LUCE AND HIS EMPIRE* 342, 365 (1972).

30. Deborah Russell, *Madonna Saddles Time Warner Deal*, *BILLBOARD*, May 2, 1992, at 1.

31. SWANBERG, *supra* note 29, at 303.

32. *Id.* at 414 (quoting Luce).

33. *Id.* at 305 (quoting Luce).

34. *Id.* at 383 (quoting Luce).

35. *Id.* at 414 (quoting Luce).

36. Rieff, *Newer Noises of War*, *supra* note 16, at 326.

37. SWANBERG, *supra* note 29, at 307-08 (quoting Luce).

ment “untrue, irrelevant and even dangerous,” Luce concluded: “lawyers have one urgent task more important than all others—to reverse Mr. Justice Holmes—and to do so for the sake of The Law itself”³⁸

This Article is my second effort to examine how legal doctrine has been affected by the modern *Kulturkampf*. The effect is most transparent in constitutional law. In an earlier article I analyzed Justice Brennan’s obscenity opinions. Early in his career, Justice Brennan had interpreted the First Amendment in light of second world prohibitions; he later fought for constitutional protection of transgressive speech, and ultimately adopted a third world theory of culture.³⁹ Due in part to the evolution in Justice Brennan’s interpretation of the Constitution, Time Warner now profits from products once illegal to distribute. My thesis here is that Time Warner owes its existence to a *Kulturkampf* in corporation law. Just as Justice Brennan and the managers of Time came to embrace third world culture, so, too, did the Delaware Supreme Court in its implicit recognition of the Time Culture.

The *Time-Warner* decision confounds second world law by respecting Time’s corporate personality (*i.e.*, its “identity and culture”⁴⁰) after Time had ceased serving its mediating, cultural function. In the second worlds, corporations are not true persons, but mediating institutions between God and the individual. Personality entails a relationship with highest authority⁴¹; it is a vertical range of possibility along which an individual can raise himself by acting in conformity with God’s commands or can descend through transgression.⁴² Corporations can be a means of ascent for individuals, but they are not themselves inviolable persons. This distinction is an innovation from pagan law, in which the tribe, not the individual, was the primary subject of rights and duties.⁴³ The sixth century Christian theologian Boethius defined “person” as “the individual subsistence of a rational nature,” a definition that expressed the impossibility of a person being anything other than an individual under God.⁴⁴

38. *Id.* at 308 (quoting Luce).

39. Joel E. Friedlander, Comment, *Constitution and Kulturkampf: A Reading of the Shadow Theology of Justice Brennan*, 140 U. Pa. L. Rev. 1049, 1095-1110 (1992).

40. See *supra* note 3.

41. Rieff, *Newer Noises of War*, *supra* note 16, at 317 (citing *Exodus* 3:14); Rieff, *Tocqueville*, *supra* note 16, at 6, 15-16 (citing *Genesis* 1:26-27).

42. Rieff, *Newer Noises of War*, *supra* note 16, at 317.

43. See CLEMENT C. J. WEBB, *GOD AND PERSONALITY* 39-51 (1919).

44. *Id.* at 47-48; see also John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655, 665-66 (1926) (discussing how Aquinas defined “person” as a “rational

Second world law recognizes corporate personality, either as a legal fiction, an invention of the law for the convenience and benefit of individuals, or as a social fact.⁴⁵ In either case, corporate personality follows from the corporation's mediating function; through incorporation individuals can achieve a sanctioned object, whether economic, moral or intellectual.⁴⁶ To take but one formulation of the doctrine, in *Dartmouth College v. Woodward*,⁴⁷ Chief Justice Marshall wrote that the law endows a corporation with the properties of "immortality, and if the expression may be allowed, individuality By these means, a perpetual succession of individuals are capable of acting for the promotion of *the particular object*, like one immortal being."⁴⁸ Chief Justice Marshall's corporations are not themselves individuals or immortal beings. To retain its corporate personality, Dartmouth College had to pursue its historic object, and remain a private college.

In allowing Time's managers to pursue the immortality of the Time Culture, over the objection of its shareholders, the *Time-Warner* decision untethers the corporation from its limited, mediating function. The phrase "Time Culture" signifies that Time's purpose had become the pursuit of its own survival, without reference to the external culture or the corporation's economic function. At the time of its combination with Warner, Time had ceased devoting itself to uncovering the truth underlying the week's news,⁴⁹ and it had subordinated the interests of

individuated substance").

45. Scholars have stressed one theory of corporate personality or the other, but the historical record is equivocal. See SIR FREDERICK POLLOCK, *Has the Common Law Received the Fiction Theory of Corporations?*, in SIR FREDERICK POLLOCK, *JURISPRUDENCE AND LEGAL ESSAYS* 212 (A.L. Goodhart ed., 1961) (1911); see also HAROLD J. BERMAN, *LAW & REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 220 & 607 n.45 (1983) (discussing the debate over whether the medieval canonists adopted a fictionist or realist conception of the corporation).

46. See CLEMENT C. J. WEBB, *DIVINE PERSONALITY AND HUMAN LIFE* 151-54 (1920); WEBB, *supra* note 43, at 48-49.

47. 17 U.S. (4 Wheat.) 517 (1819).

48. 17 U.S. at 636 (emphasis added). The idea that corporations are mediating institutions prevailed in Marshall's era. As Alexander Hamilton stated, "[a]n incorporation seems to have been regarded as some great, independent substantive thing; as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a quality, capacity, or means to an end." GERALD CARL HENDERSON, *POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 22 (1918) (quoting Hamilton). Even those who saw corporations as something more tangible recognized their mediating function: "Charters [of incorporation] are rendered sacred . . . by the objects for which they are given." *Id.* at 19 (quoting a contemporary of Hamilton).

49. See, e.g., Patrick M. Reilly, *The Instant-News Age Leaves Time Magazine Searching for*

its shareholders to the claims of the corporate body itself.

Time's assertion of the corporation's independent right to maintain its existence may have departed from the second world doctrine laid down by Boethius and in *Dartmouth College*, but it comported with recent commentary⁵⁰ and culminated the century-old creation of third world corporation law. In the late nineteenth century, the eminent German legal historian Otto Gierke⁵¹ theorized that when individuals unite, spiritually and psychologically, for a common purpose they create a separate, living person that has a will of its own. Gierke's theory became widely influential in American thinking about the modern corporation, largely through the efforts of Gierke's English-speaking translators and interpreters, among them Harold Laski and Ernst Freund.⁵² Laski advanced the idea that corporations do not derive their authority from any singular highest authority, while Freund observed that corporate management had come to represent the psychological unity of the corporation. Simultaneously, other theorists argued that lawyers need not concern themselves with the question whether corporations are persons.⁵³

These ideas are each antecedents of the Time Culture. Where Time was once a second culture corporation mediating God and the in-

a Mission, WALL ST. J., May 12, 1993, at A1 (describing how the redesign of *Time* in 1988 caused it to become, in the words of former *Time* senior writer Roger Rosenblatt, "almost an anti-newsmagazine"); Warner Board Minutes, Mar. 3, 1989, at 26; Luce Dep. Ex. 11, in *Paramount Communications, Inc.* (C.A. No. 10866) (describing presentation by Warner financial advisor Felix Rohatyn, who said the merger of the *Time* and Warner cultures had only recently become possible, since "Time is now an entertainment company").

50. Two leading practitioners/commentators write that satisfying shareholders and the public is the means by which the corporation achieves its "fundamental purpose . . . immortality," reversing Chief Justice Marshall's conception. Winthrop Knowlton & Ira M. Millstein, *Can the Board of Directors Help the American Purpose Earn the Immortality It Holds So Dear?*, in *THE U.S. BUSINESS CORPORATION: AN INSTITUTION IN TRANSITION* 169, 170-71 (John R. Meyer & James M. Gustafson eds., 1988).

51. Gierke was a leading protagonist of the Historical School of German jurisprudence in the late nineteenth century. Portions of his four-volume magnum opus, *DAS DEUTSCHE GENOSSENSCHAFTSRECHT*, have been translated into English. See OTTO GIERKE, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES* (George Heiman trans. & ed., 1977) [hereinafter GIERKE, CLASSICAL]; OTTO GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGE* (Frederic W. Maitland trans., 1900) [hereinafter GIERKE, MIDDLE AGE]; OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* (Ernest Barker trans., Beacon Press 1957) (1934) [hereinafter GIERKE, 1500-1800].

52. Gierke's influence upon English and American debates over corporation law is discussed in Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1464-78 (1987).

53. See *id.* at 1480 (citing HENDERSON, *supra* note 48, and Dewey, *supra* note 44).

dividual, the Time Culture expresses the continuing allegiance of Time's managers to their own conception of the corporate entity.

Contemporary management theory provides a complementary source for third world corporation law. The corporate culture literature⁵⁴ defines a "corporate culture" as the combination of symbols that unite a corporation's employees.⁵⁵ Leading corporate culture theorists have written that "[c]ulture is to the organization what personality is to the individual—a hidden, yet unifying theme that provides meaning, direction, and mobilization."⁵⁶ Corporate survival depends on a "president/CEO [who] is truly committed" to "cultural change tactics."⁵⁷ To that person and goal the courts will show deference. Proper management of the corporate culture allows employees to retain their identification with the corporation even as management transforms the corporation's assets.⁵⁸

As Rieffian theory predicts, this third world doctrine of the inviolable corporation recycles motifs of first world corporation law as it attacks the second culture conception of the corporation as mediating institution.⁵⁹ Sir Henry Maine wrote that in "ancient law" (first world law), unlike "developed jurisprudence" (second world law), corporations "*never die*."⁶⁰ For the ancients, the fundamental legal unit was the family, which connected all forebears and descendants by the primordial

54. See, e.g., TERRENCE E. DEAL & ALLAN A. KENNEDY, *CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE* (1982); *GAINING CONTROL OF THE CORPORATE CULTURE* (Kilmann, Saxton, Serpa & Assocs. ed., 1985) [hereinafter *GAINING CONTROL*]; LARRY F. MOORE ET AL., *ORGANIZATIONAL CULTURE* (1985) [hereinafter *ORGANIZATIONAL CULTURE*]. See also JACK HRADESKY, *TOTAL QUALITY MANAGEMENT HANDBOOK* 7, 129-76 (1995) (emphasizing "cultural change tactics" and devoting a chapter to the "cultural track").

55. See, e.g., DEAL & KENNEDY, *supra* note 54, at 4.

56. *Preface* in *GAINING CONTROL*, *supra* note 54, at ix, ix. See also *Conclusion: Why Culture is not Just a Fad*, in *GAINING CONTROL*, *supra* note 54, at 421, 422 ("culture is the social energy that drives—or fails to drive—the organization").

57. HRADESKY, *supra* note 54, at 3, 9.

58. See, e.g., W. Brooke Tunstall, *Breakup of the Bell System: A Case Study in Cultural Transformation*, in *GAINING CONTROL*, *supra* note 54, at 44, (discussing how interest in the concept of organizational culture coincides with a decade of "cultural evolution in corporate America" because cultures can be changed to make them consonant with a corporation's strategy).

59. The pagan connotations of modern corporate law doctrine have not been lost on some scholars. See, e.g., I. MAURICE WORMSER, *DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS* 24 (1927) ("[The fiction] must not be worshipped in the way savages worship . . . an ornamental totem . . ."); Charles L. Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778 (1952).

60. See MAINE, *supra* note 1, at 122.

bond of blood.⁶¹ Rule over the family descended from patriarch to patriarch, a legal operation that formed the basis for the pagan law of persons.⁶² In third world corporations, deference to the CEO's management of the corporate culture allows control to descend from successor to successor, bypassing shareholder election whenever possible.⁶³

The subsequent sections of this Article draw out these themes. In Section I, I analyze the two Time-Warner opinions, with special emphasis on how the Court of Chancery and the Delaware Supreme Court addressed the concept of the Time Culture. In Section II, I contrast the legal fiction underlying Maine's theory of the perpetual ancient corporation with the calculated falsehoods that sustain corporate culture theory. Section III discusses the intellectual origins of third world corporation theory, with extended discussions of Otto Gierke, Harold Laski and Ernst Freund, among others. In Section IV, I look to second world sources to elaborate a second world alternative to the corporate culture conception of corporate governance. Each section draws upon the insights of Rieffian sociology and the history of Time Inc.

I. DEFERRING TO THE TIME CULTURE

In 1989 the Delaware courts assessed whether Time's directors were entitled to continue the corporation's existence over the objection of its shareholders. Chancellor William T. Allen heard the case at the trial level, and Justice Henry P. Horsey wrote the opinion for the Delaware Supreme Court. Both decisions permitted Time to acquire Warner, a transaction attacked by Paramount, which wanted to acquire Time. Before Paramount made those intentions known, Time and Warner had agreed to merge. The original merger proposal and the eventual acquisition both contemplated that a new company, Time Warner, would be created. Time Warner's board of directors would be composed of twelve Time directors and twelve Warner directors, the CEOs of Time and Warner would share power, but Warner's CEO, Steven J. Ross, promised to allow Time's N.J. Nicholas, Jr. to become sole CEO of Time Warner five years hence. Both court decisions discussed the de-

61. *Id.* at 124.

62. *Id.* at 147 ("It may be shown, I think, that the Family, as held together by the Patria Potestas, is the nidus out of which the entire Law of Persons has germinated.")

63. In *Time-Warner*, the proposed merger of Time and Warner required shareholder approval under New York Stock Exchange rules. After Paramount made its offer, Time recast the combination as an acquisition, which did not require shareholder approval. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 21-22, 37.

sire of Time's directors to protect the Time Culture; neither mentioned Time's founder and long-time Editor-in-Chief, Henry Luce. This notable omission, when combined with the dimensions of Time's planned transformation, leaves open the question of what was being protected at Time besides the careers of its most prominent managers. In this section I discuss how the courts addressed the issue of the Time Culture within the doctrinal confines of Delaware's corporation law.

A. *The Chancery Court Opinion*

The facts of the case, as the Chancellor described them, tell much about the Time Culture that Time's board of directors claimed to be protecting, the Chancellor's skepticism toward that claim, but his unwillingness to base his decision on that skepticism. His opinion first notes that Time was no longer a company dominated by its famous magazines—*Time*, *People*, *Fortune*, and *Sports Illustrated*—or by its publishing activities, which included The-Book-of-the-Month Club, Time Life Books, and Little, Brown & Co. Time had “evolved” and had “tended to reinterpret its mission.”⁶⁴ Though founded as a “journalistic enterprise,”⁶⁵ video entertainment had become increasingly important to Time. Time owned cable television networks and franchises and was looking to acquire the capability to produce video entertainment and compete on a global scale.

The Chancellor reported, however, that the “transcendent aim” of Time's board of directors and management was for Time to remain independent and to continue the “Time culture.”⁶⁶ The Chancellor defined the Time Culture as “pride in the history of the firm — notably Time magazine and its role in American life — and in part a managerial philosophy and distinctive structure that is intended to protect journalistic integrity from pressures from the business side of the enterprise.”⁶⁷

Both elements of the Time Culture are the residue of Henry Luce's previous leadership of the company. Under Luce, Time magazine became the dominant influence upon American public opinion. By 1989,

64. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 8.

65. *Id.*

66. *Id.* at 9-10.

67. *Id.* at 10. That definition is supported by five citations to the record, including a page of director Arthur Temple's deposition in which he testified of his distress that Time was headed in a direction “absolutely counter to everything that [Henry Luce] had conceived.” Temple Dep. at 116, *Paramount Communications, Inc.* (C.A. No. 10866).

Time's influence had waned, which may explain why the company then prided itself on past accomplishments. Luce had also devised the corporate structure for Time Inc. known as "the church/state relationship."⁶⁸ Time's journalists composed the church, and its business people were the state. Luce presided over both, but when he retired, he handpicked two successors, an Editor-in-Chief and a CEO, to work together and dominate their respective spheres.⁶⁹ The separation of church and state was formalized in 1978, when the board of directors ratified a document entitled "Role of the Editor-in-Chief," which provided that the Editor-in-Chief would sit on the board of directors, report only to the board as a whole, pick his own successor, be solely responsible for the contents of the magazines, and intervene whenever non-publishing activities seemed to conflict with editorial positions of the company's publications, and their standards of ethics and taste.⁷⁰ In the years leading up to the merger, however, the clout of the Editor-in-Chief had withered compared to that of the CEO; the Editor-in-Chief's responsibilities extended no further than the magazines, which became an increasingly smaller part of the entire company.⁷¹

The Chancellor did not discuss the historical context of the Time Culture. Instead, he distanced himself from the perspective of Time's board. He noted that "plaintiffs in this suit dismiss this claim of 'culture' as being nothing more than a desire to perpetuate or entrench existing management disguised in a pompous, highfalutin' claim."⁷² The Chancellor himself stated that "the indiscriminate recognition of 'corporate culture'" as a defense to hostile acquirors entailed "the risk of cheap deception."⁷³ He allowed, however, for the possibility that the law "might recognize as valid a perceived threat to a 'corporate culture' that is shown to be palpable (for lack of a better word) distinctive and advantageous."⁷⁴ He did not suggest that the Time Culture fit that characterization, although he noted that Time's board sought "to maintain a distinctive Time corporate culture" as it pursued its business

68. See CLURMAN, *supra* note 2, at 36.

69. *Id.* at 21.

70. McManus Aff. Paras. 7, 8, 11, *Paramount Communications, Inc.* (C.A. 10866); see CLURMAN, *supra* note 2, at 40.

71. CLURMAN, *supra* note 2, at 82-83, 103, 301.

72. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 10.

73. *Id.*

74. Taking this quote out of context, two authors imply that it represents the high water mark of corporate culture theory. See JOHN P. KOTTER & JAMES L. HESKET, *CORPORATE CULTURE AND PERFORMANCE* 9 (1992).

goals.⁷⁵

After noting that Time had equipped itself with “the full armory of defenses” to defeat a takeover,⁷⁶ the Chancellor presented the chronology of the board’s strategic thinking. The principal managers were J. Richard Munro, the chairman and CEO, N.J. Nicholas, Jr., the president and chief operating manager, and Gerald M. Levin, the vice chairman. For the previous two years they had been pursuing discussions with Steven Ross, the CEO of Warner, concerning a possible joint venture or merger. Ross had initiated those discussions. Management had also considered mergers with other movie studios, but thought Warner the best partner. Warner had a successful movie studio, compatible cable television operations, a strong music business, international scope, and an impressive CEO.⁷⁷ The Chancellor made no mention of the testimony that Warner had a compatible corporate culture.⁷⁸

The proposed merger with Warner was presented to Time’s twelve non-management directors in July 1988.⁷⁹ The Chancellor reports that all but one director agreed that a merger with Warner was feasible if it could be assured that Time’s Nicholas would eventually control the new company. As a “typical” director reasoned, control by Time managers was necessary for Time to remain “in control of its own destiny” and for Time’s magazines to “retain their editorial independence.”⁸⁰ The Chancellor observed that Time’s unique organizational structure protected “the ‘culture’ or value of journalistic independence which the corporation had found, historically, to have been economically advanta-

75. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 10-11.

76. *Id.* at 11.

77. *See id.* at 13.

78. In their joint written testimony before Congress, Ross and Munro stated: “Both companies share the same business philosophies and values.” Munro and Ross Testimony, *supra*, note 8, at 9; *see also* Munro Dep. at 226-27, *Paramount Communications, Inc.* (C.A. No. 10866) (“I think the reason that Time and Warner make sense [is that] both corporations give an awful lot of autonomy to their people. I think the tone that is set at the top is somewhat similar.”); Nicholas Dep. at 270, *Paramount Communications, Inc.* (C.A. No. 10866) (“[Paramount’s culture is] totally alien to that of Time Inc in contrast to that of Warner, which is a lot like Time Inc. in that it highly values creative people as a nurturing kind of company, and our belief is that the [Paramount] environment is a much harsher one.”).

79. The twelve consisted of ten present or former CEOs or chairmen of other corporations, one of whom, Clifton R. Wharton, Jr., was the chancellor of the State University of New York. The other two directors were Matina S. Horner, the former president of Radcliffe College, and Henry R. Luce III, son of the founder and president of The Henry Luce Foundation, which controlled 4.2% of Time stock. *See Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 15.

80. *Id.*

geous."⁸¹

At this point in his opinion the Chancellor questioned the economic justification for protecting the "journalistic integrity of Time and People magazines." He noted that Time's magazine business would contribute only 20-25% of the revenue of a merged Time Warner and that Warner likely thought "expressive freedom" to be important.⁸² The Chancellor wondered whether Time's directors had an ulterior motive.

If an ulterior motive existed, a likely suspect would be self-interest. Time's senior managers stood to garner long-term, multi-million dollar contracts unprecedented at Time Inc. plus millions in stock options.⁸³ The outside directors who stayed on at Time Warner would benefit from the increased prestige and perquisites of directing an immense entertainment conglomerate. Oddly, the Chancellor did not next examine the record for evidence of selfish motives.⁸⁴ Instead, he dismissed such concerns, pointing instead to the psychological motivations of the type discussed in the corporate culture literature:

There may be at work here a force more subtle than a desire to maintain a title or office in order to assure continued salary and perquisites. Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm. The mission of the firm is not seen by those involved with it as wholly economic, nor the continued existence of its distinctive identity as a matter of indifference.⁸⁵

This "[subtle] force" is the psychological dependence of the third world employee upon the corporation and its leader. In second cultures, identity or personality is derived from where the individual stands in relation to sacred order and its vertical of authority.⁸⁶ In the third culture, the individual of the Protestant ethic becomes the Organization

81. *Id.* at 15-16.

82. *Id.* at 16.

83. See Luce Dep. at 62-63, *Paramount Communications, Inc.* (C.A. No. 10866); CLURMAN, *supra* note 2, at 234-35; Peter Brimelow, *Corporate Culture*, COMMENTARY, Sept. 1992, at 60, 61 (reviewing CLURMAN, *supra* note 2).

84. Later in the opinion the Chancellor discussed the new management contracts received by Munro and Nicholas as a result of the Time-Warner transaction. See *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 43-44.

