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Corporate Personhood(s):  
The Incorporation of Novel Persons in American Law, Society, and Literature, 1870-1914

By

Eugene Francis McCarthy

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

Rhetoric

in the

Graduate Division

of the

University of California, Berkeley

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## Abstract

### Corporate Personhood(s): The Incorporation of Novel Persons in American Law, Society, and Literature, 1870-1914

by

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Doctor of Philosophy in Rhetoric

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Recent U.S. Supreme Court decisions in *Citizens United* (2010) and *Hobby Lobby* (2014) have brought the concept of corporate personhood into mainstream discourse. By and large, the public reaction to corporate personhood has ranged from confused disapproval to partially informed outrage. The general suspicion focuses on the belief that individual persons are using the corporate form to cover up their own misdeeds and to shield themselves from personal liability. My investigation into the origin and nature of corporate personhood in the United States supports these suspicions. This study reveals that the legal fiction of corporate personhood has functioned as a prosthesis for natural persons from its inception in American law and society. This legal fiction's foundations, history, and social impact are more complex and controversial than many contemporary critics suspect. In this dissertation, I explain corporate personhood's origins in U.S. law and society so that we may better understand how this paradoxical person functions in American culture. My dissertation examines the nineteenth-century foundations of corporate personhood and the socio-cultural ramifications of its emergence through the lenses of corporate law, legal history, modern rhetorical theory, and the American naturalist novel. Corporate personhood's paradoxical nature lies in the fact that the corporation is simultaneously a legal fiction and a social reality; it is an artificial and invisible person, yet is composed of natural persons and tangible objects. This person enjoys perpetual life, an internal structure designed to aggregate wealth, limited liability for its deeds and debts, and a fictional body that at once enjoys legal rights *and* legal impunity. The corporate person, I argue, creates a rupture in nineteenth-century personhood more generally, whereby the Gilded Age corporate form produces additional "corporate persons" in its wake.

These various nineteenth-century corporate persons (consolidation companies, financiers, married women, and labor unions) are the subject of this study. I examine these persons – these *legal* fictions – through the lens of nineteenth-century *literary* fiction (in particular, American naturalist novels). The naturalist novel's fictive space represents, portrays, and characterizes these emergent corporate personalities and goes beyond the basic categories of black-letter law. My chapter-long case studies of legal fictions in literary fiction reveal that corporate persons like the Southern Pacific Railroad Corporation were able to dominate law, society, and the economy due to the seemingly fictional powers they derived through the legal act of incorporation. Natural persons who learned to navigate these networked bodies – like the robber baron financiers –

emerged rich and powerful. Other persons, like married women subject to coverture's erasure of personhood, could reclaim their legal personhood simply by imitating new corporate forms that emerged throughout the course of the nineteenth century. However, labor unions, the one group who could not access or emulate the corporate personality, faced socio-economic marginalization and constant defeat at the hands of the law and its corporate progeny. Legal history alone is an insufficient site for fully grasping the corporate person. Together with various theoretical and critical sources, the imagination space of the naturalist novel allows legal fictions to come to life before the mind's eye, which gives the reader a chance to study corporate persons in all their complexity. The corporate person is a powerful *legal* fiction, and *literary* fiction helps reveal just how real the power of incorporation was in nineteenth-century America and beyond.

To My Girls: Mary, Shara, Orla, and Olwen

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# Introduction

The concept of corporate personhood has come under increased scrutiny in the United States following recent Supreme Court decisions in *Citizens United v. Federal Election Commission* (2010) and *Burwell v. Hobby Lobby Stores, Inc.* (2014). Relying on precedent that a corporation is a person in the eyes of the law, the Court held in *Citizens United* that a corporation is entitled to First Amendment protections for its political speech, even if that speech comes in the form of campaign finance expenditures. In *Hobby Lobby*, the Court found that based on a closely held corporation's religious beliefs it could be exempt from government mandates (in this case, providing its employees with insurance coverage for certain methods of contraception).

Critics of corporate personhood have been passionate and vocal in their opposition to these decisions, which were a result of the age-old doctrine of corporate personhood. The late Ronald Dworkin described the decision that corporations are legal persons in *Citizens United* as “preposterous.”<sup>1</sup> *New York Times* contributor Timothy Egan wrote that the *Hobby Lobby* decision arose from the “Republican fever nests” and that in the *Citizens United* decision, five activist judges “created the notion of corporate personhood.”<sup>2</sup> President Barack Obama even entered the fray, tautologizing that “Corporations aren’t people. People are people.”<sup>3</sup> These criticisms and claims, respectively, are overblown, incorrect, and not particularly useful. Indeed, former Governor of Massachusetts Mitt Romney probably put it best – certainly from a legal standpoint, and probably also from an historical, anthropological, and cultural perspective, too – when he responded to a heckler with the oft-mocked claim: “Corporations are people, my friend.”<sup>4</sup>

Corporations *are* legally people and have been recognized as such in the United States without interruption since 1819, when the Supreme Court decided *Trustees of Dartmouth College v. Woodward*.<sup>5</sup> (The notion of corporate personality itself dates back to at least the Roman Empire.)<sup>6</sup> Since then, the Court has recognized corporations as persons under the Fourteenth Amendment hundreds of times.<sup>7</sup> This mountain of precedent guarantees corporations the constitutional due process and equal protection of the laws, making their personhood legally unassailable. This is not to say that the history of corporate personhood is uncomplicated and noncontroversial; indeed, the chapters that follow describe some scandalous and downright shocking events in our nation's uncanny relationship with corporate personhood.

From a legal perspective, however, there is nothing new or “preposterous” about corporate personality. The concept is actually quite reasonable: if corporations are to exist at all (and, I am not sure that they should), they need to have a legal personality separate from their shareholders (or “owners”) so as to be able conduct business and enter into contracts. Without

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<sup>1</sup> Dworkin, Ronald. “The ‘Devastating’ Decision.” *The New York Review of Books*. February 25, 2010.

<http://www.nybooks.com/articles/2010/02/25/the-devastating-decision/>

<sup>2</sup> Egan, Timothy. “The Conscience of a Corporation.” *The New York Times*. April 3, 2015.

<sup>3</sup> Greenfield, Kent. “If Corporations are People, They Should Act Like It.” *The Atlantic*. Feb 1, 2015

<http://www.theatlantic.com/politics/archive/2015/02/if-corporations-are-people-they-should-act-like-it/385034/>

<sup>4</sup> *Id.*

<sup>5</sup> *Trustees of Dartmouth College v. Woodward* (17 U. S. 518, 1819).

<sup>6</sup> See generally Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*. Princeton: Princeton University Press, 1997.

<sup>7</sup> Thomas, Brook. *American Literary Realism and the Failed Promise of Contract*. Berkeley: University of California Press, 1997, at 235.

this individual personality, every shareholder of the corporation would have to enter into the corporation's contracts on an individual basis or sign every deed of ownership on behalf of the corporation.<sup>8</sup> Every time a shareholder died or sold her share of the corporation, those contracts and deeds would be null and void or the surviving investors might be obligated to wind up the business, as in the case of a partnership.

What is more, the principle of legal personality is relatively basic and its application to corporations is entirely appropriate from a rights-and-duties perspective. John Dewey, one of America's most pragmatic thinkers, claims quite accurately that a "person" is merely a "synonym for a right-and-duty bearing unit."<sup>9</sup> Legally speaking, it is nonsensical to say that a tree is a person because units such as trees cannot bear rights or duties, but a corporation can. As Dewey points out, a corporation is among the rare group of things – like a natural person, but unlike a tree – that will "clearly act differently, or have different consequences, depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed on them."<sup>10</sup>

Put simply, corporate persons and natural persons generally behave in a particular way in response to the rights and duties they possess under the law. They are legal persons because they respond directly and observably to the laws that govern them (*e.g.*, a corporation issues an annual report because the law requires it to do so, a corporation chooses to pay tax – or to move off-shore to avoid paying tax – due to the duties the law imposes on it, and so on and so forth).

It is important to recognize that "personhood" is not a metaphysical and immutable category. Instead, the category of the person is a socio-legal construct that societies bestow (or deny) to their respective subjects. Anthropologist Marcel Mauss observes that the category of the person "is formulated only for us, among us," and that personhood takes on a succession of forms from one society to another "according to their systems of law, religion, customs, social structures and mentality."<sup>11</sup> For instance, some societies, such as the Melanesian islanders of the South Pacific, hold to a cosmomorphic category of personhood, whereby a person consists of an ensemble of organic and mythic qualities.<sup>12</sup> Other societies hold that the person is a composite of herself and her ancestors, as in certain Buddhist cultures.<sup>13</sup> In some societies, like the United States of America, politics and economics tend to play a key role in the construction of who, or what, counts as a person. Our nation's history offers two regrettable examples that exhibit personhood's conventionality. First, recall that Article 1, Section 2, Paragraph 3 of the *United States Constitution* – our most sacred legal document – states that

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons.*" [my emphasis]

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<sup>8</sup> Bainbridge, Stephen M. *Corporation Law and Economics*. New York: Foundation Press, 2002 at 7.

<sup>9</sup> Dewey, John. "This Historic Background of Corporate Legal Personality." *35 Yale L. J.* 655 1925-1926, at 656.

<sup>10</sup> *Id.* at 661.

<sup>11</sup> Mauss, Marcel. "A category of the human mind: the notion of person, the notion of self." Tr. W.D. Halls. Eds. Carrithers, Michael, Steven Collins and Steven Lukes. *The Category of the Person*. New York: Cambridge University Press, 1985, at 3.

<sup>12</sup> Leenhardt, Maurice. *Do Kamo: Person and Myth in the Melanesian World*. Chicago: University of Chicago Press, 1947.

<sup>13</sup> Mauss, at 14.

The Three-Fifths Compromise is a stark reminder that our society once denied full personhood to blacks based on their skin color and social status. Our own constitution, in the words of Karla FC Holloway, “relegated blacks to a fractional” personhood or, perhaps more accurately, to no personhood at all considering our judicial system’s determination in 1857 that black slaves were chattel property—or *things* with no legal standing.<sup>14</sup>

Similarly, throughout most of the nineteenth century the United States denied married women legal personhood through the doctrine of marital coverture (as discussed in detail in chapter 3). Under coverture, a wife was incorporated or merged into her husband upon marriage. The application of coverture suspended a women’s legal personhood during the duration of the marriage (she could not own property, sign contracts, or sue under her own name).<sup>15</sup> This same suspension of personhood meant that husbands could legally beat and rape their wives. These examples are morally reprehensible (and should remain a source of constant reflection), but they demonstrate that personhood is a malleable social construct.

Critics of corporate personhood might argue that corporations are not *human beings*, but the issue of whether corporations are legal persons in the United States – and that they have been for two centuries – does not appear open to debate. (And this is taking for granted that the category of the human is not likewise a social construct, an assumption that Judith Butler reminds us – in the context of international lesbian and gay politics – means that “we fail to think critically and ethically about the consequential ways that the human is being produced, reproduced, and deproduced.”)<sup>16</sup> In any event, legal personhood (and not “humanity,” whatever that may be) is an essential quality to achieving social, economic, and cultural agency. Indeed, legal personhood tends to become *real* personhood over time. In the specific case of corporate personhood, Joseph Slaughter observes that “the discursive history of corporate personality over the course of the nineteenth century suggests that even those things that may begin as purely legal fictions tend to become social realities over time—that is, the artificial legal personality tends to come to be perceived (and to be treated) as natural, at least in the ways we speak about it.”<sup>17</sup> From a purely practical perspective, achieving legal personhood probably trumps being categorized as human. As Samera Esmeir has shrewdly identified, in secular regimes governed by positive law “the status of the legal person, defined by legal rights and duties, also began to define the human.”<sup>18</sup> Under certain conditions of modernity, the status of personhood actually precedes the assignation of humanity. Legal personhood enables and produces the human and, as Esmeir adds, the removal of legal personhood results in the terrifying erasure of the human.<sup>19</sup>

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<sup>14</sup> Holloway, Karla FC. *Legal Fictions: Constituting Race, Composing Literature*. Durham: Duke University Press, 2014, at x. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>15</sup> Reid, Charles J. “The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton and the Legal Emancipation of Women.” *University of St. Thomas Law Journal: Fides et iustitia*. 10 U. St. Thomas L.J. 1123. Spring, 2013, at 1126.

<sup>16</sup> Butler, Judith. *Undoing Gender*. New York: Routledge, 2004, at 36.

<sup>17</sup> Slaughter, Joseph. *Human Rights, Inc.: The World Novel, Narrative Form, and International Law*. New York: Fordham University Press, 2007, at 60.

<sup>18</sup> Esmeir, Samera. *Juridical Humanity: A Colonial History*. Palo Alto: Stanford University Press, 2012, at 78.

<sup>19</sup> This erasure of humanity through the removal of legal personhood is evident in Arendt’s study of stateless refugees who experience an “expulsion from humanity” in the wake of losing legal personhood and Agamben’s concentration camp victim, whose loss of legal personhood in the camp’s “zone of indistinction” enables a moving threshold for defining man and non-man. See Hannah Arendt. *The Origins of Totalitarianism*. New York: Harvest, 1976, at 297 and Giorgio Agamben. *Remnants of Auschwitz: The Witness and the Archive*. New York: Zone Books, 1999, at 47.

The question, then, is not whether or not corporations are persons. They very clearly are. The more interesting question is what *kind* of persons are corporations? Moreover, *how* did the corporation become a person with constitutional rights in the first place? How did a legal fiction become a real social, economic, and cultural agent? How does access – or denial of access – to corporate personhood affect natural persons?

The corporate person is, to put it mildly, a very strange sort of person. Take, for instance, General Motors. This person was born in 1908. Just after becoming a centenarian in 2009, it was headed for bankruptcy. Due to its perceived importance to the nation's economy (it was deemed "too big to fail"), the U.S. government "bailed" it out, freely contributing billions of dollars to it in an effort to resuscitate its financial situation. The bailout failed and General Motors went bankrupt, costing the government (*i.e.*, you, me, and other taxpayers) over \$11 billion from its toxic investment. Surviving bankruptcy, as corporate persons do, General Motors has returned to its highly profitable ways in the auto industry. However, along the way General Motors fraudulently and criminally hid information about a dangerous ignition switch in its cars, killing 124 people. The government charged General Motors with the crimes of wire fraud and engaging in a scheme to withhold material facts related to these deaths.<sup>20</sup> General Motors paid the government \$900 million to settle the criminal charges—something natural people *cannot* do. In exchange for the payment, General Motors received a deferred prosecution from the government, meaning it avoided even having to plead guilty to a crime. No executives or employees of General Motors were charged with any crimes related to the 124 criminal deaths. Although the wrongful acts were deemed criminal, the government found no person – corporate or natural – criminally liable for them. Indeed, how can you even put a bodiless person into a jail cell?

The Lorillard Tobacco Company is one of the oldest persons in the nation. It was born in 1760 (making it older than the U.S.). This wily old veteran has thrived despite being implicated in a federal racketeering investigation (and, later, conviction) for intentionally concealing the deleterious effects of cigarettes for over fifty years and for giving out free cigarettes to children in low-income housing units. (Like General Motors, it settled the criminal charges with a cash payment with no person connected to it going to jail). In order to increase its economic efficiency, Lorillard recently *merged* into another person, RJ Reynolds (spry in comparison, born in 1875), and received merger consideration of \$27 billion.<sup>21</sup> The natural persons – they, of course, did not disappear in the merger – who helped hide the links to cancer and handed out free cigarettes to kids got to enjoy much of that \$27 billion.

These corporate persons also produce and enable other kinds of corporate personhood. Indeed, the corporate form instantiates new modalities of personhood equipped with a wide array of new abilities that transcend those of natural personhood. Corporate bodies have vital organs, such as executive officers and directors, who help the corporate body function on a day-to-day basis. Thus incorporated, these natural persons emerge from the corporate body with increased wealth, power, and agency. Dr. Ray Irani, the long-time CEO of Occidental Petroleum Corporation is a good case-in-point. In 2006, Irani asked Occidental to pay him a staggering \$460 million in annual compensation for his success in increasing the company's value; Occidental happily agreed (in part, perhaps, because Irani was the Chairman of the Board of Directors, members of which make decisions on executive compensation). Outraged shareholders asked Occidental to remove Irani as CEO. After mulling over the request for

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<sup>20</sup> <https://www.fbi.gov/newyork/press-releases/2015/>; see also Spector, Mike and Christopher M. Matthews. "U.S. Charges GM with Wire Fraud, Concealing Facts on Ignition Switch" *Wall Street Journal*. September 17, 2015.

<sup>21</sup> Form 10K (2015 Annual Report), Reynolds America Inc.

several years, Occidental technically agreed in 2009 to remove Irani as CEO, changing his job title from CEO to “Executive Chairman,” while leaving intact his general role within the corporate body. In 2010, Occidental paid Irani another \$76 million, in 2011, \$50 million, and in 2012, \$46 million.<sup>22</sup> Shareholders again called for Irani’s resignation. He ultimately resigned in 2013 at age 79; Occidental paid Irani \$55 million in severance, and agreed to pay him \$2.2 million annually for life.<sup>23</sup> Like a cancerous mole, nobody could make him go away.

These corporate persons can be female, too, of course. Marissa Mayer serves as the most vital organ of another corporate person: Yahoo. Yahoo paid her \$25 million in 2013 and \$42 million in 2014 to help its body function efficiently each day as its chief executive officer.<sup>24</sup> Along the way, Mayer used this position to help prove that some corporate persons could shatter the so-called “domestic sphere” that once ensnared many women and exiled them from the financial marketplace. She also used her corporate personhood to overcome what many believe is biological hindrance for women’s financial success in the business world: childbearing. Mayer essentially skipped her maternity leave and used corporate assets to build a fully functional nursery attached to her office at the corporate headquarters. This enabled her to minimize the effect that the childbearing process and childrearing years had on her career. Her decision was lauded by some, but mostly drew the ire of others who lacked the resources to make similar accommodations.<sup>25</sup> In any event (and apparently dismissive of her critics), Mayer used her augmented personhood to cast aside biological and social obstacles that have impeded many women from obtaining equal footing in the professional sphere.

The legal fiction of corporate personhood augments the powers and abilities of those who can access and utilize it, but from where exactly do these “superpowers” emerge? Like most contemporary investigations into fictional persons with superpowers (*e.g.*, recent films such as *Batman Begins*, *The Incredibles*, *Iron Man*, *X-Men: First Class*, and so on), this dissertation functions as an “origin story” of another fiction with superpowers: the corporate person. This sort of origin story generally shows us an augmented being in its simplest, earliest stages so that we can truly grasp who it is, where it came from, and how its powers developed over time. I examine the corporate person at the time in U.S. history and culture when it first began developing into a full constitutional rights-and-duties bearing subject and the dominant economic actor in America: the inter-war period between the Civil and First World Wars (1870-1914). Alan Trachtenberg dubs this time period “the age of incorporation” and observes that this era “catches incorporation in its first bloom, so to speak, as it struggled to shake off the previous order and free its revolutionizing cultural powers.”<sup>26</sup> During this age of incorporation, the U.S. transformed itself from a largely agrarian economy to one based on the principles of industrial and managerial capitalism. As a result, the corporation, according to Alfred Chandler Jr., “took on a life of its own,” and became the “modern business enterprise—the archetype of today’s

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<sup>22</sup> Helman, Christopher. “Ray Irani Is Out At Oxy - Guess How Much He Got Paid In 20 Years At The Top.” *Forbes*. May 6, 2013.

<sup>23</sup> Settlement Agreement and General Release, dated December 20, 2013, between Occidental and Dr. Ray R. Irani (filed as Exhibit 99.1 to the Current Report on Form 8-K of Occidental dated December 20, 2013 (date of earliest event reported), filed December 23, 2013, File No. 1-9210)

<sup>24</sup> Beckerman, Josh. “Yahoo CEO’s 2014 Compensation Valued at \$42.1 Million.” *Wall Street Journal*. April 29, 2015.

<sup>25</sup> Colby, Laura, Carol Hymowitz and Jeff Green. “Marissa Mayer Rewrites Rules for CEO Parenting, Again.” *Wall Street Journal*. September 1, 2015.

<sup>26</sup> Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age*. New York: Hill and Wang, 2007, at ix.

giant corporation.”<sup>27</sup> Importantly, too, this was the time period during which the corporate person carved out constitutional due process and equal protection rights for itself, resulting in its impregnable status as a constitutional person in American law and society. Examining the corporate person during its socio-legal emergence enables us to grasp its key characteristics just as it came of age and to analyze the legal foundations that made it so powerful and *strange* in nineteenth-century America and beyond.

This origin story reveals that the corporate person is unlike any other person previously known because of its ability to accrue power and assets, while also avoiding legal repercussions for its actions and liabilities. The corporate person achieves this socio-economic agency and legal impunity insofar as it emerges from state corporate codes and the federal judiciary as a *personified* (or incorporated) “actor network.”<sup>28</sup> That is, the corporate person can distribute itself through – and draw power from – its network of employees, investors, political allies, tangible assets, and all of the “things” that constitute the corporation. At the same time, the corporate person’s legal personality is artificial and “fictional” (though, of course, still *very* real) so the law cannot physically regulate, discipline, or contain it, thereby granting corporate bodies *de facto* legal impunity. The corporate person can oscillate between its singular and collective bodies. It is simultaneously a legal person (*i.e.*, the corporate entity itself) and a massive network of people, assets, qualities, and tangible things. Different forms of “corporate personhoods” emerge from within the corporate person. This dissertation examines these various modalities of personhood that emerge from nineteenth-century corporate law. Some natural persons, we shall see, can secure access to these personified actor networks and learn to navigate and emulate them, which allows them to use the corporate person as a prosthesis for their own legal personalities. They emerge from the incorporated actor network with increased agency and power in American law and society. Others, denied access to the networked corporate body, see their personhood shrink and ultimately disappear altogether.

A quick note on terminology: An “actor network” is a form of social being that presents itself as a heterogeneous network of persons, things, forces, and axioms. Actor-network theory asks us to “reassemble the social,” in order to see social actors “as the fluid, symbiotic relation” of persons and things, and “not a divided kingdom of human actors and nonhuman objects.”<sup>29</sup> Each element in an actor network – whether a person, thing, etc. – is an *actant*, or anything that causes another thing to act—or, as Bruno Latour puts it: “*any thing* that does modify a state of affairs by making a difference.”<sup>30</sup> Each actant contributes its competencies to the network, and the network *translates* these abilities to augment the larger network’s capacities. The network grows more agentive and powerful by absorbing each actant’s positive qualities and attributes. The network’s capacities increase as it *enrolls* more actants and attaches them to the network. At different times, different actants serve as the network’s *spokesperson*, or the person or thing that communicates on the network’s behalf at any given moment. If a network has a particularly visible or important spokesperson (one that serves as the fulcrum of the network), then that spokesperson may emerge as a *distributed-centered subject*.

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<sup>27</sup> Chandler Jr., Alfred D. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge: The Belknap Press, 1977, at 285.

<sup>28</sup> Latour, Bruno. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford: Oxford University Press, 2005, at 71.

<sup>29</sup> Mol, Annemarie and John Law. “Regions, Networks and Fluids: Anaemia and Social Topology.” *Social Studies of Science*, Vol. 24, No. 4 (Nov., 1994), 641-671.

<sup>30</sup> Latour, at 71.

A recent study of Stephen Hawking provides an illustrative example of how a distributed-centered subject operates.<sup>31</sup> Hawking, of course, is a theoretical physicist at Cambridge, who also suffers from amyotrophic lateral sclerosis. This person is almost entirely paralyzed and can now move only a small muscle in his cheek. The study of Hawking shows that he is “permanently attached to assemblages of machines, devices, and collectivities of people.”<sup>32</sup> His graduate students, personal assistants, colleagues, computers, 3D-models, speech devices, and publications transform a man who, in theory, should have only a minimal degree of social agency into one of the most influential physicists in the world. Hawking is an individual, but he is also a network. He oscillates between the singular (Hawking) and the collective (his hybrid collective of persons and things) translating the capacities of the actants that he has enrolled in his network to augment his disabled body. The study determines that Hawking “is, in fact, materialized and distributed in a series of overlapping and interconnecting collectivities.”<sup>33</sup> As a result of his networked subjectivity, the study concludes that Hawking is a “corporation.”

But the ultimate conclusion that Hawking is a corporation is incorrect. If Hawking commits a crime, he will go to jail. When Hawking gets old, he will die. Hawking cannot physically merge into another person nor can he raise vast funds from investors in exchange for ownership of his body and self. Hawking is not incorporated and neither are any other actor networks in the world, *except* for the corporate person. The law imbues corporate persons with powers that transcend the biological and socio-economic limitations of natural persons (*e.g.*, immortality, unlimited size, a structure designed to accumulate wealth, limited liability for its actions, the ability to merge into or acquire other corporate persons, etc.). This person both contains and inhabits the corporation’s actor network. It shields its constituent parts from legal danger, but also exercises its increased economic clout over generations of natural person’s lives. *Only* the corporate person – the legally personified actor network – has these legal and socio-economic superpowers. These powers are most clearly visible in our nation’s first full-fledged corporate persons: the massive conglomerate corporations that sprung up after the Civil War, the Gilded Age robber barons, and the first women who used corporate tactics to transcend the domestic sphere. These various persons in nineteenth-century America help display the networked subjectivity and the concomitant power and agency inherent in corporate personhood.

This origin story requires an interdisciplinary investigation. Nineteenth-century corporate law is, of course, integral to this study, but to rely on just the law would be to underestimate the complexity of the corporate personality. It has long been recognized that a coherent theory of personhood must include “a mass of non-legal considerations: considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological.”<sup>34</sup> I utilize personhood’s various “non-legal considerations” in constructing my anatomies and blueprints of America’s first corporate persons. In addition to corporate law, my study considers legal history, business history, economic history, and American history more generally. My study likewise incorporates several philosophical and theoretical approaches such as actor-network theory, feminist theory, moral theory, and various theories of the aesthetic, to name just a few. Each of these theoretical approaches helps reveal aspects and nuances of corporate personhood that would be otherwise lost in the interstices and lacunae between law and history.

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<sup>31</sup> Mialet, Helene. *Hawking Incorporated: Stephen Hawking and the Anthropology of the Knowing Subject*. Chicago: The University of Chicago Press, 2012.

<sup>32</sup> *Id.* at 194.

<sup>33</sup> *Id.* at 196.