85. *Id.* at 16-17.

86. Rieff, *Newer Noises of War*, *supra* note 16, at 317-18.

Man,⁸⁷ who derives his identity from an organization forever in flux, as determined by the shifting imperatives of top management.

As the Chancellor noted earlier in his opinion, the "mission" of Time Inc. had changed. In 1989 Time was providing mass video entertainment; no longer did it primarily "supply[] information to a relatively educated market segment."⁸⁸ Merging Time and Warner would fulfill Time's new mission, not safeguard the old. As director Arthur Temple observed, if Time's mission was still that of Henry Luce, as declared in his will, the board should have sold the television subsidiaries and kept to the publishing business.⁸⁹ Nevertheless, the Chancellor did not cast doubt on the sincerity of those who thought it important for their identity and that of Time Inc. that a Time manager preside over a merged entity no longer named "Time" and no longer devoted primarily to journalism. Instead, the Chancellor perpetuated the notion that Time retained its old mission, by quoting the following passage from the affidavit of director Horner:

I am very concerned about the need to preserve Time's editorial freedom. I believe that editorial freedom free from political or other kinds of intervention is absolutely essential if members of our society are to be enlightened enough to form wise judgments and fulfill their responsibilities as citizens. I believe that the need to foster a literate and informed citizenry is the sine qua non of this nation's and the company's future.

. . . . The editorial integrity I value is also a tremendous source of value to the company and its stockholders.⁹⁰

"Thus," the Chancellor concluded, "while the record suggests that the 'Time culture' importantly includes directors' concerns for the larger role of the enterprise in society," there was no basis to conclude that the board had ignored or sacrificed its duty to the shareholders of maximizing profits.⁹¹

Having put a charitable construction upon the board's motivations,

87. See Philip Rieff, *A Character Wrecked by Success*, 24 *Partisan Review* 304 (Spring 1957) (reviewing WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* (1956)), reprinted in PHILIP RIEFF, *THE FEELING INTELLECT* 269 (1990).

88. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 8.

89. Temple Dep. at 53, *Paramount Communications, Inc.* (C.A. No. 10866).

90. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 17 (quoting Horner Aff. paras. 13, 14).

91. *Id.* at 17-18.

the Chancellor avoided reference to the Time Culture in his legal analysis. He sidestepped Time's argument that an acquisition by Paramount threatened the Time Culture, instead casting the legal issues in the case within the framework of economics. "[T]he heart of the matter," he said, was whether Time's board was authorized to choose not to maximize the value of the company's shares in the short run in the expectation that this choice would generate higher share values in the long run.⁹² Posing this question presumed that Time's board was in fact attempting to maximize Time's profits in the long run. The Chancellor stated that nothing in the record suggested the contrary, meaning that the directors' talk of preserving the Time Culture and informing America's citizens was both genuine and would redound to Time's bottom line at some unspecified date.⁹³ Because Delaware law permitted Time's board to plan for the long run, the Chancellor ruled that the board was entitled to reject Paramount's offer for Time and reformulate Time's merger with Warner.

In a speech published three years after the Time-Warner decision, the Chancellor disclosed that his short-term/long-term distinction is a device courts employ to preserve the dogma that corporations exist to maximize profits while approving corporate acts known to be unprofitable.⁹⁴ The speech stops just short of stating that the alternative to the short-term/long-term device is legal recognition of the "claim of 'culture'"⁹⁵ — the doctrine that corporations may pursue an end apart from profits, in particular, the preservation of the corporate culture:

Business corporations may strike you as a pale, perhaps even pathetic, source of the meaning and identity people achieve through community membership and interaction. That may be as it is, and it may be as well that any instinct to preserve existing corporate structures in order to protect meaningful membership in social groups, could be satisfied only at an un-

92. *Id.* at 46.

93. *See id.* at 46; *see also id.* at 76-77 (finding "no persuasive evidence that the board of Time has a corrupt or venal motivation" in keeping to its long-term plan).

94. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 272-75 (1992). The Chancellor observes that the distinction is least tenable in takeover cases, such as *Time-Warner*, where tender offers are made at prices significantly higher than the market price of the stock. *Id.* at 274-75 ("A second difference between the issues of the takeover era and those of the prior sixty years was that the short-term/long-term distinction was really of little analytical or rhetorical use in resolving the takeover issues.").

95. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 14.

acceptable cost to economic efficiency. But putting personal judgments aside, I suggest that anyone trying to understand how our law deals with corporations must have in mind that they are the locus of many conflicting claims, and not all of those claims are wholly economic.⁹⁶

It appears that despite the Chancellor's disparagement of corporate culture, and despite his own economics-based legal reasoning, his decision turned on his implicit recognition of the Time Culture. Time's board was entitled to forego economic gain if it meant preserving Time's "existing corporate structure[]" and thus the "identity" of Time's employees. This conclusion raises more questions than it answers. If a board may sacrifice profits to "preserve existing corporate structures," by what authority could Time acquire Warner and become Time Warner? How could Time redefine its "mission"? Is maintaining the succession of the CEO a sufficient condition for "protect[ing] meaningful membership in social groups"? Unless deference to the CEO is to become a first principle of corporate law, courts must examine the substance of competing cultural claims. The Chancellor may only have acknowledged the possibility of a "claim of 'culture'" in his decision, but his refusal to discuss that claim prevented him from articulating its legal limits.

In terms of legal doctrine, the Chancellor was careful to preserve the integrity of recent Chancery Court precedents that stressed the economic function of corporations. Those decisions stood for the proposition that directors could not foreclose shareholders from accepting offers for their stock made in cash at a reasonable price.⁹⁷ Time's

96. Allen, *supra* note 94, at 280. The title of the Chancellor's article—*Our Schizophrenic Conception of the Business Corporation*—refers to the coexistence of two models of the corporation, which the Chancellor calls "the property conception" and "the social entity conception," the latter of which prevailed in *Time-Warner*. The Chancellor thinks this schizophrenia to be normal. To him, there is no legally correct answer to the questions "What is a corporation?" and "For whose benefit do directors hold power?" *Id.* at 280-81. But as one scholar has noted, speaking more truthfully than he knew:

The theoretical challenge is to appreciate the strengths of each stance so that we can appropriate for law what Phillip Rieff observed about character: 'Character is the restrictive shaping of possibility.' To be realized, we must at some point make infinite possibility finite, reduced, channelled, and restricted—and give it expression in the form of doctrine.

Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 935 (1990) (citation omitted) (quoting Rieff). The question, of course, is what doctrine emerges from the *Kulturkampf* in corporation law, of which the Chancellor's schizophrenia is but a symptom.

97. See *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 28 (citing *Grand*

acquisition of Warner foreclosed acceptance of Paramount's all-cash offer, but the Chancellor distinguished these cases on the basis that Time was acting pursuant to a long-range business plan.⁹⁸ The old legal rule remained, but its scope was narrowed.

The Chancellor's conflation of profit maximization and long term corporate planning bears the hallmarks of a legal fiction, as famously defined by Henry Maine: "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged The rule of law remains sticking in the system, but it is a mere shell."⁹⁹ The Chancellor may not have *assumed* that the Time directors' were acting to maximize profits in the long-term, but by finding that there was "an insufficient basis to suppose" that the directors were ignoring their duty to maximize profits,¹⁰⁰ the Chancellor started from the *presumption* that the directors were obeying that duty. This is hardly surprising. Legal precedent dictated that Time's original plan to merge with Warner be reviewed by the Court under the business judgment rule, which presumes that directors act in good faith.¹⁰¹ The final words in the Chancellor's opinion describe Time's acquisition of Warner as the "effectuation of the board's business judgment."¹⁰² The power of the presumption of the business judgment rule apparently vitiated the Chancellor's doubts regarding the economic basis for maintaining the Time Culture.

By presuming that the Board's desire to preserve the Time Culture was equivalent to the goal of long-term profit maximization, the Chancellor demonstrated the truth of Lon Fuller's thesis that presumptions *are* legal fictions if they are not freely rebuttable, stated in realistic terms, and based in experience.¹⁰³ The Chancellor's discussion of the facts, coupled with his subsequent speech, suggests that the goals of preserving a corporate culture and maximizing profits are, in fact, inconsistent. Nevertheless, the Chancellor's prudent use of a legal fiction must be distinguished from an endorsement of preserving the

Metropolitan PLC v. The Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988), and City Capital Assocs. v. Interco, Inc., 551 A.2d 787 (Del. Ch. 1988)).

98. *Id.* Chancellor Allen noted that in *Grand Metropolitan* and *Interco* the boards foreclosed tender offers through the use of poison pills, securities created by the board which make disfavored tender offers prohibitively expensive. *Id.*

99. MAINE, *supra* note 1, at 25-26.

100. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 7.

101. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

102. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 30

103. *See* LON FULLER, LEGAL FICCTIONS 40-48 (1964).

actual (and therefore illegal) fiction of the Time Culture.

B. *The Supreme Court Opinion*

On appeal, a panel of the Delaware Supreme Court, speaking through Justice Horsey, rejected the Chancellor's short-term/long-term distinction and the Chancery Court precedents the Chancellor attempted to preserve.¹⁰⁴ In doing so, the Supreme Court came closer to endorsing explicitly the Time Culture defense advanced by Time.

The Court recognized the existence of the Time Culture, which it referred to on numerous occasions, and not always with the protection of quotation marks:

The primary concern of Time's outside directors was the preservation of the "Time Culture."¹⁰⁵

Several of Time's outside directors feared that a merger with an entertainment company would divert Time's focus from news journalism and threaten the Time Culture.¹⁰⁶

Time, and particularly its outside directors, viewed the corporate governance provisions as critical for preserving the "Time Culture" through a pro-Time management at the top.¹⁰⁷

Levin and outside director Finkelstein were the primary opponents of paying a [multibillion dollar] premium to protect the "Time Culture."¹⁰⁸

The board's prevailing belief was that Paramount's bid posed a threat to Time's control of its own destiny and retention of the "Time Culture."¹⁰⁹

[By acquiring Warner], Time was assured of its ability to extend its efforts into production areas and international markets, all the while maintaining the Time identity and culture.¹¹⁰

104. *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150-1152 (Del. 1990).

105. *Id.* at 1143 n.4.

106. *Id.*

107. *Id.* at 1145.

108. *Id.* at 1146.

109. *Id.* at 1148.

110. *Id.* at 1148-49.

The Time board maintained that the Warner transaction offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its "culture."¹¹¹

The record attests to the zealotry of Time's executives, fully supported by their directors, in seeing to the preservation of Time's "culture," i.e., its perceived editorial integrity in journalism.¹¹²

The Supreme Court also referred to Time as if it were a living person, speaking of "Time's objectives,"¹¹³ "Time's needs,"¹¹⁴ and Time's "well being."¹¹⁵ Most telling, the Court noted that Time's board had decided that Time must "expand to survive."¹¹⁶ By merging with Warner, Time could satisfy this primal imperative, which the corporation shares with both bacteriological cultures and high cultures.

If survival is a legitimate corporate goal and expansion is an approved means, then little separates that goal from the impermissible objective of managerial entrenchment. Self-interest becomes indistinguishable from discharging fiduciary duty, especially where the retention of top management is made a condition for corporate survival in a merger.

In earlier Delaware cases, such as *Cheff v. Mathes*¹¹⁷ and *Unocal Corp. v. Mesa Petroleum Co.*,¹¹⁸ the courts had framed the issues before them in terms of the undisclosed motivations of boards of directors. Were they motivated by a good faith concern for the corporation and its stockholders, or were they acting out of a desire to perpetuate themselves in office? Evidence was sifted and decisions were rendered, though unlikely assumptions became embedded in law under the business judgment rule.¹¹⁹ In *Time-Warner*, personal motivations go unmen-

111. *Id.* at 1149.

112. *Id.* at 1152.

113. *Id.* at 1154.

114. *Id.*

115. *Id.* at 1155.

116. *Id.* at 1152.

117. 199 A.2d 548 (Del. 1964).

118. 493 A.2d 946 (Del. 1985).

119. A leading commentator observes that, according to many, the *Unocal* Court reconciled the primary purpose test of *Cheff v. Mathes* and the business judgment rule by "being naive, perhaps willfully so, . . . in minimizing the conflict of interest affecting all takeover defenses."

tioned. The Supreme Court focused solely on Time's needs, objectives, survival, identity, and culture and the desire of Time's directors to see these needs fulfilled and the culture maintained. No suggestion was made that these aspirations were illegitimate.

The Supreme Court's legal analysis followed from the predicate that Time's directors represented a distinct, living being. The Court asked whether Time had "put itself up for sale" when it agreed to merge with Warner.¹²⁰ The Court then concluded that the merger had not "made the dissolution or break-up of the corporate entity inevitable," and did not constitute "an abandonment of the corporation's continued existence."¹²¹ No factual discussion supports these conclusions, but the conclusions themselves are consistent with the finding that Time's board strove to preserve Time's identity and culture. This minimalist conception of culture requires only that the corporation's top management remain in control of the company.

The Time Culture figured directly in the next question posed by the Court: whether Time's initial decision to merge with Warner was the "product of a proper exercise of business judgment."¹²² The Court chronicled Time's history, beginning with the period 1983-84. It was then that the board made "an exhaustive appraisal of Time's future as a corporation"¹²³ and reached the fateful decision that the corporation had to "expand to survive, and beyond journalism into entertainment"¹²⁴ By 1987 the board had focused on Warner, and a year later the board became convinced that a deal with Warner best suited Time's objectives. Time's managers and directors had worked zealously to preserve Time's culture. Thus, the board's decision to merge with Warner was entitled to the protection of the business judgment rule.¹²⁵

ROBERT CHARLES CLARK, *CORPORATE LAW* 586 (1986). But as early as *Cheff v. Mathes*, the Delaware Supreme Court held that directors satisfied their burden of proof merely "by showing good faith and reasonable investigation," 199 A.2d at 555 (Del. 1964), reversing Vice-Chancellor Marvel, who reasoned: "I have concluded that . . . the actual purpose behind the purchases of its own stock . . . was to preserve corporate control in the hands of interested incumbents. In short, the contrary evidence adduced by defendants lacks conviction." *Mathes v. Cheff*, 190 A.2d 524, 529 (Del. Ch. 1963).

120. 571 A.2d at 1150.

121. *Id.*

122. *Id.* at 1151.

123. *Id.* at 1151-52.

124. *Id.* at 1152.

125. *Id.* at 1152. A subsequent review suggests that Time's strategy was less focused. In early 1982 a group of Time managers and outside management consultants prepared a report which diagnosed that Time was suffering from an "identity crisis." CLURMAN, *supra* note 2, at

The Court then reached the final legal issue: whether Paramount's offer "posed a threat to corporate policy and effectiveness"¹²⁶ and whether Time's proposed acquisition of Warner "was a reasonable response in relation to the perceived threat."¹²⁷ The Court rejected the idea that an offer must be inadequately priced to threaten an offeree. Time's board had concluded that Paramount's offer posed "other threats."¹²⁸ What were these "other threats"? The Court mentioned only the danger that Time shareholders would forego the benefits of the Warner deal out of ignorance or mistake, especially since the Paramount offer may have been designed to confuse them.¹²⁹

The argument is strained. First, the Chancellor had rejected aspects of it out of hand, reasoning that Time was acting to salvage a Time-Warner transaction, not to save the shareholders from confusion or deception regarding that transaction.¹³⁰ More important, Justice Horsey had noted earlier that Paramount's offer was considered a "threat to . . . retention of the 'Time Culture.'"¹³¹ For whatever reason, the Court did not discuss this threat. Given what the Court did write, no discussion was needed regarding whether a board may protect a corporation's identity or culture. The board's task was made to sound like that of a therapist, to allow Time to adjust to changing circum-

70. One third of the company was devoted to publishing, another third to cable television and video programming, and the final third to forest products. The report suggested selling the forest products business, which Time then did. *Id.* at 71. Time then decided to invest its cash in new magazines, but only one was launched, TV-Cable Week, and it failed, costing Time \$100 million. *Id.* at 74-77. Management consultants and managers then churned out various reports recommending contradictory acquisition plans and internal reorganizations. *Id.* at 83, 85. Negotiated acquisitions of various media companies were pursued, but none came close to being consummated. *Id.* at 86-92. In a memorandum dated August 11, 1987, Gerald Levin hatched a strategic plan—the eventual consolidation of Time, Warner, and Turner Broadcasting System. Levin's memo warned that Time's senior management and the board did not then support a merger with an entertainment company; it also stated that Paramount (then named Gulf + Western) was the only feasible alternative to Warner. Munro Dep. Ex. 11; *Paramount Communications, Inc.* (C.A. No. 10866); CLURMAN, *supra* note 2, at 151-52. In May 1988, another of Time's mid-level strategy groups met. Its draft report recommended investment in video programming. Levin and Munro seized on that report to convince Time's board that merger negotiations with Warner should be pursued. *Id.* at 156-64. After some persuasion, and with significant reservations, the board agreed. *Id.* at 154-56.

126. 571 A.2d at 1153 (1990).

127. *Id.* at 1154.

128. *Id.* at 1153.

129. *Id.*

130. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 14.

131. 571 A.2d at 1148, 1149 (1990).

stances without jeopardizing Time's "wellbeing"¹³² or, at a minimum, to defend against external mortal threats without breaking apart.

The Chancellor had implied that individual directors, managers, and employees have legitimate concerns for the psychological and social coherence of corporate life. But where the Chancellor based his decision on applied financial economics, the Supreme Court incorporated into its legal analysis the psychological, spiritual, or quasi-biological imperatives of the corporation itself. These imperatives were then reinterpreted as legal obligations, based on the directors' "broad mandate" "to manage the business and affairs of the corporation."¹³³ Nowhere in the Court's opinion is it acknowledged that directors, as fiduciaries, are moral agents whose ambitions must be circumscribed by their obligations to shareholders, or that the corporation itself has limited purposes, the achievement of which may require something other than extending its legal existence.¹³⁴

C. *An Alternative Approach to the Time Culture*

Neither the Chancery Court nor the Supreme Court developed a theme raised in the plaintiffs' briefs, that the supposed preservation of the Time Culture was little more than the culmination of certain Time careers.¹³⁵ Neither court examined how the terms of the proposed merger preserved the Time Culture. Instead, both courts looked at how the proposed merger affected Time's ownership structure, and found that the transaction did not constitute a "change of control" of Time: "aside from legal technicalities and aside from arrangements thought to enhance the prospect for the ultimate succession of Mr. Nicholas, neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market."¹³⁶ This legal rule contradicts a fundamental fact of modern corporate gover-

132. *Id.* at 1155.

133. *Id.* at 1150 (citing DEL. CODE ANN. tit. 8 § 141(a)).

134. The outer limit of the Court's decision may be the statement that directors "are not obligated to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." *Id.* at 1154. A shareholder would be hard-pressed to make that showing.

135. Plaintiffs' Opening Brief in Support of Motion for Preliminary Injunction, at 1, 8-10, 19-21, *Paramount Communications Inc.* (C.A. No. 10866); Plaintiffs' Reply Brief in Support of Motion for Preliminary Injunction, at 9-23, *Paramount Communications Inc.* (C.A. No. 10866); Opening Brief of Plaintiff-Appellants, at 11-14, *Paramount Communications Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990).

136. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 60.; see also 571 A.2d at 1150 (1990).

nance—that control of a corporation lies with its directors or managers when it does not lie with one or more significant shareholders.¹³⁷

If “control” is analyzed in terms of the allocation of power among former Time and Warner managers and directors, one conclusion becomes clear. The institutional arrangements that supposedly symbolized the Time Culture—the “church/state relationship” described earlier¹³⁸ and the prominent office of the Editor-in-Chief—were destroyed by the planned Time-Warner merger, rendering the argument from the Time Culture a falsehood. Because the merger agreement brought about the demise of the Time Culture, there was little justification for allowing Time’s continued corporate existence to supercede the shareholders’ demands for profit maximization and voting consent.

The merger contemplated significant changes to Time’s inherited management structure. An equal number of directors from Time and Warner would sit on Time Warner’s board, and entertainment would be the new company’s focus. Nevertheless, Time claimed that the Time Culture had been protected from Warner control. This claim stemmed from instructions given by Time’s nonmanagement directors to Time’s negotiators to ensure that Time management dominate the CEO succession and thus dominate the culture of the combined entity.¹³⁹ The negotiators failed to do so.

On August 4, 1988, Richard Munro, Time’s CEO, wrote a letter to Time’s outside directors to which he attached a description of the governance provisions that had been “successfully negotiated” with Warner.¹⁴⁰ The “chief protection mechanism” was a supermajority vot-

137. See BERLE & MEANS, *supra* note 3, at 5 (“[C]ontrol may be held by the directors or titular managers who can employ the proxy machinery to become a self-perpetuating body, even though as a group they own but a small fraction of the stock outstanding.”). A later interpretation of Berle and Means’ thesis regarding the separation of ownership and control illustrates the fallacy in Delaware doctrine. James Burnham argued that ownership can never be separated from control since the latter implies the former: “Ownership means control; if there is no control, then there is no ownership If ownership and control are in reality separate, then ownership has changed hands to the ‘control,’ and the separated ownership is a meaningless fiction.” JAMES BURNHAM, *THE MANAGERIAL REVOLUTION: WHAT IS HAPPENING IN THE WORLD* 92 (1941). How true. By virtue of the poison pill installed by Time’s directors, Time’s shareholders were prevented from selling their stock to Paramount. Those same shareholders cannot gain much comfort from knowing that under Delaware law, they not only owned their shares, they controlled Time Inc.

138. See *supra* text accompanying notes 68-71.

139. See 571 A.2d at 1145; Levin Dep. at 275 (“[O]ur board . . . made it very clear . . . that the Time culture was to be the prevailing culture”) *Paramount Communications, Inc.* (C.A. No. 10866).

140. Munro Dep. Ex. 15, *Paramount Communications, Inc.* (C.A. No. 10866).

ing requirement to be inserted into the new bylaws.¹⁴¹ Under it, a two thirds vote of the board would be necessary to alter the required retirement of Warner's Ross as co-CEO and co-Chairman of the Board on December 31, 1996, after which Time's Nicholas would become sole CEO.¹⁴² A two thirds vote would also be needed to fill board vacancies, adjust the committee structure, and sell a principal line of business.¹⁴³ In addition, a Time-dominated editorial committee would be created, to which the Editor-in-Chief would report. A majority vote of the editorial committee would be required to amend Time Inc.'s 1986 document, "Role of the Editor-in-Chief."¹⁴⁴ None of these provisions was contained in the eventual merger agreement.

Negotiations between Time and Warner broke down in 1988 over the question of CEO succession. In March 1989, "at Mr. Ross's request," Time's negotiators agreed to remove the succession and supermajority provisions from the bylaws.¹⁴⁵ Neither Time's board, Munro nor Nicholas was aware of this fact.¹⁴⁶ Instead, Ross promised in a nonbinding "Statement of Principles" that Nicholas would become sole CEO in five years. Yet Time Warner's bylaws permitted a simple majority of the board to remove any officer at any time, meaning that the succession of Nicholas as sole CEO was no longer protected.¹⁴⁷ Furthermore, the "Role of the Editor-in-Chief" was not included in the merger agreement; reportedly, Time's negotiators "forgot" to include it.¹⁴⁸ Jason McManus, Time's Editor-in-Chief, did not receive a long-term contract written into the merger agreement, as did other Time senior executives,¹⁴⁹ and contrary to Time tradition, the Editor-in-

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* For a description of the "Role of the Editor-in-Chief," see *supra* text accompanying notes 70-71.

145. Plaintiffs' Reply Brief at 17, *Paramount Communications Inc.* (C.A. No.10866) (quoting Warner Board Minutes, Mar. 3, 1989 at 22).

146. CLURMAN, *supra* note 2, at 190-91. Much of the confusion can be attributed to the supermajority provision in the merger agreement concerning the termination of the Time employment contracts, which guaranteed only that the Time executives got paid, not that they remain in office. *Id.*

147. *Id.* at 188-91. The succession did not take place as planned. Nicholas was forced out shortly after the acquisition, leaving Ross in control. However, Ross soon died of cancer, and Time's Levin then assumed control. *Id.*

148. *Id.* at 199.

149. *Id.* at 203.

Chief's compensation was no longer comparable to that of the CEO.¹⁵⁰

In an affidavit filed with the Court of Chancery, McManus discussed the office of the Editor-in-Chief and the "tradition of editorial independence" at Time. He testified that the Editor-in-Chief is responsible for the quality and policy of Time's publications, resolves questions of "ethics and taste," and has the responsibility for expressing his concerns to the CEO and the board if non-publishing activities appear to conflict with the editorial positions of Time's publications or their standards of ethics and taste.¹⁵¹ McManus emphasized that editorial independence depends on (i) the "charter"—the formal document setting out the Editor-in-Chief's role, (ii) the tradition of separating "church and state," and (iii) a "shared sense of history and culture," including "respect by the CEO and all the business side for the role of the of the Editor-in-Chief, for the importance of church and state separation, [and] for the values of this arrangement."¹⁵²

The final merger agreement fails on all fronts. Nonetheless, McManus insisted that it contained provisions ensuring the tradition of editorial independence. He pointed to the creation of the Editorial Committee, even though it could be altered by a simple majority vote of the board, rather than the supermajority previously negotiated.¹⁵³ McManus defended his lack of a specially protected long-term contract by pointing out that the "preservation of church and state rests on the 'charter' . . . insulating the office of the Editor-in-Chief."¹⁵⁴ Since the charter was not mentioned in the merger agreement, McManus said only that "Warner understands and accepts the 'charter.'"¹⁵⁵

The McManus affidavit also speaks of the "profound adverse effect" that would result if the "combination with Warner . . . was not seen as an acquisition by Time and which would not have made clear that Time's culture was to be preserved"¹⁵⁶ However, the "Statement of Principles" signed by Ross states that neither company should "be

150. *Id.* at 204.

151. McManus Aff. para. 11, *Paramount Communications, Inc.* (C.A. No. 10866).

152. *Id.* at para. 13.

153. *Id.* at para. 18.

154. *Id.* at para. 20.

155. *Id.* at para. 18. McManus himself proved unable to safeguard the traditional prerogatives of the Editor-in-Chief. In 1994, McManus allowed the Time Warner board to help choose his successor, and he also allowed Gerald Levin and the new CEO of Time Inc. to help him rewrite the charter. Michael Gross, *A Perfect Day for Banana Feet*, *ESQUIRE*, Jan. 1995, at 58, 60.

156. McManus Aff. para. 18, *Paramount Communications, Inc.* (C.A. No. 10866).

looked upon as anything but an equal partner."¹⁵⁷ A close examination of the merger agreement would not even support the perception that Time was an equal party in the merger. Ross had the senior title—sole chairman of the board—and the highest compensation. Warner dominated the compensation committee, and the chairman of the audit committee came from Warner, as did the chief financial officer, general counsel, and secretary of the board. In their respective employment contracts, Ross is referred to as the "Executive," while Nicholas is the "Employee." Warner's three directors emeritus were invited to attend Time-Warner board meetings, while Time's retired directors were not.¹⁵⁸

These factual issues were not addressed by either court. Both courts assumed that the CEO succession was protected by a supermajority provision,¹⁵⁹ and neither court examined the status of the officer who personified the Time Culture, the Editor-in-Chief. The plaintiffs presented some of the important facts, but did not develop them into a legal argument, relying instead on Delaware precedents of the previous decade that said nothing about the preservation of a corporate culture or corporate personality.

Plaintiffs could have cited the greatest corporations case in American history, *Dartmouth College v. Woodward*,¹⁶⁰ in which Daniel Webster argued, successfully, that a statute which altered that college much like the Time-Warner merger agreement altered Time had the legal effect of destroying it.¹⁶¹ Dr. Eleazor Wheelock had founded a missionary school and then applied for a royal charter, which he received. The charter granted the corporation perpetual existence and fixed the number of trustees at twelve. It appointed Dr. Wheelock as president and empowered him to name a successor in his will. Fifty years later, the New Hampshire legislature passed legislation transferring the corporate property of the college to a corporation with a new name, an expanded board of twenty-one trustees, the additional nine being appointed by the governor, and a new board of overseers. The legislation

157. CLURMAN, *supra* note 2, at 189.

158. *See id.* at 197-99.

159. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1146 (Del. 1990), *aff'g* *Paramount Communications, Inc. v. Time Inc.*, C.A. No. 10866, slip op. (Del. Ch. July 14, 1989).

160. 17 U.S. (4 Wheat.) 517, 518 (1819).

161. In contrast to the briefs of the plaintiffs in Time-Warner, Daniel Webster's famous oration in the Dartmouth College case exhibited a mastery of the common law authorities, English history, as well as Roman law. *Dartmouth College*, 17 U.S. (4 Wheat.) at 551-54; *see also* 3 THE PAPERS OF DANIEL WEBSTER 106-53 (Andrew J. King, ed. 1989).

turned the college into a university and authorized the creation of new colleges that would have new purposes. The President of the college became accountable to a new body for his office and salary.

Daniel Webster recited these facts and argued that if the legislation were valid, "the old corporation is abolished, and a new one created."¹⁶² The Court agreed. In a concurring opinion, Justice Story wrote, "it is apparent that, in substance, a new corporation is created including the old corporators, with new powers, and subject to a new control; or that the old corporation is newly enlarged, and placed under an authority hitherto unknown to it."¹⁶³ The same could be said of Time Inc., and its new control. Its name was changed, its board was expanded to include members from another entity, its scope and purposes were extended, the founder's design was frustrated, and the Editor-in Chief became answerable to a new body. Yet the Delaware courts treated these events not as the death of the corporation, but as milestones in a life's journey.

Unlike *Dartmouth College*, Time's directors initiated these changes and did so without violating the corporation's official charter. However, Time did not argue that its mere legal existence had been preserved; it argued that the proposed combination with Warner preserved the Time Culture, which was grounded in a document known as "the charter." As in *Dartmouth College*, the purpose of the corporation was reflected in its constitutional structure, which was destroyed. The new corporation, Time Warner, was configured to entertain by all available media, while its predecessor was designed to uphold standards of truth, quality, and decency.

The different approach of the *Time-Warner* opinions, compared to the *Dartmouth College* opinions, suggests that a new theory of the corporation has arisen. The Delaware courts saw Time as something which its management may transform unilaterally to ensure the corporation's nominal survival. In the terms of the Chancellor, directors may act to preserve their and the corporation's identity.¹⁶⁴ Justice Horsey, too, permitted a board to protect the "Time identity and culture."¹⁶⁵

162. *Dartmouth College*, 17 U.S. (4 Wheat.) at 554.

163. *Id.* at 710; see also *id.* at 653 (Marshall, C.J.) ("This system is totally changed. The charter of 1769 no longer exists."); *id.* at 664 (Washington, J.) ("In short, it is most obvious that the effect of these laws is to abolish the old corporation, and to create a new one in its stead").

164. *Paramount Communications, Inc.*, C.A. No. 10866, slip op. at 15, 17 & 18.

165. See *supra* notes 105-12.

Chief Justice Marshall, by way of contrast, stipulated that a corporation possesses "only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created."¹⁶⁶ Corporations are established to achieve an external, higher goal. The object itself is unchanging and the corporate charter is unchangeable.

In the era separating *Dartmouth College* and *Time-Warner* the corporation has become a third world culture institution. Its immortality is recognized as a legitimate end in itself and its charter contains minimal restraints on the powers of management to keep it alive. The following Section explores the modern theory of the inviolable corporation and the fiction of filiation upon which it is premised. Historically, the fiction has taken two distinct forms: the first world patriarchal tribe and the third world, quasi-familial, CEO-dominated corporate culture.

II. THE RESPECTIVE FICTIONS OF ANCIENT AND MODERN CORPORATISM

To gain perspective concerning today's corporatist vision of the perpetual corporation, it is instructive to begin with Sir Henry Maine's *Ancient Law* in which Maine discussed how the oldest corporation, the family, was literally immortal. Maine's ancients are the dead pagan societies,¹⁶⁷ but of concern to him was modernity, the retrogression of which disturbed him greatly.¹⁶⁸ He knew that the historical progression from status to contract was not an immutable law; the erosion of individual freedoms had already begun. A century after he wrote *Ancient Law: Its Connection With the Early History of Society, and Its Relation to the Modern Idea*, we can now see that the subtitle takes on a new meaning. The permanent business corporation under the rule of the CEO is a wholly modern institution, but its historical antecedent is the unlimited domain of the first world patriarch.

The link between the modern corporation and a pagan tribe can also be seen in corporate culture theory, a discipline founded by anthropologists who decided to study the modern corporation instead of ar-

166. *Dartmouth College*, 17 U.S. (4 Wheat.) at 636.

167. On the pre-theological nature of ancient jurisprudence, see MAINE, *supra* note 1, at 123, 342-347. Christianity is barely discussed, and Rabbinical jurisprudence is mentioned just once, and then only to illustrate that it adopted the notion of testamentary succession from the Romans. *Id.* at 191.

168. See RUSSELL KIRK, *THE CONSERVATIVE MIND* 315-17 (7th rev. ed. 1986).

chaic society.¹⁶⁹ The theme persists, as recent corporate culture theorists draw direct parallels to primitive cultures, in the assumption that cultural anthropologists and management professors study the same thing: culture.¹⁷⁰ In this Section I will test that assumption and conclude that corporate cultures such as the Time Culture are not cultures at all. Corporate culture theorists may pretend that managers of the modern corporation mediate primordial sacred truths, but in Rieffian terminology, such people are merely recycling first world motifs to support a revolutionary program that rejects second world conceptions of the limited functions of corporations and the limited powers of their fiduciaries.

A. *The Relevance of Ancient Corporatism*

Maine's summary of ancient corporation law supplies a dominant image of the modern corporation—an inviolable entity represented by a succession of CEOs ruling over employees united by a sense of filiation. Describing ancient society, Maine wrote:

I repeat the definition of a primitive society given before. It has for its units, not individuals, but groups of men united by the reality or the fiction of blood-relationship.

. . . Contrasted with the organization of a modern state, the commonwealths of primitive times may be fairly described as consisting of a number of little despotic governments, each perfectly distinct from the rest, each absolutely controlled by the prerogative of a single monarch The Family, in fact, was a Corporation; and he was its representative or, we might almost say, its Public officer. He enjoyed rights and stood under duties, but the rights and duties were, in the contemplation of his fellow-citizens and in the eye of the law, quite as much those of the collective body as his own. Let us consider for a

169. See John Van Maanen & Stephen R. Barley, *Cultural Organization: Fragments of a Theory*, in ORGANIZATIONAL CULTURE, *supra* note 54, at 31, 32-33 & n.2.

170. See, e.g., Harrison M. Trice & Janice M. Beyer, *Using Six Organizational Rites to Change Culture*, in GAINING CONTROL, *supra* note 54, at 370, 373 ("Using both the anthropological and the management literature as bases"); Meryl R. Louis, *Sourcing Workplace Cultures: Why, When, and How*, in GAINING CONTROL, *supra* note 54, at 126, 128; Vijay Sathe, *How to Decipher and Change Corporate Culture*, in GAINING CONTROL, *supra* note 54, at 230, 234-37; cf. Terrence E. Deal, *Cultural Change: Opportunity, Silent Killer, or Metamorphosis?*, in GAINING CONTROL, *supra* note 54, at 316, 325 (comparing a contemporary managerial technique to a Javanese funeral rite and the healing dance of the African !Kung tribe).

moment, the effect which would be produced by the death of such a representative The person representing the collective body of the family and primarily responsible to municipal jurisdiction would bear a different name; and that would be all. The rights and obligations which attached to the deceased head of the house would attach, without breach of continuity, to his successor; for, in point of fact, they would be the rights and obligations of the family, and the family had the distinctive characteristic of a corporation—that it never died.¹⁷¹

The ancient patriarch represented the unity of the family. As Maine explains, this unity was founded on the ultimate authority of the primordial bond of blood. Yet the blood-relation possessed a fictive quality. The ancients knew that all their fellows were not related by blood. The necessary institution of adoption assured that, as did the inevitable aggregation of tribes.¹⁷² Nevertheless, the ancients in good faith believed in the fiction, though they knew it to be factually false.¹⁷³ Until a new basis of authority could develop, the fiction of the blood-relation had to be reinforced, or else the community would no longer bond instinctually. Thus, upon the death of a chieftan, when the fiction of the familial bond was most threatened, the *sacra*, or family rites, were performed. These ceremonies commemorated the brotherhood, perpetuity, and sacredness of the family. Transactions between families were also highly ceremonious, signifying the creation of new bonds of attachment.¹⁷⁴ Through the *sacra*, the fact of individuality was hidden by the illusion of group unity.¹⁷⁵

Motifs of the ancient practice remain with us. Upon the death in 1967 of Henry Luce, his son, Henry Luce III (Hank Luce), promised the staff of Time that forty-four years hence, “when Time Inc. will have doubled its present span,”¹⁷⁶ the following sentence from his father’s will would still be true—“Time Inc. is now, and is expected to continue to be, principally a journalistic enterprise and, as such, an

171. MAINE, *supra* note 1, at 178-79.

172. *Id.* at 125.

173. *Id.* at 126; *see also id.* at 353 (“True archaic communities are held together not by express rules, but by sentiment, or, we should perhaps say, by instinct; and new comers into the brotherhood are brought within the range of this instinct by falsely pretending to share in the blood-relationship from which it naturally springs.”).

174. *Id.* at 185-86.

175. *Id.*

176. Luce 1967 Letter, *supra* note 2.

enterprise operated in the public interest."¹⁷⁷ Hank Luce prefaced his promise by noting that many of the staff had told him that his father "meant more than anyone except your own fathers, or that he was like a father to you, or that in a sense, he was also your father."¹⁷⁸ Luce continued: "For the fact that any of you or many of you did call him your own, I am grateful to you. For the fact that he was like a father to any or many of you, I am grateful to him."¹⁷⁹ All knew that only the two Luces were related by blood, yet a widespread seeming blood relationship among employees was affirmed at a time of solemn ceremony and corporate instability.

Twenty-two years later Time no longer existed. The younger Luce had neither the authority nor the power to make good on his prior promise. Time was a publicly held business corporation in which succession to office passed, not by blood, but by perceived managerial ability. Hank Luce became a Time director in 1967, but the offices of CEO and Editor-in-Chief passed from one handpicked successor to another. The manager who became CEO in 1980, Richard Munro, felt unconstrained by the philosophy of the elder Luce. Munro had risen to prominence at Time for his success in expanding the company's cable television operations,¹⁸⁰ a medium which the elder Luce ignored and deplored.¹⁸¹

Yet at the time of the proposed Time-Warner merger, both Hank Luce and Munro appealed to the authority of the founder's vision to support their opposing positions. Hank Luce's appeal assumed that Time, like an ancient family, was beholden to its inherited traditions. He stated that Time should remain an independent, principally journalistic enterprise, a position his father likely would have taken. Munro, who cared nothing for these traditions, sought to convince the world that Henry Luce's institution would be safeguarded by Time's acquisition of Warner, but would be destroyed by a sale to Paramount.

When the merger of Time and Warner was first proposed in 1988, Hank Luce wrote a letter to Munro in which he quoted the statement taken from his father's will that he had repeated at his father's memorial service. He then wrote that in the spirit of that statement he could

177. *Id.*

178. *Id.*

179. *Id.*

180. CLURMAN, *supra* note 2, at 69-70.

181. Luce had refused to enter the television industry because he thought it to be mindless entertainment that "cheaped American taste." *Id.* at 38-39 (quoting Luce).

not support Munro's proposal to merge the two companies.¹⁸² Shortly thereafter, Luce expressed to Munro several other concerns regarding the Warner deal, some of which related to traditions at Time that would be undone by a merger with Warner. These traditions included not offering long-term employment contracts to top management, not being a vertically integrated company, and not straying from journalism into the more vulgar world of entertainment.¹⁸³

Another Time director, Arthur Temple, also opposed the merger with Warner on grounds relating to Time's traditions and the authority of Time's founder. Temple told Hank Luce that Time's move into the entertainment business "was absolutely counter to everything that his father [Henry Luce] had conceived."¹⁸⁴ Temple also told Luce that he had merged his own "family company," Temple Industries, Inc., into Time Inc. because "his father [Henry Luce] had created a magnificent company" and because he, Temple, had "believed in the things that Henry Luce believed in."¹⁸⁵

Munro was not deterred by the opposition of Luce and Temple, whom he viewed as impediments of varying size.¹⁸⁶ But when Paramount made its bid for Time, Munro had no trouble appealing to the Luce legacy. In a letter to Marvin Davis, the CEO of Paramount, Munro paraphrased the crucial line from Luce's will. He wrote that Time "cannot and will not ignore the public interest. The journalistic integrity of our publications [is] the essence of who we are and what we do."¹⁸⁷ Munro also appealed to Time's perpetual obligations. By combining with Warner, Time would "preserve" both its "unique bond of trust with the American people" and "the enduring investment of talent and creativity that Time Incers have made—and continue to make—in this company. They remain the single greatest asset Time Inc. has."¹⁸⁸ Davis's plan for Time, on the other hand, was "cynical if

182. Luce 1988 letter, *supra* note 2.

183. See Luce Dep. at 60, 62-63, 69-109; Luce Dep. Exs. 5, 6, 8, *Paramount Communications, Inc.* (C.A. No. 10866).

184. Temple Dep. at 116, *Paramount Communications, Inc.* (C.A. No. 10866); see *id.* at 39.

185. *Id.* at 115-16. In 1989 Temple resigned from the Time board due to his opposition to Time's having become an entertainment company. See Letter from Arthur Temple to Dick Munro, Apr. 19, 1989 (Luce Dep. Ex. 13).

186. See Temple Dep. at 117, *Paramount Communications, Inc.* (C.A. No. 10866) (quoting a memorandum from Munro to director Clifton Wharton, in which Munro wrote that Wharton "shouldn't be worried about [Luce], he has no credibility nor influence, [Temple] has both.").

187. Letter from Dick Munro to Marvin Davis, June 8, 1989, at 2, 3 (Luce Dep. Ex. 15) *Paramount Communications, Inc.* (C.A. No. 10866).

188. *Id.* Due to the expense of acquiring Warner, Time later was forced to cut back severely

not downright deceptive” and “smoke and mirrors.”¹⁸⁹

Munro’s outrage would be understandable had he ever felt compelled to follow corporate precedent. But it was Munro who four years earlier had agreed to remove from Time’s offices the portraits of the two previous CEOs, Henry Luce and Andrew Heiskell,¹⁹⁰ causing Heiskell to write: “Time Inc.’s history belongs to the corporation, not its current management. And rewriting history is not part of *our* company tradition.”¹⁹¹ Two years later Munro had demanded that his mentor, Heiskell, pay rent for his use of Time offices.¹⁹² That demand met with the following rebuke from Heiskell’s wife, Marian Sulzberger, herself a director of the *New York Times*: “How can you ever have told me . . . that Andrew was like a father to you? . . . I’m afraid you have become so engrossed in what you consider the major problem of the day, ‘take over,’ that you’ve lost sight of what makes a good company. It’s *people* . . . People who will do anything for you because they know they’ve got the support of their CEO.”¹⁹³ Munro’s concept of perpetual succession was neatly expressed in his speech celebrating the Time-Warner merger: “Time Inc. is gone. Long live Time Warner.”¹⁹⁴ Munro cared little for the symbols of Time’s traditions, yet he knew that the residue of Henry Luce’s legacy—the Time Culture—carried authority outside of Time’s precincts.

Hank Luce and Richard Munro both believed that control over Time should be handed down from one generation to the next. But of the two, only Luce thought it important that Time’s practices also be handed down. The conflict between Luce and Munro is that between the traditionalist and the rationalist. Tradition, derived from *Traditio*, a mode of transferring property in Roman law, is that which is transmitted from past to present over at least two generations.¹⁹⁵ Tradition is

on editorial staff and reporters. See Reilly, *supra* note 49, at A6.