<sup>34</sup> Dewey, 655.

Central to my analysis are the cultural productions that stem from the age of incorporation, in particular the novel. Historians who study this era have identified that the “deepest changes in these decades of swift and thorough industrialization and urbanization lay at the level of culture, difficult for contemporaries to recognize, and baffling to historians, the deepest resistances and oppositions also lay there, in the quality as well as the substance of perceptions, in the style as well as the content of responses.”<sup>35</sup> The novels written during the incorporation of America capture this perception, response, resistance, and opposition to corporate personhood in ways that no other discipline or media can, both in a “politically unconscious” fashion and directly, as clear snapshots of various nineteenth-century corporate personhoods produced in the historical moment.<sup>36</sup> The novels that I utilize from this period come from the field of American naturalism, in part because naturalist authors produced these texts during the rise of corporate personhood, but also because, as Walter Benn Michaels puts it, “In naturalism, no persons are natural. In naturalism, personality is always corporate and all fictions, like souls metaphorized in bodies, are corporate fictions.”<sup>37</sup> That is to say, upon closer inspection it becomes evident that naturalist authors and their texts – consciously or not – are obsessed with corporate personhood and its uncanny effects on both the individual and society.

Naturalism famously examines the gritty, realistic, and negative aspects of the human condition. In addition, however, corporate personhood(s) are also ubiquitous in these texts and, as such, these contemporaneous representations of emergent corporate personalities prove invaluable in helping us to grasp the corporate person’s true nature during its nascent stages of existence. As such, naturalist novels like Rebecca Harding Davis’s *John Andross* (1874), Edward Bellamy’s *Looking Backward* (1887), Ignatius Donnelly’s *Caesar’s Column* (1890), Frank Norris’s *The Octopus* (1901), D.G. Phillips’s *The Deluge* (1905), Jack London’s *Burning Daylight* (1910), Edith Wharton’s *The Custom of the Country* (1913), and Theodore Dreiser’s *The Titan* (1914) provide the cultural narrative of the corporate person’s socio-legal origin story that I recount in this dissertation.

Literature plays a crucial role in my argument about the nineteenth-century social and legal history of corporate personhood. First and foremost, these novels serve as what actor-network theorists refer to as “immutable mobiles” for both the corporate person’s network and my own interdisciplinary network of research methods. These novels transpose massive corporations into textual microcosms, freezing each corporate person into a single, static, and accessible site (or spokesperson) that presents itself for analysis across time and space. Likewise, novels have proven themselves ideally suited to critical interpretation through each of the disciplinary lenses upon which I rely: law, history, and the various other hermeneutic approaches of literary theory. Furthermore, literature, like the law, is fundamentally interested in producing and imagining different types of personhood. Corporate personhoods clash with other imagined personhoods in naturalist texts. As Joseph Slaughter so eloquently puts it, “law and literature are discursive regimes that constitute and regulate, imagine and test, kinds of subjects, subjectivities, and social formations; that they are machines for producing [and governing] subjectivity’.” As

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<sup>35</sup> Trachtenberg, at 7.

<sup>36</sup> For a canonical study of how the novel reflects the unconscious ideological content of an historical era, see Frederic Jameson’s *The Political Unconscious: Narrative as a Socially Symbolic Act*. Ithaca: Cornell University Press, 1981.

<sup>37</sup> Michaels, Walter Benn. *The Gold Standard and the Logic of Naturalism*. Berkeley: University of California Press, 1987, at 213.



law and society produced the corporate person, the naturalist authors used the novel's fictive space (or "imagination space") to imagine and test this emergent form of subjectivity.

In his book-length study exhibiting the novel's potential for producing socio-economic effects, David Zimmerman identifies (echoing muckraker David Graham Phillips) that novels are "uniquely able, through their narrative and imaginative hold, to make the reader 'see, feel, and understand' the plight of society's victims."<sup>38</sup> The other side of this coin, of course, is that the novel makes the reader "see, feel, and understand" the corporate person, too. The corporate persons that come to life in these texts have much to reveal about the complex nature and profound power of the emergent corporate person during America's age of incorporation. The novel allows us to experience the corporate person in action. These texts enable us to witness in vivid detail how corporate personhood emerged, and how individuals responded to this emergence from both an historical and psychological perspective. In short, literature enables us to imagine as real a legal fiction that was coming to life in simultaneity with the production of these texts. These novels capture in their pages and make available to us corporate personhood's legal inception, social conception, and cultural reception.

Incorporating American naturalist literature pays unexpected dividends, as well. The naturalist texts that contribute to my argument reveal a bevy of dynamic and powerful characters. Whether it is the first full-fledged constitutional corporate person (*i.e.*, the Southern Pacific Railroad Company), the robber baron financiers, or the financially empowered women that dominate their respective texts, these characters upset traditional interpretations of naturalist fiction. The traditional view of naturalist texts is that they portray the "range of human activity as if determined, not free," whereby the individual is limited by the "oppressive constraints of heredity and environment."<sup>39</sup> Jennifer Fleissner updates this phenomenon, observing that male naturalist characters follow a "plot of decline" while female characters are "stuck in place" or move "in a nonlinear fashion epitomized by a language of 'drift'."<sup>40</sup> The characters (both male and female) that I discuss in the chapters that follow are, on the contrary, radically free agents very clearly on the rise in American society. They dominate their respective texts and this unexpected freedom and agency helps demonstrate the power of corporate personhood. Indeed, the following chapters are filled with corporate personhood's legal, historical, theoretical, and literary power. The remainder of this dissertation shows a legal fiction coming to life and uncovers the nature, method, and traits that allow corporate persons to dominate not only the age of incorporation, but contemporary society as well.

Chapter 1 of this dissertation examines the origins of corporate personhood in U.S. law and society. It tracks corporate personhood's development through the actual business and legal history of the first full-fledged constitutional corporate person: the Southern Pacific Railroad Corporation. Frank Norris's *The Octopus* (1901) is the primary site of investigation into the legal, historical, and socio-economic impact of corporate personhood in the U.S. Norris takes seriously the notion that a corporation is a person, and represents the Southern Pacific as such in his epic novel about the battle between California wheat ranchers and the monolithic Southern Pacific railroad corporation. A close study of this corporate character in conjunction with the legal

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<sup>38</sup> Zimmerman, David A. *Panic! Markets, Crises, and Crowds In American Fiction*. Chapel Hill: University of North Carolina Press, 2004, at 103.

<sup>39</sup> Mitchell, Lee Clark. *Determined Fictions: American Literary Naturalism*. New York: Columbia University Press, 1989, at viii.

<sup>40</sup> Fleissner, Jennifer L. *Women, Compulsion, Modernity: The Moment of American Naturalism*. Chicago: The University of Chicago Press, 2004, at 163.

history of corporate personhood produces the primary claim of my argument: that the corporate person's power and agency arise because it is an incorporated (and, therefore, *personified*) actor network and a legally augmented distributed-centered subject. As such, the Southern Pacific is not only a legal person with the same rights as a natural person, but also can disseminate this personhood through its corporate network and translate the capacities of each of its constituent parts. Norris's text then allows the reader to experience how the corporate person affected the individuals it encountered after securing its full constitutional personhood. Norris's character subsumes and assimilates the human characters – and their tangible assets – throughout the novel. The Southern Pacific destroys any character that resists enrollment into its voracious actor network. Norris's depiction of the corporate person and his prose style together reveal the historical fact that unincorporated natural persons would have to fight for their lives against the oncoming incorporation of America. As these incorporated actor networks grew in size, their networks pushed natural persons to the margins of society or, worse, into the abyss.

Some natural persons, however, did see a way of augmenting their own personhood through a strategy of attaching themselves to – and then navigating within – these emergent corporate persons. Again drawing on legal history and naturalist texts, the second chapter studies these financiers and maps out the corporate routes they followed in achieving unprecedented levels of wealth and power in nineteenth-century America. “Robber barons” like Andrew Carnegie, Jay Gould, and J.P. Morgan used these until-then fictional levels of wealth to become legally unassailable social actors. I argue that they achieved this legal impunity through the instrumentalization of nineteenth-century U.S. corporate law. They helped initiate corporate law's so-called “race to the bottom,” whereby states offered enabling corporate laws in return for massive revenue streams. The fictive spaces of three naturalist texts, each of which portrays a character based on a composite of real-life financiers, present a precise prosopography and universal blueprint of the financier's legal methodologies. Three “money novels” – Theodore Dreiser's *The Titan* (1914), Jack London's *Burning Daylight* (1910), and D.G. Phillips's *The Deluge* (1905) – show how financiers created massive, banyan-like networks of interconnected corporate bodies. They navigated these networks of corporate bodies, evading discipline and punishment by shielding themselves with the corporate person's limited legal and financial liability. They used the corporate form's sanctuary to erect a new moral code for themselves. Operating within this new moral structure allowed the financiers to behave as “supermen,” imposing their collective will to power on unincorporated natural persons.

Chapter 3 focuses on persons and themes that conventional legal history generally excludes from the discourse of corporate personhood: nineteenth-century married women and the legal fiction of marital coverture. Under coverture, a husband and wife became one corporate body upon marrying, but only the husband's legal personality survived the merger. I offer a close reading of two novels – *John Andross* (1874) and *The Custom of the Country* (1913) – written by female naturalist authors who were themselves subjugated by marital coverture. I argue that Rebecca Harding Davis and Edith Wharton use the novel's fictive space to show how nineteenth-century women could model their behavior after emergent corporate forms to overcome the debilitating socio-legal effects of marital coverture. Davis's *John Andross* portrays Isabel Latimer, a woman who models her marriage after the emergent securitized industrial corporation, a new corporate form whereby each of the corporation's shareholders retained their individuality and economic independence. Isabel retains her legal personality in marriage by mirroring the new corporate form of her era. Wharton's Undine Spragg, the anti-heroine of *The Custom of the Country*, even more radically models her marital career after the holding company and the

“merger wave” that it catalyzed at the turn of the century. Undine portrays the power of this corporate form (first perfected by Rockefeller’s Standard Oil Company), through which one corporate body can merge with countless other corporate bodies, stripping them of their valuable assets through the process of vertical integration. Both authors suggest that access to the corporate person’s methods and structures can increase a natural person’s power and agency. Simply emulating corporate personhood enables these women to augment their natural persons and erase coverture’s debilitating legal restrictions and civil death.

The final chapter examines labor unions, the one group of natural persons that had no access to the corporate personality and its networked subjectivity in nineteenth-century America. The judiciary forced labor unions to live in a “legal twilight zone,” constructively denying them access to incorporation and its legal protections. As such, union members were consistently enjoined from striking, boycotting, and often even organizing as a group. Labor’s futility in late nineteenth-century America is apparent in countless naturalist novels, but perhaps no more so than in two science-fiction novels written by naturalist authors: Edward Bellamy’s *Looking Backward* (1887) and Ignatius Donnelly’s *Caesar’s Column* (1890). The “cognitive estrangement” inherent in science fiction texts enables authors to propose new, imaginative, and radical possibilities for humanity by transcending the fixed concepts of their empirical environments. However, even in this radically free fictive space, labor cannot overcome corporate law’s overwhelming presence and debilitating effects. *Caesar’s Column* shows labor organizing on a world-wide scale, but with no access to corporate personhood. When the “Brotherhood of Destruction” rises up, the organization immediately unravels and Armageddon ensues. *Looking Backward* presents labor’s uprising as a ringing success: the nation actually becomes a corporation and functions as a single, efficient corporate person. However, a closer look at the “utopia” in this text reveals that the corporate person has enslaved the working classes, enlisting them in a fascist “industrial army” against their will. Even in the revolutionary fictive space of science fiction, labor cannot imagine a way to access or defeat the corporate person. Nineteenth-century labor associations ultimately failed because they could neither access nor emulate corporate personhood’s incorporated actor networks.

The nineteenth-century power of incorporation was profound. Corporate law, legal history, theory, and the imagination space of the naturalist novel allow legal fictions to come to life before the mind’s eye. This interdisciplinary approach gives the reader a chance to study in detail the corporate person’s complex origins and enigmatic socio-legal status. This new understanding of corporate personhood’s profound subjectivity and potential for magnifying a natural person’s power and agency provides the necessary foundations for an inquiry into how the corporate person functions in contemporary American society. Armed with this information, we can next turn our gaze toward modern corporate persons, like pharmaceutical companies, investment banks, and technology companies to examine how these new and even more pervasive personified actor networks continue to produce, shape, and magnify (or nullify) the natural persons they encounter.

# Chapter 1 - Tracking the Rise of Corporate Personhood in Frank Norris's *The Octopus*

Summary: Chapter 1 examines the origins of corporate personhood in U.S. law and society. It tracks corporate personhood's development through the actual business and legal history of the first full-fledged constitutional corporate person: the Southern Pacific Railroad Corporation. Frank Norris's *The Octopus* (1901) is the primary site of investigation into the legal, historical, and socio-economic impact of corporate personhood in the U.S. Norris takes seriously the notion that a corporation is a person, and represents the Southern Pacific as such in his epic novel about the battle between California wheat ranchers and the monolithic Southern Pacific railroad corporation. A close study of this character in conjunction with the legal history of corporate personhood produces the primary claim of my argument: that the corporate person's power and agency arise because it is an incorporated (and, therefore, personified) actor network and a legally augmented distributed-centered subject. As such, the Southern Pacific is not only a legal person with the same rights as a natural person, but also can disseminate this personhood through its corporate network and translate the capacities of each of its constituent parts. Norris's text then allows the reader to experience how the corporate person affected the individuals it encountered after securing its full constitutional personhood. Norris's character subsumes and assimilates the human characters – and their tangible assets – throughout the novel. The Southern Pacific destroys any character that resists enrollment into its voracious actor network. Norris's depiction of the corporate person and his prose style together reveal the historical fact that unincorporated natural persons would have to fight for their lives against the oncoming incorporation of America. As these incorporated actor networks grew in size, their networks pushed natural persons to the margins of society or, worse, into the abyss.

Frank Norris's novel *The Octopus* (1901) serves as a key for decoding the complex and little-understood origin and nature of corporate personhood as it emerged in nineteenth-century America and beyond. Norris dramatizes the historic battle between a group of California wheat ranchers and the Southern Pacific railroad company (which Norris calls the Pacific and Southwestern railroad company, or the P&SW). The Southern Pacific, not coincidentally, was the first corporation to achieve full-fledged constitutional corporate personhood, meaning that it carved out for itself the same due process and equal protection rights as natural persons. The novel is littered with clues that help to uncover hidden aspects of corporate personhood's strange legal history and uncanny socio-economic position. Tracking these hints in the novel's fictive space allows the reader to imagine and experience the metamorphosis of the corporate person from an artificial or "fictional" person into a dominant and very real social actor. Indeed, the fictional corporate person – the P&SW – emerges as the protagonist of Norris's novel. *The Octopus* also immerses the reader in the cultural milieu wherein corporate personhood arose, giving the reader the opportunity to witness first-hand the effects that the first constitutional corporate person had on individual human beings who originally encountered and resisted it.

Frank Norris introduces Lyman Derrick in *The Octopus* just after the P&SW informs the ranchers that it is commandeering their ranchlands. Lyman is a dastardly character and typically villainous. He is a lawyer and a newly elected member of the state railway commission who we find will soon betray his own family and the other wheat ranchers of the San Joaquin Valley. In exchange for the P&SW's backing in the next gubernatorial campaign, Lyman helps the railroad

corporation to gouge the state populous and evict the ranchers from land that the P&SW had pledged to sell to them at a minimal cost. Before his betrayal is revealed, Lyman is in his office standing over a P&SW's railroad map. He observes that the map was "gridironed by a vast, complicated network of red lines marked P. and S.W.R.R.," and that it was a "huge, sprawling organism, with its ruddy arteries converging to a central point" (288-89). Norris's description of the railroad corporations could not be more apt. Indeed, in this Chapter I argue that the corporate person is a legally personified "organic network," and that it is precisely through this networked subjectivity that corporate persons achieved unprecedented economic power and socio-legal agency in the U.S. The Southern Pacific is at once a vast, complicated network *and* a legal person. The corporate person, however, has no physical body, lives forever, can merge into other corporate persons, and enjoys limited financial and criminal liability for its actions. Unlike *natural* persons who attach themselves to networks who die when they get old, go to prison when they commit crimes, and have physical bodies to discipline and punish to keep them in line, corporate persons do not die, go to jail, or have tangible bodies. As such, the corporate person is simultaneously an augmented legal *person* that transcends the biological limitations of humanity and a massive *actor network* that absorbs the capacities of its multitudinous system of persons and things.

A close study of this corporate character demonstrates that the corporate person's power and agency arise because it is an "incorporated actor network" and a legally personified "distributed-centered subject." As such, the railroad corporation is not only a legal person with the same rights as a natural person, but also can disseminate this personhood through its corporate network and translate the capacities of each of its constituent parts to augment its own power and agency. Norris's corporate character subsumes and assimilates the human characters and their tangible assets, while destroying any characters that resist enrollment into its voracious and potentially limitless actor network. This very real but bodiless person becomes legally unassailable. Norris's fictional depiction of the first full-fledged constitutional corporate person reveals the historical fact that unincorporated natural persons would have to fight for their lives against the oncoming incorporation of America. As these incorporated actor networks grew in size, their networks pushed natural persons to the margins of society or, worse, into the abyss.

### If These Walls Could Talk: The Socio-Legal Path to Constitutional Corporate Personhood

The Southern Pacific was among the first nineteenth-century conglomerate corporations that business historian Alfred Chandler Jr. calls the "mega corporations" that would serve as the "archetype of today's giant corporation."<sup>41</sup> Its corporate network was truly massive, even by today's standards. It constructed and operated over 10,000 miles of track and 16,000 miles of overseas shipping routes.<sup>42</sup> Under the Pacific Railway Acts of 1862 and 1864, as amended, it could earn up to \$96,000 in government funds and receive 12,800 acres of federal land (with all the resources attached to the land) for each and every mile of track it laid. It had subsidiary construction companies, shipping companies, telegraph companies, and countless other business entities connected to it. In the 1890s, a single railroad corporation like the Southern Pacific generally employed more persons, had more funds, and used more capital than the most complex

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<sup>41</sup> Chandler Jr., Alfred D. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge: The Belknap Press, 1977, 285.

<sup>42</sup> Richard. J. Orsi. *The Sunset Limited: The Southern Pacific Railroad and the Development of the American West 1850-1930*. Berkeley: University of California Press, 2005, at 31.

of American governmental and military organizations.<sup>43</sup> Richard White observes that “the actual railroad network of tracks, bridges, stations, and trains had a doppelgänger—a network of promoters and investors,” who “ensnared what the railroads needed to survive—subsidies, friendly legislation, newspaper stories that made it easier to market the railroads’ securities, and favors of all kinds.”<sup>44</sup>

This new breed of corporation, the Southern Pacific foremost among them, represented a radically new kind of “actor network.” An actor network is a social assemblage that exists as a heterogeneous network of persons, things, forces, and axioms.<sup>45</sup> Each element in an actor network (whether a person, thing, etc.) is an *actant*, or anything that causes another thing to act—or, as Bruno Latour puts it: “*any thing* that does modify a state of affairs by making a difference.”<sup>46</sup> Each actant contributes its competencies to the network, and the network *translates* these abilities to augment the larger network’s capacities. The network grows more agentive and powerful by absorbing each actant’s positive qualities and attributes. The network’s capacities increase as it enrolls more actants and attaches them to the network.<sup>47</sup> At different times, different actants serve as the network’s spokesperson, or the person or thing that communicates on the network’s behalf. Particularly important spokespersons function as a network’s fulcrum and may become a distributed-centered subject that can put “himself in the position of other people and of things, and endows them with new competencies” while the ability to “locate himself in several places at once allows him to nourish his know-how, preserve his position at the centre of the network he has created, and enhance his reputation.”<sup>48</sup> The distributed-centered subject exists simultaneously in two ontologically real states, as the individual spokesperson and the actor network through which it disseminates its capacities. *The Octopus* directs attention to the legal and economic actants that produced the incorporated actor network through the legal fiction of corporate personhood. In the same passage in which Norris identifies the corporation as an organic, living network, he describes Lyman’s railroad-financed law office:

noting with satisfaction its fine appointments, the padded red carpet, the dull olive green tint of the walls, the few choice engravings—*portraits of Marshall, Taney, Field, and a coloured lithograph*—excellently done—of the Grand Canyon of the Colorado—and deep seated leather chairs, the large and crowded bookcase (*topped with a bust of James Lick, and a huge greenish globe*) (286).<sup>49</sup>

The conspicuous allusion to Supreme Court Justices John Marshall, Roger Taney, and Stephen Field immediately invokes the concept of constitutional corporate personhood. Legal

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<sup>43</sup> Chandler, 204.

<sup>44</sup> White, Richard. *Railroaded: The Transcontinentals and the Making of Modern America*. New York: W.W. Norton and Co., 2011, at 50 and 96.

<sup>45</sup> Law, John. “After ANT: Complexity, Naming and Topology.” In *Actor Network Theory and After*. Ed. John Law and John Hassard. Oxford: Blackwell Publishers, 1999, pp. 1-15.

<sup>46</sup> Latour, Bruno. *Reassembling the Social: An Introduction to Actor-Network-Theory*. Oxford: Oxford University Press, 2005, at 71.

<sup>47</sup> See Callon, Michel and John Law. “On Interests and Their Transformation: Enrolment and Counter-Enrolment.” *Social Studies of Science*, Vol. 12, No. 4, Theme Section: Laboratory Studies (Nov., 1982), at 620. See also Callon, Michel. “Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St. Brieuc Bay.” In *Power, Action and Belief: A New Sociology of Knowledge?* Ed. John Law. London: Routledge, 1986, at 10.

<sup>48</sup> Mialet, Helene. “Making a Difference by Becoming the Same.” *Entrepreneurship and Innovation*, Vol 10, No 4, 2009, at 264.

<sup>49</sup> Norris, Frank. *The Octopus: A Story of California*. New York: Penguin Books, 1994. My emphasis.

historians use precisely these Justices as markers in tracking the evolution of nineteenth-century corporate personhood from a “mere” artificial creature of law to the full-fledged constitutional corporate person that emerged – in the legal body of the Southern Pacific railroad corporation – at the end of the century.<sup>50</sup> Each of these Justices plays a pivotal role in making the corporate person less “fictional” and more “real” in nineteenth-century law, society, and culture. Included in *The Octopus*’s singular allusion to historical persons is James Lick, the historical business entrepreneur and one-time wealthiest man in California. The inclusion of such a prominent symbol of private wealth (and the fact that the entire scene is tinted in monetary green) complicates the legal history of corporate personhood by suggesting that special financial interests also played a role in the rise and evolution of the constitutional corporate person.

This passage from *The Octopus* reminds us that it is important not only *that* the corporation became a person in the nineteenth century, but also *how* the corporation achieved personhood. The legal history of corporate personhood involves a complex alchemy of heterogeneous elements that through happenstance, intrigue, and legal transubstantiation produces a metaphysically paradoxical bearer of legal rights. In this section, I examine how this combination of incorporated actants – Supreme Court justices and economic special interests – produced a corporate person (the Southern Pacific railroad corporation) who approaches (or maybe surpasses) the concrete ontological status of natural persons while remaining in flux between fictional and organic states. The confluence of law and economics that Norris brings to our attention in Lyman’s office makes this legal paradox possible. *The Octopus* invokes the precise socio-legal history that explains the origins of its own protagonist, while also showing the networked capacities of nineteenth-century corporate personhood.

The first half of corporate personhood’s socio-legal and cultural origin story seems innocuous, possibly even optimistic. This part of the story, which encompasses John Marshall and Roger Taney’s contributions to the evolving legal concept of corporate personhood, reads as if it drifted from the pages of Willard Hurst’s rendition of nineteenth-century legal history. In the beginning, the law personifies the corporation to “protect and promote the release of individual creative energy” so as to facilitate the nation’s expansion across the vast and untamed continent.<sup>51</sup> After all, nineteenth-century Americans recognized the corporation as the *indispensable* “instrument for mustering and disciplining large amounts of capital and allowing dependable continuity for its use.”<sup>52</sup> The judiciary’s role was to protect private property and to ensure the productive use of that property at all costs, while also maintaining the spirit of the Constitution. In American jurisprudence, the corporate person begins with Chief Justice John Marshall, who served the longest tenure of any Chief Justice in U.S. history (from his controversial “midnight appointment” in 1801 until his death in 1835). Marshall first invokes corporate personhood in the relatively well-known *Trustees of Dartmouth College v. Woodward* (1819). In this case addressing the issue of whether or not a state could revoke a corporate charter, Marshall held under the Contract Clause of the Constitution that a state could make no

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<sup>50</sup> Hovenkamp, Herbert. *Enterprise and American Law: 1836-1937*. Cambridge: Harvard University Press, 1991. Hovenkamp claims that “To collapse a very long history, the jurisprudential concept of the corporation passed through three broad categories: an ‘associational’ view, which dominated the thinking of the Marshall Court, a ‘fictional’ view that ascended during the Taney period,” and a “personal” or “entity” view that emerged during Justice Field’s tenure, at 14.

<sup>51</sup> Hurst, James Willard. *Law and the Conditions of Freedom in the Nineteenth-Century United States*. Madison: University of Wisconsin Press, 1956, at 6.

<sup>52</sup> Hurst, James Willard. *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970*. Charlottesville: University Press of Virginia, 1970, at 34.

such revocation. The corporation was a “being” that entered into a contract in the form of its corporate charter, and Marshall held sacrosanct such contractual rights. Marshall’s earliest corporate person was limited, since: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.”<sup>53</sup>

The Marshall Court again addressed the issue of corporate personality four years later in *Society for Propagation of the Gospel v. Town of New Haven* (1823). In this case, the Court stated that “there is no difference between a corporation and a natural person, in respect to their capacity to hold real property.”<sup>54</sup> In order for the corporate entity to enter contracts and conduct business in its own name, it requires some legal personality separate and distinct from the humans associated within that corporate body. This initial conflation of the artificial and natural person would prove pervasive throughout the corporate person’s legal evolution—perpetuating the already complex historical account of the *persona mixta*.<sup>55</sup> Indeed, scholars have determined that after the Marshall Court’s corporate personhood decisions, the line between artificial and natural persons started to become irrevocably blurred: “Courts began to assimilate artificial persons to natural ones and to draw larger numbers of commercial associations under the rubric of the protected corporation, all the while maintaining the language of artificiality.”<sup>56</sup> Regardless of its future implications, this early doctrine of corporate personhood made clear that a state could not revoke the corporation’s right to exist. In other words, unless the corporate charter – the legal contract with the state that brings the corporation into existence – distinctly grants the state the right to revoke that charter, the state cannot threaten the corporate person’s existence.