189. Luce Dep Ex. 15 at 1, 2, *Paramount Communications, Inc.* (C.A. No. 10866).

190. CLURMAN, *supra* note 2, at 22.

191. *Id.* at 24.

192. *Id.* at 22.

193. *Id.* at 23.

194. *Id.* at 25.

195. SHILS, *supra* note 17, at 12-16. The Roman *Traditio* was an important innovation in the history of the law of property. It allowed property to be alienated by mere delivery, rather than through the elaborate ceremonies required by the earlier doctrine of Mancipation. MAINE, *supra* note 1, at 269-71. The retrogression of property law to first world forms can be seen in management’s ability, through the fictional security of the poison pill, to require that control of a corporation be transferred by the ceremonies of negotiation, rather than by tender offer or the

distinguishable from a sense of filiation or a sense of identity, since a person may sense continuity with previous generations though nothing identifiable was ever passed down.¹⁹⁶ Business corporations can have traditions, but the goal of the businessman is anti-traditional, to maximize profits by the rational economic use of resources.¹⁹⁷ The rational businessman will dispense with unprofitable traditions but may encourage a sense of corporate identity to improve the bottom line.

Time and Warner were merged for rationalist reasons. Time's decision to own and create video programming was designed to "better enable it to compete on a global basis."¹⁹⁸ The merger of Time and Warner created "a media colossus with international scope."¹⁹⁹ This goal is an example of what Max Weber called "the rationalization of the world," the systemization of action and belief and the concomitant emptying out of tradition, culture, religion, magic and faith.²⁰⁰ Weber theorized that the process of rationalization would overwhelm the remnants of the familial bonds and ceremonies that once held together Maine's ancient societies. A corporation devoted to becoming a medium of global entertainment would not concern itself with its traditions of editorial integrity. It would not be constrained by its history as a principally journalistic enterprise and would not pay heed to whether the document formalizing the role of its Editor-in-Chief was included in a merger agreement, or whether that same merger agreement protected by supermajority vote the editorial committee or the line of succession. Such a corporation would not care whether it endured as a cultural institution.

B. *The Fictional Basis of Modern Corporatism*

Paradoxically, in the century after Weber, the rationalizing corporation is one that claims to promote its own "corporate culture." Nick Nicholas proclaimed that the creation of Time Warner was the "crowning achievement of the Munro era, capping nearly ten years of rethink-

solicitation of proxies. Cf. Opening Brief of Appellants John A. Moran and the Dyson-Kissner-Moran Corporation at 20-29, 34-41, *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (discussing the fictive nature of the poison pill and its effect on tender offers and proxy contests). The ceremonial nature of negotiated acquisitions, and their ancient antecedents, are discussed at *infra* notes 213-25 and accompanying text.

196. SHILS, *supra* note 17, at 14.

197. *See id.* at 29, 32, 175.

198. *Paramount*, 571 A.2d at 1144.

199. *Id.* at 1147.

200. *See generally* SHILS, *supra* note 17, at 291-310.

ing, restructuring, and rebuilding."²⁰¹ Ten years of strategy sessions, reorganization plans, management consultants, executive retreats, and acquisition proposals led to the transaction by which Henry Luce's legacy would be interred and a new company created. Meanwhile, Nicholas was also designated as the person whose control over Time Warner would preserve the Time Culture.

Time was not unique. In the decade of its restructuring, management consultants told other corporations of the need to both restructure their operations and cultivate a corporate culture. A notable example of this dual advice is Deal & Kennedy's *Corporate Cultures: The Rites and Rituals of Corporate Life*,²⁰² which echoes Maine's description of pagan corporate practice in its emphasis on corporate rites, rituals, and ceremonies. The similar diction raises the question whether the corporate culture movement is, in fact, culturally conservative.

Deal & Kennedy's book provides easy access to the central motifs of the corporate culture movement. It opens with an anecdote illustrating how a corporate culture can be more powerful than the allegiances forged during World War II. National Cash Register Corporation had built a factory in Germany before the war. As the retired chairman of the board tells the story, he returned to the site in August 1945 via military plane to find two former employees clearing out rubble and awaiting his return. Days later, an American soldier approached in his tank, announced that he was an NCR employee from Omaha, inquired whether the others had met their monthly sales quota, and then embraced the manager. The authors conclude: "[NCR] was a living organization [to those men]. The company's real existence lay in the hearts and minds of its employees. NCR was, and still is, a corporate culture, a cohesion of values, myths, heroes, and symbols that has come to mean a great deal to the people who work there."²⁰³

NCR may be a cohesion of all those things, but it is not therefore a culture. To Deal & Kennedy, corporate culture is a management tool; it makes people feel better and work harder, which in turn leads to

201. CLURMAN, *supra* note 2, at 25 (quoting Nicholas).

202. DEAL & KENNEDY, *supra* note 54. Other corporate culture theorists have pointed to the link between corporate culture and corporate restructuring. See Tunstall, *supra* note 58, at 44; Karl E. Weick, *The Significance of Corporate Culture*, in ORGANIZATIONAL CULTURE, *supra* note 54, at 381 (pointing out that descriptions of corporate culture are no different than descriptions of managerial strategy).

203. *Id.* at 4.

corporate success.²⁰⁴ When a company's "values, myths, heroes, and symbols" do not lead to the desired effect, large-scale "cultural change" may be in order, even if it means stripping away the symbols of the corporate culture.²⁰⁵ In such circumstances, the smart manager plans appropriate "transition rituals"²⁰⁶ and may bring in the "shamans"—the management consultants.²⁰⁷

Such a corporate culture does not perform the historic task of cultures—to translate invisible sacred orders into visible and habitable social forms.²⁰⁸ Neither the "outside shamans" nor the company "priests"²⁰⁹ bring to employees an unalterable sacred truth of right conduct. On the contrary, Deal & Kennedy lay down no precepts around which a corporate culture is to be centered. It is the manager's job to articulate an appropriate "paramount belief" or "superordinate goal."²¹⁰ This belief must be capable of encapsulation by an all-embracing slogan, such as "IBM means service" or DuPont's "Better things for better living through chemistry."²¹¹ Time Warner's slogan could be "journalistic and artistic integrity."

The manager's goal is to "create a sense of identity for those in the organization, making employees feel special."²¹² Producing this psychological effect does not depend on retaining the corporation's identity. Two companies with different corporate cultures may be merged, provided that there is agreement among the top managers, changes in management compensation and proper use of "rites, rituals, [and] ceremonies."²¹³ Nor must the content of a corporation's traditions be preserved in a merger. According to the corporate culture literature, a takeover, like the death of a corporation's founder, provides managers with an opportunity to decide whether to change the corporate culture.²¹⁴

204. *Id.* at 16-19.

205. *Id.* at 157-61.

206. *Id.* at 175.

207. *Id.* at 176.

208. *See supra* note 12 and accompanying text.

209. On "priests" and "priestesses," *see* DEAL & KENNEDY, *supra* note 54, at 88-90. They, together with the storytellers, whisperers, gossips, secretarial sources, spies, and cabals, make up the corporation's "cultural network." *Id.* at 87-98.

210. *Id.* at 6.

211. *Id.* at 6.

212. *Id.* at 23.

213. *See* Kilmann, Saxton & Serpa, in *GAINING CONTROL*, *supra* note 54, at 429; Ralph H. Kilmann, *Five Steps for Closing Culture-Gaps*, in *GAINING CONTROL*, *supra* note 54, at 351, 369.

214. *See* Edgar H. Schein, *How Culture Forms, Develops, and Changes*, in *GAINING CON-*

In terms of corporate culture theory, Warner's Ross and Time's Munro acted properly. They believed that their companies were compatible,²¹⁵ they adjusted the compensation for themselves and their lieutenants,²¹⁶ and they inaugurated the ceremony of writing a letter to the President of the United States announcing the merger agreement.²¹⁷ In their joint testimony before a congressional subcommittee they began the process of managing the Time Culture, invoking the name of Henry Luce and jointly pledging themselves "to the practice of independent journalism" as "Time Inc. is transformed into this new venture."²¹⁸

These rites, rituals and ceremonies for managing a corporate culture are premised on a fiction. This fiction is more mendacious than the fiction of kinship, to which the ancients subscribed. The rites that accompanied all ancient inheritances, adoptions, and funerals may have expressed the fiction of the blood relation but they also attested to the sacredness of the family.²¹⁹ The modern fiction of corporate culture is the self-conscious pretense that there is something sacred about an everchanging corporation devoted only to its own perpetuation.

Deal & Kennedy's manager "priests" and management consultant "shamans" are creators of therapeutic fictions. Deal & Kennedy believe that this function is no different than that of their religious predecessors. Deal writes that "[h]istorically, rituals and ceremonies have helped humans create and celebrate the social fictions culture expresses."²²⁰ He

TROL, *supra* note 54, at 17, 30-33 (discussing how the death of the founder allows the company to examine itself therapeutically and decide whether the professional managers who succeed the founder should preserve or change the culture); Caren Siehl, *After the Founder: An Opportunity to Manage Culture*, in ORGANIZATIONAL CULTURE, *supra* note 54, at 125 (discussing how times of crisis, e.g., a takeover or the death of the founder, offer an opportunity to manage the culture).

215. See *supra* note 78.

216. Time's Nicholas, Levin, and McManus each received millions in stock options following the merger and Ross received the greatest option grant ever recorded in American corporate history. See CLURMAN, *supra* note 2, at 326-27.

217. Munro Dep. Ex. 13, *Paramount Communications, Inc.* (C.A. No. 10866); see CLURMAN, *supra* note 2, at 213.

218. Munro Dep. Ex. 2 at 12, *Paramount Communications, Inc.* (C.A. No. 10866); CLURMAN, *supra* note 2, at 213.

219. MAINE, *supra* note 1, at 184-89. Adoption, for example, was both a necessary legal fiction and an occasion for the *sacra*. Compare *id.* at 26 with *id.* at 125 and *id.* at 185-88.

220. DEAL & KENNEDY, *supra* note 54, at 297. See also Linda A. Krefting & Peter J. Frost, *Untangling Webs, Surfing Waves, and Wildcatting*, in ORGANIZATIONAL CULTURE, *supra* note 54, at 155, 166 ("As a therapist, a manager attempts to mobilize an organizational culture through the incorporation of shadow elements . . . rituals and myths may serve as the base from which such therapeutic actions may begin.").

discusses how managers can convert pagan funeral rites into “transition rituals” that help employees adjust to the “cultural change” wrought by a corporate reorganization, a shift in organizational philosophy, or a succession in upper management.²²¹ One particularly “well-designed transition ritual” marking the close of a two-week management retreat was replete with candles, somber music, the donning of institutional caps and the unfurling, signing, and refolding of an organizational banner.²²²

Unlike the ancients, we moderns mask revolutionary change in religious costume. Whenever a CEO decides to undertake the transformation of the corporation, the managers and management consultants concoct therapeutic ceremonies to convince employees (and the courts) of the corporation’s vitality (and legal inviolability).²²³ The ancients, on the other hand, invoked their deities when confronted by primordial forces beyond their comprehension.²²⁴ While the ancient rites and rituals allowed for legal innovation to take place, “from the little we know of the progress of law during this period, we are justified in assuming that set purpose had the very smallest share in producing change.”²²⁵ The subtleties of ancient legal fictions mock the transparency of our modern frauds.

C. *A Comparison to Second Culture Corporatism*

Any corporate culture is true so long as it works. Deal & Kennedy’s book concludes with a discussion of three exemplars for managers—McDonald’s, the U.S. Forest Service, and the Roman Catholic church.²²⁶ Each organization maintains a common spirit over far-flung distances. All three “capture some of the same religious tone. [They] capture . . . soul, spirit, magic, heart, ethos, mission, saga.”²²⁷ They each have their “symbols,” and their “heroes,” whether they be

221. DEAL & KENNEDY, *supra* note 54, at 292, 296, 308.

222. *Id.* at 317-18.

223. If cultures are seen as human inventions that are reinforced by behavior until they are absorbed unconsciously, see DEAL & KENNEDY, *supra* note 54, at 301; see also Krefling & Frost, *supra* note 220, at 155, 156, then corporate cultures are presumably invented by managers and absorbed by subordinates.

224. See generally SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* (1st abridged ed. 6th prtg. Macmillan 1958). Frazer summarized his multivolume compendia of pagan rites and rituals as follows: “[T]he fear of the human dead [was] probably the most powerful force in the making of primitive religion.” *Id.* at vii.

225. MAINE, *supra* note 1, at 20.

226. DEAL & KENNEDY, *supra* note 54, at 193-95.

227. *Id.* at 195.

Ray Kroc and the waitress of the month; Smokey the Bear; or the pope, together with the martyrs, missionaries, and saints.²²⁸ In terms of corporate culture theory, there is no difference between McDonald's and the Church.

Are the two global corporations identical culturally? Deal & Kennedy laud McDonald's for successfully "creat[ing] a mystique of quality, service, cleanliness, and value."²²⁹ The employees "become true believers."²³⁰ Hidden by the "mystique" is a business reality: profits come from high turnover, not "better burgers."²³¹ The McDonald's mystique is not beyond rational understanding. It is both a lie and an instrumental truth, a necessary creation to persuade employees to work better and faster. No mystique need exist if employees responded to directives such as 'less sloth means higher profits.'²³²

The Church has its own mystique. According to canon law, the Church constitutes the mystical body of Christ, the *corpus mysticum Christi*.²³³ In that mystique, which cannot be rationalized away, both the clerisy and laity are true believers. Christ is the highest authority. Those authorized to perform Church functions, the priests, have a double purpose in service of Christ: to prepare for the life beyond by incorporation into the body of Christ; and to produce on earth the fulfillment of the law of Christ.²³⁴ These precepts can be traced back to the teachings of Paul, to whom the community of the faithful is a united body ruled by the Spirit of God: "Now ye are the body of Christ and members in particular. And God hath set some in the church, first apostles, secondly prophets, thirdly teachers, after that miracles, then gifts of healings, helps, governments, diversities of tongues."²³⁵ Through

228. *Id.* at 194-95.

229. *Id.* at 114; *see also id.* at 193.

230. *Id.* at 114.

231. *Id.* at 113.

232. IBM's culture is partly based on a similar therapeutic lie. Deal & Kennedy praise IBM for the effectiveness of its "Hundred Percent Club," a collection of "heroes" who meet their sales quota. *Id.* at 96-97. "In reality, there is no real distinction to becoming a club member. IBM simply wants to weed out the 20% worst salespeople." *Id.* But the creation of "heroes" is useful because it motivates salespeople better than "a corporate policy memo on the virtues of perseverance" or a "memo on a new increase on sales quotas." *Id.* at 50, 39.

233. GIERKE, CLASSICAL, *supra* note 51, at 145. The Church also has its mysteries, religious truths revealed through Christ to the elect. *Mark* 4:11.

234. ADOLF HARNACK, OUTLINES OF THE HISTORY OF DOGMA 446-47 (Edwin K. Mitchell trans. 1957) (1893).

235. *I Corinthians* 12:27-28 (King James), *quoted in* GIERKE, CLASSICAL, *supra* note 51, at 145.

the Church, the apostles, prophets, and teachers deliver the word of God.

The corporate culture of McDonalds is a fiction created by, and for the benefit of, those who control the corporation. The culture of the Church, on the other hand, is derived from highest authority and mediated by the corporation and its representatives. The Church's rites and rituals have hardened into dogma, truths susceptible to change, but only when the body reinterprets the commands of highest authority.²³⁶ To the enduring truth of its dogma, the Church owes its institutional survival.²³⁷ McDonald's owes its survival to the persuasiveness of its self-created fictions. In that respect the Church is a second culture corporation, and McDonald's is a third culture corporation.²³⁸

Rieff discusses the distinction Deal & Kennedy refuse to make when they conflate the *corpus mysticum Christi* with the McDonald's "mystique":

In their highest obedience, humans are compelled by god-terms that will not be treated as mere heuristic devices. On the contrary, rightly used, minds in their service rather than served by them, these are terms that will not suffer to be tested or reduced; after the use of a god-term, there can be no 'because of.' God-terms are neither 'functional' nor 'mythic'; they are truths [A] high culture is a culture of truth.²³⁹

The corporate culture movement is full of god-terms—the strong cultures, paramount goals, superordinate beliefs, shamans, priests, cere-

236. See generally HARNACK, *supra* note 234.

237. See Philip Rieff, *Introduction* to HARNACK, *supra* note 234. Rieff writes: "In sum, dogma serves to preserve the church For the development of dogma remains the grandest effort in all western history to guarantee the prevalence of an institution against the competition of time." *Id.*

238. The Church retains first world elements, as Philip Rieff has instructed. It identifies the corporation with Christ, who is highest authority. A true second culture corporation mediates sacred order, and in doing so maintains an unclosable distance between highest authority and the individual. The doctrine of apotheosis—becoming one with highest authority through a mediating body—is of pagan origin. A third world variation is the identification of an employee with the corporate culture, as represented by the CEO responsible for creating it.

239. RIEFF, *FELLOW TEACHERS*, *supra* note 16, at 67-68. In a footnote to this passage Rieff attacks the scientific, anthropological definition of culture advanced in A. L. KROEBER AND CLYDE KLUCKHOHN, *CULTURE* (1963) because it emphasizes "values" rather than commanding truths. See RIEFF, *FELLOW TEACHERS*, *supra* note 16, at 68 n.36. The corporate culture literature uniformly follows the scientific, anthropological definitions. See, e.g., Sathé, *supra* note 170, at 234-35; DEAL & KENNEDY, *supra* note 54, at 301. No corporate culture is founded on a commanding truth.

monies, rites, rituals, symbols, and heroes—and all are open to this objection. All may be tested by the demands of profitability.²⁴⁰ Deal & Kennedy write, “[a] culture is its heroes, values, networks. It is all these things, but something else besides. Culture is a money-in-the-pocket investment”²⁴¹

Time made the same argument to the Delaware Supreme Court. Its brief quoted Munro’s statement that Time separates “church” and “state” because it is profitable to do so: “the separation is ‘not simply culture for culture’s sake.’”²⁴² Certainly not. Time’s managers had no compunction about changing Henry Luce’s governance structure or the corporation’s purpose. Under Luce, Time had been principally a journalistic company, and Luce separated the journalists from the managers so that the Editor-in-Chief would be free to report truth and uphold standards of ethics and taste.²⁴³

As seen in Time Warner’s publication of Madonna’s *Sex*, the particular corporate culture established by Luce to uphold those standards has vanished. A new culture, more congenial to the managers, was created, one which glorifies artistic license. According to the editor of *Sex*, Nancy Neiman, the decision to publish the book was made “by Warner Books with no input from the corporate office.”²⁴⁴ That decision less reflected editorial independence than a new form of subservience. Neiman stated that her job was “to realize the author’s vision.”²⁴⁵ Neiman did not edit the text, and Madonna had final say over which pictures would run. The only prohibitions placed on Madonna were “no penetration, no sex with animals, religious objects or children.”²⁴⁶

Henry Luce and Arthur Temple each had a second culture conception of Time, in which the corporation served an unchanging higher authority. Luce saw his job as to “to help the truth prevail by reason.”²⁴⁷ Temple testified that the entertainment business was not suit-

240. Whether a corporate culture can be so compelling that it returns profits is an open question. Recent scholarship refutes the premise that “strong cultures” lead to improved long-term performance. See KOTTER & HESKET, *supra* note 74, at 10-11.

241. DEAL & KENNEDY, *supra* note 54, at 129.

242. Answering Brief of Time Appellees at 8, *Paramount Communications, Inc.*, 571 A.2d 1140 (quoting Munro).

243. See *supra* text accompanying notes 143-44.

244. Clurman, *supra* note 20, at H16 (quoting Neiman).

245. *Id.* at H16.

246. *Id.* at H16.

247. SWANBERG, *supra* note 29, at 305 (quoting Luce).

able for Time and himself because "the violence, the gratuitous vulgarity, the sex, the perhaps unwitting promotion of values to which we don't subscribe are not consistent with my business ethics."²⁴⁸ In second worlds, the pursuit of profits is confined by the commandments of morality. Luce's and Temple's Time was a corporation limited by culture, as opposed to being a corporate culture. Third world corporate cultures always negate culture; they open possibilities otherwise closed, and justify, rather than limit, managerial discretion. The corporate culture that emerged from the merger of Time and Warner is but one example.²⁴⁹

In this Section I discussed the historical context of the idea that a corporation is itself a culture entitled to perpetuity. We saw that in the first worlds the tribe was a corporation that endured forever, always under the sovereign reign of the patriarch. The tribe's perpetuity was premised on a fiction, the primordially of the blood-relation, which had to reinforced by sacred rites and ceremonies. We also saw that the modern third-world corporation has taken the pagan fiction one step further, by feigning the familial bond, through therapeutic "rites and rituals." By creating symbols of a fictive group identity, managers and management consultants strive to maintain allegiance to a corporation forever in flux. Where second world corporatism is limited by its adherence to truths that stand above the corporation, the third world CEO knows an unprecedented freedom, the freedom to establish the terms by which the corporation is judged.

III. MODERN JURISPRUDENTIAL PRECEDENTS OF THE TIME CULTURE

Third culture corporatism did not originate with the Delaware Supreme Court's *Time-Warner* decision or with the corporate culture texts of the previous decade. A century earlier, the works of corporate law scholars contained the same motifs. In this Section I discuss the works of those early legal scholars, to see what light they shed on the contemporary idea that managers can create a corporate culture that renders

248. Temple Dep. at 39, *Paramount Communications, Inc.* (C.A. No. 10866).

249. In the sentence of his corpus touching most directly upon the corporate culture movement, Rieff writes: "A culture that engages itself to the interminable opening of possibility issues its own death warrant: apostles and advertisers of the opening of possibility—as 'Life' or 'Progress' or 'Better Living Through Chemistry'—have adopted the transgressive rather than the interdictory style as their own[.]" RIEFF, *FELLOW TEACHERS*, *supra* note 16, at 70-71. The transgressive "opening of possibility" is the true meaning behind the "journalistic and artistic integrity" of which Gerald Levin speaks, as the controversies over Ice-T and Madonna make clear. See *supra* notes 18-28 and accompanying text.

the corporation impervious to claims by its shareholders and the commands of sacred order.