Chief Justice Roger Taney, Marshall’s immediate successor, would seem at first glance the outlier in Norris’s collection of Supreme Court Justices. Taney attempted to dial back and overturn many of Marshall’s federalist-leaning judicial decisions and was considered a staunchly anti-corporate jurist.<sup>57</sup> This belief was reinforced in the famous *Charles River Bridge* case (1837), where Taney refused to uphold a corporation’s implied monopoly rights to build the only bridge over a Massachusetts river. Taney decided that the judiciary would interpret corporate charters as narrowly as possible and would not read implied terms into such contracts.<sup>58</sup> However, Taney would re-cross this bridge two years later and grant the corporate person a legal right that proved essential in producing full-fledged constitutional personhood. In *The Bank of Augusta v. Earle* (1839), Taney *did* read implied powers into a corporate charter, determining that corporations

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<sup>53</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), at 636.

<sup>54</sup> *Society for Propagation of the Gospel v. Town of New Haven*, 21 U.S. 464 (1823).

<sup>55</sup> Ernst Kantorowicz provides a detailed history of the checkered past of the corporate body and the mixed person. He notes that in the mixed person, various capacities and strata concurred within the single corporate body, which incorporates both secular and spiritual notions of personhood. The earliest corporate bodies blended “christus and fiscus,” so to speak. And it would appear this paradox persists today in the American constitutional corporate person. See *The King’s Two Bodies: A Study in Mediaeval Political Theology*. Princeton: Princeton University Press, 1996, at 179.

<sup>56</sup> Gregory, Mark A. “The Personification of the Business Corporation in American Law.” *The University of Chicago Law Review*, Vol. 54, No. 4 (Autumn, 1987), pp. 1441-1483, at 1450.

<sup>57</sup> As Secretary of the Treasury, Taney stated: “It is a fixed principle of our political institutions, to guard against the unnecessary accumulation of power over persons and property in any hands; and no hands are less worthy to be trusted with it than those of a moneyed corporation.” See Frankfurter, Felix. “Taney and the Commerce Clause.” *Harvard Law Review*, Vol. 49, No. 8 (Jun., 1936), pp. 1286-1302, at 1299. Note also the corporate person has already sprouted a pair of hands.

<sup>58</sup> *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).



had the right to conduct business outside of their chartered jurisdiction. Taney held that under the principle of comity one state must respect the rights of a corporation chartered in another state. The practical result of his holding was that a corporation in one state could now conduct business unimpeded on a nation-wide scale, greatly increasing its capacity to grow in size and wealth.<sup>59</sup> In deciding the case, Taney reinforced the notion of corporate personhood: “It is, indeed, a mere artificial being, invisible and intangible; *yet it is a person*, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court.”<sup>60</sup> Despite their ideological differences with regard to the extension of federal powers, Marshall and Taney both sought to foster corporate freedoms and relied on notions of personhood to do so.<sup>61</sup>

The second part of the nineteenth-century corporate person’s origin story is susceptible to far more pessimistic interpretations. This part of the socio-legal and cultural narrative involves the role of wealthy business interests and corporate influences over the legislative and judicial processes. Rather than invoking Hurst’s more innocent (or naïve) notions of legal default and drift, the late-nineteenth century saga of corporate personhood reads like Richard Posner’s “realist” portrayal of law as interest-group politics, in which special interests “purchase” legislation and the judiciary enforces these “deals.”<sup>62</sup> This story deeply implicates the model for Norris’s railroad corporation protagonist: the so-called “Pacific Railroad Ring,” and more specifically the Southern Pacific railroad corporation. This “Ring” included the Southern Pacific, Union Pacific, and Central Pacific railroad corporations. Though they often competed for individual perks from the government, these closely intertwined corporations would first merge in 1901 and can be spoken of as a single legal actor.<sup>63</sup> The eastern branch of this ring, the Union Pacific, utilized a dummy construction company, known as The Credit Mobilier of America, to extract most of its profits from building and operating the transcontinental railroad. The railroad ring, through Credit Mobilier, engaged in an audacious bribery campaign of federal government officials. The list of bribe recipients (in the form of Credit Mobilier stocks and bonds) was an all-star cast, including various Senators, Representatives, the Speaker of the House (and future Vice President Schuyler Colfax), and soon-to-be U.S. President James A. Garfield, to name but a few. The bribery shares accounted for in the subsequent government investigation constituted only half of the shares that railroad promoter (and Senator) Oakes Ames had at his disposal, leaving open the likely scenario that many more legislators (and some suggest President Grant himself) were bribe recipients.<sup>64</sup>

One of the lesser-known recipients of Credit Mobilier stock was Representative John Bingham of Ohio. Although Bingham was a seemingly small fry in the railroad network, he actually plays an integral role (whether intentionally or unwittingly) in producing full-fledged

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<sup>59</sup> *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839).

<sup>60</sup> *Id.* My emphasis. He cites the earlier Marshall Court opinions in taking this next crucial step toward full-fledged corporate personhood.

<sup>61</sup> Mark, Gregory A. “The Court and the Corporation: Jurisprudence, Localism, and Federalism.” *The Supreme Court Review*, Vol. 1997 (1997), pp. 403-437. Gregory notes that “while the Marshall and Taney Courts differed in their approaches, each used appeals to supposedly universal law to counteract state law tendencies to retard the use of corporations for business enterprise,” at 420.

<sup>62</sup> Landes, William M & Posner, Richard A, 1975. “The Independent Judiciary in an Interest-Group Perspective.” *Journal of Law and Economics*, University of Chicago Press, vol. 18(3), December, pp. 875-901.

<sup>63</sup> Maury Kline observes that “The Pacific roads were a curious spectacle: two independent companies bound together in a symbiotic relationship that forced them to cooperate in everything from schedules to supplies to setting rates.” This symbiosis, of course, extended to attaining mutually beneficial legal privileges, *The Union Pacific, Volume 1*. Minneapolis: University of Minnesota Press, 2006, at 142.

<sup>64</sup> Kline, 145.

corporate personhood. Bingham was chairman of the House Judiciary Committee and the Joint Committee on Reconstruction in 1866, as well as the lead drafter of section one of the Fourteenth Amendment of the U.S. Constitution. Roscoe Conkling, a former Senator and a fellow drafter of the Fourteenth Amendment, alleged later – as an attorney representing (who else?) the Southern Pacific railroad corporation before the Supreme Court – that Bingham, Conkling, and others had drafted the Equal Protection and Due Process clauses of the Fourteenth Amendment to specifically and intentionally include corporations under the ambit of these new constitutional rights. According to Conkling, they carefully chose language to afford protections to “persons” as opposed to just “citizens” in order to ensure that corporations (not just freedmen) received these new constitutional guarantees. Conkling, a respected jurist who twice turned down appointments to the Supreme Court, quoted extensively from a then-unpublished Journal of the Joint Committee to support his claim. In their canonical *Rise of American Civilization*, historians Charles and Mary Beard concluded that Bingham had intended to “take in the whole range of national economy” in drafting the Amendment’s “cabalistic clause.”<sup>65</sup> For generations, historians accepted that the drafters of the Fourteenth Amendment, in collusion with corporate interests, had smuggled a “capitalist joker” into the Constitution.<sup>66</sup>

Citing evidence that Bingham (recipient of Credit Mobilier bribes), Conkling (attorney for the Southern Pacific), and fellow drafter Reverdy Johnson (general counsel for the Baltimore and Ohio Railroad for over 40 years) were well aware while drafting the Fourteenth Amendment that railroad corporations were attempting to void state regulations through due process claims, the ambivalent Howard Jay Graham allows for the possibility of a “secondary intent” to provide constitutional protections to corporate persons to aid business interests. That is, the drafters of the Fourteenth Amendment “saw no reason to oppose phraseology which offered prospects of incidental Congressional or judicial aid to beleaguered railroads and insurance companies.”<sup>67</sup> Many contemporary legal historians claim that this conspiracy is now “debunked.”<sup>68</sup> Conspiracy or not, the fact is that these legislators with inappropriate ties to the transcontinental railroad corporations drafted an amendment that the railroad network soon employed – based on a drafter’s legal advice – to radically immunize themselves from state regulation and legal interventions. In any event, it is revealing that by 1911 the Supreme Court heard 312 cases regarding equal protection claims brought by corporate persons, but only 30 claims brought by minority natural persons.<sup>69</sup>

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<sup>65</sup> Beard, Charles A., and Mary R. *The Rise of American Civilization*. New York: MacMillan, 1933, at 112.

<sup>66</sup> Bates, E.S. *The Story of Congress: 1789-135*. New York: Harper Brothers, 1936, at 233-4.

<sup>67</sup> Graham, Howard Jay. “Justice Field and the Fourteenth Amendment.” *The Yale Law Journal*, Vol. 52, No. 4 (Sep., 1943), pp. 851-889. Though Graham ultimately shifted course again, concluding that there was no conspiracy, he kept open the possibility of conspiratorial intent until his final ideological essay written during the civil rights movement, to which Graham was passionately committed. The evidence Graham relies on in concluding that there was no conspiracy is the least compelling of his many conclusions on the matter of the conspiracy.

<sup>68</sup> See Aynes, Richard L. “Unintended Consequences of the Fourteenth Amendment,” in *Unintended Consequences of Constitutional Amendment*. Ed. David E. Kyvig. Athens: University of Georgia Press, 2000, at 112; Gans, David H., and Douglas T. Kendall. “A Capitalist Joker: The Strange Origins, Disturbing Past and Uncertain Future of Corporate Personhood in American Law.” *Constitutional Accountability Center*, 2010, at 18; and Winkler, Adam. “Corporate Personhood and the Rights of Corporate Speech.” *30 Seattle U. L. Rev.* 863 (2007), at 865.

<sup>69</sup> Thomas, Brook. *American Literary Realism and the Failed Promise of Contract*. Berkeley: University of California Press, 1997. See also Justice Hugo Black’s dissent in *Connecticut General Life Insurance Company v. Johnson* (303 U.S. 77, 1938), where he decried that “of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations.”

However, the corporate person still had to become a *constitutional* person (not just an artificial person) before it could exercise these newfound constitutional rights. That is, a corporate person needed to establish precedent that it was a “person” with regard to the Fourteenth Amendment. Justice Stephen Field, the third Justice that Norris affixes to Lyman’s law office wall, was the actant that took the final legal steps to bring about full-fledged constitutional corporate personhood. Incidentally, Field was appointed to the Court by President Lincoln based on the recommendation of Leland Stanford, president of the Southern Pacific railroad corporation. Field was a notoriously corrupt judge. One of his contemporary political *allies* described Field as “one of the most dishonest characters that has ever discharged the function of the judicial office.”<sup>70</sup> While “riding circuit,” Field produced what has become known pejoratively as “Ninth Circuit Law.” In essence, Field traveled throughout the western states (primarily California) deciding cases on a local basis that created federal court precedent, establishing his own opinions and legal theories as the law of the land. Field was an avid opponent of “communism” and supporter of laissez fair capitalism; his Ninth Circuit Law, which reflects these political positions, was in direct and open conflict with the Supreme Court precedent at the time.<sup>71</sup> In particular, Field went to great lengths to create precedent that railroad corporations were entitled, as persons (and as being composed of persons), to Fourteenth Amendment protections.<sup>72</sup>

To uphold the integrity of the court, Chief Justice Morrison Waite flatly denied Field permission to write opinions relating to the transcontinental railroads and corporate personhood, declaring that the decisions had to be written by a person “who would not be known as the personal friend of the parties representing these rail road interests,” adding that “There was no doubt of your intimate personal relations with the managers of the Central Pacific [the Southern Pacific’s parent corporation].”<sup>73</sup> This battle of wills culminated in perhaps the strangest moment in the legal history of constitutional corporate personhood: the 1886 case of *Santa Clara County v. Southern Pacific Railroad Company*.<sup>74</sup> Field petitioned the Court to write the opinion in the relatively straightforward case involving the taxation of railroad fences, but Waite denied the request. In a still unexplained move, J.C. Bancroft Davis, in his capacity as Supreme Court Reporter (and erstwhile president of Newburgh and New York Railway Company), included a curious headnote with the official report of the opinion. Despite the fact the Chief Justice Waite told Davis that “we avoided meeting the constitutional question in the decision,” Davis included a headnote misstating with precise wording that “Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment

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<sup>70</sup> Kens, Paul. *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age*. Lawrence: University of Kansas Press, 1997, at 239-43.

<sup>71</sup> Graham, Howard Jay. “Justice Field and the Fourteenth Amendment.” *The Yale Law Journal*, Vol. 52, No. 4 (Sep., 1943), pp. 851-889.

<sup>72</sup> Field wrote the lower court opinion in *County of San Mateo v. Southern Pacific Railroad* (116 U.S. 138) and *County of Santa Clara v. Southern Pacific Railroad* (118 U.S. 394). Admittedly, Field argued that corporations were entitled to these protections under an associational view, in that the corporation consisted of an association of persons, and these persons should not be deprived of their corporate property without due process of law. However, the ultimate Court holding would turn out to be an even greater extension of this entitlement to the corporate entity.

<sup>73</sup> Magrath, C. Peter. *Morrison R. Waite: The Triumph of Character*. New York: Macmillan, 1963, at 260. Field, after the oral arguments concluded in *San Mateo*, attended a dinner hosted by Leland Stanford and fraternized with the defendant’s lawyers throughout the evening. The press caught wind of the close friendships, and publicly lampooned all parties involved.

<sup>74</sup> *Santa Clara County v. Southern Pacific Railroad Company*, 118 US 394 (1886).

to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”<sup>75</sup>

A headnote does not constitute legal precedent, but Field quickly remedied this technicality. Chief Justice Waite fell suddenly ill with pneumonia, a fact kept secret from the public (and even his wife). Waite was absent from the Court during this illness and would never return to the bench due to his untimely death a year later. In the ten-month period between Waite’s incapacitating illness and his death, Field rapidly authored and discharged at least five Supreme Court opinions (the very thing Waite had forbidden him from doing) that determined corporations were persons within the meaning of the Fourteenth Amendment, citing the *Santa Clara* headnote in each case. These subsequent cases *were* valid legal precedent and, as a result, the full-fledged constitutional corporate person was now a reality.<sup>76</sup> The fiction was real, and its personhood was now legally unassailable because it was entitled to the civil rights guaranteed by the Fourteenth Amendment. Legal historians have cried foul with regard to Field’s jurisprudential methods. Malcolm Harkins, for instance, claims that “the concept of the corporate person was imposed on the law *ipse dixit*, that is, by judicial fiat and without definition, in a series of late nineteenth century Supreme Court cases,” whereby “Field unilaterally created a web of cross-corroborating decisions claiming that corporate personhood had been definitively established by Supreme Court precedent.”<sup>77</sup> The corporate person now had the right to life under its corporate charter, the same property rights as natural persons, and the economic and civil rights granted through the Fourteenth Amendment’s substantive due process and equal protection clauses.

The legal history of the corporate person is, to say the least, intriguing. Regardless of these legal actants’ intentions or motivations, they certainly lent their capacities to the Southern Pacific’s actor network and produced a real juridical subject and a person that occupies an ontological space somewhere between the artificial and the natural. At the end of the nineteenth century the corporation was something more than a “mere creature of law,” as it had the same constitutional protections and civil rights as a natural human being. As Samera Esmeir has noted, legal personhood actually precedes, defines, and perhaps even produces that category of the human.<sup>78</sup> That is, in attaining legal personhood the corporation, in a practical sense, emerged as something resembling the human (or, at least, could participate in juridical humanity). Nineteenth-century Americans embraced this anthropomorphism, and the organic theory of the corporation entered cultural discourse. Even if the corporate person were only “artificial,” contemporary commentators observed “that which is artificial is real, and not imaginary: an artificial lake is not an imaginary lake, nor is an artificial waterfall a fictitious waterfall.”<sup>79</sup> The corporation exhibited a logic of its own—it “decided” to act in certain ways due to internal managerial debates, outside market conditions, and in support of its own economic interests and

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<sup>75</sup> Id. at 224; *Santa Clara v. Southern Pacific Railroad* (118 U.S. 394).

<sup>76</sup> See *Pembina Consol. Silver Mineral & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U.S. 210 (1888); *Georgia R.R. & Banking Co. v. Smith*, 128 U.S. 174 (1888); *Home Insurance Co. v. New York* 134 U.S. 594 (1889).

<sup>77</sup> Harkins, Malcolm J. “The Uneasy Relationship of *Hobby Lobby*, *Conestoga Wood*, the *Affordable Care Act*, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System.” *Saint Louis University Journal of Health and Law Policy*. Vol. 7: 2014, at 211.

<sup>78</sup> Esmeir, Samera. *Juridical Humanity: A Colonial History*. Palo Alto: Stanford University Press, 2012, at 78.

<sup>79</sup> Machen Jr., Arthur. “Corporate Personality.” *Harvard Law Review*, Vol. 24, No. 4 (Feb., 1911), pp. 253-267, at 257.

well-being.<sup>80</sup> The corporate person had evolved into something very different from its employees and shareholders and was now distinct from the human persons who worked for it. It engaged in “superindividual undertakings” for which its constituent human actors were not liable or accountable, such as lawsuits to protect its own interests and reputation.<sup>81</sup>

Priscilla Wald reflects on the ramifications of legal personhood in America, noting that legal being actually produces social and cultural being.<sup>82</sup> Legal personification produces a degree of ontological personification, whether or not society intends it to do so. This reflects conceptualizations of associational organic personhood that infiltrated American legal and cultural discourse in the late nineteenth century. Turn-of-the-century Chicago law professor Ernst Freund summarizes the increasingly popular viewpoints of jurists such as Otto Gierke and Frederic Maitland, noting how these widely read theorists believed that “the law does not create the corporate person, *but finding it in existence* invests it with a certain legal capacity.”<sup>83</sup> Ultimately, these legal decisions, discourses, and the very language of personification combined “to form an image of an autonomous, creative, self-directed economic being. This image permeated the community at large and especially the legal community. The general terms of discourse conditioned the way human beings thought about corporations, their structure, and their actions.”<sup>84</sup> In essence, when the law calls something a person it shapes the way society thinks about personhood. Legal personification has a social and cultural legitimizing effect.<sup>85</sup> Through various legal, social, and economic factors, a *real* corporate person emerged in nineteenth century America.

By invoking this legal history, *The Octopus* enables us to examine the metaphysical complexity of these emergent nineteenth-century persons. These incorporated actor networks became radically distributed-centered subjects. However, when the corporate person serves as the distributed-centered subject, it becomes a different sort of spokesperson than any natural person or thing could ever hope to be. Not only can the corporate person extend its capacities through its massive incorporated actor network, but the law also enables it to live forever, merge with other persons and assimilate their assets, limit its financial and criminal liability, and to exist without a physical body that the state can regulate or punish. As such, the corporate person functions as a liminal person, able to oscillate between the singular and the collective, all the while possessing socio-legal and economic qualities and characteristics that far surpass those of natural persons.

The *Santa Clara* case exhibits the power of the liminal corporate person: the Southern Pacific railroad corporation (*i.e.*, the corporate person) appears before the Court as a party to the case, while its incorporated network swarms around it to transubstantiate the corporate form into

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<sup>80</sup> Note, “Constitutional Rights of the Corporate Person.” *The Yale Law Journal*, Vol. 91, No. 8 (Jul., 1982), pp. 1641-1658.

<sup>81</sup> Vinogradoff, Paul. “Juridical Persons.” 24 *COLUM. L. REV.* 594. (1924), at 595.

<sup>82</sup> Wald, Priscilla. *Constituting Americans: Cultural Anxiety and Narrative Form*. Durham: Duke University Press, 1995, at 8. In Wald’s account, legal personhood can both give and take away. She writes that “National narratives actually shape personal narratives by delineating the cultural practices through which personhood is defined,” adding that legal institutions and conventions define how individuals “will experience and understand themselves as people and part of a people,” at 4.

<sup>83</sup> Freund, Ernst. *The Legal Nature of Corporations*. Chicago: The University of Chicago Press, 1897, at 13. My emphasis.

<sup>84</sup> Gregory, Mark A. “The Personification of the Business Corporation in American Law.” *The University of Chicago Law Review*, Vol. 54, No. 4 (Autumn, 1987), pp. 1441-1483, at 1478.

<sup>85</sup> Fagundes, David. “What We Talk about When We Talk about Persons: The Language of a Legal Fiction.” 114 *Harvard Law Review* 1745 (April, 2001)

a full constitutional person (*e.g.*, working on the corporate person's behalf were its lawyer, Roscoe Conkling; its Supreme Court Justice, Stephen Field; the Fourteenth Amendment, drafted by its bribe recipient John Bingham; its mysterious court reporter, Bancroft Davis, who plants a convenient headnote in the opinion; its wealth that fuels these actants, and the taxes it evades in the decision that add to this wealth). The Southern Pacific's distributed-centered subjectivity made possible this display of courtroom agency. Keep in mind, this agentive courtroom network was a mere microcosm of the Southern Pacific's massive national and global incorporated actor network. Similar nodes in the Southern Pacific's actor network were working to augment its capacities in other courtrooms, on its 10,000 miles of train tracks and 16,000 miles of shipping lanes, in its construction companies, in congress, and so on and so forth. Lyman Derrick's law office walls introduce the legal actants that vivified this new and powerful juridical person. Indeed, this powerful person still lives today. The Southern Pacific, which was subsumed into the Union Pacific Corporation via merger, currently trades its shares on the New York Stock Exchange and has a market capitalization of nearly \$1 trillion dollars. At 153 years of age, it is today the 38<sup>th</sup> richest corporate person in the nation.<sup>86</sup>

#### Norris's Corporate Character and the Incorporated Actor Network

As a result of the sheer size of its network and its unassailable legal personhood, the Southern Pacific grew ubiquitous in the American West and began to decrease the political, economic, and social relevance of unincorporated human beings. Jimmy Swinnerton's famous 1896 *San Francisco Chronicle* cartoon portraying the Southern Pacific as "The Octopus" captures this corporate ubiquity. The cartoon depicts a single entity with a network of tentacles gripping (incorporating and assimilating) San Francisco, Oakland, the press, the farmers, the merchants, and the vote. It squeezes the capacities from these various actants. A decade before this infamous cartoon appeared, the California railroad commissioner had declared that the Southern Pacific "is too powerful an organization to be successfully resisted by any individual or firm."<sup>87</sup> The rapidly increasing corporate size and power of the Southern Pacific and other major corporations left a shrinking space for individual human agency in American society and culture. Commercial and industrial corporations increasingly occupied multi-state markets and geographical space, which created a rising sense of individual helplessness and personal alienation. For many Americans, the rise of corporate persons like the Southern Pacific resulted in a childlike submission to this apparently transcendental corporate power.<sup>88</sup> As Willard Hurst succinctly puts it: "Big industry, big finance, big cities, big markets overshadowed individual lives."<sup>89</sup> Proliferating corporate persons reduced the size of the socio-economic, legal, and cultural space left for individual human beings to inhabit. Nineteenth-century literature dramatizes and explains the attenuated position of the individual in the face of rising corporate capitalism in America.

Frank Norris characterizes the corporate person in *The Octopus* and, in establishing the P&SW as the novel's protagonist, reveals the uncanny power and networked presence of the

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<sup>86</sup> And the Southern Pacific/Union Pacific is a spring chicken in comparison to some of its brethren corporate persons. For instance, some of today's dominant corporate persons have enjoyed long and illustrious lives: the Lorillard Tobacco Company is 262 years old (older, in fact, than the United States), Cigna insurance is 222 years old, the JPMorgan Chase banking corporation is 213 years old, Dupont Chemical is 210 years old, and the ExxonMobil oil corporation (formally known as Standard Oil) is 142 years old.

<sup>87</sup> *Fourth Annual Report of the California Board of Railroad Commissioners* (1883), 134.

<sup>88</sup> Newfield, Christopher. *The Emerson Effect: Individualism and Submission in America*. Chicago: University of Chicago Press, 1996.

<sup>89</sup> Hurst, *Law and the Conditions of Freedom*, at 73.

nineteenth-century corporate person. Norris captures the P&SW's metaphysically complex personality, whereby a single legal person contains a vast actor-network incorporated within its juridical body. *The Octopus*'s fictive space enables us to imagine and conceptualize in detail the corporate person's networked subjectivity. Through literary fiction, we actually experience a legal fiction coming to life not just on a local, but on a global scale. Going beyond just the corporate person's legal history, the novel presents in vivid detail its cultural influence on American society and its psychological impact on individual natural persons. Like the real-life corporate person from legal history, we see how the corporate character translates – or assimilates – the powers and abilities of its constituent parts to augment its own legal, economic, and personal stature. Norris casts us directly into the incorporated actor network, whereby the novel's fictive space and narrative style allow the reader to bear witness to the corporate person and the cultural angst that followed in its wake in nineteenth-century America and beyond.<sup>90</sup>

*The Octopus* is set roughly in the year 1880, a time when corporate capitalism was replacing simpler agrarian and mercantile economic models.<sup>91</sup> Human individuality appeared to be disappearing into emergent systems and networks. Alan Trachtenberg observes that during these years “new systems of thought appeared; the word ‘system’ itself became a buzzword,” and that this era saw “a whole way of life undergoing near-volcanic change, old ideals of selfhood, obligation, and reward clashing with emerging systems and hierarchies.”<sup>92</sup> As new technologies – mechanical, economic, and legal – emerged, the corporation led to what Walter Benn Michaels identified as “the irruption in nature of the powerfully unnatural”<sup>93</sup> and to what Mark Seltzer refers to as the alienating “miscegenation of nature and culture.”<sup>94</sup> New kinds of national and global networks spread throughout society, and corporate networks were foremost among them.