The seminal corporations theorist of the late nineteenth century was Otto Gierke, a German legal historian whose theory of the modern corporation was informed by his research into the earliest forms of associations. Gierke theorized that the corporation is a real person, separate from the individuals who created it, and that this separate person is ruled by a group-spirit. Two of Gierke's successor-critics, Harold Laski and Ernst Freund elaborated upon these themes. Laski argued that corporations were not answerable to any higher authority, such as God or the State. Freund discussed how managers came to represent the abstract psychological unity of the corporation. Again, I will use incidents from the saga of Time and Time Warner to test the insight of these long forgotten theorists and trace the demise of the corporation as a mediating institution.

A. *Otto Gierke's Theory of the Corporation as Group-Person*

A century ago, the German jurist Otto Gierke presented a jurisprudence centered on the legal claims of groups. Historically, these groups included corporations, universities, clubs, churches, trade unions, guilds, and towns, among numerous others. Gierke argued that a true jurisprudence would acknowledge that groups are living persons as real as individuals and therefore equally deserving of legal personality—the enjoyment of rights and the obligations of duties.²⁵⁰ This theory opposed the orthodoxy of his age, especially prevalent in the United States, that the corporation was an artificial or fictitious entity that had standing in law only when the sovereign chose to recognize it.²⁵¹ Until Gierke's ideas took hold in America, contracting individuals were viewed as the reality behind the fictitious corporation,²⁵² in accordance with the sec-

250. See generally J. WALTER JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 71-76 (1940) (providing an overview of Gierke's theory).

251. Some theorists distinguish between the theory that a corporation is created by concession of the State and the theory that the corporation is a fiction of the law. See, e.g., Dewey, *supra* note 44, at 666-67. However, the consequence of the two theories is the same. *Id.* As Frederic Maitland wrote: "Thus 'the Fiction Theory' leads us into what is known to our neighbors as 'the Concession Theory.' The corporation is and must be, the creature of the State. Into its nostrils the State must breath of a fictitious life, for otherwise it would be no animated body but individualistic dust." Frederic Maitland, *Introduction to GIERKE, MIDDLE AGE*, *supra* note 51, at xxx.

252. See HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 at 42-46 (1991) (examining how, over the course of the nineteenth century, the American corporation became treated as a person, though individuals were still viewed as the reality beneath the corpo-

ond world principle that legal personality resides properly only in God and the individual.²⁵³

Selected quotations of Gierke's English-speaking successors may best illustrate the purpose and rhetorical force of Gierke's theory that groups are real, not fictitious, persons. Frederic Maitland wrote that, to Gierke, the group "is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own."²⁵⁴ John Dewey wrote that all adherents to Gierke's "real personality" theory quoted the following passage: "When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law but by the very nature of things, differs from the individuals from which it is composed."²⁵⁵

As do today's corporate culture theorists, Gierke emphasized the social and psychological bond among those who compose a corporation. Unlike them, however, Gierke wrote that this bond is a natural phenomenon, which the law must recognize. It is not something manufactured, managed, or transformed by a corporation's governing elites. After reviewing Gierke's theory, and its first world sources, I will analyze the contemporary manifestations of his theory from the perspective of Rieffian sociology.²⁵⁶ I aim to demonstrate that Gierkean theory, and the corporate culture theory which succeeded it, are examples of a modern third-world impulse to reject inherited institutions by self-consciously affecting a return to lost pagan cultures. It should then become more clear that corporate management plays a revolutionary role in the present *Kulturkampf*.

rate fiction, only they being capable of possessing natural rights); Maitland, *supra* note 251, at xxiv ("[I]n America . . . highly interesting attempts have been made to dispel the Fiction . . . and find therein nothing but contract-bound men.") (footnote omitted).

253. See *supra* notes 40-44 and accompanying text.

254. Maitland, *supra* note 251, at xxvi.

255. Dewey, *supra* note 44, at 673 (quoting ALBERT V. DICEY, *LAW AND PUBLIC OPINION* 165 (1914)); see also Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 404 (1916) (quoting DICEY, *supra*, at 165); Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594, 602 (1924) (quoting Dicey, *The Combination Law and Opinion*, 17 HARV. L. REV. 511, 513 (1904)).

256. I undertook a similar analysis of Gierke's theory of the group in Friedlander, *supra* note 39, at 1070-77, 1107-08.

1. *Gierke's Germanic Roots*

Gierke offered an indirect proof from sociology and psychology for the unconventional idea that groups naturally possess a legally significant unity, or personality.

We find from our observation of the social processes among which our life is spent . . . that nations and other communities determine by their activities the balance of forces in our world, and produce our material and spiritual civilisation Now the effects which we are obliged to ascribe to the community are so constituted, that they cannot be explained as the result of a mere aggregation of individual elements If this is true of the effects, then it follows that the community which produces them must also be something different from the sum of the individuals who constitute it. It must be a Whole, with a life-unity which is itself super-individual.

Our internal experience corroborates the truth which we learn from external experience We are conscious of our self as being enclosed in itself; but we are also conscious of our self as a part of a living whole which is operative in us. If we abstract our membership of our particular nation and State, our religious community and Church, our family and a variety of other groups and associations, we cannot recognise ourselves in the pitiable residue It is a matter of psychical connections which extend down into our innermost being, and constitute integral parts of our spiritual existence We can [conclude that social Wholes are of a corporeal-spiritual nature] because these effects consist of spiritual processes which are corporeally mediated. This is the reason we speak, not only of social "bodies" and their "members", but also of the folk-soul, folk-feeling, folk-opinion and folk-will—of class-spirit, esprit de corps, family-feeling and the like.²⁵⁷

Gierke sought to ground his theory of corporations upon observable social processes and palpable psychical connections, but his studies were mostly historical. As seen in the repeated references to the *Volk*,

257. Ernest Barker, *Introduction to GIERKE, 1500 to 1800*, *supra* note 51, at lxvii-lxix (quoting OTTO GIERKE, *NATURE OF HUMAN GROUPS* 19-22 (1902)).

the groups which Gierke thought deserving of legal recognition were those embedded in the German spiritual past. Maitland wrote of Gierke's theory: "The new theory was to be philosophically true, scientifically sound, morally righteous, legally implicit in codes and decisions, practically convenient, historically destined, genuinely German, and perhaps exclusively Germanistic."²⁵⁸ In particular, Gierke found the historical antecedents of his theory in the ancient Germanic conception of the *Genossenschaft*, or fellowship.

Gierke's interpreters bring out the first world, pagan aspects of this institution. Ernest Barker, an English historian, describes the *Genossenschaft* as "the company of brothers, linked by the right hand of fellowship and knit together by a spirit of fraternity, who pursued the common interests of the group (whether based on profession, or occupation, or the simple foundation of voluntary association), and vindicated its common honour with common ardour."²⁵⁹ Barker explains further that the historical origins of the fellowship lay in "early tribalism" and "the kin group . . . of common blood."²⁶⁰ An example is "the *comitatus* described by Tacitus, whose members were so linked to their chief, and to one another, that they will die round him in one body in the stern hour of defeat."²⁶¹ Harold Berman, an American legal historian, writes that the prototypical Gierkean fellowships were "the Germanic household, or warrior band, or clan, or village," whose unity and authority were derived not from any higher authority, but from the "voluntary coming together of the members to achieve an end set by themselves."²⁶² Another Gierke interpreter, George Heiman, notes that

258. Maitland, *supra* note 251, at xxv. Maitland quoted the following passage from Gierke: "The Germanists will never be weary of seeking to champion the independent character of their own country's legal ideas, and to develop further the genuinely German content of our law, along lines of expansion that will bring it into closer accordance with the national genius." *Id.* at lvii (quoting OTTO GIERKE, *THE HISTORICAL SCHOOL OF LAW* 33 (1903)).

259. Barker, *supra* note 257, at lviii.

260. *Id.* at lviii.

261. *Id.* at lviii. Tacitus, a Roman historian of the first century, wrote *GERMANY*, an historical and ethnographic monograph of the Germanic tribes, upon which Maine relied. See MAINE, *supra* note 1, at 116-17. See generally *WHO WAS WHO IN THE ROMAN WORLD* 517-19 (Diana Bowder ed., 1980). Tacitus' description of Germanic assemblies is some of the earliest evidence of Western legal systems. BERMAN, *supra* note 45, at 49.

262. BERMAN, *supra* note 45, at 217. Edward Gibbon similarly wrote:

The German tribes were voluntary and fluctuating associations of soldiers, almost of savages. The same territory often changed its inhabitants in the tide of conquest and emigration. The same communities, uniting in a defence or invasion, bestowed a new title on their new confederacy. The dissolution of an ancient confederacy restored to the independent tribes their peculiar but long-forgotten appellation.

the right to form a fellowship originated in communal holdings of German pastures, forests, vineyards, and waters.²⁶³

Germanic tribal society exemplifies the kinship bond studied by Maine and the first worlds studied by Rieff.²⁶⁴ Life was organized around the tribe, and the basic legal unit within the tribe was the household. The household was a "community of comradeship and trust based partly on kinship and partly on oaths of mutual protection and service."²⁶⁵ An outsider's violation of the peace of a household would lead to retaliatory blood feuds, the mediation of which was the object of the legal order. Interhousehold hostility was reconciled by monetary compensation, interclan negotiations, public assemblies and trials by ordeal or ritual oath. All aspects of the ancient customs were governed by a belief in the arbitrariness, remorselessness, and centrality of pagan fate.²⁶⁶ Each clan was willing to accept the decree of fate to resolve the primordial struggle between them.²⁶⁷ Even the Christianization of the tribes did not destroy the primacy of the kinship bond and pagan fate to the Germanic folklaw.²⁶⁸

The history of the Germanic *Genossenschaft*, or fellowship, would not be worth describing had not Gierke's theory of the group-person coincided with the rise of the modern corporation. Gierke, and those Englishmen and Americans who followed him, looked to this ancient institution to comprehend the legal status of a new institution not easily explained by common law principles of individuated private property.²⁶⁹ Gierke himself criticized his fellow drafters of the German Civil Code for producing a first draft whose treatment of corporations was un-German, individualist, and capitalist.²⁷⁰ And Frederic Maitland wrote in 1900 that if ever a single body exercised a group will, or *Gesamtwille*, it was the great American trusts that were just beginning to assume the corporate form.²⁷¹

1 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 206 (Oliphon Smeaton ed., The Modern Library, New York (1929)).

263. George Heiman, *The Nature of Associations and Fellowships*, in GIERKE, *CLASSICAL*, *supra* note 51, at 21-23.

264. See MAINE, *supra* note 1, at 116.

265. BERMAN, *supra* note 45, at 52.

266. *Id.* at 59.

267. *Id.* at 60.

268. *Id.* at 62-76.

269. See generally Mark, *supra* note 52, at 1441, 1443-47, 1464-70.

270. JONES, *supra* note 250, at 71 n.3; see also Barker, *supra* note 257, at lv-lvi.

271. See Maitland, *supra* note 251, at xxxii.

Standard Oil thus becomes the juristic successor of ancient Germanic warrior tribes. As another interpreter of Gierke put it, a modern stock company may not be a Gierkean group person, but it is treated as such.²⁷² In that analogy lies the fiction of modern corporation theory, the imagining that an inextinguishable and self-perpetuating pagan clan bears a legally significant resemblance to Time Inc.

A self-conscious return to the images of a lost past is at the core of Gierke's Germanist theory of the modern corporation.²⁷³ But where Gierke thought he had discovered ample historical evidence of jurisprudential truth, some who followed him used historical images to camouflage a revolutionary program. When the Nazis rewrote the German corporation statute in 1937, they removed all mention of fiduciary duties owed to shareholders. The original draft of the new section 70 simply proclaimed: "The managing board is the leader (*der Fuhrer*) of the Corporation." However, the final version of the statute achieved the same result by invoking the teutonic personal bond of feudal fealty. It read: "The managing board is, in its own responsibility, to manage the corporation as the good of the enterprise and its retinue and the common weal of folk and realm demand."²⁷⁴ This is the clearest example of which I am aware of the *Kulturkampf* in corporate law—a fictive return to first world legal relations justifying a third world seizure of private property. Should we not be skeptical of boards of directors that proclaim their allegiance to the public interest or their own corporate culture?

2. Gierke's History of the Kulturkampf in Corporation Law

Gierke's importance lies not only in his analogizing the modern corporation to the Germanic *Genossenschaft* but also in his historical studies of corporation theory. Both aspects of his thought help us understand the contemporary corporation. Gierke properly understood that the legal status of corporations turned on the outcome of a continuing struggle between competing cultures and their separate theories of the corporation. Gierke himself championed the Germanic theory, the theory that a corporation embodies a group spirit that is created when individuals come together for a common purpose. As we have already seen, an opposing theory is the idea that the corporation is a fictitious

272. See Heiman, *supra* note 263, at 23.

273. See Barker, *supra* note 257, at lx.

274. For the translation and interpretation of the statute, I rely on Detlev F. Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 HARV. L. REV. 23, 40 (1966).

entity created by the state. Gierke located the origins of the fiction theory in ancient Rome, where all associations derived their authority from the State and the will of the Emperor was the living law.²⁷⁵ Much of Gierke's thought can be interpreted as his attempt to resuscitate native Germanic law and overthrow the Romanist law that had swept over Germany six centuries before Gierke's birth.²⁷⁶

A more important cultural divide is that identified in Gierke's *Political Theories of the Middle Age*. In that book, Gierke discussed how, in the thirteenth century, papal legists and canonists strove to create a theory public law out of such diverse sources as Aristotelian philosophy, Roman and canon law, medieval history, and Augustine's *City of God*.²⁷⁷ The most important intellectual struggle at this time, according to Gierke, was "the contest between [ideas] Properly Medieval and 'Antique-Modern' thought."²⁷⁸ Gierke summarized medievalism as "a system of thoughts which culminated in the idea of a Community which God Himself had constituted and which comprised All Mankind."²⁷⁹ Every being is assigned a place in a larger whole, and God is the one source and goal of every being. The powers of the State are limited by law, and every intermediary group between the individual and God is an organism directed by the Divine Will.²⁸⁰ Antique-Modern thought, by way of contrast, conceived of the State as the absolute concentration of group life.²⁸¹

That division, between medieval thought on the one hand and antique-modern thought on the other, is present in the Rieffian typology of first worlds, second worlds, and third worlds. The antique worlds of Greece and Rome are both examples of pagan first worlds. Ideas that are "Properly Medieval" are those Christian theories belonging to the second world. Modern, third world theories recycle motifs of first world thought, in opposition to second world motifs. What Gierke failed to realize is that the Germanic thought he championed belongs

275. GIERKE, CLASSICAL, *supra* note 51, at 108. As Justinian's *Institutes* famously proclaim: "That which seems good to the emperor has also the force of law." G. INST. 1.2.6.

276. See generally Maitland, *supra* note 251, at xii-xviii.

277. See GIERKE, MIDDLE AGE, *supra* note 51, at 1-2; See also BERMAN, *supra* note 45, at 204-05 ("Justinian's Roman law was considered . . . a written embodiment of reason Jurists turned to Justinian's texts as they turned to the Mosaic law [and Germanic law] and as they later turned to Aristotle, as sources of positive law.")

278. GIERKE, MIDDLE AGE, *supra* note 51, at 3.

279. *Id.* at 4.

280. *Id.* at 7-37.

281. *Id.* at 21.

just as much to the first world as does Romanist thought. As Maine recognized, both Germanic law and Roman law are of tribal origin.²⁸² In both legal systems, the basic legal unit is the permanent familial group, whether that group be a German *Genossenschaft* or the Roman *populus Romanus*.²⁸³ The distinguishing feature of second world law is that all groups are intermediary institutions between God and the individual. The basic legal relation in second world law is the *imago dei*, individual persons created in the image of God and obligated to follow God's commands.²⁸⁴

The present *Kulturkampf*, between second world and first/third world motifs, continues the battle between ideas "Properly Medieval and 'Antique-Modern' thought." Section II of this article drew certain connections between first world patriarchal families and third world corporate practice. The present section traces the influence of Gierke's recycled theory of the *Genossenschaft* and analyzes how modern corporation theory opposes the second world conception of the corporation as a mediating institution standing under divine command.

3. Time Culture as Fictive Gierkean Revival

Today's corporate culture theorists invoke a distinctly American lost patriarchal history. Deal & Kennedy write that American managers have lost their way since the 1920s.²⁸⁵ Before then was an age of "visionary

282. MAINE'S *Ancient Law* draws on both Germanic and Roman sources, and Maine's governing principle, that the basic legal unit of ancient society is the permanent family, applies to both. On the particular relationship between Germanic law and Roman law, Maine wrote: "The German law of the conquerors and the Roman law of their subjects would not have combined if they had not possessed more affinity for each other than refined jurisprudence has usually for the customs of savages." MAINE, *supra* note 1, at 288.

283. Gierke wrote that the *populus Romanus* was "the theoretically assembled totality of the Roman citizens," which, when acting collectively, carried the "uniform and indivisible common will." GIERKE, *CLASSICAL*, *supra* note 51, at 101, 102. This idea is itself based on the centrality of the family group:

In most of the Greek states and in Rome there long remained the vestiges of an ascending series of groups out of which the State was at first constituted. The Family, House and Tribe of the Romans may be taken as the type of them, and they are also described to us that we can scarcely help conceiving them as a system of concentric circles which have gradually expanded from the same point.

MAINE *supra* note 1, at 123-24. Gierke drew many fine distinctions between Germanic and Roman conceptions of the group, but the principle holds, I believe, that the centrality of the group to both legal systems places them in fundamental opposition to second world jurisprudence.

284. See Rieff, *Tocqueville*, *supra* note 16, at 6, 15-16; see also Rieff, *Newer Noises of War*, *supra* note 16, at 317.

285. DEAL & KENNEDY, *supra* note 54, at 37.

heroes,²⁸⁶ of people such as Tom Watson, John D. Rockefeller, and Henry Ford, who “have become part of the folklore of American industry.”²⁸⁷ They built great companies by creating a “an environment—in effect, a culture . . . in which employees could be secure and thereby do the work necessary to make the business a success.”²⁸⁸ Today’s middle managers are therefore instructed to follow a plan “as American as apple pie.”²⁸⁹ “American business needs to return to the original concepts and ideas that made [IBM, Standard Oil, Ford et al.] great.”²⁹⁰

Henry Luce and Time belong in the same pantheon. Luce, too, created a successful corporation in which its employees flourished.²⁹¹ As at IBM, Standard Oil, and Ford, there was no doubt that Time’s corporate culture emanated from a single individual. Luce had occasion to remind his subordinates that they worked not for a permanent corporation, but for him personally:

I suppose that most of you, or many of you, take Time rather for granted But I think an old-timer, a real old-timer, can never *quite* get used to the fact that we don’t have to worry about Time’s still being in existence a little while So I introduce myself to you first as an old-timer. And then secondly, I introduce myself to you as your boss. Whether or not I’m the father of Time and of Time Incers I am literally your boss.²⁹²

Because Luce was the boss, Time’s editorial policy kept in step with his political opinions.²⁹³ Time’s drama critic once remarked, “one of the things wrong with [Time’s] staff was its being more royalist than the

286. *Id.* at 43.

287. *Id.* at 38.

288. *Id.* at 5.

289. *Id.*, at 5.

290. *Id.* at 5.

291. See CLURMAN, *supra* note 2, at 20-21:

“Luce’s place” was a hurly-burly Camelot, with its warring lords and unruly plebians, talented, diverse, and well tended. The heady environment around him and the magazines his messianic near genius created, extended the range and sophistication of journalism beyond that of any press eminence of the century.

292. SWANBERG, *supra* note 29, at 330 (quoting Luce). Another remark of Luce’s leaves open to doubt whether Luce made Time as secure and stable as the family home. Luce reportedly told Robert Fuoss, the publisher of the *Saturday Evening Post*: “The way to get the best man for a job is to let two men compete for it.” *Id.* at 238.

293. Luce reminded his staff that he was boss as he defended *Time* magazine’s more favorable coverage of Dwight Eisenhower than Adlai Stevenson. SWANBERG, *supra* note 29, at 330.

king."²⁹⁴ As king, Luce dispensed benefits and demanded loyalty in return.

Gierke demanded more from his theory of groups. What he termed the "decisive step" was the recognition of "an invisible unity as the true Ruling Personality."²⁹⁵ Yet the modern corporation is ruled not by "an invisible unity," but by its managerial elite, which Adolf Berle aptly termed "the control."²⁹⁶ A corporation so controlled is not a true Gierkean group-person. As Gierke himself said of early modern political theorists who claimed that the State was ruled by an organic unity: "As soon as the issue became that of finding personal 'Subjects' for this system of control the stage was once again occupied merely by individuals, or by assemblies of individuals In spite of all assertions to the contrary, [the State] was no more than a work of art, counterfeited to look like a natural body; a machine invented and controlled by individuals."²⁹⁷ Gierke summarized the theoretical failure of his favorite thinker, Johannes Althusius,²⁹⁸ as follows: "in spite of every effort to attain the idea of a true and organic Group-being by the use of the Teutonic conception of 'Fellowship', there is a final failure to make either the State or the corporation a whole which is really one"²⁹⁹

The modern corporation cannot be a first world "whole which is really one." It, too, is a counterfeit made to resemble a person with natural needs and aspirations. Unity must be feigned, as modernity's centrifugal forces isolate each member of the corporation from his fellow. At Time Inc., the shareholders, journalists, cable television executives, inside directors and outside directors acted on their different interests, belying the claim that the imperatives of the Time Culture controlled decisionmaking at the corporation. Corporate culture theorists themselves counsel that corporations contain various "subcultures," which must be managed.³⁰⁰

294. SWANBERG, *supra* note 29, at 325, (quoting, LOUIS KRONENBERGER, NO WHIPPINGS, NO GOLD WATCHES 135-136 (1970)).

295. GIERKE, 1500-1800, *supra* note 51, at 52.

296. BEARLE & MEANS, *supra* note 3, at 5.

297. GIERKE, 1500-1800, *supra* note 51, at 52.

298. Gierke wrote about Althusius at length in his *THE DEVELOPMENT OF POLITICAL THEORY* (Bernard Freyd trans., 1939) (1880). Unlike Gierke's theory of the *Genossenschaft*, Althusius' theory of the corporation, or *collegium*, is based primarily on Scripture and Roman law. See JOHANNES ALTHUSIUS, *POLITICA* 33-38 (Frederick S. Carney ed. & trans., 1995) (1614).

299. GIERKE, 1500-1800, *supra* note 51, at 76.

300. See DEAL & KENNEDY, *supra* note 54, at 138-39, 150-54; Van Maanen & Barley, *supra*

In the age of Deal & Kennedy's "visionary heroes," corporations more closely resembled a unified tribal group. Hiring and promotion policies perpetuated ethnic homogeneity, increasing compatibility among employees, but excluding the most qualified minorities, especially Jews.³⁰¹ A generation ago, corporate policy shifted toward assimilation and redistribution. In 1966 one professor wrote: "[T]he managers of corporations and all of us are engaged in the highly important and perhaps fateful task of creating a new society, one perhaps which will be more democratic and more capable of developing and distributing its material and spiritual rewards to our people."³⁰² A sociologist of that same era spoke of the "revolutionary role" the modern corporation is playing in "gradually creating a world community."³⁰³

More precisely, management discovered its "revolutionary role." No longer controlled by the corporation's owners, whose predecessors banded together to create the corporation, management converted the corporation into a world-transforming institution, and assumed the third world position in the *Kulturkampf*. Unlike a unified Gierkean tribal group, the modern corporation celebrates large-scale fictive group-identities, often apart from the corporation itself. In many of our largest corporations, management consultants teach "diversity awareness," group therapy sessions in which non-white employees are categorized as members of separate cultures, to be judged by separate standards for purposes of hiring and promotion.³⁰⁴ CEOs commit their corporations to affirmative action programs despite the frictions and lack of tangible benefits produced.³⁰⁵ And no longer bound by the common-law rule that

note 169, at 36-51.

301. See E. DIGBY BALTZELL, *THE PROTESTANT ESTABLISHMENT: ARISTOCRACY & CASTE IN AMERICA* 315-34 (1964).

302. W. Lloyd Warner, *The Corporation Man*, in *THE CORPORATION IN MODERN SOCIETY*, 106, 121 (Edward S. Mason ed., 1959).

303. BALTZELL, *supra* note 301, at 320.

304. Heather MacDonald, *The "Diversity" Industry*, *THE NEW REPUBLIC*, July 5, 1993, at 22, 23 (reporting that 40% of American companies have instituted a form of "diversity" training, and that half of the Fortune 500 companies have a manager responsible for diversity management); see also Leon E. Wynter, *Diversity Is Often All Talk, No Affirmative Action*, *THE WALL ST. J.*, Dec. 21, 1994, at B1 (noting that 72% of Fortune 50 firms have formal diversity-management programs and that the promotion of "diversity" is seen as less stigmatizing and offensive than a commitment to "affirmative action"). Both MacDonald and Wynter see diversity awareness as an ideology following in the footsteps of affirmative action. Wynter may be correct that some companies pursue diversity as a replacement for affirmative action goals and timetables, but MacDonald well describes how diversity training aims to lower the tensions that arise from race-based hiring and promotion policies.

305. See *Affirmative Action: Why bosses like it*, *THE ECONOMIST*, Mar. 11, 1995, at 29 (dis-

corporate donations benefit the corporation, managers donate vast sums to organizations that tend toward the utopian,³⁰⁶ while the bonds of fellowship within the corporation become more attenuated.

Richard Munro's career at Time spanned the period from when corporations were modeled after families to when managers used the corporation's resources to transform society. When Munro finished college and arrived at Time, it was, in his words, "very WASPy, Williams, Yale, a little blue blood."³⁰⁷ A paternalist, Henry Luce provided excellent employee benefits, signed no employment contracts, and paid himself a relatively small salary.³⁰⁸ Three decades later, when Munro was CEO, he spoke of his dismay that the "social contract" between employees and corporations no longer existed.³⁰⁹ Yet Munro disparaged the idea that managers should devote themselves solely to the benefit of the corporation; he concerned himself with "the bigger issues."³¹⁰ He volunteered much of his time to improving New York's public schools, thought the national government should adopt the agenda of "Japan Inc.," and he believed in affirmative action policies, though he admitted that they hurt Time at least in the short run.³¹¹ Munro criticized executive salaries as being "obscene" and "outrageous,"³¹² but under his own employment contract, he collected \$1.5 million in his first year in retirement following the merger, and was guaranteed a lifetime retirement income of over \$1 million annually, in addition to income from his

cussing multicultural policies at Corning, Avon Products, Xerox Corporation, Digital Equipment Corp. and how "it is becoming an article of faith in American business schools that heterogeneous firms will be better placed to form global alliances"); Alan Farnham, *Holding Firm on Affirmative Action*, FORTUNE, Mar. 13, 1989, at 87 (reporting that 59% of CEOs do not plan to change their affirmative action programs and 42% remain fully committed to them, even though only 22% believe that their programs have produced substantial new talent for their companies); see also *supra* note 304.

306. By the time the leading case of *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953) was decided, the common-law rule prohibiting donations that did not benefit the corporation had been largely superseded by statute. According to a recent study, American corporations now donate \$5 billion annually, representing five percent of all charitable giving. Of the 250 most philanthropic corporations, most give to predominantly liberal or leftist causes, as opposed to conservative or non-ideological organizations. Jeffrey H. Coors, *The Meaning of Corporate Stewardship*, IMPRIMUS, June 1993, at 1, 4, 6.

307. CLURMAN, *supra* note 2, at 69 (quoting Munro).

308. *Id.* at 67, 328.

309. Munro Dep. Ex. 10, *Paramount communications, Inc.* (C.A. No. 10866).

310. *Id.*

311. *Id.*

312. CLURMAN, *supra* note 2, at 328.

stock holdings, worth approximately \$20 million.³¹³

Munro's vision is far from that of Luce and farther still from Gierke's *Genossenschaft*. The first world conception of the corporation as an embodiment of the bond of blood has become an empty abstraction. No longer controlled by its owners, who initially may have shared a common bond, the corporation becomes an instrument of the CEO, whose claimed devotion to the corporate culture masks the pursuit of private wealth and public power. This transfer of power is abetted by permissive corporation statutes and nominal fiduciary duties. To repeat an oft-quoted passage: "We have nothing left but our great empty corporation statutes—towering skyscrapers of rusted girders, internally welded together and containing nothing but wind."³¹⁴ The Nazi corporation statute discussed earlier is a leading example.³¹⁵

B. Harold Laski's Severance of Corporations from Highest Authority

1. Laski's Third Culture Pluralism

The English political theorist Harold Laski introduced an idea that has helped consolidate the authority of the CEO against the claims of moralists and shareholders alike. Laski called his idea "pluralism," by which he meant that corporations are autonomous units that are not answerable to a singular highest authority, such as the State.³¹⁶ Corporations and other groups must instead be judged in reference to themselves.³¹⁷ The influence of Laski's pluralism can be seen decades later in Gerald Levin's defense of Ice-T, when Levin said that neither the State nor any cultural elite would influence Time-Warner's decision of what products to disseminate. Laski's pluralism can also be seen in the recognition extended by Delaware's courts to Time's continued corporate existence. As the Delaware Supreme Court described the case, Time's board had decided that "the corporation must expand to survive," and that Time's survival plan was threatened by Paramount.³¹⁸

313. *Id.* at 327.

314. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 *YALE L.J.* 223, 245 n.37 (1962).

315. See *supra* note 274 and accompanying text.

316. HAROLD J. LASKI, *STUDIES IN THE PROBLEM OF SOVEREIGNTY* 23 (1917); Harold J. Laski, *The Personality of Associations*, 29 *HARV. L. REV.* 404, 425 (1916). For a brief summary of Laski's pluralism, see Isaac Kramnick, *Our Harold*, *THE NEW REPUBLIC*, Dec. 6, 1993, at 21.

317. LASKI, *supra* note 316, at 11.

318. *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1152-53 (Del. 1990).

That analysis could have been taken directly from Laski, who, in 1917, exclaimed: "The association is to thrive. It is not to have its life cramped, its development impeded."³¹⁹ I discuss below how that thought relates to later evolutions in corporation theory and to the *Kulturkampf* in corporate law.

Following Gierke, Laski believed that trusts, corporations, clubs, universities, churches, and towns are all real persons deserving legal recognition, since each possesses a group-life and a group-will that is not conferred by the State.³²⁰ Unlike Gierke, Laski thought the legal recognition of corporate bodies to be inconsistent with belief in a singular highest authority, to which all corporate bodies are ultimately subordinate. Laski opposed his own pluralism to Gierke's description of medieval political thought, in which "[e]verywhere the One comes before the many."³²¹ From this medieval, or second world, perspective, corporations are each agents of the Divine Will.

Laski did not direct his aim at God's primacy, however, perhaps assuming that no modern thinker defended that position. What Laski called "that all-embracing One" is not God, but the State.³²² Laski's enemies were those who believed that "[t]he State must triumph and has need of some organ whereby its end may be attained."³²³ To that argument, Laski responded: "We refuse [the State] the title of creator of all else."³²⁴

If the corporation was to have its own personality, one not created by God or the State, then that personality had to be created by itself. "We shall then say that the corporation, being a real entity, with a personality that is self-created and not state-created, must bear the responsibility for its actions."³²⁵ But to whom is the corporation responsible? Who will keep it and its representatives in check?

Laski did not answer those questions, as he was more concerned with opposing the efforts of Church and State to confine corporate activity beyond its natural limits. This concern extended to the rivalry between Church and State for supremacy in public affairs. Laski believed that those who asserted the priority of the Papacy, such as de

319. Laski, *supra* note 316, at 418.

320. LASKI, *supra* note 316, at 4-5; Laski, *supra* note 316, at 417, 426.

321. LASKI, *supra* note 316, at 5 (quoting Gierke).

322. *Id.* at 5.

323. *Id.* at 7.

324. Laski, *supra* note 316, at 426.

325. *Id.* at 417.

Maistre, erred just as much as those who asserted the priority of the State, such as Bismarck. Both claimed absolute sovereignty, and neither side recognized that various groups, such as corporations, churches and unions had legitimate, competing claims upon an individual's allegiance.³²⁶ Laski asked rhetorically: "Was not the *Kulturkampf* but the expression of Bismarck's conviction that your sovereign must be one and know no fellow?"³²⁷ Historically speaking, the answer is yes, but Laski was mistaken if he believed that a proliferation of corporate bodies would resolve the *Kulturkampf*. It only allowed corporations to become combatants in the culture war.

When Laski wrote, the word *Kulturkampf* referred to efforts by the State to disarm by law the authority of the Church.³²⁸ Laski supported neither side in that battle, but in the larger war between the second worlds and the emergent third, Laski was a fierce partisan. He set himself to disarming the intellectual edifice established by the medievalists, who recognized the existence and powers of corporate bodies but subordinated them to God and those individuals authorized to apply God's law.³²⁹ The continuing *Kulturkampf* encompasses all assaults upon sacred order, whether they be launched by the State, by theorists such as Laski or by the plurality of corporate bodies that he championed. Rieff writes, "[h]ere and now, pluralism has its price: a united front of second against third world assaults, which are often mounted in the name

326. LASKI, *supra* note 316, at 211-65.

327. *Id.* at 8. Laski similarly criticized Gladstone. *Id.*, at 425.

328. Rieff writes that the word, *Kulturkampf*,

first appeared in common German use in the early 1870's during the struggle of the National Liberal political party to disarm by law the *moral/educational* authority, and political pupltry, of a triumphalist Roman Catholic hierarchy, revitalized as it then was by its dogma of papal infallibility in matters of faith and morals. The aim of the National Liberals was to shift the German Catholic imagination away from the church to the state. The Pope responded to newly restrictive laws by forbidding clerical conformity to them. In turn, the state dismissed clerical resisters from their duties and, moreover, suspended their state salaries. Elites of the *kulturstaat*, both Catholic and Protestant, then learned a fatally rational and enduring lesson: the high price of being other than indifferent to the temptation of opposing the *machtstaat* [i.e., the power of the state].

Rieff, *Newer Noises of War*, *supra* note 16, at 326-27.

329. For a thorough discussion of the medievalists' application of this principle, see GAINES POST, *STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE, 1100-1322*, at 27-60 (1964), which traces how bishops and popes came to recognize the University of Paris as a corporation free from direct control by its cathedral chapter and the bishop, but still subordinate to the canon law of the church and to the jurisdiction of the bishop and chancellor in certain respects.

of pluralism.”³³⁰ Laski was the first to mount an assault against second world corporation law in the name of pluralism.

2. *The Consequences for Corporate Practice*

Laski did not foresee that corporations, once unleashed from the limits imposed by higher authorities, would themselves claim sovereign power over individuals. He believed corporations to be naturally limited in scope, writing “[c]ommercially, Mr. Brandeis has shown that certain business units may become so large that as to be physically incapable of successful administration.”³³¹ Since those words were written, managers and management consultants have dedicated themselves to proving Brandeis wrong, to the point where someone reading the corporate culture literature, or witnessing the plight of a Time shareholder, would have good reason to conclude that Laski’s following description of the State now better describes the corporation: “You must surrender your personality before its demands It has the right, as in the sovereign view it has the power, to bind your will into its own. They who act as its organ of government and enforce its will can alone interpret its needs. They dictate; for the parts there is no function save silent acquiescence.”³³² Authors of a leading book on corporate culture concede: “So strong is the need for meaning, in fact, that most people will yield a fair degree of latitude or freedom to institutions that give it to them. The excellent companies are marked by very strong cultures, so strong that you either buy into their norms or get out.”³³³

At Time, for example, shortly before its merger with Warner, Time’s Editor-in-Chief, Jason McManus, required that the employment contracts of the managing editors contain a clause proscribing that the editors “not at any time denigrate, ridicule, or intentionally criticize [Time], including without limitation, by way of news interviews, or the expression of personal views, opinions or judgments to the news me-

330. Rieff, *Newer Noises of War*, *supra* note 16, at 326.

331. LASKI, *supra* note 316, at 284.

332. LASKI, *supra* note 316, at 8. The corporation has since been compared to the Hobbesian Leviathan. See Earl Latham, *The Body Politic of the Corporation*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 302, at 218. The comparison works in reverse, as well. For an excellent article on how the latest trend in authoritarian corporatism can be adapted to governmental administration, see Leon Weiseltier, *Total Quality Meaning: Notes toward a definition of Clintonism*, *THE NEW REPUBLIC*, July 19 & 26, 1993, at 16.

333. THOMAS J. PETERS AND ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES* 77 (1982).

dia.”³³⁴ Warner’s Ross objected to the clause, but Time executives insisted that it remain, even though, if enforced, it would prohibit a Time reviewer from criticizing any Time-Warner product, such as Ice-T or Madonna.³³⁵ When Gerald Levin attacked corporate censorship three years later, he elevated solicitude for Time-Warner products to the level of company credo.³³⁶ No one at Time Warner could question the morality of what the corporation disseminated globally.

Such a Time Warner Culture implicates another of Laski’s fears regarding the State: “We seem in genuine danger of going back to an ancient and false worship in unity, to a trust in undivided sovereignty as the panacea for our ills.”³³⁷ The “false worship of unity” is a motif of the first and third worlds, arising when any properly intermediary group—such as the State or the Corporation—becomes itself an object of piety. Third world elites assert nothing greater than the fictive group they claim to represent. They claim that the Corporation or the State is the creator of culture, meaning, and identity. Because it mediates no higher truth, the Time Warner culture can be expressed as the ambition to mediate everything by all means imaginable, to be a “media colossus with international scope.”³³⁸

Henry Luce also attempted to build a global media colossus, but he saw himself, Time Inc., and America as agents of sacred order, making him more like Gierke’s medieval monist than Laski’s modern pluralist. Time existed to deliver the truth, not what Luce called “alleged journalistic objectivity.”³³⁹ The American government existed to perform God’s will. Luce regarded America as a “special dispensation under Providence.”³⁴⁰ “God rules the world. . . . In his Providence, He calls this nation now to be a principal instrument of His will on earth.”³⁴¹ America’s, Time’s and Luce’s place in sacred order were all on display when *Life* magazine published Luce’s essay, “The American Century,”³⁴² in which Luce announced America’s global mission of “lifting the life of mankind from the level of beasts to what the Psalmist called

334. CLURMAN, *supra* note 2, at 309.

335. *Id.* at 310.

336. *See supra* notes 26-28 and accompanying text.

337. LASKI, *supra* note 316, at 284.

338. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1147 (Del. 1990).

339. SWANBERG, *supra* note 29, at 331 (quoting Luce)

340. *Id.* at 332 (quoting Luce)

341. *Id.* at 307 (quoting Luce).

342. Henry Luce, *The American Century*, LIFE, Feb. 1941, at 61.

a little lower than the angels."³⁴³

Alfred Kazin, the eminent literary critic and former writer for *Fortune* magazine, described how Time Inc. fit into Luce's second culture worldview:

He of course believed that his magazines, whose very names summed up all human experience—*Time*, *Life*, *Fortune*—was the great educational medium. He was looking for a word to fit the great American deed. He was looking for a theology of the business society, for America as word. America was to be *made* word. Luce, born of missionary parents, thought of himself as a zealous Christian with a mission.³⁴⁴

Because Luce believed Time Inc. to be a cultural institution, a medium of sacred order, it could not be a self-referential Time Culture whose growth was its own end. Luce explicitly proclaimed that "get[ting] bigger and more profitable . . . was never exactly the main point about Time Inc. and [was] not likely to become so."³⁴⁵

Luce's division of Time into journalists and managers, "church" and "state,"³⁴⁶ was designed to ensure that Time retained its cultural function. Though Laski likely would have applauded this system of divided sovereignty, it affirmed the existence of a highest authority, to be mediated by the Editor-in-Chief, whose exercise of editorial discretion would prevent the magazines from printing fictions and falsehoods, and ensure that the corporation did not stray from journalism to disseminating the immoral imaginings of film directors and entertainers.

The weakness of successor Editors-in-Chief eventually led to the demise of the "church/state relationship," and the concomitant affirmation of the empty Time Culture, signalling that the corporation's function had been transformed to mere expansion and self-perpetuation. Where Time had once been ruled by a second culture "zealous Christian with a mission," Time Warner came to be controlled by Gerald Levin, a one-time aspirant to the rabbinate converted to the third culture cult of "action." In an interview, Levin stated that his favorite author is Camus, who Levin describes as believing that "the act of rebel-

343. *Id.*

344. ALFRED KAZIN, *NEW YORK JEW* 54 (1978).

345. CLURMAN, *supra* note 2, at 343 (quoting Luce).

346. See *supra* text accompanying notes 68-71.

lion, the fact of action, that's where you get meaning." ³⁴⁷Rebellious action: a good working description of what drives the third world corporation once it is severed from highest authority. In Time Warner, Laski's autonomous corporation achieved its apotheosis.

3. *The Consequences for Corporate Governance*

By severing the corporation from the claims of the state, Laski sought to expand the corporation's freedom of action. This ideal of the thriving corporation justified liberating management from all restrictions imposed by a higher authority, whether that higher authority be the State, the shareholders or management's own recognition of sacred order. The implications of Laski's theory were recognized a generation later by Adolf Berle, who knew that management need be controlled by one of these three sources of authority.

Early in his career, Berle argued that permitting corporations to pursue goals other than shareholder profits, without creating an enforceable scheme of managerial responsibility, amounted to handing the corporation "over to control with a pious wish that something nice will come of it all."³⁴⁸ The law developed as Berle feared it would, without such external controls, causing Berle to note: "The legal presumption in favor of management . . . leaves management with substantially absolute power. Thus the only real control . . . is the . . . philosophy of the men who compose them."³⁴⁹ Faced with that reality, Berle developed an alternative theory of managerial responsibility, the "corporate conscience," which was premised on the idea that managers could be educated to act responsibly.³⁵⁰ Berle looked to history and observed how the Catholic Church had checked the power of monarchs; Saint Augustine had developed a system of such authority that princes felt

347. CLURMAN, *supra* note 2, at 148 (quoting Levin). Clurman relates further evidence of Levin's ethos of action. Levin became a lawyer but gave it up "because you were giving advice to people who were really doing something." *Id.* at 149 (quoting Levin). Levin then came under the influence of David Lilienthal, former chairman of the Tennessee Valley Authority, who taught Levin "how you take things with the force of an idea and put them into action." *Id.* (quoting Levin).

348. Adolf A. Berle, Jr., Note: *For Whom Corporate Managers Are Trustees*, 45 HARV. L. REV. 1365, 1368 (1932); see BERLE & MEANS, *supra* note 137, at 221.

349. ADOLF A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 180 (1954).

350. *Id.* at 184-85. Late in his career Berle indicated his preference for his earlier position. See Berle, *Foreword* to *THE CORPORATION IN MODERN SOCIETY*, *supra* note 302, at xii ("I am not convinced [that social fact and judicial decisions turned out right]. Things being as they are, I am unabashed in endeavoring to seek the best use of a social and legal situation whose existence can neither be denied nor changed.").

obligated to submit themselves to it.³⁵¹

Berle hoped that in response to unremitting pleas for justice, the CEO, as king, would create an office equivalent to that of the medieval Chancellor, who would aid aggrieved members of the corporation. Berle did not realize, however, that the present *Kulturkampf* has weakened not only the legal constraints on the internal governance of corporations, but also those cultural institutions which weigh heavily on a sovereign's conscience. No longer can we count on the "priests . . . to intimidate the policeman [or the] philosophers [to] check the politicians."³⁵² It appears folly to expect corporate management to begin recognizing "higher law."³⁵³

Henry Luce may have come closest to Berle's ideal. He recognized higher law, attempted to create "a theology of the business society" and "spoke of *Fortune* as an intellectual service to American leaders."³⁵⁴ His creation of the office of Editor-in-Chief, wholly independent from the CEO, can even be seen as an attempt to embody the corporate conscience. The history of *Time* demonstrates, however, that corporate officers cannot be trusted to subordinate themselves either to shareholders or morals. External controls are needed.