Norris's literary characterization of the corporate person accords nicely with Deidre Lynch's economy of character, or “pragmatics of character,” whereby changing socio-economic circumstances enable new kinds of literary characters that help both readers and writers navigate changing cultural protocols and emergent forms of economic intercourse. Lynch's study shows that the literary character has “no autonomous history,” and just as eighteenth-century English authors characterized banknotes and coins in order to reflect an emergent system of credit and the subsequent investment risk it produced, so too does Norris characterize the corporate person

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<sup>90</sup> Importantly, these networks remove any absolute essence from persons and things—such distinctions are irrelevant distractions for understanding the network. Actor-network theorists demand instead that we understand the social as the fluid, symbiotic relation of actants and not a divided kingdom of human actors and nonhuman objects. See Mol, Annemarie and John Law. “Regions, Networks and Fluids: Anemia and Social Topology.” *Social Studies of Science*, Vol. 24, No. 4 (Nov., 1994), 641-671. Other actor-network theorists argue that “entities take their form and acquire their attributes as a result of their relations with other entities. In this scheme of things entities have no inherent qualities: essentialist divisions are thrown on the bonfire of the dualisms.” Law, John. “After ANT: Complexity, Naming and Topology.” In *Actor Network Theory and After*. Ed. John Law and John Hassard. Oxford: Blackwell Publishers, 1999. pp. 1-15.

<sup>91</sup> Chandler Jr.

<sup>92</sup> Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age*. New York: Hill and Wang, 1982, at xi and xiv.

<sup>93</sup> Michaels, Walter Benn. *The Gold Standard and the Logic of Capitalism*. Berkeley: University of California Press, 1987, at 212.

<sup>94</sup> Seltzer, Mark. *Bodies and Machines*. New York: Routledge, 1992.

to engage in a cultural critique of emergent corporate capitalism and increasing corporate ubiquity in late nineteenth-century America.<sup>95</sup>

*The Octopus* focuses on a local section of the Southern Pacific's incorporated actor network to lay the foundations for grasping how the larger network functions. Indeed, by the end of the novel the reader grasps the immense size and power of the corporate person as it exists as an incorporated actor network and legally augmented distributed-centered subject. Actor-network theory often focuses on localized actor networks to help explain larger, more complex ones. For instance, Bruno Latour explains how localized actor networks function through a sociological case study of a hydraulic door closer.<sup>96</sup> He examines the small actor network consisting of a human, a door, a hinge, and a hydraulic door-closer and shows how this localized actor network accomplishes a huge task: allowing people and things to pass through walls with minimal effort. The persons and things in this network delegate different tasks to one another, which allows them to translate the various capacities of each actor to create an efficient system for allowing persons to enter buildings, while keeping weather outside, with relative ease. Latour suggests that by understanding these processes (delegation, translation, prescription, etc.) on a micro level, we can begin to grasp the dizzying transfer of capacities in larger and more prolific networks. Frank Norris likewise presents a localized actor network around a hydraulic door-closer, and an examination of this local network helps explain how the P&SW functions as a distributed-centered literary character on a larger scale.

Halfway through *The Octopus* we encounter Dyke, the ex-train engineer for the P&SW and all-around nice guy, just after he learns that P&SW has destroyed him financially. Thinking that he could ship his hops harvest with the P&SW for two cents a ton to San Francisco based on an earlier rate chart, the railroad clerk informs him the rate has more than doubled to five cents a ton. Dyke is instantly ruined. S. Behrman, the local P&SW railroad agent, will soon foreclose on Dyke's farm and drive him to a life of crime and, ultimately, a life sentence in jail for robbing the railroad and killing a railroad employee. As Dyke stands stupefied in the P&SW office, Norris tells us that "He stepped aside to give place to a coatless man in a pink shirt, who entered, carrying in his hands an *automatic door-closing apparatus*" (351, my emphasis). A squabble breaks out between S. Behrman and the man with the door-closer. He refuses to affix the door-closer unless the railroad also buys a fifteen-cent sign to hang on the door in order to warn patrons about the newfangled device. S. Behrman refuses to pay the fifteen cents on principle, only moments after effectively stealing thousands of dollars from Dyke.

After S. Behrman rejects the door-closer, Norris introduces the web of corporate actants that S. Behrman uses to extend his capacities throughout the San Joaquin Valley. We see the collective through which S. Behrman disperses himself, within which he oscillates between the singular and the multiple. S. Behrman stands facing Dyke with his incorporated assemblage of persons and things—with his hybrid collective of heterogeneous actants. Cyrus Ruggles, the railroad land agent, and an unnamed freight clerk flank Behrman as he confronts Dyke. S. Behrman has the clerk retrieve Tariff Schedule No. 8, an "immutable mobile," which speaks for the P&SW and imposes the new rate on hops shipments. When Dyke demands to know how S.

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<sup>95</sup> Lynch, Deidre Shauna. *The Economy of Character: Novels, Market Culture, and the Business of Inner Meaning*. Chicago: University of Chicago Press, 1998. Lynch notes that "From one perspective this substitution of currency for the person who would otherwise act as our chief protagonist humanizes an economic system that, in an era marked by greater financial risk-taking in business and estate management, by an increasing dependence on credit arrangements, and by more and more bankruptcies, made English men and women uneasy," at 96.

<sup>96</sup> Latour, Bruno. "Mixing Humans and Nonhumans Together: The Sociology of a Door-Closer." *Social Problems*, Vol. 35, No. 3, June 1988, pp. 298-310.



Behrman can justify the inequity of the new rate, S. Behrman translates capitalist theory into the network, taping his forefinger on the counter before him, stating the P&SW's policy: "All—the—traffic—will—bear" (350). Norris then reminds us of Dyke's mortgaged house and farm, which reverts to S. Behrman and the P&SW at this precise moment, therein adding additional actants to the incorporated actor network. Dyke collapses with shock into the "seat that had been removed from a worn-out railway car to do duty in Ruggles's office," reminding us of the P&SW fleet of locomotives (the very engines Dyke himself once drove as a P&SW employee).

The parade of corporate actants in the door-closer scene continues. First, Genslinger, the editor of the *Bonneville Mercury* newspaper, who was "hardly better than the mouthpiece" and the "paid speaker of the Railroad" enters the office (457). Next, Delaney walks into the office. Delaney is one of the many "dummy buyers" that S. Behrman and the P&SW use to purchase the ranches that the corporation steals from the ranchers. He is also the hired gunman who will capture Dyke – at the behest of S. Behrman – after Dyke turns to a life of crime. S. Behrman then arranges stock cars, at a special rate, for Delaney who has just purchased a "string of horses," the same horses that the corporation's posse will use to hunt Dyke down after his crime. Looking for help, Dyke then "thought of the courts, but instantly laughed at the idea," asking himself "What court was immune from the power of the Monster?" (353). The P&SW acts through the courts, S. Behrman, Delaney, the media, and its locomotives. It speaks to the ranchers through Tariff Schedule No. 8, the *Mercury* newspaper, and capitalist axioms produced by and through corporate capitalism.<sup>97</sup>

Looking at S. Behrman's cadre of actants that suddenly materialize out of nowhere in the door-closer scene – and knowing this smaller group of actants merely serves as a microcosm of the P&SW on a state, national, and global scale – Dyke realizes that he has been "caught and choked by one of those millions of tentacles suddenly reaching up from below, from out of the dark beneath his feet, coiling around his throat, throttling him, strangling him, sucking his blood" (353). Dyke, the individual, cannot escape the corporate network's grasp. In the end, the P&SW arranges for a "special train, one car and an engine" that would transport Dyke to the Visalia jail for the rest of his days. This individual character experiences first-hand the corporate person's power, size, and agency. The corporate person and its multitudinous network ensnares him and subsumes his capacities. The P&SW through the power of its actants absorbs his farm, his hops, and his freedom.

This local snapshot of the corporate body is only a subsidiary part of the P&SW's incorporated actor network—there are even more agentive actants and spokespersons housed in the theoretically infinite corporate body. Shelgrim, the P&SW's president, spreads himself throughout an even larger network than the P&SW's local agents. Shelgrim translates S. Behrman's localized competencies to augment his own individual capacities, just as the P&SW translates Shelgrim's abilities into its even larger national and global networks. Harran Derrick (the ranchers' always observant but impotent voice), speaking to the ranchers about the "conspiracy" to acquire their lands, reminds them that "There's a big deal of some kind in the air, and if there is, we all know who is back of it; S. Behrman, of course, but who's back of him? It's Shelgrim" (103). Shelgrim's name is "big with suggestion, pregnant with huge associations" because he is "the amalgamation of powers, the consolidation of enormous enterprises" that operated the "width of an entire continent" (104). The always-practical Annixter recognizes the

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<sup>97</sup> See *Dodge v. Ford Motor Company*, 170 NW 668 (Mich 1919), which established the principle – later tempered by the business judgment rule – that a corporation must act to maximize shareholder profits. That is, it must charge "all the traffic will bear" for its goods and services.

futility of challenging Shelgrim. In the oft-repeated line, Annixter reminds us that “*You can’t buck against the Railroad*,” because Shelgrim can access the incorporated actor network, whereby he:

“owns the courts. He’s got men like Ulsteen in his pocket. He’s got the Railroad Commission in his pocket. He’s got the governor of the state in his pocket. He keeps a million dollar lobby at Sacramento every minute of the time the legislature is in session; he’s got his own men on the floor of the United States Senate. He has the whole thing organized like an army corps. What *are* you going to do? He sits in his office in San Francisco and pulls the strings and we’ve got to dance” (105).

Annixter is actually understating the situation, because Shelgrim does not even pull the strings; the P&SW president is just another incorporated organ in the corporate body. The P&SW – the entity that lives forever, that can consume other entities, and that has the actual economic and legal rights when it comes to conducting business – looms over and embodies the entire incorporated actor network. Annixter, after hearing of Dyke’s financial demise, accurately concludes: “Exit Dyke, and score another tally for S. Behrman, Shelgrim *and Co.*” (360, my emphasis). If Shelgrim is “back of” S. Behrman, we must remember that “*and Co.*” – the corporate person – is similarly “back of” Shelgrim, which reinforces the fact that the corporation’s subjectivity is always shifting. In the oft-quoted passage, Shelgrim declares to a stupefied Presley: “*Railroads build themselves...Control the road! Can I stop it? I can go into bankruptcy if you like. But otherwise if I run my road, as a business proposition, I can do nothing. I can not control it. It is a force born out of certain conditions, and I—no man—can stop or control it*” (576). Shelgrim’s words ring with the “clear reverberation of truth” to Presley, but they are not even technically true, legally speaking. Shelgrim is just another incorporated actant, and Norris makes this evident through his reference to the corporate person’s complex decision-making process—its networked form of deliberation and volition. Shelgrim, despite his claims to the contrary, *cannot* actually put the P&SW into bankruptcy. And here we get another glimpse of the corporate character’s liminal subjectivity.

Corporations maintain a separation of ownership and control, whereby shareholders “own” the corporation and managers and directors “control” corporate actions.<sup>98</sup> As such, Shelgrim is only partially and temporarily in control of the P&SW, because the fundamental corporate decision-making process resides in the board of directors. Cyrus Ruggles, the P&SW land agent, makes this clear in *The Octopus*. He informs Annixter that it is neither his nor Shelgrim’s decision to sell Annixter the ranch lands. He claims that “I’m only acting for the General Office, Mr. Annixter. Whenever the Directors are ready to take the matter up, I’ll be only too glad to put it through for you” (194). Similarly, the directors, not Shelgrim, would have to decide to put the P&SW into bankruptcy; however, they too, would need authorization from the corporation’s shareholders. What is more, even if the P&SW went into receivership or bankruptcy, it would more than likely be restructured and remain the same perpetually living corporate person upon its emergence from bankruptcy (just as a bankrupt Southern Pacific temporarily came under control of the E.H. Harriman and the Union Pacific from 1901-1913).<sup>99</sup> The only changes might be some new shareholders, directors, and managers, but the P&SW – the person – would retain its legal rights, history, name, identity, and primary assets. The complex corporate person would merely

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<sup>98</sup> Uniform Partnership Act (1914), Section 18. See, generally, Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*. New York: Macmillan, 1932.

<sup>99</sup> Orsi, Richard J. *Sunset Limited: The Southern Pacific Railroad and the Development of the American West: 1850-1930*, Berkeley: University of California Press, at 33.

undergo a legalistic organ transplant, replacing Shelgrim with a new president. The P&SW's real-life model (the Southern Pacific), for instance, had 19 different presidents – or Shelgrims – in its 150 year history. Addressing the individual's futility within the corporate body, Malcolm Cowley observes that "Even Shelgrim, the great-souled president of the railroad, is merely the agent of a superhuman power."<sup>100</sup> The corporate person's identity remains the same while its component pieces are entirely fungible. The network grows and changes, while the corporate person that contains the network feeds of that growth and change.

Norris demonstrates the corporate person's prominence over its networked actants in his portrayal of S. Behrman's eventual demise. After playing such a large narrative role, S. Behrman stumbles into the hull of the *Swanhilda* and drowns in a deluge of wheat. The P&SW does not miss a beat. In concluding the novel, Presley observes that, despite S. Behrman's death, when the "drama was over...the Railroad had prevailed. The ranchers had been seized in the tentacles of the octopus; the iniquitous burden of extortionate freight rates had been imposed like a yoke of iron" (650). The P&SW does not miss S. Behrman, just as it would not miss Shelgrim or one of its railroad depots or a locomotive. The corporate person will merely translate other competencies and delegate its own know-how and capacities through different tentacles of its network. Alfred Chandler Jr. reminds us that, during this era of corporate capitalism, corporations changed because their "hierarchies had a permanence beyond that of any individual or group of individuals who worked in them. When a manager died, was fired, or promoted another was ready and trained to take his place. Men came and went. The institution and its offices remained."<sup>101</sup> The distributed-centered subject simultaneously maintains its personal identity and inhabits its incorporated actor network through which it disseminates its capacities. The P&SW is a liminal subject—a character made up of other characters and inanimate objects while retaining its individual identity and socio-legal rights. Like no other network, the corporate person is immortal and beyond bodily discipline, yet it is designed to grow larger and aggregate wealth at an unprecedented pace. Norris provides a relatively clear anatomy of the corporate character, but he also shows how this character navigates the narrative and textual space of the nineteenth-century American novel. In doing so, he allows the reader to both imagine and experience corporate personhood as it expressed itself in American society and culture.

### Corporate Ubiquity and Norris's Shrinking Character-Space

Norris's characterization of the Southern Pacific as the P&SW is truly fascinating and the result of this representation is a new permutation in the asymmetrical structure, or "distributional matrix," of what Alex Woloch refers to as character-space (the space of intersection between a character and a circumscribed narrative). Woloch observes that the protagonist and the minor characters in nineteenth-century realist novels engage in a war for importance within the narrative structure, which rounds out a strong, fully realized protagonist while flattening a group of "delimited" and "specialized" minor characters.<sup>102</sup> The study of this character-space and the various character-systems (or interactions between major and minor characters) reveals key aspects about the narrative as well as the socio-economic system in which it was produced. The ways in which minor characters "disappear" exposes the real-life mechanisms of the narrative's

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<sup>100</sup> Cowley, Malcolm. "'Not Men': A Natural History of American Naturalism." *The Kenyon Review*, Vol. 9, No. 3 (Summer, 1947) at 417.

<sup>101</sup> Chandler Jr., at 8.

<sup>102</sup> Woloch, Alex. *The One vs. the Many: Minor Characters and the Space of the Protagonist in the Novel*. Princeton: Princeton University Press, 2003, at 34.

cultural time and space. *The Octopus* allows the reader to inhabit the shrinking character space and to witness the obliteration of the individual during the rise of corporate personhood in American law, society, and culture.

*The Octopus* produces a character-space where the corporate person is not only round and complex, but also ubiquitous in the narrative. The P&SW consistently interrupts the minor characters in the text and ruthlessly invades their character-space. In addition, railroad imagery infiltrates Norris's representation of minor characters, such that the P&SW's iron tentacles thread themselves into the text itself. Through this narrative and textual ubiquity, the P&SW enrolls each minor character into its incorporated actor network. The P&SW "disappears" or "obliterates" any minor character that resists incorporation. As corporate networks proliferated, they subsumed and alienated unincorporated individuals.

The fact is that without the P&SW as a bona fide character, *The Octopus* would seem to lack a true, roundly developed, and complex protagonist.<sup>103</sup> Other commentators, such as Walter Benn Michaels, Adam Wood, and Gina Rossetti, have spoken of the P&SW as a character—but only in the "reified" sense of Marxist criticism. The P&SW is not some fetishized or reified *thing*, but is instead (as its legal history reveals) a complex person that lives in Norris's text, just as it did in nineteenth-century American law and society.<sup>104</sup> The novel's remaining individual characters are mechanical and flat character types. They fit the naturalist character mold—they are "stuck in place" or "determined" by economic, evolutionary, or biological forces beyond their control.<sup>105</sup> They are insipid, anemic, and typical naturalist subjects: Presley is the effete academic, Annixter the practical Yankee, Dyke the affable working man, Magnus Derrick the gold rush gambler, Annie Derrick the timid old schoolmarm, and so on and so forth. Describing Mrs. Hooven, Norris writes that she offered "not the least characteristic that would distinguish her from a thousand other women of her class and kind" (15). Presley likewise observes the ranchers during a political meeting, noting that "in them all he saw many types" (116). They lack the multifaceted and networked subjectivity that the P&SW possesses. The P&SW adapts and grows throughout the text; the corporate person speaks, schemes, and deliberates. It imposes its will. The other characters are simply, as one corporate actant puts it, "going out in paper boats and shooting peas at a battleship" (455). The minor character's anemic one-dimensionality results in their complete and utter helplessness when they face the railroad network's "colossal power." As such, the P&SW summarily absorbs, subsumes, or destroys each of these individual characters as it expands its network and extends its capacities.

The first form of the P&SW's character ubiquity comes in the form of narrative interruptions. In one way or another – or through one corporate actant or another – the P&SW consistently intervenes in the narrative and prevents the minor characters from developing,

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<sup>103</sup> See Donald Pizer's "Another Look at 'The Octopus'." *Nineteenth-Century Fiction*, Vol. 10, No. 3 (Dec., 1955), at 218. See also Pizer's "Synthetic Criticism and Frank Norris; Or, Mr. Marx, Mr. Taylor, and *The Octopus*." *American Literature*, Vol. 34, No. 4 (Jan., 1963), at 535. See also Pizer's *The Novels of Frank Norris*. Bloomington: Indiana University Press, 1966, at 136.

<sup>104</sup> Rossetti, Gina M. "Turning the Corner: Romance as Economic Critique in Norris's Trilogy of Wheat and DuBois's The Quest of the Silver Fleece." *Studies in American Naturalism*, Vol. 7, No. 1, Summer 2012, at 41. Wood, Adam. "The Signs and Symbols of the West: Frank Norris, *The Octopus*, and the Naturalization of Market Capitalism," in *Twisted from the Ordinary: Essays on American Literary Naturalism*. Ed. Mary E. Papka. Knoxville: University of Tennessee Press, 2003, at 108.

<sup>105</sup> Mitchell, Lee Clark. *Determined Fictions: American Literary Naturalism*. New York: Columbia University Press, 1989, at 35.

growing, or succeeding.<sup>106</sup> The novel's first sentence sets this meddlesome tone: "Just after passing Caraher's saloon, on the County Road that ran south from Bonneville, and that divided the Broderson ranch from that of Los Muertos, Presley was suddenly aware of the faint and prolonged blowing of a steam whistle that he knew must come from the railroad shops near the depot at Bonneville" (3). The P&SW is ubiquitous in the text because one or more of its actants embodies and then intrudes the corporate person into each narrative scene. This ubiquitous embodiment is the corporate person's primary characteristic—its incorporated actants disseminate the legal person's subjectivity everywhere in *The Octopus*. Listening to the steam whistle blowing, Presley rides his bicycle through the ranches that serve as the sites for the telling of Norris's tale. After his bicycle ride and hours of solitary contemplation, Presley sits on the brink of inspiration, "But suddenly there was an interruption." The interruption, of course, was "a locomotive, single, unattached, shot by him with a roar, filling the air with the reek of hot oil, vomiting smoke and sparks; its enormous eye, cyclopean, red, throwing a glare far in advance, shooting by in a sudden crash of confused thunder" (49). The P&SW invades the first key moment in the novel, and thwarts a character's intellectual and narrative development.

Later, Presley and his mysterious friend Vanamee sit philosophizing about life in a Guadalajara café. Norris sets the scene, noting "these two strange men, the one a poet by nature, the other by training," both out of tune in these modern times, were "searching for a sign, groping and baffled amidst the perplexing obscurity of the Delusion" (217). They sit in profound silence when "at length they could plainly distinguish at intervals the puffing and coughing of a locomotive switching cars in the station of Bonneville. It was, no doubt, this jarring sound that at length roused Presley from his lethargy" (217). The corporate person once again denies these characters the opportunity to develop. The P&SW interrupts Annixter's barn dance later that evening, first by Delaney (the corporation's dummy buyer and hired gun) barging in "with the suddenness of an explosion" and then a few hours later when the P&SW sends an official messenger to the party with dire news for the ranchers. Annixter is pouring another glass of spiked punch when "he was aware that some one was pulling at the sleeve of his coat" (270). It is the railroad's messenger with a thick yellow envelope with "the word 'Urgent' written in blue pencil in one corner" (270). The railroad message is that the price for the ranch lands is not \$2 an acre as promised, but \$27 an acre. The P&SW's gunman, messenger, and envelope interrupt the festivities and the dance abruptly comes to an end, as does Book I of *The Octopus*.

Awaiting the court's decision with regard to these new land prices, Magnus Derrick paces Lyman's library with his "imagination all stimulated and vivid" with thoughts of new financial plans, when "abruptly Magnus was aware that some one had spoken his name" (321). It is the P&SW's announcement that the court has decided in the corporation's favor, and with "a brusque wrench, [he was] snatched back to reality" (322). The P&SW flattens Magnus's vivid imagination, snatching away any hope for progress or further development. Meanwhile back on the ranch, the milk-pure and all-natural Hilma Tree enjoys an afternoon at the picturesque Broderson Creek. But even this pristine spot "was interrupted by the thunder of trains roaring upon the trestle overhead, passing on with the furious gallop of their hundreds of iron wheels, leaving in the air a taint of hot oil, acrid smoke, and reek of escaping steam" (324). After Hilma and Annixter marry, the newlyweds prepare to set out on a picnic with a few close friends. Presley and Annixter share a touching moment with regard to Annixter's love for Hilma, when Annixter raises his head and suddenly exclaims "Hello, there's somebody in a hurry for sure."

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<sup>106</sup> Hsu, Hsuan L. "Literature and Regional Production." *American Literary History*, Vol. 17, No. 1 (Spring, 2005), at 47.

Norris informs us that “The noise of a horse galloping so fast that the hoof-beats sounded in one uninterrupted rattle, abruptly made itself heard” (469). The ruckus is Dyke, still on the lamb from the railroad posse, with S. Behrman and Company in hot pursuit. Annixter, with “thoughts of the Railroad,” provides Dyke a fresh horse and the touching scene suddenly comes to a close. The railroad posse races through and the picnic and discourse on love are quickly forgotten.

After the debacle at Annixter’s barn dance, the ranchers have their next mass meeting at Osterman’s jack-rabbit drive. The drive successfully completed, the ranchers begin to enjoy a massive barbeque and “Homeric” feast. Annixter, Harran, and Presley climb to the top of the hill – the same hill where the train first interrupted Presley at the beginning of the novel – to take in the Valley view. The three men “paused for a moment on the crest of the hill to consider it,” when suddenly “Young Vacca came running and panting up the hill after them, calling for Annixter” (505). Vacca’s news: the railroad corporation has put its dummy buyers in possession of the ranches during the jack-rabbit drive. Once again, the festivities come to a sudden halt and the P&SW forces the three characters to end whatever considerations they were about to undertake.

These actions set off a chain of events leading to the dramatized Mussel Slough Massacre, where the railroad’s gunmen shoot dead Annixter, Osterman, Harran, and Hooven, among others. The P&SW suddenly interrupts the lives of seven characters. After the massacre, “Governor” Magnus Derrick plans a speech to rally the League of ranchers against the railroad. The speech at the opera house begins in silence: “‘Gentlemen of the League,’ he began, ‘citizens of Bonneville—’ But at once the silence in which the Governor had begun to speak was broken by a shout” (554). Shouts from “Railroad supporters” erupt throughout the opera house and it quickly appears that “the interruption of the Governor’s speech was evidently not unpremeditated. It began to look like a deliberate and planned attack. Persistently, doggedly, the group in the gallery vociferated” (555). These P&SW actants throw copies of the *Bonneville Mercury* from the gallery, and Genslinger’s newspaper article exposes Magnus’s corruption and bribery. The speech abruptly ends; the League is disbanded.<sup>107</sup>

Like the interruption of Magnus’s speech, Norris’s narrative interruptions are likewise “evidently not unpremeditated” as the persistent and dogged interruptions begin to look very much like a “deliberate and planned attack” on the reader’s sense and sensibility. Not a single important scene passes without the P&SW’s intervention. Its incorporated actants are teeming throughout the narrative and the railroad consistently disrupts the reader’s train of thought. The repetitive interruptions are part of Norris’s attempt to strike the great “iron note” against the railroad’s “iron barrier.” This iron note, fittingly, includes saturating the novel with imagery and descriptions of iron (the primary substance that materializes and embodies the railroad). At times not a page – and sometimes not a paragraph – passes without reference to iron. Norris describes the P&SW as the “iron monster” or the “iron-hearted monster” at least eight times in the text. These narrative deposits of iron appear throughout the text in sometimes subtle veins. For instance, in the novel’s first scene, Presley sets his bike against one of the “county watering tanks, a great, iron-hooped tower of wood,” upon which are printed the ominous words: “S. Behrman has something to say to you” (4). Like the water tower, iron encircles the entire narrative,

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<sup>107</sup> The disbanding of the League is also important as it serves as a stark contrast to the incorporated actor network. The League, like other labor associations of its time, could not incorporate and attain legal personhood. As such, the League has none of the legal protections or economic advantages that the corporate person possessed. Norris makes the League’s inevitable defeat at the hands of the PS&W serve to further demonstrate and reinforce the corporate person’s power and agency.

constantly reminding the reader that the P&SW has something to say to them through the relentless striking of this iron note.