Berle knew that the management consultants had become the successors to the ecclesia. He noted approvingly that General Motors had retained Peter Drucker, the philosopher-turned-management consultant, to advise them how to construct a community for the 21st century.³⁵⁵ General Motors did not follow Drucker's advice, however,³⁵⁶ suggesting that the consultants' authority does not rank with that of the medieval church. Berle and others may suggest that corporations examine their "conscience" and follow the lead of philosophers,³⁵⁷ but the management consultants do not provide moral instruction and their

351. BERLE, *supra* note 349, at 68-69, 71, 177-78, 180-81.

352. *Id.*, at 187; *see id.* at 69.

353. *Id.* at 69.

354. KAZIN, *supra* note 344, at 53, 54.

355. BERLE, *supra* note 349, at 70, 173.

356. *See* PETER DRUCKER, *THE CONCEPT OF THE CORPORATION* 117 (2d ed. 1975).

357. *See* Bernard Murchland, *The Socialist Critique of the Corporation*, in *THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, THE CORPORATION: A THEOLOGICAL INQUIRY* 156, 171 (Michael Novak & John W. Cooper eds., 1981) ("[Corporations] should make periodic retreats for a kind of examination of conscience (A philosopher in residence for each corporation might be a good idea.)"). Murchland, like Berle, believes that a medieval perspective might be useful in understanding corporations, but he concludes that modern corporations are most compatible with motifs taken from modern philosophy, such as Nietzsche's will to power. *Id.* at 180.

advice is followed only if it serves the interests of the CEO. As seen in Deal & Kennedy's *Corporate Cultures: The Rites and Rituals of Corporate Life* and the related literature, the development of a corporate culture rests on the managers' fictive ministrations of the priestly function.³⁵⁸

The accuracy of Berle's early prophecy and the failure of his alternative theory evidences the *Kulturkampf* in corporate law that followed Laski's attack upon the subordination of the corporation to agencies of highest authority. Today, Delaware corporations must still yield to the orders of the Chancellor, originally the depository of the king's grace, whose centuries-old jurisdiction is to recognize the equitable rights of those without power.³⁵⁹ However, the deference extended to the Time Culture by the Delaware Court of Chancery and the Delaware Supreme Court illustrates the continuing influence of Laski's pluralism, which severed corporations from highest authority.

C. Ernst Freund and the Psychological Basis of Managerial Authority

In this subsection, as in the previous two, I attempt to trace the eclipse of the corporation as second world mediating institution, by which individuals achieve mutually beneficial ends within the bounds of sacred order. The modern corporation, under the permanent control of its management, is an authority unto itself. In this subsection, I explore the modern justification for managements' authority.

1. *The Importance of Psychology to Modern Corporation Law*

Management's assumption of control over the corporation is a modern phenomenon from which almost all contemporary corporate law scholarship begins.³⁶⁰ Less discussed today is the psychological basis of managerial authority. When Chancellor Allen and Justice Horsey each deferred to the Time directors' choice of a merger partner, they gave implicit legal sanction to the Time directors' psychological justification for that choice—a deal with Warner allowed for a Time co-CEO, thereby maintaining the Time “identity,” to which the directors felt allegiance.³⁶¹ The therapeutic goal of maintaining a presumed psychological

358. See *supra* notes 202-225 and accompanying text.

359. JOHN MARTIN POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 33-35 (5th ed. 1941).

360. See Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 923 (1984).

361. *Paramount Communications, Inc. v. Time Inc.*, C.A. No. 10866, slip op. at 16-17 (Del.

bond among employees was rendered consistent with fiduciary duty, even though it rended the trust of the great majority of Time's stockholders.

The importance of psychology to corporation law dates from Otto Gierke, whose emphasis of the psychological bond among a corporation's members influenced academic debate for decades. In 1932, a prominent scholar remarked that corporation theory, though long surrounded by "the touch of mysticism," now "also involves a psychological factor which is thoroughly modern."³⁶² Shortly thereafter, Yale professor Thurman Arnold anticipated the corporate culture movement by five decades when he noted that if a corporation is to be thought of as a person, then when the corporation fails to function, "reforms must be attempted with something like the same point of view with which a trained psychiatrist reforms an individual."³⁶³ Legal scholars then ceased examining the cultural tectonics underlying corporate law, once they absorbed John Dewey's critique that corporation theory had become encumbered by "extraneous conceptions" chiefly imported from "uncritical popular beliefs, from psychology, and from a metaphysics ultimately derived from theology."³⁶⁴ The courts' implicit recognition of the Time Culture reveals the continued centrality of these "extraneous conceptions"; therapeutic ideals have displaced legal doctrines "ultimately derived from theology." There lies the *Kulturkampf* in corporation law.

The theological principle attacked by Gierke is that the only true persons are individuals and their Creator. Gierke's antagonists, the fictionists, held that corporations, as mere creatures of law, were not moral agents entitled to full legal rights. The old English syllogism is

Ch. July 14, 1989) ("[Many people] derive their identity in part from [the] organization and feel that they contribute to the identity of the firm."); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1149 (Del. 1990) ("[Time's acquisition of Warner assured its expansion], all the while maintaining the Time identity and culture.").

362. Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643, 663 (1932).

363. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 138 (3d printing 1968) (1937). The therapeutic element of corporate culture theory is discussed in sections II.B and II.C, *supra*. For a recent example of how corporate practice is directly affected by corporate therapists, the industrial psychologists, see Amal K. Naj, *Corporate Therapy. The Latest Addition to Executive Suite is Psychologist's Couch*, WALL ST. J., Aug. 24, 1994, at A1. William Whyte was the first to explore how industrial psychologists had transformed the individualistic Protestant ethic into the cult of the Organization Man. See Rieff, *supra* note 87.

364. Dewey, *supra* note 44, at 664. H.L.A. Hart similarly argued that philosophical discussions about the nature of the corporation could be replaced by common law reasoning. H.L.A. HART, *DEFINITION & THEORY IN JURISPRUDENCE* 25 (1953).

as follows: "None can create souls, but God; but a corporation is created by the King; therefore a corporation can have no soul."³⁶⁵ Gierke and the organicists argued that corporate bodies manifest the moral and psychological indicia of personality. Frederic Maitland observed that when an American judge dissolves a corporation in a *quo warranto* proceeding³⁶⁶ "he uses the language of penal justice; he may even say that he passes sentence of death, and will expend moral indignation on the culprit that stands before him."³⁶⁷

In the tradition culminating in Gierke and Maitland, the psychological attributes of corporate life are inseparable from the bond among the original incorporators, who came together for a purpose that locates them in sacred order. Gierke's predecessor, Johannes Althusius, described a *collegium*, or corporation, as "three or more men of the same trade, training, or profession [who] are united for the purpose of holding in common such things they jointly profess as duty, way of life, or craft."³⁶⁸ Gierke observed that the first Roman *collegia*, which included religious associations and trade-guilds, derived their permanence and individuality—their personality—from their purposes, which were connected to sacral law but emphasized mutual assistance and economic advancement.³⁶⁹ Similarly, Henry Luce saw Time Inc. as a group of managers and journalists united by a common mission of building a business that uncovers the truth.

The *Time-Warner* decision establishes that corporate rights may be founded upon psychological attributes divorced from the moral and economic purposes that caused the incorporators to come together. The

365. *Tipling v. Pexall*, Y.B. 2 Bulstr. 233 (1613) (Coke, quoting Baron Manwood), quoted in HENDERSON, *supra* note 48, at 173 n.3.

366. Originally, the writ of *quo warranto* allowed the English king to inquire "by what authority" a person (i.e. a feudal baron) claimed any office, franchise, or liberty. It also commanded a defendant to show by what warrant he exercised a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 262 (9th ed. 1978) (1783). In nineteenth century corporation law, *quo warranto* procedures were legal actions against the corporation brought by the incorporating state for abuse of its franchise or other illegal acts. By the end of the century such state supervision disappeared, and shareholders became responsible for policing the misdeeds of managers. HOVENKAMP, *supra* note 252, at 56-59.

367. Maitland, *supra* note 251, at xxxix (citing *People v. North River Sugar Refining Co.*, 24 N.E. 834 (N.Y. 1890) (Finch, J.)). Dewey similarly noted that the organicist theory of the corporation had been strongly influenced by the association of the corporate will with the ideas of "agency", "responsibility" and "guilt." Dewey, *supra* note 44, at 663 n.10.

368. ALTHUSIUS, *supra* note 298, at 34.

369. GIERKE, CLASSICAL, *supra* note 51, at 117-18.

Time Culture standing before the Delaware Supreme Court was the invention of a handful of managers and lawyers who wanted to sidestep the shareholders and transform Time into a global projector of transgressive, therapeutic expression. Time no longer bore the sacred predicates of personality but the corporation and its representatives were recognized nonetheless. This is third world law, where "anything can be made a legal unit . . . a building, a child unborn, a family. There is no reason, except the practical one, why . . . the law should not accord to the last rose of summer a legal right not to be picked."³⁷⁰ Anything can be deemed a person, but the politics of the *Kulturkampf*, not practicality, will determine whether that status may be founded upon a CEO's construct, whose only warrant is the psychological unity it supposedly reflects.³⁷¹

2. Freund Reconciles Psychological Unity with Legal Doctrine

The best legal analysis of the purely psychological conception of the corporation is found in Ernst Freund's 1897 dissertation, *The Legal Nature of Corporations*.³⁷² Freund sought to reconcile Gierke's doctrine of the corporation as living person with a legal order premised on individual rights. Freund observed that Gierke's theory satisfied the psychological and moral demand that corporate rights, like individual rights, be vested in a person. However, the organic theory was flawed in its overemphasis of psychological effects. Legal recognition of corporate bodies does not depend on the existence of a psychically unified group, and it is impossible to resolve questions of corporate rights by defining the limits of a unified and distinctive corporate personality.³⁷³ Why and to what extent should evidence of a Time Culture expand the powers of Time's board of directors?

Freund believed that the appropriate limits upon the psychological conception of the corporation followed from the recognition that most

370. HENDERSON, *supra* note 48, at 165 (footnotes omitted).

371. The triumph of the third world corporate theorists, such as Henderson and Dewey, allowed for corporate rights to be wielded by the victor in a *Kulturkampf*. "This new vision, to one degree or another, denied that rights inhered in anything; it saw only interests to be protected after society determined that the interests deserved protection In this sense whether corporations resembled human beings was utterly irrelevant because personhood no longer constituted the basis for rights." Mark, *supra* note 52, at 1481.

372. ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* (Lenox Hill, New York 1971) (1897).

373. *Id.* at 50-51. A militia or terrorist organization, for example, will not be recognized as a corporation, even though it may exhibit psychological and social cohesion. See *id.*

corporate acts are "not corporate in the psychologically collective sense."³⁷⁴ Instead, corporate acts are merely acts taken by a representative body that are imputed to the corporation for reasons of convenience.³⁷⁵ Corporate action takes on a certain "psychological correctness" when it is the "product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission."³⁷⁶ The unanimous agreement of all of a corporation's shareholders produces the "psychologically correct" result, but so, presumptively, does the concurrence of a majority of a quorum of directors, so long as they deliberate in a joint meeting.³⁷⁷ In corporation law, actions taken by a representative body are presumptively attributable to the corporation because a personal nexus exists between the representative act and the psychological influence of the collective body.³⁷⁸

In certain circumstances, however, the presumption is not justified. A conflict may arise between the majority of shareholders and the board of directors, with each claiming to represent the shareholders as a whole.³⁷⁹ Or a sudden and radical change in membership of the corporate body can destroy the possibility of corporate unity, rendering representative action a fiction.³⁸⁰ In both cases there is reason to doubt that corporation action was the product of a psychological force traceable to the legitimate desires of the shareholders as a whole.

A contemporary manifestation of this conflict is when arbitrageurs buy large blocks of stock after a corporation becomes the subject of takeover rumors. The directors may feel that a psychological force impels them to take defensive measures, but the source of the psychological force cannot be the current body of shareholders, most of whom desire a quick profit. Instead, the psychological pressure likely originates from the managers themselves. As the corporate culture literature instructs, the CEO creates the psychological bond that guides corporate policy.

Freund anticipated that in large corporations, in which shareholders acquiesce completely to the board of directors, the locus of psychologi-

374. *Id.* at 52.

375. *Id.* at 52.

376. *Id.*

377. *Id.* at 53-54.

378. *Id.* at 75.

379. *Id.* at 59-60.

380. *Id.* at 78-79.

cal unity shifts from the shareholders to their representatives. Legally, the authoritative corporate will remains with the shareholders; the board of directors holds corporate rights in trust for their benefit.³⁸¹ Factually and psychologically, however, the representatives wielding corporate power will appear authorized to undertake all possible corporate action. "It is inevitable that representative acting capacity should appear to the popular mind as coextensive with the possibilities of corporate will."³⁸² The danger always exists that "the psychological possibility of corporate action" will exceed the original purposes of the shareholders and usurp their rights in the corporation.³⁸³ "If the psychological possibilities of the bond of association are allowed full scope . . . [i]ts only intrinsic limit is the consciousness of collective ends and purposes[.]"³⁸⁴

The *Time-Warner* decision is grounded in this psychological reality. What is the Time Culture if not the directors' consciousness of Time's collective ends and purposes? As stated by the Delaware Supreme Court, Time's directors saw Time's culture as a synonym of the corporation's "destiny," "survival," and "identity."³⁸⁵ Extraordinary corporate acts were taken to protect the Time Culture, including a multibillion dollar acquisition that altered every aspect of the corporation's business and organization. Since the acquisition was formulated to avoid a shareholder vote, it can be doubted whether a personal nexus remained between the shareholders and their putative representatives. Nevertheless, the shareholders were forced to submit to the directors' conception of Time's purpose. The directors need not yield "unless there is clearly no basis to sustain the corporate strategy."³⁸⁶

The Court's reasoning embraces Gierke's organic theory of the corporation, which Freund had rejected. The organic theory assumes that the psychological force motivating Time's directors also pervaded Time as a whole. This assumption "carries into the law an unknown and hypothetical metaphysical quantity,"³⁸⁷ an apt characterization of the

381. *Id.* at 59. This argument resembles the theory elaborated by Adolph Berle early in his career. See *supra* note 337 and accompanying text.

382. *Id.* at 58.

383. *Id.*

384. *Id.*

385. 571 A.2d at 1148, 1149.

386. 571 A.2d at 1154. Freund warns that "while corporate action must manifest a possible tendency to inure in some degree to the benefit of each member, such benefit may easily be offset by a much greater injury to the member's individual non-corporate interests." FREUND, *supra* note 372, at 61.

387. FREUND, *supra* note 372, at 83.

Time Culture. Not only is this assumed psychological force “unknown and hypothetical,” its limitlessness is inimical to corporate rights. Freund reasoned that individuals create corporations to protect their joint interests; delegating power to representatives effectuates those interests. The law justifiably recognizes the corporate person, but only when it safely can be presumed that the representatives are motivated by the legitimate purposes that caused the incorporators to band together and delegate power.³⁸⁸ Psychological unity among the representatives is no substitute for fiduciary duty to the shareholders.

3. *The Modern Corporation as Psychological Man*

A recent commentator argues that Freund provided the intellectual justification for managerial control of corporate affairs, which allowed the corporation to become “the quintessential economic man.”³⁸⁹ This commentator explained how shareholders’ joint economic interests are furthered by managerial control:

Corporations, unlike corporeal persons, were immortal. The original purpose to which corporate property was dedicated might cease to be economically relevant, endangering the interests of the shareholders. Because the incorporators could not easily dissolve the corporation, indeed because they were an everchanging community, the power to adapt had to reside with management. Protecting the integrity of the corporate entity required flexibility. In the “brain” of the corporation jurists [such as Freund] found the capacity to will change.³⁹⁰

This “capacity to will change” may be exercised to effectuate the interests of the shareholder, but, as Freund’s theory suggests, there are times when we have reason to think the corporate brain is delusional, or that its decisions are based merely on an assessment of its own psychic health.

The need to adapt to a changing economic environment may explain why Time’s directors decided to merge with Warner. They may well have believed that Time’s economic success depended on expanding from journalism into entertainment. But as discussed in Section I.A., *supra*, the directors’ decision to resist Paramount’s tender offer is

388. *See id.* at 31-33.

389. Mark, *supra* note 52, at 1483. *See id.* at 1477.

390. *Id.* at 1476.

difficult to justify in economic terms. And as discussed in Section I.C., *supra*, the directors' belief that a Time-Warner merger would preserve a recognizable Time Culture was insupportable factually. As discussed in Section II, *supra*, a better explanation for the board's decision is that the economic concerns were subordinated to the therapeutic fiction that Time's culture depended on management's retention of their offices. Managerial control has wrought something other than "the quintessential economic man."³⁹¹

The alternative to economic man is suggested by Freund himself. Freund observed that when the nexus between the bond of association and the representative body is lacking, directors may obey psychological imperatives that conflict with the economic interests of shareholders.³⁹² The modern corporation, permanently controlled by its managers, is better described as the quintessential "psychological man," a personality type shaped by Sigmund Freud and identified by Philip Rieff. Rieff describes psychological man as follows: "Psychological man lives by the ideal of insight—practical, experimental insight leading to the mastery of his own personality."³⁹³ Here lies an explanation for how Time's directors could destroy Time in the name of defending its culture. For therapeutic reasons, psychological man chooses his own identity, and emancipates himself from bonds to the past.³⁹⁴ The corporate culture literature so instructs.³⁹⁵

Rieff developed an historical typology of character types. In antiquity the character ideal of political man dominated Western civilization. That ideal was succeeded first by religious man, then, in the Enlighten-

391. The demise of the corporation as economic man occurred decades ago. Thurman Arnold wrote in 1937 that the idea of the corporation as profit-maximizing individual was a dominant myth, but by 1962 he thought that federal regulation of business had killed it. See ARNOLD, *supra* note 363, at ix. A contemporary professor thinks that the profitmaximizing corporation expired in 1937, though he admits that that year is "symbolic and somewhat arbitrary." HOVENKAMP, *supra* note 252, at 1. Hovenkamp thinks Berle & Means' *THE MODERN CORPORATION AND PRIVATE PROPERTY*, *supra* note 3, published in 1932, "contributed greatly to the breakdown of the classical corporation in legal theory, because it appeared to undermine the most essential premise in classical political theory: . . . the 'invisible hand' Berle and Means pointed to the rather awesome possibility that corporations were *not* individual profit-maximizers." HOVENKAMP, *supra* note 252, at 359. Perhaps the most appropriate date is April 24, 1933, when *Time* magazine observed that *THE MODERN CORPORATION AND PRIVATE PROPERTY* was "the economic Bible of the Roosevelt administration." *TIME*, April 24, 1933, at 14, quoted in HOVENKAMP, *supra* note 252, at 360.

392. FREUND, *supra* note 372, at 61.

393. PHILIP RIEFF, *FREUND: THE MIND OF THE MORALIST* 356 (3d ed. 1979).

394. *Id.* at 219.

395. See *supra* text accompanying notes 205-7.

ment, by economic man, and most recently, by the psychological man of our own century.³⁹⁶ The Rieffian typology corresponds to the history of corporations. In ancient societies, the basic political unit was the tribal group described by Maine.³⁹⁷ The Jews transferred worship of the tribal deity to individual worship of the one God, consciousness of which is mediated by the group,³⁹⁸ leading to Christian church civilization. A successor institution to the church is the business corporation,³⁹⁹ which allows capitalists to achieve earthly salvation. This bounty has extended to the managerial class, which preserves its own interests through manipulation of the corporate psyche, or culture.⁴⁰⁰

Managers are great expenders of agency costs, as they believe in no principal. Regarding the difference between psychological man and economic man, Rieff writes:

The therapeutic as an American type has outgrown his immediate ancestor in one clear sense, for both Socrates and Christ taught economic man to be at least slightly ashamed of himself when he failed to sacrifice the lower capacity to the higher Freud taught lessons which Americans, prepared by their own national experience, learn easily: survive, resign yourself to living within your moral means, suffer no gratuitous failure in a futile search for ethical heights that no longer exist—if they ever did. Freud proclaims the superior wisdom of choosing the second best.⁴⁰¹

Twice Time's managers chose second best. In 1989, the morally safer course would have been either to remain a journalistic company, or, if that was not economically feasible, to combine with Paramount, the apparent high bidder, even if it meant personal sacrifice to the directors (both economic and psychological). In 1992, Time Warner's

396. RIEFF, *supra* note 393, at 356.

397. MAINE, *supra* note 1, at 123-24.

398. See WEBB, *supra* note 46, at 158-60.

399. Berle was the leading proponent of this comparison. See BERLE & MEANS, *supra* note 3, at 352-57; BERLE, *supra* note 349, at 177-85.

400. One professor argues "that the central goal of managers in the past hundred years has been to make sure their firms survived." NEIL FLIGSTEIN, *THE TRANSFORMATION OF CORPORATE CONTROL* 5 (1990). He continues, "managers rarely know what is economically efficient [T]he driving force for managers . . . is to preserve their organizations and further their individual and collective interests." *Id.* at 302.

401. RIEFF, *TRIUMPH OF THE THERAPEUTIC*, *supra* note 16, at 58; see also RIEFF, *supra* note 393, at 356-57.

management unashamedly backed Ice-T and Madonna, economically rational decisions, but not in keeping with the highest traditions of the company.⁴⁰² Henry Luce would have chosen differently.