Little iron reminders are everywhere in *The Octopus*. Magnus Derrick, whose hair is “thick and iron-grey,” (63) is a man of “iron integrity” (178) who would have to put his “iron rigidity” (455) to the test against the railroad, but who in the end loses his “iron authority” (459). Magnus loses this iron authority, his wife tells us, because “the world, like a colossal iron wedge, crushed itself between” Magnus and his ranch. Dyke only drank “sarsaparilla-and-iron” soft drinks prior to the railroad’s betrayal, but soon turns to whiskey and robs the P&SW. During the posse’s pursuit, Dyke commandeers a “great iron brute” of a locomotive and braces its “steel muscles, its thews of iron” (475), but he cannot escape and ends up jailed for life behind “iron doors” (620). Annixter, riding in the rain to the first meeting of the League of ranchers, was obliged to put up the roof to his buggy, where he “caught the flesh of his hand in the joint of the iron elbow that supported the top and pinched it cruelly. It was the last misery, the culmination of a long train of wretchedness” (90). Another misery is close at hand, when, at the rancher’s meeting, Annixter and others concede that the ranchers should have secured “a more iron-clad agreement with the P. and S.W.” to buy their respective ranch lands (118). They did not obtain this iron-clad agreement, and ultimately are forced to wear “a yoke of iron” that the railroad imposes upon them (650). The P&SW is, for the ranchers, this long train of wretchedness that plants its iron rails everywhere in their lives, just as Norris plants them in the text.

The most ironic iron story involves Presley, our poet and primary narrator. The man who wanted to strike the great iron note is veritably steeped in the stuff. Presley sleeps in a “white painted iron bed” (371), and while lying on this bed recalls that he fails the ranchers because he “hesitated to act at this precise psychological moment, striking while the iron was yet hot” (395). He does eventually act, giving a speech to the League, a group of men newly awakened after “feeling the iron in its flank” (544). During the speech he thinks of his desire to “clutch like iron into the great puffed jowl of” S. Behrman (543). He warns the listeners of the railroad’s “great iron hand” (538), the “grip of their iron claws” (539) and the “iron nail you have yourselves compounded” (540). He tries to kill S. Behrman with six inches of plugged iron gaspipe, but fails.

Dejectedly wandering the streets of San Francisco, Presley asks: “Was this to be still another theme wrought out by iron hands upon the old, the world old, world-wide keynote” of the railroad? (569). Spurred by this fear, Presley confronts Shelgrim at the P&SW General Office. Shelgrim, a man “of blood and iron” (574) with an “iron-grey beard” (571), sits in his office behind a “wrought-iron door” (573). The humiliating meeting with Shelgrim further demoralizes Presley, leading him to meet with his Uncle Cedarquist, yet another capitalist with “iron grey hair and moustache” who just so happens to be the “head of the big Atlas Iron Works” (301). Presley secures passage on Cedarquist’s ship *Swanhilda*, whose sister ship is to be built with the “scrap iron of the Atlas Works” (648). Norris reminds us that under Presley’s feet S. Behrman lies dead in the hull of the ship. He has suffocated between the “iron sides of the ship” (643) with his back against the “iron hull” (645) as a torrent of wheat plunged incessantly from the “iron chute” above his head (646). The irony of S. Behrman’s death is lost on Presley, as he sails away dejected and defeated.

Norris’s iron ubiquity serves as a constant reminder that the P&SW is not only present but also embodied everywhere in *The Octopus*. Like the Southern Pacific’s massive heterogeneous network of persons and things that produced corporate personhood, the P&SW reaches into every aspect of Norris’s text—even its characters. Norris’s incorporated actor network enrolls and translates the capacities of trains, tracks, politicians, courts, judges,

legislation, wheat, and ultimately the individual characters themselves. The iron-hearted monster (the distributed-centered corporate character) passes through these minor characters, assimilating what it needs and destroying what remains. The P&SW's narrative presence – through its textual interruptions and symbolic ubiquity – simply leaves no room for unincorporated characters.

This “textual squeeze” relates to Woloch's claim that a minor character's “strange significance resides largely in the way that the character disappears, and in the tension and relief that results from this vanishing.”<sup>108</sup> The mode of disappearance reveals the inner workings of the social milieu in which each narrative discourse is produced. *The Octopus* presents a sobering form of character disappearance, one that suggests that late nineteenth-century America's emerging corporate person left little room for unincorporated natural persons such as the members of the loosely organized League of ranchers. The P&SW offers these characters a poor choice: disappear through assimilation into the corporation (become an incorporated actant that surrenders its capacities to the corporate person) or disappear from the narrative through textual “obliteration.” *The Octopus*'s character system demands that the minor characters merge into the corporate character or simply “go to hell.”

Norris's short vignette demonstrates the P&SW's voracious consumption of character-space in *The Octopus*. Minna Hooven, the precocious beauty forced to move to San Francisco after the P&SW kills her father, searches for a job as a nanny to support herself. She engages in a fruitless city-wide search while riding the P&SW's ubiquitous modes of public transportation. She observes that:

upon the street-railways, upon the ferryboats, on the locomotives and way-coaches of the local trains, she was reminded of her father's death, and of the giant power that had reduced her to her present straits, by the letters, P. and S.W.R.R. To her mind, they occurred everywhere. She seemed to see them in every direction. She fancied herself surrounded upon every hand by the long arms of the monster. (583)

Shortly thereafter, the P&SW takes “her last penny” and Minna – desperate – accepts a madame's offer to enter a life of prostitution where, in her last words before disappearing from the narrative, she tells Presley: “Oh, *I've* gone to hell” (588). Minna is not engaging in fancy when she envisions the P&SW everywhere, both physically and textually. The P&SW's ubiquity simply squeezes Minna out of the narrative's character-space. Its prolific network enrolls and translates her last penny and then she vanishes forever. To one degree or another, this is the fate of all the unincorporated characters in *The Octopus*.

First, Norris marginalizes unincorporated characters by causing them to become stuck in place within the narrative. The P&SW's powerful and ubiquitous network leaves them with nowhere to go. In her masterful work on naturalism, Jennifer Fleissner identifies the naturalistic theme of “an ongoing, nonlinear, repetitive motion—back and forth, around and around, on and on—that has the distinctive effect of seeming also like a stuckness in place.”<sup>109</sup> The characters in *The Octopus* that attempt to resist the P&SW exhibit this very stuckness. Early in the novel, Annixter scoffs at the futility of resisting the P&SW, pointing out to the other ranchers that “Good Lord! What can you do? We're cinched already. It all amounts to just this: YOU CAN'T BUCK AGAINST THE RAILROAD. We've tried it and tried it, and we are stuck every time.” (104). Dyke tells his story of P&SW repression over and over again, but one verdict prevailed:

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<sup>108</sup> Woloch, 38.

<sup>109</sup> Fleissner, Jennifer L. *Women, Compulsion, Modernity: The Moment of American Naturalism*. Chicago: University of Chicago Press, 2004, at 9. Fleissner's argument applies specifically to female naturalist characters, but I believe it is also an interesting concept for analyzing naturalist characters more generally.



“You’re stuck” (354). Indeed, Norris closes each of the next three paragraphs by writing that “The tentacle held fast. He was stuck,” and “He did not know what to do. He was stuck,” and finally, “He resigned himself. What did he care? What was the use of going on? He was stuck” (354). Later, in Caraher’s saloon, the disheartened ranchers realize they are “stuck, cinched, and not one thing to be done” (356). Indeed, when the entire populace of the San Joaquin Valley gathers for the jackrabbit hunt, Norris condemns them *en masse*: “For miles over the flat expanse of stubble, curved the interminable lines of horses and vehicles. At a guess, nearly five thousand people were present. The drive was one of the largest ever held. But no start was made; immobilized, the vast crescent stuck motionless under the blazing sun” (494).

Beyond being stuck within the narrative, characters also disappear from the text altogether. As Dyke prepares to mortgage his property to S. Berhman early in the novel – that is, at the moment he becomes a railroad actant – Norris uses the soon-to-be-familiar two-line sentence, stating simply that “He disappeared” (201). Delaney, after the shootout at the barn dance, “turns railroad” in hopes of squaring the score with Annixter. As he leaves the barn, Norris again observes that “He disappeared” (261). Magnus Derrick, just after the P&SW publicly exposes his bribery and just before he agrees to “turn railroad,” flees the opera house stage, when Norris tells us: “He had disappeared” (557). These character-actants seem to have no choice in the matter. Like actors on the stage, they merely follow directions [exit, pursued by railroad]. Annie Derrick disappears from the narrative more violently than her husband—she engages in an act of self-obliteration, ceasing altogether to be a character with any degree of agency. Quaking in fear over the P&SW’s power, she decides that it “was better to submit, to resign oneself to the inevitable. She obliterated herself” (180). Annixter, shortly before the events that will lead to his death are set in motion, assumes a pose of “self-obliteration” (265). Presley disappears from the text in a similar fashion. As he sets sail for India with his tail between his legs “like a clock with a broken spring” he engages in a moment of self “abnegation, of self-obliteration” (377). As Barbara Hochman succinctly observes, at the end of the novel “Presley appears to possess virtually no ‘self’ of his own.”<sup>110</sup> None of the unincorporated characters retain a sense of self. The P&SW enrolls their capacities in its network and tosses the remainder aside, like so much useless offal.

*The Octopus* is the first novel that characterizes the nineteenth-century corporate person, and this character has much to reveal about the law, society, and culture from which it emerged. The three Supreme Court Justices and the wealthy capitalists that Norris conspicuously inserts into the novel played pivotal roles in conceiving, developing, and elevating to prominence the full-fledged constitutional corporate person. This legal history deeply implicates the model for Norris’s protagonist: the Southern Pacific railroad corporation. The Southern Pacific’s role in producing corporate personhood reveals that the nineteenth-century corporate person was an incorporated actor network and a legally augmented distributed-centered subject. This person exists simultaneously as an individual juridical subject and the collective actor network incorporated in and through that subject. This person oscillates between the singular and the collective, at once disseminating its subjectivity throughout the corporate network while also translating and converting the network’s power to augment its own individual capacity. The law imbues the corporate person – unlike any other person – with a perpetual existence, a body that transcends physical discipline, and limited liability for its actions.

Norris captures this liminal subjectivity through his representation of the P&SW railroad corporation as the protagonist of his novel. Norris shows the networked nature of the corporate

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<sup>110</sup> Hochman, Barbara. *Frank Norris, Storyteller*. Columbia: University of Missouri Press, 1988, at 95.

person, with the roaming subjectivity which provides for an elusive literary character and social actor. The P&SW is the corporate entity, but it is also S. Behrman, Shelgrim, Ruggles, Dyke, Delaney, Magnus Derrick, Genslinger, the iron locomotive, grain rates, tariff schedules, and its own iron tracks. The P&SW is ubiquitous in the novel, which Norris makes clear through the corporate character's narrative interruptions and by inundating the text with the railroad's iron ore. In taking up so much narrative space, the P&SW leaves no character-space for the novel's minor characters. The corporate person squeezes these flat, typical characters out of the narrative. Each minor character in the text "disappears," either through assimilation into the corporate network or through a kind of self-defeating "obliteration," where they become stuck in place while the railroad, literally, leaves them in its tracks. The corporate person's characterization functions as a reflection of the emergence of nineteenth-century corporate personhood and serves as a warning about the status of the individual in this new socio-economic world order. The novel ends by suggesting that perhaps in the "larger view" this new character system functions for the good, where "the individual suffers, but the race goes on," but it is hard to forget the other half of the message in Norris's final words in *The Octopus*. When "the drama was over" the "Railroad had prevailed," and

Men—motes in the sunshine perished, were shot down in the very noon of life, hearts were broken, little children started in life lamentably handicapped; young girls were brought to a life of shame; old women died in the heart of life for lack of food. In that little, isolated group of human insects, misery, death, and anguish spun like a wheel of fire. (651)

The corporate person had arrived on the scene in nineteenth-century America, and Norris warns the reader that the "isolated group of human insects" would have to fight tooth and nail for every little piece of character-space going forward.

## Chapter 2 - Nineteenth-Century Corporate Law's "Race to the Bottom" and the Rise of the Financier

Summary: Chapter 2 examines a group of natural persons who found a way to augment their own personhood through a strategy of attaching themselves to – and then navigating within – these emergent incorporated actor networks. This chapter studies these nomad financiers and maps out the corporate routes they followed in achieving unprecedented levels of wealth and power in nineteenth-century America. “Robber barons” like Andrew Carnegie, Jay Gould, and J.P. Morgan used these until-then fictional levels of wealth in America to become legally unassailable social actors. I argue that they achieved this legal impunity through the instrumentalization of nineteenth-century U.S. corporate law. They helped initiate corporate law’s so-called “race to the bottom,” whereby states offered enabling corporate laws in return for massive revenue streams. Though the financiers’ various financial tactics appear to be different, they follow fundamentally the same path to power and wealth. The fictive spaces of three naturalist texts, each of which portrays a character based on a composite of real-life financiers, present a precise prosopography and accurate blueprint of the financier’s legal methodologies. Three “money novels” – Theodore Dreiser’s *The Titan* (1914), Jack London’s *Burning Daylight* (1910), and D.G. Phillips’s *The Deluge* (1905) – show how financiers created massive, banyan-like networks of interconnected corporate bodies. They navigated these networks of corporate bodies, evading discipline and punishment by shielding themselves with the corporate person’s limited legal and financial liability. They used the corporate form’s sanctuary to erect a new moral code for themselves. Operating within this new moral structure allowed the financiers to behave as “supermen,” imposing their collective will to power on unincorporated natural persons.

Alan Trachtenberg observes that with the emergence of large, conglomerate corporations like the Southern Pacific Railroad Corporation in nineteenth-century America, there “appeared a new breed of men” who exhibited “unprecedented personal wealth and untrammelled power.”<sup>111</sup> This new breed was the so-called “robber baron,” or the financier that came to epitomize America’s new economic order. These financiers accumulated wealth and power at an unprecedented pace, while engaging in morally, ethically, and legally questionable behavior in achieving their financial success. And, by and large, they went unpunished by the state for their moral, ethical, and legal infractions. Financiers such as Jay Gould, Andrew Carnegie, J.P. Morgan, and others ran roughshod over traditional business practices, erecting modern corporate networks that revolutionized America from a political, economic, and social perspective. In exercising their corporate will to power, these financiers managed to revalue a nation’s values and became the richest and most powerful individuals of the era.

It is no coincidence that this new breed arose contemporaneously with the modern corporation. In fact, the corporation and corporate law produced this new form of corporate personhood: the financier that could freely roam the vast incorporated actor networks that emerged in nineteenth-century America. These financiers rose to prominence, in part, due to what legal historians call nineteenth-century corporate law’s “race to the bottom.” The race to the bottom was the mid-to-late nineteenth century legal atmosphere in which the laws governing

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<sup>111</sup> Trachtenberg, Alan. *The Incorporation of America: Culture and Society in the Gilded Age*. New York: Hill and Wang, 1982, at 57

corporations underwent a shift from mandatory and limiting rules to “enabling” ones. Instead of imposing strict regulations on corporate bodies, the law began to enable corporate actors to “accomplish incorporation on terms which they freely choose,” allowing corporate managers to operate with minimal state interference.<sup>112</sup> As states began competing for the lucrative revenue from corporate franchise taxes, each competing state’s corporate laws became more and more permissive in an effort to attract corporate entities. This “race” ultimately produced a regime of unchecked corporate power and vastly increased the potential for unregulated and immoral corporate action. The financier learned to use these changes in corporate law to extend the networked corporate person *ad infinitum*, compounding and then coopting the original powers of corporate personhood to augment his own capacities. Justice Louis Brandeis, who is among the race to the bottom’s earliest critics, concluded that state corporate laws created “Frankenstein monsters” that came to plague the very governments that brought them into existence.<sup>113</sup>

Nineteenth-century corporate law did not, however, create Frankenstein monsters. Rather, corporate law produced, enabled, and empowered the financier, a new kind of financial “superman.” These supermen financiers relied on changes in the law (which, in many cases, they orchestrated themselves) to build their respective corporate empires. The financiers’ legal legerdemain is often obscured in traditional business and legal histories, which seem to suggest that the financiers each used distinct tactics in their respective rise to power. However, the financiers actually followed an identical course in attaining socio-economic dominance and the legal pathway they followed emerges in turn-of-the-century “money novels.” These novels present detailed composite character studies that function as a prosopography of the infamous financiers, such as Jay Gould, Andrew Carnegie, and J.P. Morgan.<sup>114</sup> The fictive space in each of these novels provides access to the contemporary reception, complex legal methodology, and psychological makeup of the most powerful financiers of the era. These hybrid characters help the legal methods the financiers utilized to coalesce for the reader, showing that in each case the financier instrumentalized nineteenth-century corporate law to extend, inhabit, and navigate the kinds of incorporated actor networks described in Chapter 1. They augmented their own personhood by stepping into and utilizing dynamic corporate bodies to extend their capacities and shield themselves from liability.

Choosing three texts whose respective protagonists are overdetermined composites of the era’s leading financiers, I identify in Theodore Dreiser’s *The Titan* (1914), Jack London’s *Burning Daylight* (1910), and David Graham Phillips’s *The Deluge* (1905) the legal

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<sup>112</sup> Ralph K. Winter. “State Law, Shareholder Protection, and the Theory of the Corporation.” *The Journal of Legal Studies*, Vol. 6, No. 2 (Jun., 1977), pp. 251-292, at 252. Winter is summarizing the general claims surrounding “enabling” corporate statutes. See also William Cary. “Federalism and Corporate Law: Reflections upon Delaware.” *The Yale Law Journal*, Vol. 83, No. 4 (Mar., 1974), pp. 663-706, at 666. See also Lucian Arye Bebchuck. “Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law.” *Harvard Law Review*, Vol. 105, No. 7 (May, 1992), pp. 1435-1509, at 1438.

<sup>113</sup> Justice Louis Brandeis made the original “race to the bottom” argument in *Liggett Co. v. Lee* (288 U.S. 517), where he noted that the removal of corporate law restrictions on size and other such limitations has resulted in a situation where “corporations, once merely an efficient tool employed by individuals in the conduct of private business have become an institution—an institution which has brought such concentration of economic power that so-called private corporations are sometimes able to dominate the state,” at 565.

<sup>114</sup> For a discussion of the influence of the “money novel,” see Preston, Claire. “Ladies Prefer Bonds: Edith Wharton, Theodore Dreiser, and the Money Novel,” *Soft Canons, American Women Writers and Masculine Tradition*, Ed. Karen L. Kilcup. Iowa City: University of Iowa Press, 1999, 184-201.

methodology that the financiers used to inhabit corporate networks and rise to power.<sup>115</sup> This literary-historical prosopography, or collective biography, generates a precise model of how nineteenth-century corporate law produced the financier (and how the financier recursively produced nineteenth-century corporate law). This prosopographic character study also exhibits the identical legal, economic, and social powers that the financier came to wield through their use of corporate law and the incorporated actor networks it made possible.

This prosopography incorporates nineteenth-century America's most powerful and influential financiers. Dreiser, for instance, bases *The Titan's* protagonist, Frank Cowperwood, on Charles Yerkes, the Philadelphia, Chicago, and London street-railway tycoon. He stated, however, that he "selected Yerkes's career as the scaffold on which to build the themes of his novel from the careers of a number of other financiers whose lives he had studied," such as Cornelius Vanderbilt, Jay Gould, Daniel Drew, Jim Fisk, William Hearst, Collis Huntington and Jay Cooke.<sup>116</sup> London's financier Elam Harnish (or, "Burning Daylight") is modeled primarily after James R. Keene ("The Silver Fox of Wall Street"), a silver miner turned capitalist, but also draws characteristics from Frances "Borax" Smith, a financier and Oakland developer, and railroad robber baron Russell Sage.<sup>117</sup> Finally, Phillips bases Matthew Blacklock on real-life muckraking financier and Wall Street iconoclast, Tom Lawson, but also conflates him with John D. Rockefeller and Andrew Carnegie.<sup>118</sup> These protagonists help represent the careers of at least fourteen of the most influential financiers in nineteenth-century America. Together, this literary prosopography provides a clear blueprint of the financiers' fundamentally identical underlying business plan.

This prosopography reveals that these characters, like the historical financiers on which they were based, begin their ascent by holding the law in contempt, seeing it only as the strong man's sword (and shield) to wield against their enemies, such as the public, government, and rival financiers. In each case, the financier utilizes crafty corporate lawyers to interpret and tailor the law to suit his own personal needs. After constructing or inhabiting an intricate network of corporate bodies, the financier moves in and out of these corporate networks to evade discipline and punishment. When the state intervenes, the financier has already abandoned, sold, or dissolved the corporation. To justify – and promote – this corporate nomadism, the financiers pronounce their adherence to a new code of "Wall Street" morality. They consider themselves

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<sup>115</sup> Theodore Dreiser. *The Titan*. New York: Signet Classic, 1965. Jack London. *Burning Daylight*. New York: Macmillan Company, 1919. David Graham Phillips. *The Deluge*. Toronto: Mcleod & Allen, 1905.

<sup>116</sup> That Dreiser's Cowperwood is based on Charles Yerkes, the Philadelphia, Chicago, and London street-railway tycoon, see Philip L. Gerber. "Dreiser's Financier: A Genesis," *Journal of Modern Literature*, Vol. 1, No. 3 (Mar., 1971), pp. 354-374. See also Philip L. Gerber. "The Financier Himself: Dreiser and C. T. Yerkes," *PMLA*, Vol. 88, No. 1 (Jan., 1973), pp. 112-121. For his reliance on the careers of other financiers, see Larzer Ziff, "Introduction," *The Financier*. New York: Penguin, 2008 at xi. Other scholars have noted similarly that "Dreiser began with Charles Yerkes, but created instead the type of the evil financier," Wayne E. Westbrook. *Wall Street in the American Novel*. New York: New York University Press, 1980, at 155. Dreiser mentions Vanderbilt, Gould, Drew, Fisk, Hearst, Huntington and Cooke, among other financiers, in his "Trilogy of Desire," which suggests a familiarity with the real-life character models.

<sup>117</sup> For claims that London's Elam Harnish (or Burning Daylight), is modeled primarily after James R. Keene ("The Silver Fox of Wall Street"), an historical miner turned capitalist, see Westbrook at 119. However, Daylight is also based on Frances "Borax" Smith, a financier and Oakland developer, see Hildebrand, G.H. *Borax Pioneer: Francis Marion Smith*. San Diego: Howell-North Books, 1982, at 1. London also invokes real-life financiers in his text such as Gould, Fisk, and Sage, see Westbrook, at 121.

<sup>118</sup> Westbrook, at 103.

above social convention and the strictures of law, and the financier emerges as a socio-economic superman able to exercise a Nietzschean will to power in the business world.

In what follows, the first section provides historical sketches of the most notorious real-life financiers' financial and legal maneuverings. These sketches suggest that each of the financiers followed his own path in rising to power. However, a closer investigation in the second section shows that each financier exploited corporate law's so-called "race to the bottom" in their respective rise to the top. Indeed, the chapter's final section presents a detailed literary-historical prosopography, in which a close reading of the era's "money novels" illustrates that these seemingly different financiers were following a common blueprint in establishing their own forms of corporate personhood.

### The Historical Financier

The nineteenth-century financiers appear to have little in common, but for their lust for power and wealth. Aside from the common trait that they were mostly white males (with Hetty Green being the notable exception)<sup>119</sup>, the major financiers came from very different backgrounds and utilized seemingly different tactics in amassing their respective fortunes. This section provides historical character sketches and representative financial transactions of several of the most (in)famous (and successful) financiers of the era: Jay Gould, Andrew Carnegie, and J.P. Morgan. These sketches demonstrate that, at least from a purely historical perspective, the financiers apparently utilized divergent financial tactics in their rise to power.

Jay Gould used stealth and guile in amassing his fortune. A contemporary of Gould described him as "the worst man on earth since the beginning of the Christian era. He is treacherous, false, cowardly, and a despicable worm incapable of a generous nature."<sup>120</sup> Recent biographies suggest that Gould, also known as the Mephistopheles of Wall Street, probably was not *quite* as bad as his contemporaries suggested, but he was certainly a crafty little man. Gould mastered the financial world by cultivating "the art of controlling huge enterprises with minimal holdings, utilizing not only equity control but funded debt, the proxy market, floating debt, contractual flaws, receiverships, and especially legal technicalities."<sup>121</sup> In his earliest ventures as a surveyor and tannery manager, he sought to explore opportunities and engage in behavior that quickly taught his partners that he had no intention of conforming to traditional business norms. In one instance, Gould armed his employees and had them take over a tannery from which one of his business partners attempted to exclude him.<sup>122</sup> In other instances, he openly bribed legislators, bought judges, betrayed business partners, and in the case of the Erie Wars, actually "stole" the Erie Railway Company (well, its stocks and ledgers) and rushed it across the state border from New York to New Jersey to evade arrest.<sup>123</sup> His Erie ploy worked, and all criminal charges against Gould and the two other directors who took the stocks were dismissed when Gould reincorporated in New Jersey and made the proper "political contributions." When faced with the threat of state or financial discipline, Gould's response was inevitably "ingenious, strikingly original, unexpected, technically legal, and ethically dubious."<sup>124</sup>

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<sup>119</sup> Henrietta "Hetty" Green, known as the "Witch of Wall Street," was a financier considered to be the Gilded Age's richest woman.

<sup>120</sup> Kline, Maury. *The Life and Legend of Jay Gould*. Baltimore: Johns Hopkins University Press, 1997, at 3.

<sup>121</sup> *Id.* at 66.

<sup>122</sup> *Id.* at 59.

<sup>123</sup> This created "the novel spectacle of a corporation in exile." *Id.* at 83.

<sup>124</sup> *Id.* at 330.

Two of Gould's related financial transactions demonstrate his business ingenuity. In 1880 Gould was the majority shareholder and a director of the Union Pacific Railroad. Due to his insider's position, he knew that the corporation would soon have to redeem government bonds at great expense to the corporate treasury, which would depress the stock price. As such, he quietly sold most of his interest in the corporation and used the profits to buy into other railroad companies.<sup>125</sup> He secretly began buying smaller, regional railroad corporations such as the Kansas Pacific, Missouri Pacific, and the Wabash. He scattered his stock ownership across a wide field to veil his intentions. His holdings "were too diverse and sprawling for anyone to know where the heart of his system lay."<sup>126</sup> At the same time, using several newspapers he owned, Gould attacked out of nowhere Western Union's monopoly over the telegraph industry. As sentiment against Western Union grew, its stock price fell. Gould purchased heavily. He also took control of a defunct telegraph corporation, American Union. He illegally voided his contracts with Western Union and made new corporate contracts between his regional railroads and American Union to provide telegraph services.

Gould subsequently stepped down from the Union Pacific board of directors and then threatened to combine his regional railroads into a national system to compete directly with the Union Pacific. The Union Pacific was compelled to buy Gould's various railroads for \$6.7 million.<sup>127</sup> Meanwhile, Western Union faced ruinous competition with Gould's American Union telegraph corporation. Western Union proposed a merger with American Union, and upon the merger Gould became the majority shareholder of the Western Union Corporation and took control of its board of directors that same year. He immediately entered into a contract on behalf of Western Union with the Union Pacific (and all of his regional railroads, which he had recently sold to the Union Pacific) to provide telegraph services. Essentially, Gould shifted from ownership and control of the Union Pacific to ownership and control of Western Union, using different corporate bodies and underhanded tactics to make the shift possible and to extract huge sums of capital from both entities. For good measure, he again took over the Union Pacific and became its president a decade later. His secretive tactics "enabled him to roam freely, a dealer in the unexpected. It was impossible for others to know what he actually controlled, let alone discover his intentions. He was the consummate one-eyed jack, an enigma, a phantasmagoria."<sup>128</sup> All the while he illegally invalidated contracts, used corporate attorneys to issue and cancel injunctions, and orchestrated judicial rulings that perfectly met his needs. For these reasons, to his rivals, "Gould would remain an image spread to infinity across a hall of mirrors."<sup>129</sup>

Andrew Carnegie operated as an obstinate, self-interested, and monolithic figure in a single field: the steel industry. He succeeded by hedging his investments and ensuring that his enterprise took on as little risk as possible through methods of self-dealing. Carnegie was always looking for a way to climb the corporate ladder, starting as a telegraph operator at the Pennsylvania Railroad and ending as the owner of the behemoth Carnegie Steel Company, which he sold in 1901 for nearly \$500 million. He entered into countless enterprises with a small financial stake, "bouncing from flower to flower," until he saw a "good opportunity to scale up—reorganizing, reenergizing, and recapitalizing—almost always emerging as the lead

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<sup>125</sup> Morris, Charles R. *The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan Invented the American Supereconomy*. New York: Holt and Company, 2005, at 144.

<sup>126</sup> Klein, at 249.

<sup>127</sup> Id. at 248.

<sup>128</sup> Id. at 254.

<sup>129</sup> Id. at 421.

shareholder.”<sup>130</sup> One of his earlier deals, the St. Louis Bridge project, is illustrative of his financial self-dealing and business acumen. He financed the operation by issuing bonds through his St. Louis Bridge Company (which he owned) and selling those bonds to the public. The Keystone Bridge Company, which Carnegie also owned, carried out the construction on behalf of the St. Louis Bridge Company. The St. Louis Bridge Company paid Keystone with the funds it generated from selling its bonds to the public. The Keystone Bridge Company purchased its supplies from the Union Iron Mills, which Carnegie, of course, owned. For good measure, the St. Louis Bridge Company employed the one and only Andrew Carnegie, at a huge fee, as its investment banker to place its bonds and sell them to investors.<sup>131</sup> The bridge opened in 1874, and the St. Louis Bridge Company quickly settled its accounts with Keystone (*i.e.*, Carnegie), Union Iron Mills (*i.e.*, Carnegie), and with Carnegie individually. The bridge company, unfortunately, went bankrupt the next year, leaving the bondholders high and dry, but leaving Carnegie with a small fortune from the various services he supplied (Jay Gould, incidentally, purchased the bridge for a song and used it as leverage in his Union Pacific transaction).<sup>132</sup>

Carnegie justified his dubious business dealings, quite simply, by “lying—egregiously, consistently, and continually.”<sup>133</sup> Indeed, his biographers suggest that Carnegie was one of the most prolific liars in American history. This same immoral mendacity accompanied Carnegie’s war profiteering, where he escaped legal punishment for Carnegie Steel’s supplying faulty steel plates to the U.S. Navy. A government investigation substantiated his employee’s claims that Carnegie knowingly supplied faulty steel armor and falsified the results of ballistic tests to the government, but the investigation could not determine precisely *who* within the corporation had lied or plugged holes in the armor plates. The government imposed a fine on *the corporation*, in the amount of \$150,000—or ten percent of the transaction cost.<sup>134</sup> Carnegie retained his lucrative government contracts to supply steel to the navy after the investigation notwithstanding the scandal.

J.P. Morgan did not have to hustle quite as much as either Gould or Carnegie. Morgan’s father, Junius Spencer Morgan, was one of the nation’s leading bankers and established Morgan in the family business. Morgan acted as the banker and fiscal agent for the leading corporations in most major industries, and he held large blocks of stock in the corporations he represented.<sup>135</sup> He either served on the board of directors, or had a representative on the board of directors, of each of these companies. A congressional investigation later revealed that Morgan’s infamous system of “interlocking directorates” held 341 directorships in 112 corporations.<sup>136</sup> At one point, he controlled a third of the nation’s railroads and over two thirds of the steel industry through his U.S. Steel corporation (the largest portion of which, incidentally, he purchased from Andrew Carnegie).<sup>137</sup> In addition to an incident of war profiteering in which Morgan knowingly financed

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<sup>130</sup> Morris, at 91-2.

<sup>131</sup> *Id.* at 93.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 16.

<sup>134</sup> Josephson, Matthew. *The Robber Barons*. New York: Harcourt Brace, 1932, at 391-2.

<sup>135</sup> *Id.* at 313.

<sup>136</sup> Zimmerman, David A. *Panic! Markets, Crises, & Crowds in American Fiction*. Chapel Hill: The University of North Carolina Press, 2006, at 154.

<sup>137</sup> *Id.*



the sale of defective weapons to American troops, Morgan was rumored to have ignored and violated countless corporate laws and federal market regulations during his lifetime.<sup>138</sup>

His oft-repeated goal was to end “ruinous competition” by creating large corporate trusts to engage in price fixing and market control.<sup>139</sup> The sheer size of his interlocking directorates made it difficult to know which directors were serving Morgan’s interests and which were serving the corporation’s interests. This industry-wide control was on display during the Panic of 1907. The Panic of 1907 was a three-week banking crisis that resulted in the collapse of several banking and trust companies in New York. In the aftermath of the Panic, credible accusations arose that Morgan orchestrated the Panic, enabling him to weed out his bank’s competitors and to overcome legal barriers against profitable, but forbidden, corporate mergers.<sup>140</sup> Morgan agreed to help end the Panic on the condition that President Roosevelt promise to refrain from applying the Sherman Antitrust Act to Morgan’s acquisition of the Tennessee Coal and Iron Company, which he long coveted but which would result in a monopolistic restraint on trade when joined with Morgan’s monolithic U.S. Steel Corporation.<sup>141</sup> Roosevelt agreed to the merger and Morgan miraculously ended the Panic. Morgan purchased Tennessee Coal and Iron during the Panic for \$45 million; financial analysts at the time valued the company at close to \$1 billion.<sup>142</sup>

These are emblematic case studies of the seemingly very different methodologies that the financiers used during the nineteenth-century. Gould secretly bought and sold shares in unexpected companies, Carnegie engaged in self-dealing, and Morgan planted his representatives in hundreds of corporations to corner entire industries so as to end competition and to ensure stable profits (or to use his influence to strategically destabilize markets to maximize his future control). As the next section shows, these apparently divergent business tactics prove to be fundamentally identical, in that each was ultimately made possible by corporate law’s race to bottom, whereby the laws governing corporations underwent a shift from limiting rules to enabling ones. Grasping corporate law’s race to the bottom helps us to then see that these apparently different business methods were, in actuality, very similar, if not identical, to one another on the most fundamental level.

### The Race is On: Enabling New Financial Tactics

Gould was a chimera, Carnegie was stubborn and mendacious, and Morgan simply had the means at his disposal to exercise influence over a huge number of business enterprises. Despite these seemingly different financial tactics, each of these financiers was aided by systematic and revolutionary changes to corporate law during the late nineteenth-century—changes that these financiers helped to orchestrate. This section maps corporate law’s so-called “race to the bottom,” whereby the law shifted from constraining corporations to enabling them. In its earliest days, American corporate law looked like its conservative English ancestor: incorporation was a rare special privilege and the corporation was a “creature of the state” bound by stringent legal requirements enunciated in its corporate charter. These initial corporate charters (the legal documents that bring a corporation into existence and define its capacities) established a number

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<sup>138</sup> Chernow, Ron. *The House of Morgan: An American Banking Dynasty and the Rise of Modern Finance*. New York: Grove Press, 1990, at 370. Morgan’s “preferred list” or bribe recipients (in the form of stock sales on a when-issued basis) shows the level of corruption the banker attained, and how little he thought of the so-called immorality of his actions.

<sup>139</sup> Kolko, at 65.

<sup>140</sup> *Congressional Record—Senate*, 24 March 1908, 3796.

<sup>141</sup> Chernow, at 128.

<sup>142</sup> *Id.*

of mandatory rules for the corporation and drastically restricted corporate powers. For instance, most pre-Civil War corporate charters limited the type of business in which a corporation could engage. Any *ultra vires* corporate actions (those exceeding the powers granted in the charter) would be void. The *ultra vires* doctrine not only limited what a corporation could do, but also dictated what kind (and what amount) of property it could own in conducting its permitted business activities. These charters likewise restricted the corporation's size, life span, financial resources, territorial boundaries, and held shareholders to "double liability," meaning they had to pay twice their investment amount upon corporate liquidation or dissolution.<sup>143</sup>

Also significant is the fact that early corporate law expressly denied one corporation the right to own shares in another corporation.<sup>144</sup> This all changed after the Civil War as states began to remove each of these corporate law restrictions. In place of these mandatory laws and constraints, states generally restructured their corporate laws into "enabling statutes" that granted incorporators freedom to both create and manage corporate powers. These enabling laws sprung from the ingenuity of corporate lawyers. State legislatures gave these business lawyers the opportunity to create and draft each state's respective corporate statutes. The result was an insular legal system where, in essence, corporations regulated their own affairs free from state intervention. The late-nineteenth century corporate form authorized particular individuals – the corporate financiers – to engage in financial transactions of stupefying complexity and unprecedented risk. At the same time, these laws enabled the financiers to pass that risk on to the public or the government, always limiting their own liability by hiding behind the corporate veil. As the previous chapter explains, corporations ultimately came to enjoy the rights, privileges, and protections of human beings, while simultaneously having their own special body of law that afforded them all sorts of super-human attributes (*e.g.*, immortality, unrestricted size, the ability to merge with other corporate bodies, etc.).

The historical starting line for the race to the bottom is debatable, but a reasonable hypothesis demarcates the Civil War and the subsequent ascendance of the Republican Party's pro-business political platform.<sup>145</sup> Civil War financing generated the first investment bankers and first public market for securities (the trading of government war bonds), two of the driving forces behind corporate law's evolution. After the war the nation continued to expand westward at a rapid rate, and the corporation emerged as the primary "instrument for mustering and disciplining large amounts of capital and allowing dependable continuity for its use."<sup>146</sup> The corporation's ability to accumulate private capital through shareholder investment and then to use that capital to perform quasi-public functions (*e.g.*, build a transcontinental railroad, provide a city with water, etc.) enticed the government to sweeten the pot for incorporators, from both a

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<sup>143</sup> P.M. Vasudev. "Corporate Law and its Efficiency: A Review of History." 50 *Am. J. Legal Hist.* 237 (July, 2010), at 246.

<sup>144</sup> Hurst, James Willard. *The Legitimacy of the Business Corporation in the Law of the United States: 1780-1970*. Charlottesville: University of Virginia Press, 1970, at 69.

<sup>145</sup> See Charles A. and Mary R. Beard's *The Rise of American Civilization, Vol. II*. New York: MacMillan Publishing Co., 1927, at 429. The Beards describe the Civil War as the "Second American Revolution," that ended in the capitalist co-opting of the political system. See also Hurst, *supra* 5, at 140. See also Matthew Josephson, *The Robber Barons*. New York: Harcourt Brace, 1932, at 51. Josephson notes that Lincoln, whether he realized it or not, "hastened miraculously a transfer of power to the emergent groups of large-scale capitalism." See also Charles R. Morris, *The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J.P. Morgan Invented the American Supereconomy*. New York: Holt and Company, 2005. Morris notes that "Once in office, and freed from Southern obstructionism after the attack on Fort Sumter, Lincoln and his Republican majority unleashed a blitz of predevelopment legislation without parallel in American History," at 10.

<sup>146</sup> Hurst, at 34.

legal and financial perspective. In essence, federal and state governments granted corporations great legal and financial leeway because those corporations were doing the government's job for it. The government evaluated corporate utility so highly that it warranted the use of law to give "businessmen a free hand in adapting the corporate instrument to their own will" and determined that the function of corporate law was to "enable businessmen to act, not police their action."<sup>147</sup> Businessmen and corporate lawyers seized this opportunity and imposed their will and vision on these developing corporate instruments. The race to the bottom was off and running.

States subsequently began to eliminate restrictions on corporations in their corporate law statutes. These states sought revenue from in-state incorporations; meanwhile, business promoters sought venues with less stringent corporate restrictions. This alignment of interests produced symbiotic combinations of state legislatures and corporate lawyers who worked together to re-draft more lenient and attractive corporate laws. The next big surge in the race to the bottom occurred when New Jersey – the "Traitor State," or "Mother of Trusts" – decided to openly court corporations in order to maximize this newfound revenue-generating potential. In 1875, New Jersey amended its State Constitution to abolish legislatively granted special corporate charters, which ushered in an era of so-called "general incorporation." Under the special charter system, state legislatures issued a sparing number of special charters that included the limiting and mandatory rules described above (*e.g.*, ultra vires, lifespan restriction, size restriction, etc.). In order to generate corporate revenue, New Jersey's law of general incorporation allowed anybody to incorporate in the state of New Jersey so long as they filed an incorporation fee, obeyed simple corporate formalities, and paid an annual franchise tax. Corporations flocked to New Jersey and the state quickly became the most popular venue for legal incorporation.<sup>148</sup>

New Jersey became such an attractive state for corporations because a small group of corporate lawyers effectively wrote the state's corporate statutes to serve the needs of their clients.<sup>149</sup> The goal was to create as much legal protection as possible from personal liability for the incorporators and managers of these corporations. Allowing corporate lawyers to draft a state's corporate laws became common practice. In many cases, corporate lawyers from the industry subject to proposed government regulation actually drafted the legislative bills ostensibly aimed at curbing their corporate powers.<sup>150</sup> After the 1875 move to general incorporation, New Jersey engaged in a methodical program of loosening corporate law restrictions. In 1889, the legislature passed a statute that allowed one corporation to purchase and own stock in another corporation, even if that corporation was incorporated in a state other than New Jersey.<sup>151</sup> Essentially, this law allowed one corporation to act as a holding company with a corporate structure that included various subsidiary corporations, which might be dispersed throughout the states. Since they were housed under a New Jersey holding company, each of these subsidiary corporations – regardless of their state of incorporation – would be governed by New Jersey's more lenient corporate laws.

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<sup>147</sup> *Id.*, at 13 and 71.

<sup>148</sup> Yablon, Charles M. "The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910." 32 *Iowa J. Corp. L.* 323, at 327.

<sup>149</sup> *Id.* at 336.

<sup>150</sup> Kolko, Gabriel. *Railroads and Regulation: 1877-1916*. New York: W.W. Norton & Co., 1965, at 21, 77, and 95. Kolko's discussion involves mostly federal corporate regulation, but his discussion relates and applies to state regulation as well.

<sup>151</sup> 1889 N.J. Laws 414.

This statute also allowed a corporation to purchase another corporation's assets and to use its own stock, to which it could assign any value, as consideration for the asset purchase. This little wrinkle enabled "cash-strapped promoters" to purchase another corporation's valuable assets with what might ultimately amount to worthless stock (the risk was on the seller of the assets, who believed – with good cause and from practical experience – the stock would one day be as valuable as advertised when the holding company was finally reorganized and begin oligarchical price fixing within an industry).<sup>152</sup> Importantly, it also opened the door for intra-corporate looting, whereby subsidiary corporations could engage in sham transactions with one another to extract valuable assets and funds. That is, two corporations owned by the same financier could transact with one another in what amounted to a financial shell game of moving and hiding assets. In this transaction, one corporation would use worthless stock (but assigned an artificially high value by the board of directors) to purchase actually valuable assets from the other corporation. These types of sales allowed financiers to move assets around in various corporate bodies, sheltering those assets from creditors and regulatory regimes.

New Jersey again revised its laws in 1896 to eliminate the *ultra vires* doctrine, removing limitations on the corporation's size, duration, and business activities.<sup>153</sup> The 1896 Act allowed New Jersey corporations to issue different classes of stock, with varying powers and shareholder voting rights. This power enabled corporations to issue non-voting stock, whose primary purpose was to function as an asset to be traded on a capital exchange market, thus encouraging investment for purely speculative purposes. Shareholders became speculators; as speculators, these shareholding "owners" of the corporation became geographically scattered and largely disinterested in the day-to-day business operations of the corporation. If the stock price rose (no matter the reason), they were content. This left those in control of the corporation – corporate managers and directors – in a position to use the corporation for self-dealing and self-enrichment so long as they could inflate the stock price, whether through legitimate or artificial means.<sup>154</sup>

Because corporate managers decided where to incorporate, New Jersey and other states that participated in the race to the bottom (in particular, Wyoming, Maine, West Virginia, and Delaware) tailored laws to suit management's interests, not the interests of shareholders.<sup>155</sup> The 1896 Act was an enabling act that allowed incorporators to structure corporate powers as they saw fit, while implicitly excluding the state and public shareholders from the corporation's formation and control. These laws sheltered management – and the corporation – from true market discipline, since disinterested and speculative shareholders had almost no say in the corporation's policies and actions. The quasi-legal requirement to "maximize shareholder value" enabled corporate managers to justify all sorts of amoral corporate acts that might be repugnant to shareholders, but that might also produce more corporate profit and artificially increase the stock's value.<sup>156</sup>

In the event that shareholders sought to discipline or punish the corporation or its promoters, they found it difficult to pierce the corporate veil to reach key investors, individual directors, or the financiers acting through the corporate body. In 1891 the Supreme Court

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<sup>152</sup> Yablon, at 343.

<sup>153</sup> 1896 N.J. Laws 279-80.

<sup>154</sup> Berle, Adolf A. and Gardiner C. Means. *The Modern Corporation and Private Property*. New York: Harcourt, 1932. Berle and Means were, famously, among the first to identify this "agency problem" with regard to the emerging separation of corporate ownership and control.

<sup>155</sup> Bebchuk, Lucian. "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law." *Harvard Law Review*, Vol. 105, No. 7 (May 1992).

<sup>156</sup> *Dodge v. Ford Motor Company*, 170 NW 668 (Mich 1919).

reinforced permissive state corporate law rulings by validating the doctrine known as the business judgment rule.<sup>157</sup> According to the business judgment rule, directors (at that time, usually composed of the promoting financiers and their intimates) were not liable for mistakes of judgment with regard to corporate actions, even if they were “so gross as to appear to us absurd and ridiculous.”<sup>158</sup> The standard for director liability lies somewhere between gross negligence and criminal misconduct, both of which present steep burdens of proof for any plaintiff shareholder. Directors can justify all sorts of bad – or even self-serving – decisions by couching them as mere mistakes in “business judgment.”

In the rare case in which a shareholder is able to overcome this burden of proof against the directors, any monetary damages the shareholder “wins” in a lawsuit would be awarded to the corporation, not the offended shareholders. This counterintuitive outcome results from the fact that the suit is “derivative,” brought by a shareholder against the directors *on behalf of the corporation*.<sup>159</sup> Corporate law added yet another protective layer for management, whereby corporations were authorized to reimburse and indemnify directors for legal fees associated with these derivative suits.<sup>160</sup> In other words, if a manager commits a corporate misdeed and gets sued for it, the corporation will cover her legal expenses and insure she has no personal liability for her actions. Some state legislatures erected still more barriers in favor of corporate managers, declaring that shareholders must post bond for the costs and expenses of defendant directors and officers before bringing suit.<sup>161</sup> If the shareholders won the suit, the money went to the corporation; if they lost the derivative suit, they were responsible for the directors’ legal fees. Shareholders could do next to nothing to discipline the corporate actors, short of selling their stock in that enterprise.

Some legal scholars see the race to the bottom in a very different light, of course. Instead of seeing a trend of state legislatures selling out to corporate managers’ interests, they see the states’ *laissez faire* approach to corporate formation as a model of pure economic and legal efficiency. According to this view, the competition between states for corporate charters tends toward “optimal legal systems regulating the market for capital.”<sup>162</sup> Corporations will move to the state that provides the most economically sound set of legal rules. These rules will enable the corporation to function in the way that best suits its particular industry. As corporations grow larger and gain greater freedom to act, they grow more diversified and increase economies of scale, producing better products at cheaper prices. These better and cheaper goods and services, the argument goes, decrease the cost of living and increase the standard of the general public’s lifestyle. “Race to the top” advocates claim that the business judgment rule and the indemnification of corporate actors is not a mechanism for protecting corporate malfeasance. Instead, the business judgment rule encourages corporate innovation and economic risk taking, which results in maximizing shareholder value.<sup>163</sup> Furthermore, they argue, incorporators are likely to incorporate in a state that investors prefer, since they will want those investors to purchase their corporation’s stock. They point to empirical evidence that investors traditionally

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<sup>157</sup> *Briggs v. Spaulding*, 141 U.S. 132 (1891).

<sup>158</sup> *Sperling’s Appeal*, 71 Penn. St. 11. (1872).

<sup>159</sup> Hurst, at 99.

<sup>160</sup> *Id.*, at 101.

<sup>161</sup> *Id.*, at 100.

<sup>162</sup> Winter, at 290.

<sup>163</sup> Bainbridge, Stephen M. *Corporation Law and Economics*. New York: Foundation Press, 2002, 259-67.

prefer corporations that are incorporated in states with lenient corporate laws.<sup>164</sup> Corporate law simply bowed to economic efficiency. According to proponents of freedom of corporate contract, this deferral to economic interests is precisely the role of corporate law (and of “law” in general).<sup>165</sup>

Whether viewed as a corrupt race to the bottom or an efficient race to the top (or both), the result was a corporate form where financiers and incorporators could freely delegate and create corporate powers via contract without state interference. So long as corporate promoters paid taxes and fees to the state of incorporation, the state would not intervene in the nature of that contract. As a result of these new nineteenth-century corporate laws, the new breed of financiers including Gould, Carnegie, and Morgan were endowed with a staggering array of enhanced capacities. Due to the race to the bottom (or top), these corporate actors no longer had to make distinctions between their personal interests and their corporate responsibilities, enabling them to extract personal profits from corporate entities.<sup>166</sup> The financier could be the buyer and seller in the same corporate transaction, fleecing both corporations while personally enriching themselves as a third party beneficiary. For instance, in the late-nineteenth century the law did not yet prohibit insider trading (trading in securities while in possession of material nonpublic information).<sup>167</sup> As such, financiers used “bear” tactics such as rumors of new competition or decreased dividends to drive stock prices down in order to purchase large blocks of stock. They would follow with “bull” tactics (rumors of large dividends or new acquisitions) to quickly elevate the stock price so that they might sell to the public at enormous personal profit.<sup>168</sup> This cycle of bulling and bearing, or selling and buying at prices that the financier manipulated, was potentially endless.

The corporate laws permitted other low-risk but high-reward financial maneuvers, as well. Financiers and their corporations could issue corporate bonds to the public to finance some large enterprise (*e.g.*, building a bridge, a railroad, etc.). They would then loot the capital raised through these bonds by way of some construction or service corporation that they also controlled. Indeed, in many cases the primary corporate enterprise was created simply so financiers could plunder that corporation’s publicly raised capital via subsidiary service and construction corporations. This method was perfected by the early railroad corporations, and was widely copied in other industries (and by Andrew Carnegie throughout his career). The corporate person discussed in the first chapter – the Southern Pacific Railroad Corporation – blazed this trail for future corporate persons to follow. The Southern Pacific Railroad’s financiers utilized this tactic via the Pacific Improvement Company, which charged the Southern Pacific outrageous fees to construct and repair railroad engines and tracks.<sup>169</sup> By moving in and out of the Pacific Improvement Company (which, around the office, cynical employees called the Personal Interest Company), the Southern Pacific, and other related entities, these financiers became “chimeras able to change form at will, and by changing form, they created value.”<sup>170</sup> That is, since these

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<sup>164</sup> Romano, Roberta. “Competition for Corporate Charters and the Lesson of Takeover Statutes.” *Fordham Law Review* 843 (1993).

<sup>165</sup> See, generally, Richard A. Posner’s *The Economic Analysis of Law*. 9<sup>th</sup> Ed. New York: Wolters Kluwer Law and Business, 2014.

<sup>166</sup> Klein, at 95-6.

<sup>167</sup> The federal prohibition arose in *Strong v. Repide* 213 U.S. 419 (1909). See also Bainbridge, 519-24.

<sup>168</sup> Klein, at 96.

<sup>169</sup> White, Richard. *Railroaded: The Transcontinentals and the Making of Modern America*. New York: W.W. Norton & Co., 2014, at 267.

<sup>170</sup> *Id.* at 199.

financiers owned each of the service and construction companies that transacted with the Southern Pacific, they simply “proffered a deal, went to the other side of the table, put on another set of hats, and accepted the deal. In the books and ledgers of these companies, trades that appeared to be between a wide variety of entities were not what they seemed.”<sup>171</sup> The construction and service contracts were, of course, way above market prices and allowed the financiers to extract all the capital from the railroad corporation, which was generally run at a financial loss. When the project was complete and with the exorbitant construction profits in hand, they could sell their interest in the bonded corporation or simply declare corporate bankruptcy.<sup>172</sup>

These tactics sound all too easy, but it actually took exceptional individuals to fully exploit corporate law’s race to the bottom. The next section turns to the literary-historical prosopography of the financier, which reveals that a symbiotic relationship between nineteenth-century corporate law and the financier led to a fundamentally identical rise to power for each of these seemingly iconoclastic financial actors.