Henry Luce's Time was not psychological man, but economic man with a moralistic streak. His conception of the corporate interest was coupled with his economic stake in Time's success and his recognition of Time's place in sacred order. Because Luce was Time's largest shareholder and its Editor-in-Chief, a personal nexus existed between Time's acts and the operation of the bond of association. And by creating a management structure based on the separate offices of Editor-in-Chief and CEO, Luce strove to maintain that personal nexus after his retirement and ensure that Time's journalism upheld editorial standards. But gradually and then suddenly, Time's managers took it upon themselves to transform Time into an entertainment company whose guiding ethic is artistic license.

Levin, Nicholas and Munro successfully established their authority to act on Time's behalf. The source of their authority was not obvious, however, as it was not based on their fidelity to Time's shareholders or to the maintenance of Time's traditions. One professor writes:

When the invisible hand of the competitive market is, in turn, displaced to a significant extent by the increasingly visible hand of powerful corporate management, the question "Quo warranto?"⁴⁰³ is bound to arise, whatever decisions are in fact made. And the fact is that the power of management is, in the political sense, irresponsible power, answerable ultimately only to itself.⁴⁰⁴

In the era of psychological man, the question of "quo warranto?" or "by what authority?" answers itself. The personal, apparent authority of the representatives is sufficient; they create the corporate culture and

402. Time Warner's executives may be learning to be ashamed of some sources of corporate profits, but the lesson is being taught by politically powerful outsiders. See Landler, *supra* note 25, at D20 (quoting William Bennett as saying, in response to Time Warner's decision to sell its stake in Interscope Records, "[t]his proves that moral suasion actually works. Somewhere at that company there is a healthy sense of shame."). Three years earlier, the directors of Time Warner had considered adopting content standards for its music labels but failed to do so. See Johnnie L. Roberts, *Time Warner Directors May Bar Release of Certain Music*, WALL ST. J., July 24, 1992, at B1.

403. See *supra* note 366.

404. Carl Kaysen, *The Corporation: How Much Power? What Scope?*, in MASON, *THE CORPORATION IN MODERN SOCIETY*, *supra* note 302, at 85, 99.

determine the corporation's identity; they alone interpret the corporation's needs and objectives. By what authority do the shareholders assume to know what is best for them, the corporation and its employees?

In second world law, corporate authority is ultimately derived from the individual owners and their desire to band together to further their joint interests by legitimate means. The bond of association is a sacred one, founded on trust, as are the derivative relations between the shareholders and their representatives. These legal relations are not necessarily psychologically compelling. As Freund predicted, the psychological bond among managers can overwhelm the obligation from agent to principal. Psychological man and the psychological corporation forsake that obligation in the name of therapeutic goals, failing to recognize that the maintenance of personality depends on a recognition of highest authority. Rieff writes: "Therapy is to transgression as theology was to prohibition: inseparable."⁴⁰⁵ Dewey may have succeeded in divorcing contemporary corporation theory from theology and psychology, but successful corporate governance depends on their union.

IV. TOWARD A SECOND WORLD CORPORATION LAW

Sections II and III of this Article examined the *Time-Warner* decisions as evidence of a third world jurisprudence of corporations. With little explanation, the Delaware courts allowed Time's directors to act on behalf of a putative psychological unity, the Time Culture, and effect a transaction in which these same directors were the only known beneficiaries. I have attempted to furnish the modern intellectual precedents for the courts' decision, and show how those precedents recycle the pagan motifs of the kinship bond and the patriarch, while opposing the second world conception of corporations as limited, mediating institutions whose officers serve the individual members within the bounds of sacred order.

This approach implicitly assumes the existence and accessibility of a second world alternative to the jurisprudence implicit in the *Time-Warner* decisions. If this assumption is correct, we might expect to find traces of a second world sensibility among the *dramatis personae* of the Time-Warner merger. This sensibility is not apparent in Time's Levin, Nicholas or Munro—who set out to transform an historically journalistic company into one devoted principally to transgressive entertainment,

405. Rieff, *Newer Noises of War*, *supra* note 16, at 325.

and did so in a manner that appeared to favor their own interests over those of the stockholders—but in the dissenters to the transaction. Hank Luce was initially concerned with the departure from Time's traditions, and he later opposed Time Warner's involvement in gangsta rap.⁴⁰⁶ Arthur Temple refused to become a director of Time Warner, because of his aversion to the ethics of the entertainment industry; he also thought that Munro and Nicholas were "fleecing their nests" and that shareholder consent should have been sought for a transaction that so altered Time's direction.⁴⁰⁷ The plaintiffs argued in favor of shareholder rights, while a later dissenter, Time Warner shareholder Charlton Heston, suggested that the company donate the profits it earned from Ice-T's music to the families of murdered police officers.⁴⁰⁸

The positions taken by the dissenters suggest two necessary aspects of second world corporate law: (1) limits upon management's ability to contravene shareholder interests and (2) the subordination of profits to the commands of sacred order. The dissenters' positions also suggest, in their invocations of Time's history, that the managerial philosophy of Henry Luce might be a source for second world corporate governance. However, the capitalist who preached of America's moral obligation to oppose communism was not wholly a second culture warrior.

A. *Luce's Divergence from Second World Praxis*

Any second culture theory of corporate governance must recognize that the corporation is a limited institution, devoted to advancing the interests of its members by legally sanctioned means. In the last century, however, corporation statutes and caselaw have given rise to corporations whose management is neither limited by the interests of its shareholders or by the prohibitions of culture. Gerald Levin's Time Warner may be the most apt example, but Henry Luce's Time shows similarities.

Henry Luce claimed to be "biased in favor of god, Eisenhower and the stockholders of Time Inc.,"⁴⁰⁹ a trinity indicating that Luce's Time attempted to do something other than maximize profits within the bounds of morality. As Alfred Kazin observed, Luce was explicit about

406. See *supra* text accompanying notes 175-76; see also Landler, *supra* note 25.

407. See *supra* notes 176-77 and accompanying text; see also Temple Dep. at 13, 132, Paramount Communications, Inc. (C.A. No. 10866).

408. Heston, *supra* note 21, at 53.

409. SWANBERG, *supra* note 29, at 383 (quoting Luce).

Time's alternative purpose: "Henry Luce, proud because his large glossy magazine for the executive class did *not* bring in a profit, spoke of *Fortune* as an intellectual service to American leaders."⁴¹⁰

Luce's pride in not earning profits appears to stem from his exalted conception of the managerial function. He observed in 1929 that "it is not a seat in Congress but on the directorate of the greatest corporations which our countrymen regard as the greater post of honor and responsibility."⁴¹¹ Sixteen corporate leaders made the cover of *Time* magazine that year, including *Time*'s Man of the Year, Owen D. Young, President of General Electric. Young would soon be lionized by Professor Merrick Dodd as the avatar of a new type of business leader, who ran corporations for the good of the public, as opposed to the good of the shareholders alone.⁴¹² Luce, too, embodied that doctrine. In his will he proclaimed that Time Inc. was always to be "an enterprise operated in the public interest."⁴¹³

Luce's call for public leadership by the managerial class coincided with management's newfound power to direct corporate affairs. His celebration of public-minded CEOs was also a celebration of their power, a weakness noted by Luce's contemporaries. Harold Laski described Luce as having "a sophomoric streak in him which makes him identify notoriety with success, power with greatness."⁴¹⁴ Kazin wrote that "[s]o far as any real human ideal was concerned, Time Inc. was dead cold in its neutrality. Its real emphasis was the personal traits behind every successful and 'outstanding' career."⁴¹⁵ Kazin drew the following historical connection between Luce's *Time* and the managerialism Luce was incapable of opposing:

This was the period of James Burnham's *The Managerial Revolution* Burnham was now reaching American business executives, scientists, and the technocratic elite with the news that they were the leaders of the future. Burnham's analysis was still functionally Marxist. History was nothing but the domination of one class over another. In this eternal power game it

410. KAZIN, *supra* note 344, at 53.

411. SWANBERG, *supra* note 29, at 72 (quoting Luce).

412. See E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1154 (1932) (quoting Young at length).

413. Luce 1967 Letter, *supra* note 2.

414. SWANBERG, *supra* note 29, at 111 (quoting HAROLD LASKI, *THE AMERICAN DEMOCRACY* 659 (1949)).

415. KAZIN, *supra* note 344, at 55.

was the managers' turn to walk off with the pot.⁴¹⁶

Luce took it upon himself to teach these managers of the public obligations that accompanied their power. In doing so, he exemplified Burnham's thesis. By choosing to educate American managers at the expense of Time's shareholders, and at the expense of the shareholders of the companies whose managers were influenced by Luce, Luce proved that management had become the true owners of corporate property.⁴¹⁷

In 1941, Burnham feared a worldwide managerial revolution displacing capitalism, while Luce editorialized that America must enter World War II to defeat the planned economies of Germany and Japan. The two philosophies appear compatible,⁴¹⁸ but only Burnham articulated the dangers of rising managerialism in the American economy. Luce propagandized on behalf of free market capitalism, but he was also a manager who cared more about transforming the world than maximizing corporate profits. Had Luce lived to see the takeover battles of the 1980s, he may well have chosen to defend managerial prerogative.

Luce's successors chose not to continue fighting his particular ideological battles, and in their embrace of Hollywood they turned against his legacy. What remained at Time Inc. was Luce's belief that the interests of shareholders must be subordinated to management's waging of a worldwide *Kulturkampf*. In this conviction, Richard Munro, Nick Nicholas, and Gerald Levin are Henry Luce's true heirs.

B. *Antecedents of Second World Corporate Governance*

If we are to locate the natural limits upon the exercise of managerial power, we must look not to the philosophy of a modern CEO, but to principles elaborated centuries earlier. In the second worlds, positive law and the power it authorizes are derived from commanding truths. The relationship between God and the individual is at the center of second world jurisprudence, including the law of associations. Unlike pagan law, the leader does not automatically command the allegiance of the group. His powers are limited by law. Corporate governance is

416. *Id.* at 60-61.

417. *See supra* note 137.

418. Compare the discussions of Luce and Burnham in JOHN B. JUDIS, *GRAND ILLUSION: CRITICS AND CHAMPIONS OF THE AMERICAN CENTURY* 65, 142-43 (1992).

itself a second world creation.

This principle finds clear expression in the original second world legal system, Talmudic Jewish law, in which the corporation is not a juristic category. Property is owned only by individuals, requiring common ownership to be expressed in terms of partnership, with the manager of the partnership construed as the agent of the component members.⁴¹⁹ Community property is deemed to be held in partnership by members of the community; title is vested either in the benefactors or the intended beneficiaries.⁴²⁰ The sale of a synagogue therefore requires the acquiescence of all benefactors and regular worshippers (in whom the benefactors intended title to vest).⁴²¹ This rule is functionally similar to the common law rule requiring the unanimous consent of stockholders to change the business of the corporation.⁴²² One century later, Delaware law authorized Time's directors to decide unilaterally with which entertainment conglomerate Time should combine, without even requiring the directors to act in the sole interest of the stockholders.

Another leading second world legal system, the canon law, was built on rules governing the legal relations within and among corporate bodies. In the eleventh, twelfth and thirteenth centuries, the canonists transformed first world Germanic and Roman ideas into a systematic body of corporate law that resolved disputes concerning the Church of Rome, its component bishoprics and abbeys and their members.⁴²³ Canon law required the consent of a corporation's members for certain actions, rejecting the rule from Roman law that corporations act only through their representatives. Canon law also treated corporate property as the common property of its members, a further innovation from Roman law, which had followed the maxim that "what pertains to the corporation does not pertain to its members." Instead, the canonists elaborated upon the following constitutional principle: "What concerns everyone ought to be considered and approved by everyone."⁴²⁴ Rights

419. Kirschenbaum, *Legal Person*, in 10 *ENCYCLOPAEDIA JUDAICA* 1567, 1568 (1972).

420. David Bleich, *The Controversy Concerning the Sotheby Sale*, 8 *CARDOZO L. REV.* 91, 131, 132-33 (1986).

421. *Id.* at 131-32.

422. See BERLE & MEANS, *supra* note 137, at 139-41; Dodd, *supra* note 3, at 32-33.

423. BERMAN, *supra* note 45, at 215-21; see also POST, *supra* note 329, at 27-60 (1964) (discussing how the University of Paris became a corporation, achieving freedom from the direct control of the cathedral chapter, but becoming subordinate to the public law of the Church).

424. BERMAN, *supra* note 45, at 221 & 608 n.54 (explaining the use by the canonists of the Roman maxim *Quod omnes tangit omnibus tractari et approbari debet*); see also POST, *supra*

pertaining principally to the bishop could be acted upon by the bishop alone, but transactions pertaining to the corporate body as a whole (such as the alienation of church property) required the consent of the clergy, either by unanimous or majority vote, or by vote of the sounder part.⁴²⁵

Traces of this principle remain part of Delaware corporation law. Stockholder consent is required for fundamental changes to the corporation—charter amendments, mergers, consolidations, the sale, lease or exchange of substantially all assets, and dissolutions.⁴²⁶ This principle was not carried over into the caselaw concerning corporate takeovers, however. In *Moran v. Household Int'l, Inc.*,⁴²⁷ the courts sanctioned poison pills, which afforded directors the unilateral power to respond to tender offers, even though tender offers “require no ‘corporate’ action and do not involve distinctly ‘corporate’ interests.”⁴²⁸ In *Time-Warner*, the directors were allowed to reformulate the combination with Warner so as to avoid a stockholder vote.⁴²⁹

In both *Household* and *Time-Warner* the Delaware Supreme Court justified the board’s power to determine the corporation’s fundamental structure by pointing to Section 141(a) of the Delaware General Corporation Law, which empowers the board to manage the business and affairs of the corporation.⁴³⁰ At common law, however, a board’s managerial power had been limited to ordinary business transactions, not decisions concerning the corporation’s continued existence.⁴³¹ As in

note 329, at 163-238 (discussing how Bracton adapted a similar maxim from Justinian’s Code, *quod omnes similiter tangit, ab omnibus comprobetur*, as an equitable principle of thirteenth century English private law requiring that the due process rights of property owners be respected).

425. BERMAN, *supra* note 45, at 220-221 & nn. 53, 54.

426. DEL. CODE ANN. tit. 8, §§ 242, 251-58, 275-76 (1995).

427. 500 A.2d 1346 (Del. 1985).

428. *TW Services, Inc. v. SWT Acquisition Corp.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,334, n. 17 (Del. Ch. 1989).

429. *Paramount Communications, Inc.*, C.A. No. 10866, Slip op. at 64-68; *see also Paramount Communications, Inc.*, 571 A.2d at 1149.

430. *Moran*, 500 A.2d at 1353 & n.11 (citing DEL. CODE ANN. tit. 8, § 141(a)); *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989) (citing DEL. CODE ANN. tit. 8, § 141(a)).

431. *See* Opening Brief of Appellants John A. Moran and the Dyson-Kissner-Moran Corp., *supra* note 195, at 52-56 (discussing *Commercial National Bank v. Weinhard*, 192 U.S. 243, 248-49 (1904); *Chicago City Railway Co. v. Allerton*, 85 U.S. 233 (1874); BALLANTINE, PRIVATE CORPORATIONS § 97, at 320 (1927); CLARK & WORMSER, HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 609-11 (3d ed. 1916); FREUND, *supra* note 372, at 60; MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 512, at 479-80 (2d ed. 1886)).

Roman law, matters affecting the corporation are now determined by the representatives alone.

The current legal regime implies a rejection of second world personality: "the ordinary members of the multitude are so far regarded as *mere individuals*, not properly persons in their own right, but only as such in and through their representatives."⁴³² Upon the resurgence of first world Roman law in the late middle ages, rules governing procedural consent to governmental action became subordinated to the public necessity of the State, as determined by the king.⁴³³ In *Time-Warner*, stockholder consent was dispensed with once the board determined that there existed a "threat to corporate policy and effectiveness."⁴³⁴

A controversy two centuries ago may best exemplify the natural limits upon a manager's power to act on a corporation's behalf. The protagonist was Edmund Burke, who opposed the renewal of the East India Company's charter in 1780 and later pursued the impeachment of the corporation's governor general, William Hastings, because Hastings failed to recognize that even global corporations with broad charters are not autonomous worlds beyond the jurisdiction of highest authority.⁴³⁵ Hastings had acted on his belief that he and the East India Company had been granted by Parliament the unlimited power to rule in India, to which Burke responded:

My lords, the East India Company have not arbitrary power to give him. The king has no arbitrary power to give My lords, no man can govern himself by his own will; much less can he be governed by the will of others. We are all born—high as well as low—governors as well as governed—in subjection to one great, immutable, pre-existing law, a law prior to all our devices and all our conspiracies, paramount to our feelings, by which we are connected in the eternal frame of the universe, and out of which we cannot stir. This great law does

432. WEBB, *supra* note 43, at 49-50.

433. See POST, *supra* note 329, at 564-68. According to Post, the twelfth century marks the earliest manifestations of Burckhardt's the "State as a work of art." *Id.* at 570; see also Rieff, *Newer Noises of War*, *supra* note 16, at 321 & n.15 (discussing the third world dimensions of Burckhardt's thesis, in which the state is a fictive creation with the power of death over its citizens). See generally JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY*, chs. 1-5 (1944).

434. 571 A.2d at 1153 (1990).

435. See generally 2 CARL B. CONE, *BURKE AND THE NATURE OF POLITICS* 95-256 (1964); PETER J. STANLIS, *EDMUND BURKE AND THE NATURAL LAW* 58-66 (1986).

not arise from our combinations and compacts; on the contrary, it gives to them all the sanction they can have.⁴³⁶

This "one great, immutable, pre-existing law" is the source for the equitable doctrines that continue to prevent fiduciaries from claiming that a corporate charter or statute grants directors the absolute power to control a corporation's destiny.

Hastings offered a second defense for his actions that bears more directly upon the *Time-Warner* decisions and the Time Culture. In Burke's words, Hastings believed he could rule India as he did because "the whole history of Asia is nothing more than precedents to prove the invariable exercise of arbitrary power."⁴³⁷ Burke denounced this argument as follows: "[Hastings] makes the corrupt practices of mankind the principles of his government; he collects together the vicious examples of all the robbers and plunderers of Asia, forms the mass of their abuses into a code, and calls it the duty of a British governor."

Gerald Levin and his subordinates similarly argued that they were dutybound to produce gangsta rap. In the midst of the controversy over Ice-T, "Levin described rap as a legitimate expression of street culture, which deserves an outlet."⁴³⁸ William Bennett relates that when he asked Time Warner executives how they could defend the dissemination of lyrics so repugnant that none of the executives would read them aloud, one executive replied that the music "represented the authentic voice of black America."⁴³⁹ Burke attacked the imperialist version of this argument as "geographic morality, by which the duties of men in public and private stations are not to be governed by their relation to the great Governor of the universe, and by their relation to one another, but by climates."⁴⁴⁰ Burke concluded, "Mr. Hastings has no refuge . . . let him fly where he will—from law to law—law, thank God, meets him everywhere . . . I would as soon have tried him on the Koran, or any other eastern code of laws, as on the common law of this kingdom."⁴⁴¹ Gerald Levin's only refuge is the newly permissive interpretation of the First Amendment.⁴⁴² His "street culture" or "black

436. STANLIS, *supra* note 435, at 62 (quoting Burke).

437. *Id.* at 61 (quoting Burke).

438. Zoglin, *supra* note 18, at 37.

439. C-SPAN television broadcast, Sept. 25, 1995.

440. STANLIS, *supra* note 435, at 63 (quoting Burke).

441. *Id.* at 64 (quoting Burke).

442. I traced the development of third world First Amendment jurisprudence in Friedlander, *supra* note 39, at 1095-1109.

America" are lands of his own imagination; no society on the globe long tolerates uncensored expression.⁴⁴³

Levin and Hastings are both proponents of the third world corporation, to which nothing is forbidden. In third world corporation law, the remissive space granted by the business judgment rule⁴⁴⁴ and section 141(a) of the Delaware General Corporation Law allows directors to take extraordinary actions in the name of fictions such as the "Time Culture," even as they struggle against culture and its sacred predicates in all its social forms. The cultural danger is present whenever corporate power resides in persons who fail to recognize the corporation's mediating function. Burke teaches that the central problem of modern corporation law is not the separation of ownership and control; it is the separation of the corporation from sacred order.

V. CONCLUSION

The fiction must drop out of the final reckoning We call the corporation a person. This statement is false; it represents the introduction of a foreign element into our calculations, the notion of the 'personality' of the corporation. But we correct the error by extracting from the word "person" (when it is applied to corporations) all those qualities attributes not legally appropriate to the corporation.

Lon Fuller⁴⁴⁵

In the final reckoning, second world law is founded upon commanding truths, not fictions. The form by which these commanding truths are delivered—from a divine person to individual persons—negates the possibility that highest authority is located in a group, whether that group be founded upon the pagan kinship bond or the modern identification with the corporate culture. In the second worlds, unlike the firsts, a group's legal status is provisional. Its "personality"

443. African-American organizations have been among Time Warner's most outspoken critics. Lacayo, *supra* note 18, at 29.

444. The business judgment rule has expanded from a negligence standard to a more lenient standard resembling that of the early nineteenth century, when directors received no compensation for their services. See HOVENKAMP, *supra* note 252, at 62-63.

445. FULLER, *supra* note 103, at 117-18.

or "culture" depends on whether it continues to serve its shareholders by means sanctioned by the surrounding culture.

The *Time-Warner* decisions reveal the emergence of third world corporation theory into legal doctrine. However implicitly and tentatively, the Delaware courts recognized the authority of the Time Culture, allowing Time's CEO to perpetuate the corporate personality over the shareholders' objection. In calling the corporation a culture, Time's managers and directors subscribed to a fiction. Cultures establish limits. In its perpetuity, inviolability, capacity for transformation and imperviousness to moral demands, the Time Culture represents limitlessness as the basis for corporate action. The recording artists of Time Warner who continue to wage the permanent *Kulturkampf* do so no more or less vigorously than did the company's directors and their lawyers.