### The Financier’s Path to Power: A Literary-Historical Prosopography

The financiers’ fundamentally identical methodology for exploiting corporate law is obscured by the sheer variety of financial instruments and business tactics the robber barons employed. Some were stock manipulators, others tried to consolidate industries to fix prices, while others simply created corporations to loot them via subsidiary service contracts. No consistent underlying financial plan or methodology comes immediately to the surface. This section demonstrates how American literary naturalism’s financier novels, or money novels, offer a unique opportunity for capturing and observing the financier’s various tactics, as well as the complex personalities and moral codes that informed and drove these tactics. The characters that inhabit these texts serve as composite sketches of various historical financiers. Such composite sketches are made possible through the fictional conflation and subsequent re-representation of the financiers’ key legal methodologies and the psychological attributes that enabled such methods. Studied together, this literary-historical prosopography – or collective biography – provides a precise model of how the financiers built and utilized their respective corporate networks. The financiers, it turns out, followed the same path and used identical methods in augmenting and extending their own personhood through the corporate form.

More specifically, this section argues that Dresier’s *The Titan*, London’s *Burning Daylight*, and Phillips’s *The Deluge* reveal that the financiers’ path to success begins by exploiting the race to the bottom and instrumentalizing corporate lawyers in order to reshape the law to advance their personal agendas. Indeed, each financier’s understanding of the law rests on the underlying assumption that the law is a merely a weapon for his own personal use. The financier sees corporate law simultaneously as a shield and a sword—but in either capacity as something he can control and then wield against others. Next, these financiers manipulate and navigate the vast corporate networks that the race to the bottom made possible. The legal production of these root-like corporate systems enables the financier to inhabit and flee corporate bodies at will, extracting capital and evading liability and punishment. Finally, each of these financial actors uses corporate law’s various forms of limited liability to construct a similar “moral code” to justify their actions. The financiers each see life as a sort of confidence game

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<sup>171</sup> Id.

<sup>172</sup> For an example of this tactic in action, see Morris, at 92.

comprised of the strong and the dupes. They seek only to satisfy themselves thought the corporate will to power—and corporate law, we shall see, permits them to do so.

The financiers understand that they can redefine the law to suit their own needs. In some cases, they actually consider themselves *to be* the law. In Dreiser's *The Titan*, Frank Cowperwood conquers the street railway industry of Chicago. Having fled Philadelphia and his past legal troubles, he comes to dominate Chicago's financial world, and does so through his distinct understanding of the law. The law does not apply to Cowperwood, for he "was a law unto himself," and "knew no law except such as might be imposed upon him by his lack of ability to think" (121). He thinks his way past legal obstacles and instead imposes his personal view of the law on the city of Chicago and the nation. Like Gould, Carnegie, and Morgan, Cowperwood surrounds himself with a bevy of corporate lawyers in order to produce his own legal system. Corporate lawyers are his tools; he "picked them up as he would any club or knife wherewith to defend himself."<sup>173</sup> He builds a large and illustrious legal team in Chicago. His first recruit is General Judson P. Van Sickle, a "dusty old lawyer" with "a whole world of shifty legal calculations and false pretenses floating around in his brain" (49). He brings attorney Harper Steeger along from Philadelphia to help organize his corporate network in Chicago, and also hires Burton Stimson because he "detected that pliability of intellect which, while it might spell disaster for some, spelled success for him" (53). Ex-judge Joel Avery rounds out the team, as he has "recently been in all sorts of corporation work, and knew the ins and outs of the courts—lawyers, judges, politicians—as he knew his revised statutes" (297). He eventually also attaches, "by methods which need not be described," an active judge, the Honorable Nahum Dickensheets, to his rising star (231).

This crack legal team, "those familiar agents, his corporation attorneys," advise and assist Cowperwood in all sorts of matters: blackmailing the mayor, bribing the governor, suborning aldermen, creating holding companies, reorganizing corporations, merging entities, and arranging, when necessary, advantageous "legal holidays" to prevent state interference with his questionable actions. At Cowperwood's request, his legal team hatches a scheme to amend the Illinois State Constitution to allow passage of an otherwise-unconstitutional law to extend his corporate railway franchises for another fifty years. Asking themselves, "What is a little matter like a constitution between friends, anyhow?" they set out to plant the law's "fine cobwebby figments" to render inoperative the constitution's original intent (433). As Cowperwood tells us in *The Financier*, in the hands of the strong the law was not only "a sword and a shield," but was indeed "anything you might choose to make of it—a door to illegal opportunity; a cloud of dust to be cast in the eyes of those who might choose, and rightfully, to see; a veil to be dropped arbitrarily between truth and its execution, justice and its judgment, crime and punishment" (328). In his own strong hands, Cowperwood chooses to make the law his personal instrument for expanding his corporate network until he controls two-thirds of Chicago's street railways. He and his attorneys participate in corporate law's race to the bottom, and in doing so they ensure Cowperwood's rapid rise to the top of Chicago's financial world.

Jack London's financier, Elam Harnish, better known as Burning Daylight (since he hates wasting precious time—or, burning daylight), is likewise an embodiment of his own set of laws. Starting from his prospecting days in the Klondike and extending to his financial dealings on Wall Street and in San Francisco, Daylight determines for himself what is legal or not. London writes that "everybody forgave Daylight. He, who was one of the few that made the Law in that far land, who set the ethical pace, and by conduct gave the standard of right and wrong, was

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<sup>173</sup> Theodore Dreiser. *The Financier*. New York: Penguin, 2008.



nevertheless above the Law” (74). Daylight views the law as society’s “great bunco game,” which gives the financial rulers the “privilege to rob” the masses (202). The law and its commandments (like “THOU SHALT NOT STEAL”) apply only to the honest worker—not to the financiers. Daylight enlists Larry Hegan as his corporate lawyer, and together the two make a fortune through various corporate enterprises. Hegan, with his “Napoleonic legal mind,” guides Daylight “through the intricacies of modern politics, labor organization, and commercial and corporation law. It was Hegan, prolific of resource and suggestion, who opened Daylight’s eyes to undreamed possibilities in twentieth-century warfare” (220). Together Daylight and Hegan build up – and destroy – massive corporate enterprises in shipping, mining, and real-estate development. Daylight and Hegan use the law – *their* law – to engage in corporate finance, or the newest form of warfare.

David Graham Phillips presents a further indictment of the mercenary nineteenth-century corporate lawyer in *The Deluge*. Phillips’s financier character, Matthew Blacklock, is a “bucket shop” Wall Street trader who uses newspaper columns to promote stocks to the public. He aspires to rise to the level of “financier” and, with the help of his lawyers, reaches his goal at the end of the novel. Blacklock recognizes that society is a “big gilded dive of the dollarocracy,” and that “Lawyers are the doorkeepers and the messengers of the big dive” (16). Phillips’s financier refers disparagingly to lawyers as cocottes and mercenaries, but when trouble strikes, for Blacklock it is “straight to my lawyers, Whitehouse and Fisher, in the Mills Building” (60). Directly citing the race to the bottom, Blacklock observes that the “great lawyers of the country have been most ingenious in developing corporate law in the direction of making the corporation a complete and secure shield between the beneficiary of a crime and its consequences” (52). Blacklock will utilize this shield to help manipulate the stock market and fleece the public before the novel’s conclusion. During “Wild Week,” he instigates a financial panic and purchases the corporate holdings that will constitute his financial kingdom at bargain-basement prices. The police help him escape on his boat until the public uproar against him subsides. However, the financier knows that in order to effectively use the law as a shield, he must first build up (or buy up) a corporate network in which to hide and through which to strike.

The race to the bottom in corporate law enables intra-corporate stock holding, where one parent corporation can own countless subsidiaries. These subsidiaries can, in turn, own still more subsidiary-subsubsidiaries. Parent corporations can transfer assets, making a former subsidiary the new parent, and so on as forth, *ad infinitum*. As a result, nineteenth-century corporate systems were not hierarchical, arborescent, or straightforward structures. Instead, they were complex corporate assemblages – akin to intersecting masses of roots, or *rhizomes* – whereby one financier could own, control, inhabit, or navigate a massive array of corporate entities (recall J.P. Morgan’s corporate network that included 112 different corporations, scattered across countless industries).<sup>174</sup>

In Deleuzian terms, the financier is a “nomad,” who can use rhizomatic corporate structures to deterritorialize himself by going “from the central layer to the periphery, then from the new center to the new periphery, falling back to the old center and launching forth to the

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<sup>174</sup> Deleuze and Guattari describe arborescent systems as blocked, singular, and limited “hierarchal systems with centers of significance and subjectification,” where one “element only receives information from a higher unit, and only receives a subjective affection along preestablished paths.” *A Thousand Plateaus: Capitalism and Schizophrenia*. Minneapolis: University of Minnesota Press, 1987, at 16.

new.”<sup>175</sup> The rhizomatic nature of corporate structures enables the financier to hide in one body, flee to another, and spring up at any point in the corporate network. The nomad-financier “goes from point to point,” and maintains “the possibility of springing up at any point,” as Jay Gould did in his Union Pacific and Western Union transactions).<sup>176</sup> Through corporate law, the financier acquires the ability to engage in an “endless chain” of variation through a potentially limitless cycle of “corporate reorganization”: deterritorialization, reterritorialization, deterritorialization, etc.<sup>177</sup> The financiers navigate their corporate systems and disappear within the complex mass of roots.

Cowperwood is the practitioner *par excellence* of the nomadic navigation of corporate bodies. Even in his greener Philadelphia days, Cowperwood created corporate systems to protect his various street railway holdings. He incorporated a new entity to construct every three-mile extension of railway track. Dreiser explains that after capitalizing the new corporation with minimal investment, he would “issue stock and bonds for its construction, equipment, and manipulation. Having done this he would then take the sub-corporation over into the parent concern, issuing more stocks and bonds of the parent company wherewith to do it, and, of course, selling these bonds to the public” (*The Financier*, 159). Essentially, Cowperwood sold bonds to the public to finance his street railways, and kept the Ponzi scheme going so that the new issue of bonds would allow him to pay the interest on the previous issue. All the while, he extracted huge profits from constructing and running the railway systems that the public – who paid to ride the rails – had also paid to build.

Cowperwood erects this corporate network because he recognizes that financial life “was an endless network of underground holes,” or an “endless chain” of buying a certain property “on a long-time payment and issuing stocks and bonds sufficient not only to pay your seller, but to reimburse you for your troubles and to enable investment in allied properties, *ad infinitum*” (111). Corporate law and its race to the bottom’s legalization of intra-corporate stock ownership and the incorporator’s ability to arbitrarily set a stock’s value enables the production of this “endless network.”

In *The Titan*, Cowperwood creates a prolific corporate network that dwarfs his earlier enterprises. Through his use of complex corporate structures, Cowperwood himself becomes “rhizomatic.” As Dreiser tells us, Cowperwood and his fellow financiers are like banyan trees, they drop roots from every branch and are themselves a forest—a forest of intricate commercial life, of which a thousand material aspects are the evidence. His street-railway properties were like a net—the parasite goldthread—linked together as they were, and draining two of the three important sides of the city. (428)

The banyan tree (or “strangler fig”) actually converts arboreal tree-like structures into rhizomatic root-like ones.<sup>178</sup> The banyan sapling begins the process at the top of a host tree, and gropes its way down the tree’s trunk and across its branches through a constantly growing mass of creeping

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<sup>175</sup> Id., at 53. The system has no center and no hierarchical structure. Subsidiaries proliferate. The corporate structure undergoes reorganization and the parent becomes a subsidiary, and a former subsidiary become a parent, etc.

<sup>176</sup> Id., at 381.

<sup>177</sup> Deleuze and Guattari add that “wherever there is multiplicity, you will find also an exceptional individual,” at 243. That exceptional individual is the nomad financier that inhabits the corporate assemblage. They continue by noting that the “plane of consistency is a plane of continuous variation; each abstract machine can be considered a ‘plateau’ or variation that places variables of content and expression of continuity,” at 511. The nomad financier inhabits this plane of consistency, and takes his corporate war machine from one point to the next, never becoming molar or stratified, always engaging in creative lines of flight.

<sup>178</sup> Athreya, Vidya R. “Trees with a Difference: The Strangler Figs,” *Resonance* (July 1997), pp. 67-74.

roots. The banyan then drops roots from the branches and creates a canopy – or forest – of roots that steals nourishment from the host tree and spreads into the soil and even to other trees. At the end of the process, the only evidence of the original host tree, according to ecologists, is a “hollow inside the fused roots of the strangler fig.”<sup>179</sup> Cowperwood and the financiers like Gould, Carnegie, and Morgan function in a similar fashion. Cowperwood’s corporate network expands and creeps around the entire city of Chicago, parasitically draining the city’s financial resources. Meanwhile, the financiers use corporate law to proliferate and expand their corporate network through which – depending on the circumstances – they navigate, hide, or escape.

Cowperwood’s banyan-like infiltration of the city is on full display in the text. Having established himself in Chicago, he quickly takes control of, and merges, the Chicago Gas, Light, and Coke Company, The People’s Gas, Light, and Coke Company, the South Side Gas Company, and the North Chicago Gas Illuminating Company into the newly formed Lake View Gas and Fuel Company and the Hyde Park Gas and Fuel Company, respectively. After making a killing through these mergers, Cowperwood incorporates the Chicago Trust Company, and uses it as a holding company for countless street railway corporations. He then reorganizes his corporate structure, with “much toiling and moiling on the part of his overworked legal department,” and reconsolidates his enterprises in the Consolidated Traction Company of Illinois, whereby each of his subsidiary railway lines becomes its own corporation (429). After he sets up and inhabits his corporate network, Cowperwood “was like a canny wolf prowling in a forest of trees of his own creation” (362).<sup>180</sup> Like the banyan tree, Cowperwood extends his rhizomatic corporate network across the city; like the canny wolf (and Jay Gould), he navigates this network with stealth and power and wrests financial and political control of the city from more conservative financiers, like Arneel, Hand, Merrill, and Schryhart.

Matthew Blacklock, similarly, uses corporate finance and stock manipulation to produce his own nomadic transformations. He, too, understands the “endless chain” of corporate bodies and theoretically infinite restructurings that the law makes possible. Blacklock describes the financier’s “reorganization” process:

First, buy the comparatively small holdings necessary to create confusion and disaster; second, create confusion and disaster, buying up more and more wreckage; third, reorganize; fourth, offer the new stocks and bonds to the public with a mighty blare of trumpets which produces a market boom; fifth, unload on the public, pass dividends, issue unfavorable statements, depress prices, buy back cheap what you have sold dear. Repeat *ad infinitum*, for the law is for the laughter of the strong, and the public an eager ass. (52)

Blacklock’s rise to the top begins through his participation in these very tactics with other financiers, like Mowbray Langdon and Henry Roebuck (based on Carnegie and Rockefeller, respectively). Blacklock invests heavily, buying stock in the Manasquale mines, National Coal and Railway Company and the Textile Trust. When his rival financiers double-and-triple cross him, Blacklock engages in an impossibly rapid and complex succession of stock and bond transactions in an effort to free himself from “an inextricable tangle” of corporate holdings (75).

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<sup>179</sup> *Id.*, at 68.

<sup>180</sup> Deleuze and Guattari laud the action of “becoming-wolf” and use the wolf as one of the primary examples of rhizomatic assemblages. They note “In becoming-wolf, the important thing is the position of the mass, and above all the position of the subject in relation to the pack or wolf-multiplicity: how the subject joins or does not join the pack, how far away it stays, how it does or does not hold to the multiplicity,” at 29. Cowperwood, as a banyan and as a wolf, truly reflects nomadic deterritorialization within a rhizomatic structure.

Blacklock deftly navigates the tangle and extricates himself from the chaotic market. Financially damaged but not destroyed, Blacklock reveals that “My whole life has been a series of transformations so continuous that I had noted little about my advance, beyond its direction,” but during this recent flurry he caught himself “in the very act of transformation” (109). This transformation involves Blacklock’s flight from Manasquale, National Coal and Railway, and Textile Trust and his reterritorialization in a new corporate network.

In the process, he transforms himself from a financial speculator into a financial wrecker: a la Jay Gould, Blacklock decides to take down his rival financiers through a series of newspaper exposés. He sells all of his stocks and bonds in his various corporate enterprises, locks the cash in a vault, and through his articles causes a financial panic known as “Wild Week.” After “Wild Week” depresses and nearly destroys the stock market, Blacklock buys back all of his stock and bonds – and then some – at a fraction of the cost. He “reorganized” not just a corporation, but countless corporate bodies. Indeed, Blacklock reorganizes Wall Street itself.

Blacklock in effect becomes a nomadic “war machine.” Deleuze and Guattari describe the nomadic war machine and line of flight in the following terms: “Then, on the horizon, there is an entirely different kind of line, the line of the nomads who come in off the steppes, venture a fluid and active escape, sow deterritorialization everywhere, launch flows whose quanta heat up and are swept along by a Stateless war machine.”<sup>181</sup> The nomad war machine is creative, fluid, and always unexpected. It makes new assemblages of techniques and technologies, allowing the nomads to engage in rapid-fire shock-and-awe campaigns, often disappearing to the forest or desert as fast as they emerged from them. Blacklock engages in exactly this behavior, sowing deterritorialization throughout the financial markets. Wild Week was a massive reworking of corporate connections that created new, unexpected financial assemblages.

Financial nomadism seems to come naturally to Burning Daylight, too. His experiences in the Yukon Territory produced capacities perfectly suited to navigating within and through networks of corporate bodies. London explains that Daylight’s success as a financier results from the fact that “no one knew where or how the next blow would fall. The element of surprise was large. He balked on the unexpected, and, fresh from the wild North, his mind not operating in stereotyped channels, he was able in unusual degree to devise new tricks and stratagems” (195). Upon arriving on Wall Street, Daylight gets involved in a “bull campaign” regarding the Ward Valley Copper Company, only to have several other financiers double-cross him and fleece him of his entire \$11 million fortune. Daylight the nomad goes into action, unexpectedly barging into his enemies’ office, pulling a Colt handgun, robbing his money back, and then fleeing on a train to San Francisco. He threatens physical retribution if his rivals seek recourse, legal or otherwise. They robbed him through the market, he merely returned the favor with his Colt.

His arrival in San Francisco perplexes the financial world. It was known that Daylight lost his fortune, yet

he immediately reappeared in San Francisco possessing an apparently unimpaired capital. This was evidenced by the magnitude of enterprises he engaged in, such as, for instance, Panama Mail, by sheer weight of money and fighting power wresting the control away from Shiftily and selling out two months later to the Harriman interests at a rumored enormous advance. (194)

Daylight then initiates one tumultuous transaction after another, entering and exiting corporate bodies at a rapid rate. He takes over the California & Altamont Trust Company, but abandons it when attacked by the Lake Power and Electric Lighting Corporation. He then acquires the

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<sup>181</sup> Deleuze and Guattari, at 222.

Coastwise Steam Navigation Company and then the Hawaiian, Nicaraguan and Pacific-Mexican Steamship-Company. After extracting his profits and disposing of the steamship companies, he purchases and incorporates new corporations to re-build the city of Oakland. His corporate network grows so vast that Daylight boasts: “I’ve got more companies than you can shake a stick at. There’s the Alameda & Contra Costa Land Syndicate, the Consolidated Street Railways, the Yerba Buena Ferry Company, the United Water Company, the Piedmont Realty Company, the Fairview and Portola Hotel Company, and a half a dozen more that I’ve got to refer to a notebook to remember” (328). Daylight inhabits and navigates his network to produce an entirely new city and, in the process, accumulates massive financial capital.

These corporate networks do more than just allow financiers to accumulate wealth; they also allow the nomad financiers to evade legal (and financial) discipline and punishment. As the financier flees from one corporate body to the next, only the legal shell of the corporation remains to answer for the financier’s misdeeds and financial liabilities. The law focuses on the corporate body (on the “paper” charter and the corporate person), not the financier’s physical body or personal financial assets.

The financiers use these corporate bodies to evade physical, financial, and legal retribution. In Foucaultian terms, the financier is able to substitute a fictitious legal body for his own, thus evading the “‘political economy’ of the body” that our society’s systems of punishment use to discipline and punish illegal and aberrant behavior; for, with discipline it “is always the body that is at issue – the body and its forces, their utility and their docility, their distribution and their submission.”<sup>182</sup> Through his flight in and out of corporate bodies, the financier is the rare individual who can situate himself outside biopower’s networks and escape the institutional networks’ “compact functioning of the power to punish: a meticulous assumption of responsibility for the body and the time of the convict, a regulation of his movements and behavior by a system of authority and knowledge; a concerted orthopaedy applied to convicts in order to reclaim them individually.”<sup>183</sup> The nomad financier leaves behind only the corporate body (the paper), which the institutionalized disciplinary forces crumple to no purpose.

This evasion of discipline and punishment is evident when Cowperwood’s rivals plan to simultaneously call each of his corporate loans in an effort to bankrupt the financier and drive him from the city. One rival notes that “It would only be just if he could be made to pay for [causing a financial panic],” adding that “he has been allowed to play fast and loose long enough. It is time someone called a halt to him” (388). Of course, bringing the financier to a halt is easier said than done. The ring of Chicago businessmen quickly find that Cowperwood has long been plundering his corporate network, and that “Out of the cash drawers of his various companies he took immense sums, temporary loans, as it were, which later he charged by his humble servitors to ‘construction,’ ‘equipment,’ or ‘operation’” (362). Through these methods Cowperwood amasses a secret, ancillary fortune in anticipation of his rivals’ tactics. They can demand that his corporations pay the loans, but Cowperwood has already extracted his fortune and he, personally, owes money to nobody. The looted corporations are on the brink of insolvency, and calling their loans will be a fruitless gesture that will only compound the city’s financial panic. Cowperwood (and his fortune) will remain untouched. His enemies cannot punish him due to his ability to navigate and utilize his corporate network—he remains one step ahead, always on the move.

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<sup>182</sup> Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan. New York: Vintage, 1977, at 25.

<sup>183</sup> Id. at 130.

After realizing the Cowperwood has left only corporate shells as the site for their vengeance, the leaders of the Chicago ring ask “Could he thus flaunt their helplessness and his superiority in their eyes and before their underlings and go unwhipped?” (396). The answer, of course, is yes, he can. They can try to whip the looted corporate bodies, but not the financier himself. The corporate body always shields the physical body.

Blacklock and Daylight likewise use their respective corporate bodies to avoid personal liability and to escape personal bodily discipline and punishment. Blacklock emerges at the end of the novel as an extremely wealthy financier, but during his financial nadir in the weeks prior to Wild Week the public, the law, and the market all turned against him. Still, he avoids each of these institutional disciplinary regimes by staying one step ahead of them within his corporate network. When Mowbray Langdon and other rivals spring their financial traps to bring Blacklock down, he announces “before the Langdons or anybody else can have Blacklock pie, they’ll have first to catch their Blacklock” (64). But catch him they never will, because they are attacking only his corporate bodies; as Blacklock puts it: “You are insulting a purely imaginary, hearsay person” (105). Blacklock is not his corporate identities or securites. He is always on the move, navigating corporate networks faster than his rivals. Tapping his forehead, Blacklock concludes that “they might take away my money. But if they did, they would only be giving me a lesson that would teach me how more easily to get it back. I am not a bundle of stock certificates or a bag of money. I am—here” (94). He immediately submerges into the market, plots Wild Week, sells his holdings, out-maneuvers Langdon and Roebuck, and emerges on top with new and immense corporate holdings.

Daylight makes a similar observation about the impossibility of disciplining or punishing fictional corporate bodies, comprised only of charters, stocks, and bonds. Financial panic strikes and Daylight’s future wife, Dede Mason, laments that everything will be destroyed if he cannot save his corporate enterprises. The financier responds that “Nothing will be destroyed, Dede, nothing. You don’t understand this business game. It’s done on paper,” and, accordingly, if his corporations go bust, “it won’t alter one grain of sand in all that land” (407). He admits investors will lose money and that there will be temporary receiverships, but he and Dede will be fine. In fact, prior to “going bust,” he transfers (by means of a fraudulent conveyance) his Sonoma ranch to Dede’s name. As the economy crashes, Daylight announces “I’m going off to the sunshine, and the country, and the green grass” (409). Dede and Daylight marry soon thereafter, and Daylight gets his ranch back. The ranch, incidentally, is sitting on gold deposits worth millions of dollars. Daylight will potentially break even, at worst, if or when he decides to reorganize the ranch property into the gold mine that he has already envisioned in great detail.<sup>184</sup> Indeed, each time Daylight has one of these organizing visions in the novel, he carries out the envisioned enterprise.

The financier’s limited personal liability results in the emergence of a new morality that embodies both the power and evasiveness of nineteenth-century corporate law. The economic strength and legal impunity that corporate legal codes afford the financiers enable them to, borrowing from Nietzsche’s moral theory, engage in a “radical revaluation of their enemies’ values,” by erecting their own moral code and freely exercising their corporate will to power.<sup>185</sup>

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<sup>184</sup> It has been suggested that Daylight is reformed after successfully quitting the financial world, see Earle Labor and Jeanne Campbell Reesman. *Jack London, Revised Edition*. New York: Twayne, 1994, at 98.

<sup>185</sup> See Friedrich Nietzsche, “On the Genealogy of Morals,” in *The Basic Writings of Nietzsche*. Trans. and Ed. Walter Kaufmann. New York: Random House, 2000, at 470. In Nietzschean terms, the financiers defy the “herd instinct” and the “slave morality” that the resentful, weaker members of society attempt to impose upon them.

Echoing these Nietzschean sentiments, near the end of Dreiser's *The Titan*, Cowperwood's twenty-year-old mistress begins to see the powerful financier as "a kind of superman, and yet also a bad boy" (425).<sup>186</sup> This corporate morality allows the financier to run roughshod over traditional norms and values. The financier becomes his own value-positing "I" and wipes clean any preexisting genealogy of morals. Indeed, at the beginning of *The Deluge*, Blacklock scoffs at the very concept of genealogies and makes clear that the strong do not require historical or normative justifications for exercising their will to power, noting that

When Napoleon was about to crown himself—so I have somewhere read—they submitted to him the royal genealogy they had faked up for him. He crumpled the parchment and flung it in the face of the chief herald, or whoever it was. "My line," said he, "dates from Montenotte." And so I say, my line dates from the campaign that completed and established my fame—from "Wild Week." (3)

Indeed, from the first lines of the novel Blacklock shows no patience for "faked up" genealogies and moral platitudes. After his Napoleonic reference, he paraphrases Schopenhauer, noting "It was a great day for fools when modesty was made a virtue," and goes on to laud the Nietzschean will-to-power character traits that he, Blacklock, possesses: instinctual action, self-assertion, and aggressive individuality (3).

Blacklock is the consummate man of action—he is not the rational man, but the intuitive man who allows his instinct toward power to govern. He essentially kidnaps and forces his wife, Anita, to marry him. His strength, in the end, convinces her the abduction was a good thing. He uses his newspaper column to inflate and deflate stock prices to enrich himself, and he uses Wild Week to destroy his enemies, cripple the economy, and make himself filthy rich. He justifies his various stock manipulations by noting that "it was—and is—right under the code, the private and real Wall Street code" (74). This new code mirrors corporate law's race to the bottom: it allows its adherents to designate their own moral capacities free from state intervention, which results in a pragmatic and efficient human subject who can defy social norms. Blacklock couches the new code in language of social Darwinism: "My morals are practical, not theoretical. Men must die, old customs embodied in law must be broken, the venal must be bribed and the weak cowed and compelled, in order that civilization may advance" (39). He tells us that his actions put him in "the small and truly aristocratic class of men who *do*"; traditional morality – "slave morality" – is for the sheep "trotting meekly up to be shorn or slaughtered" (22). Blacklock refuses to let anybody shear him, let alone lead him to slaughter. Ultimately, it is the wealth accrued through his corporate financial transactions that permits him, and his fellow financiers, to use the new code to guide (and justify) his actions. After Wild Week, Blacklock finds himself "at last in the position I've been toiling to achieve. I don't have to be prudent. I can say and do what I please, without fear of the consequences. I can freely indulge in the luxury of being a man" (111). The financier is above the law, and this transcendence permits him to dictate his own legal and moral codes.

Burning Daylight likewise sees society's moral code as another aspect of the "bunco game," and he holds in contempt the "fools" who blindly honor and respect the arbitrary rules of

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Instead, the financiers allow their instinct to dominate and engage in "vigorous, free, joyful activity," at 469. The nomad financier's new moral code allows him to act and grow spontaneously. His will to power takes over, since there is no accountability for his actions.

<sup>186</sup> For a detailed discussion of nineteenth-century "bad boy" literature and for a survey of the concept's popularity and evolution from Thomas Bailey Adrich's *The Story of a Bad Body* (1869) onward, see Trenskey, Anne. "The Bad Boy in Nineteenth-Century American Fiction," *The Georgia Review*, Vol. 27, No. 4 (Winter 1973), pp. 503-517.

law, morality, and ethics. He ignores social conventions, because “he failed to reverence the particular tin gods worshipped variously by the civilized tribe of men. He had seen totems before, and knew them for what they were” (159). Daylight enlists cutthroat teamsters in one of his corporate battles, which results in the corruption of the San Francisco city government. His conscience, London writes, “suffered no twinges...It was all gamble and war between strong men. The fools did not count” (223). A newspaper reporter confronts Daylight about these underhanded business practices. Daylight mocks the reporter and his “morality and civic duty”: “If you quit your job tomorrow and went to work on another paper, you would write just what you were told to write. It’s morality and civic duty now with you; on the new job it would be backing up a thieving railroad with...morality and civic duty, I suppose” (223). Strong individuals like Gould, Carnegie, and Morgan constitute their own legal and moral codes above and beyond commonplace traditions. The nineteenth-century financiers were the strongest of the strong, so they could lie, cheat, and steal.<sup>187</sup> When Daylight pulls his gun on the double-crossing financiers, he boasts “I’m Burning Daylight—savee? Ain’t afraid of God, devil, death, nor destruction. Them’s my four aces, and they sure copper your bets” (191). Freed from the fetters of both legal and moral accountability, the financier can engage in just about any behavior he wishes.

Dreiser’s Cowperwood takes full advantage of this chance to pursue his own path free from traditional moral constraints. Dreiser writes again and again that Frank Cowperwood seeks only to “satisfy himself.” Cowperwood’s moral compass points in whatever direction is most profitable (or pleasurable) for him at any given moment. He is an absolute moral relativist; he “subscribed to nothing” and “did as he pleased” (16). The financier takes what he can and has no qualms in doing so: “That thing *conscience*, which obsesses and rides some people to destruction, did not trouble him at all. He had no consciousness of what is currently known as sin. There were just two faces to the shield of life from the point of view of his peculiar mind—strength and weakness. Right and wrong? He did not know about those” (*The Financier*, 271). Cowperwood uses this freedom to not only engage in unethical business practices like bribery, blackmail, and price gouging, but also – much like Charles Yerkes himself – to indulge in countless sexual affairs with a host of very young women. In Philadelphia, he leaves his first wife for Aileen Butler, the daughter (whom he first met when she was a teenager) of one of his clients.

In *The Titan*, Cowperwood has over-lapping extramarital affairs with Ella F. Hubby, Josephine Ledwell, Rita Sohlberg, Antoinette Nowak, Stephanie Platow, Caroline Hand, Florence Cochrane, Ira Carter, and her daughter, Berenice Fleming, to name but a few. Cowperwood also becomes intimate with Cecily Haguenin, the daughter of sympathetic journalist (and friend), Augustus Haguenin. His “friend” discovers the affair and confronts the financier. Cowperwood does not justify his behavior; instead, he utters his familiar refrain on moral relativism: “There seems to be no common intellectual ground, Mr. Haguenin, upon which you and I can meet on this matter. You cannot understand my point of view. I could not possibly adopt yours” (239). Indeed not.

The financier cannot possibly adopt the moral point of view of the average person, because he is not subject to the same rules, regulations, or repercussions. Legally unassailable

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<sup>187</sup> London had a conflicting relationship with his “literary supermen,” such as Burning Daylight. He saw the strong financial-minded individual as advancing human and social evolution, but paradoxically saw individuals like Daylight as the vanguard of a socialist state. For a discussion of this perceived “Vulgarized Nietzscheanism,” see Geoffrey Hapham’s “Jack London and the Tradition of Superman Socialism,” in *American Studies*, Vol. 16, No. 1 (Spring 1975), 23-33.



and morally unaccountable, the financier gets to follow his own path free from social convention. Dreiser addresses the unusual financial, legal, and amorous tide that bears Cowperwood along, noting “An unconscious drift in the direction of right, virtue, duty? These are banners of mortal manufacture. Nothing is proved; all is permitted” (230).<sup>188</sup> The fact that law and morality hold any sway at all is proof that “The world is dosed with too much religion. Life is to be learned from life, and the professional moralist is at best a manufacturer of shoddy wares” (499). Copwerwood, Blacklock, and Daylight, like Gould, Carnegie, and Morgan, refuse to let traditional morality and social expectations cow them into actions that they consider to be beneath them. Their legal impunity results in their amoral (or immoral) approach toward business, sex, and to life more generally.

Corporate law’s race to the bottom provides the nineteenth-century financier with the legal tools to construct, inhabit, and navigate complex corporate networks. Corporate law becomes a veil behind which to hide, an impregnable shield for limiting personal liability, and a sword for making financial attacks. The financiers amassed so much wealth so quickly that they were able to capture the state’s regulatory apparatus and redefine the law to suit their own financial and personal needs. This power and wealth resulted in impunity from the law and dispensation from traditional moral opprobrium.

The condensed literary representations of these fourteen financiers helps crystalize their seemingly different personalities and tactics into singular characters available for detailed study and analysis. The literary prosopography displays common characteristics and behaviors that produce a hermeneutic model for understanding these newly incorporated persons in nineteenth-century America. The financiers instrumentalize the law and use corporate lawyers as tools of inequity. They fashion the law – through the race to the bottom – so that they can build up complex, root-like corporate networks. They flee from one corporate body in the network to the next, looting as they go and always avoiding personal liability for their actions. This new form of financial existence results in a race to the top of the economic world. The financier becomes an unassailable human subject in the eyes of the law. This legal impunity results in a moral indifference (or contempt), whereby a new “code” arises that allows the strong to take what they want and to satisfy themselves at the expense of the general population.

Berenice Fleming is correct: the financiers are, indeed, supermen. They magnify and augment their own personhood by stepping into and controlling the corporate person. And, as a result, they are also very bad boys. Jack London reaches precisely this conclusion in *Burning Daylight*:

Thus, all unread in philosophy, Daylight preempted for himself the position and vocation of a twentieth-century superman. He found, with rare and mythical exceptions, that there was no noblesse oblige among the business and financial supermen. . . . These modern supermen were a lot of sordid banditti who had the successful effrontery to preach a code of right and wrong to their victims which they themselves did not practice [sic]. With them, a man’s word was good just as long as he was compelled to keep it. (201)

These corporate supermen impose their will upon unincorporated individuals. David Graham Phillips’s financier is one of these new supermen. Blacklock states at the end of the novel that “My enemies caused it to be widely believed that ‘Wild Week’ was my deliberate contrivance for the sole purpose of enriching myself. Thus they got me a reputation for almost superhuman

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<sup>188</sup> These “banners of mortal manufacture” are reminiscent of Nietzsche’s comment on slave morality, where he states “But enough! Enough! I can’t take any more. Bad air! Bad air! This workshop where ideals are manufactured—its seems to me it stinks of so many lies,” *Genealogy* at 483.

daring, for satanic astuteness and cold-blooded calculation” (139). And Cowperwood, too, “came by degrees to take on the outlines of a superman, a half-god or demi-Gorgon. How could the ordinary rules of life of the accustomed paths of men be expected to control him? They could not and did not” (478). Perhaps, then, it is the nineteenth-century financier who emerges from his incorporated actor network with the corporate legal code in his hand who declares: “I TEACH YOU THE SUPERMAN. Man is something that is to be surpassed. What have ye done to surpass man?”<sup>189</sup>

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<sup>189</sup> Nietzsche, Friedrich. *Thus Spake Zarathustra*. New York: Dover, 1999, at 3.

## Chapter 3 - Marital Coverture and the Literary Reincorporation of Female Personhood

Summary: Chapter 3 focuses on persons that conventional legal history generally excludes from the discourse of corporate personhood: nineteenth-century married women. These married women were subject to the legal fiction of marital coverture. Under coverture, a husband and wife became one corporate body upon marrying, but only the husband's legal personality survived the merger. I offer a close reading of two novels – *John Andross* (1874) and *The Custom of the Country* (1913) – written by female naturalist authors who were themselves subjugated by marital coverture. I argue that Rebecca Harding Davis and Edith Wharton use the novel's fictive space to show how nineteenth-century women could model their behavior after emergent corporate forms to overcome the debilitating socio-legal effects of marital coverture. Davis's *John Andross* portrays Isabel Latimer, a woman who models her marriage after the emergent securitized industrial corporation, a new corporate form whereby each of the corporation's shareholders retained their individuality and economic independence. Isabel retains her legal personality in marriage by mirroring the new corporate form of her era. Wharton's Undine Spragg, the anti-heroine of *The Custom of the Country*, even more radically models her marital career after the holding company and the "merger wave" that it catalyzed at the turn of the century. Undine portrays the power of this corporate form (first perfected by Rockefeller's Standard Oil Company), through which one corporate body can merge with countless other corporate bodies, stripping them of their valuable assets through the process of vertical integration. Both authors suggest that access to the corporate person's methods and structures can increase a natural person's power and agency. Simply emulating corporate personhood enables these women to augment their natural persons and erase coverture's debilitating legal restrictions and civil death.

As discussed in detail in Chapter 1, in the case *Trustees of Dartmouth College v. Woodward* (1819), the Supreme Court established the legal fiction of corporate personhood by adopting Daniel Webster's argument that a corporation is a person entitled to constitutional economic protections. Justice Joseph Story, who inappropriately advised and colluded with Webster in formulating this argument, wrote a concurring opinion in the case. His opinion deploys the legal fiction of marital coverture as an analogy to support his argument that a corporate charter – a corporation's founding document – creates property rights immune from state interference.<sup>190</sup> Under coverture, or the doctrine of marital unity, a wife is incorporated or merged into her husband upon marriage. In its extreme application, coverture suspended a women's legal personhood during marriage (she could not own property, sign contracts, or sue under her own name).<sup>191</sup> In his concurrence equating the marriage contract with the corporate contract, Story states that "A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune, and to divest such

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<sup>190</sup> Newmyer, R. Kent. "Daniel Webster as Tocqueville's Lawyer: The Dartmouth College Case Again." *The American Journal of Legal History*, Vol. 11, No. 2 (Apr., 1967), pp. 127-147, at 141.

<sup>191</sup> Reid, Charles J. "The Journey to Seneca Falls: Mary Wollstonecraft, Elizabeth Cady Stanton and the Legal Emancipation of Women." *University of St. Thomas Law Journal: Fides et iustitia*. 10 U. St. Thomas L.J. 1123. Spring, 2013, at 1126.

right, without his default and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate.”<sup>192</sup>

Two historically significant legal fictions – corporate personhood and marital coverture – collide in this opinion, but the collision itself tells us next to nothing about their implications in American culture. These one-dimensional pronouncements of black-letter law are rife with socio-cultural blind spots. They fail to reveal how debilitating coverture was to a woman’s socio-economic standing and, in contradistinction, precisely how powerful a legal tool corporate personhood proved to be.

In this chapter, I shed light on these blind spots not only through an analysis of these concepts in legal opinions and black letter law, but also by giving a cultural account of the implications of these two legal fictions in nineteenth-century American law and society. In conjunction with an historical examination of coverture and the corporate person’s evolution in form, I turn to different textual sites where these legal fictions met once again at key moments in the history of the corporation: Rebecca Harding Davis’s novel *John Andross* (1874) and Edith Wharton’s novel *The Custom of the Country* (1913).<sup>193</sup> Davis’s narrative revolves around characters related in one way or another to the Gray Eagle Iron Works. Throughout the course of the novel, the Works evolve from a partnership to a securitized industrial corporation, which was a new corporate entity that emerged in the 1870s and allowed for a clear separation of investor ownership and managerial control of the business enterprise. Davis produces female characters whose marital relationships mirror this corporate evolution and opens the possibility for increased female control and agency within the marital enterprise. Wharton likewise invokes both legal fictions through her conspicuous allusion to Daniel Webster, the only historical person included in her text. Her protagonist, Undine Spragg, engages in several tactical marriage and divorce-related financial negotiations with her business-savvy father. During a pause in one such negotiation, Undine stares at a “blotched looking-glass that hung in a corner of the office under a steel engraving of Daniel Webster” and, suddenly, regains confidence in her business capacity and closes the deal (141). This scene conflates marriage, business, and the very lawyer who helped bring the legal fictions of coverture and corporate personhood together in *Trustees of Dartmouth College v. Woodward*.

Davis and Wharton both produce cultural avatars that embody coverture’s erasure of self and the corporate form’s prosthetic extension of personhood. They give these legal fictions social context and a human voice, while immersing them in a cultural moment that allows their implications to unfold in the novel’s fictive space. This fictive space enables us to envision the legal fictions interacting with one another in a way that a court case or black letter law never could. Isabel Latimer and Undine Spragg repeatedly refuse to allow coverture to erase their individual personhood and, instead, employ new systems of corporate consolidation in order to increase their individual social and economic agency. Like the financiers before them, these women use the incorporated actor network (in this instance, through imitating it rather than embodying it) to extend their capacities and magnify their own personhood. These authors invite the reader to imagine their characters as new corporate bodies that emerged first in the 1870s and again at the turn of the century: as the securitized industrial corporation and as the holding company, respectively.

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<sup>192</sup> *Trustees of Dartmouth*, 696-97.

<sup>193</sup> Davis, Rebecca Harding. *John Andross*. New York, Orange Judd Co., 1874. Wharton, Edith. *The Custom of the Country*. New York: Penguin Books, 1987.

Isabel Latimer emulates the emergent securitized industrial corporation to carve out more control over the marital enterprise, while Undine Spragg seemingly *becomes* a corporate conglomerate and turns coverture into an economic weapon. She engages in a series of mergers and acquisitions whereby she vertically integrates key assets from each corporate takeover – or marriage – and emerges as the dominant financial actor in the novel. The industrial corporation replaced rigid partnerships, allowing for more fluid changes in the enterprise’s ownership and control. Later, the holding company became a new corporate person that could suddenly subsume and assimilate other corporate persons via merger and acquisition. The resulting conglomerates (led by John D. Rockefeller’s Standard Oil Company), integrated the key assets of the companies they acquired, which allowed them to sustain unlimited growth and accumulate the unprecedented power and wealth that ushered in the age of corporate and financial capitalism. Each character’s respective reincorporation of *female personhood* via *corporate personhood* demonstrates the corporate form’s profound power to magnify a human being’s power in law and society. Together, Isabel and Undine represent yet another modality of personhood made possible through the corporate form.

### The First Legal Fiction: Coverture’s Erasure of Female Personhood

This section examines how nineteenth-century American law and society created a culture of dependence for women. The first half of the nineteenth century fostered the so-called “cult of true womanhood,” whereby society at large judged women (and compelled women to judge themselves) in accordance with their level of submissiveness, domesticity, piety, and purity.<sup>194</sup> It was a woman’s job to be a devoted wife and mother by providing the necessary care for her husband and children. In essence, and with few exceptions, American society and the cultural expectations it produced held women hostage in the domestic sphere. In addition to the cult of true womanhood, the discursive mechanisms of religious, medical, and economic institutions defined women as reliant on men and reinforced a kind of compulsory dependence.<sup>195</sup> In the early nineteenth century, there were few economic opportunities for women aside from marriage. Indeed, in the eyes of the law, young women were considered wards of the state until they married, at which point their wardship transferred to their husband.<sup>196</sup> In general terms, this near mandate to marry exhibits the constraints that nineteenth-century American law and society placed on women’s economic freedom and their potential for independence. More specifically, however, it is the doctrine of coverture that serves as the prime example of the socio-economic and legal disadvantages that nineteenth-century women faced in their fight for equal rights. Marital coverture by law merged a married woman into her husband’s legal identity, producing a single body in the eyes of the law. The principle of coverture attempted to erase married female personhood altogether.

The doctrine of coverture, or marital unity, is a British common law holdover which the U.S. inherited during the colonial period. In the simplest of terms, coverture dictates that upon marriage the husband and wife become a single person—the *husband*. In his *Commentaries on the Laws of England*, Blackstone defines coverture in the following terms: “By marriage, the

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<sup>194</sup> Welter, Barbara. “The Cult of True Womanhood: 1820-1860.” *American Quarterly*, Vol. 18, No. 2, Part 1 (Summer, 1966), pp. 151-174, at 152.

<sup>195</sup> Warren, Joyce W. *Women, Money, and the Law: Nineteenth-Century Fiction, Gender, and the Courts*. Iowa City: University of Iowa Press, 2005, at 62-63

<sup>196</sup> Hill, Ann Corinne. “Protection of Women Workers and the Courts: A Legal Case History.” *Feminist Studies*, Vol. 5, No. 2 (Summer, 1979), pp. 246-273, at 250.

husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything.”<sup>197</sup> He goes on to describe the husband as the wife’s baron and lord, who covers her with his protection and influence. Prior to marriage, a single female (a *feme sole*) retained, at least in theory, the same economic rights as a male. Upon marriage, however, she became a *feme-covert*, or covered female with little or no economic agency.

Coverture obviously had a profound effect on women’s lives. Under absolute coverture, a wife had no legal existence and became what the authors of the Seneca Falls *Declaration of Sentiments* described as “civilly dead.”<sup>198</sup> Under coverture, a women lost most of her substantive and procedural legal rights.<sup>199</sup> A married woman could no longer sue or be sued in court, own property separately from her husband, execute contracts, execute a will, or retain earnings from work she conducted outside the home without her husband’s permission; in addition, the husband held legal “title” to their children.<sup>200</sup> If her husband refused to represent her in court, a woman had to seek a “next friend,” or a male lawyer and guardian to plead her case.<sup>201</sup> Though she might retain title to property she brought to the marriage, her husband controlled any income and rents arising from those properties.<sup>202</sup>

Coverture not only dissolved a married woman’s economic rights at law, but also had dire consequences for her basic human and bodily rights as well. Under the common law principles stemming from coverture, a husband had the legal right to physically abuse his wife in order to adjust her behavior.<sup>203</sup> Through his right to consortium, a husband had property rights in his wife’s services, companionship, body, and sexuality.<sup>204</sup> If a wife continued to disobey her husband or refused his property rights to her body, a husband also had the right to institutionalize his wife in a mental asylum without a public hearing and without her consent. Norma Basch cites one such case, where, in 1860, the Reverend Theophilus Packard committed his wife, Elizabeth, to an Illinois insane asylum for three years because she “refused to recant religious views that he deemed detrimental to both his children and his church.”<sup>205</sup> Short of murder, coverture gave a husband absolute dominion over his wife.

Activists made efforts to reduce coverture’s restrictions throughout the nineteenth century. Among the most important efforts to limit coverture, at least at first glance, were the married women’s property acts that appeared during the middle of the nineteenth century. New York’s Married Women’s Property Act of 1848 (which set the standard and served as a model for other states) determined that a married woman could keep as “separate property” any property she

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<sup>197</sup> Blackstone, Sir William (1769). “Of Husband and Wife,” Book I, Chapter 15. *Commentaries on the Laws of England* (1765–1769). Lonang Institute. Retrieved 2015-06-24.

<sup>198</sup> Elizabeth Cady Stanton, *A History of Woman Suffrage*, vol. 1 (Rochester, N.Y.: Fowler and Wells, 1889), pages 70-71.

<sup>199</sup> Kanowitz, Leo. *Women and the Law: The Unfinished Revolution*. Albuquerque: University of New Mexico Press, 1977, at 36.

<sup>200</sup> Warren, at 45.

<sup>201</sup> Id. at 46.

<sup>202</sup> Zaher, Claudia. “When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture” 94 *Law Libr. J.* 459 (Summer, 2002), at 461.

<sup>203</sup> Warren, at 48.

<sup>204</sup> Reilly, Kimberley A. “Wronged in Her Dearest Rights: Plaintiff Wives and the Transformation of Marital Consortium, 1870-1920.” *Law and History Review* (31 *Law & Hist. Rev.* 61) (February, 2012), at 68.

<sup>205</sup> Basch, Norma. *Framing American Divorce: From the Revolutionary Generation to the Victorians*. Berkeley: University of California Press, 1999, 1974.

possessed at the time of marriage. Her husband could not divest the property, and she could retain rents and profits arising from that property.<sup>206</sup> However, historians have shown that these property acts did not have the effect – or, perhaps, even the intent – that one might expect. Indeed, it appears that judges and legislators likely decided to protect married women’s separate property in order to avoid the rash of bankruptcies that arose during economic recessions (the property acts were an attempt to keep some property safe from a husband’s creditors). In other words, states may have instituted the property acts in the name of family economy, not only to advance women’s rights.<sup>207</sup>

It is also likely that states initiated married women’s property acts to protect the property rights of wealthy fathers, who were concerned that their sons-in-law would squander their daughters’ dowries or inheritances.<sup>208</sup> In addition, judges engaged in a relentless assault on these property acts, and in case after case their conservative interpretations negated the law’s utility for women.<sup>209</sup> States likewise enacted earnings and wage laws, whereby married women had a legal right to earnings from work they conducted outside the home. Predictably, though, in most cases “husbands were allowed to claim their wives’ earnings from third parties until well into the twentieth century, prevailing over defendants’ objections that the wife was the proper party to recover.”<sup>210</sup> Despite these few (and largely ineffectual) efforts to the contrary, nineteenth-century American law and society erased a married woman’s legal (and, subsequently, economic) personhood.

Admittedly, despite the economic and cultural compulsion to marry, women could choose to remain single – or retain their *feme sole* status – and enjoy the economic rights to which men were entitled, at least in theory. Several factors made this “alternative lifestyle” a difficult reality for women. First, there were few attractive jobs available to nineteenth-century women. Women could work in emerging industrial factories or in traditional domestic capacities, but they were barred from high-paying professions. The case of Myra Bradwell is indicative of the limitations the law imposed on married women’s professional opportunities. Though Bradwell was married, her husband helped her successfully petition the Illinois legislature to retain her *feme sole* status in order to publish the *Chicago Legal News*, a profitable professional bulletin. However, when she petitioned the state to be admitted to practice law (a profession for which she was qualified), the Illinois Supreme Court denied her that right, noting that “God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws.”<sup>211</sup> The case eventually wound up before the U.S. Supreme Court, where another group of male judges ruled against Bradwell and her right to practice law. Justice Bradley’s concurring opinion stated that “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.”<sup>212</sup>

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<sup>206</sup> 1848 N.Y. Laws 307.

<sup>207</sup> Hoff, Joan. *Law, Gender, and Injustice: A Legal History of U.S. Women*. New York: New York Univ. Pr., 1991, at 122.

<sup>208</sup> *Id.* at 124.

<sup>209</sup> Warren, at 50-52.

<sup>210</sup> Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2136 (1994), at 2157.

<sup>211</sup> *In re Bradwell*, 55 Ill. 537.

<sup>212</sup> *Bradwell v. The State of Illinois*, 83 U.S. (16 Wall.) 130 (1872).

Nineteenth-century American law, society, and culture also barred women from other professions using a similar “jurisprudence of separate spheres.”<sup>213</sup>

Unsurprisingly, the law was far less stringent when it came to granting women access to low-paying and menial jobs that men had little interest in doing themselves. Women could set aside their God-given destiny and mission to be wives and mothers, it turns out, in order to work in factories, sweatshops, and on assembly lines, just not to attend college or practice a profession. If women decided to remain unmarried, the law likewise intervened to ensure that women could not earn enough money to comfortably support themselves at these menial jobs. These women laborers were subject to the “living wage” or “family wage,” which did not regard a female worker as an independent labor unit. That is, the *family* was considered the labor unit, and the living wage was set to be enough for a man to support a wife and children who stayed out of the labor force. States generally set the living wage at about \$8 a week at the turn of the century, with \$7 representing the level of bare existence.<sup>214</sup> The 1905 census showed that 20% of women laborers earned less than \$4 a week, 50% earned less than \$6 a week, and nearly 80% earned less than \$8, the generally accepted living wage to comfortably support life.<sup>215</sup> The law permitted this state of affairs since a woman’s income, whether or not she was married, was considered supplemental, and merely added to the husband’s goal of reaching the acceptable living wage. As one historian put it, “A woman’s wage was enough to keep from starving but not enough to make leaving home attractive.”<sup>216</sup> Female labor remained a very unattractive prospect.

If circumstances nonetheless compelled a woman to work at a menial task for low pay, the law added still more handicaps to her efforts to support herself. Several key cases upheld state laws that provided “protective legislation” for women. Despite the fact that the Supreme Court had already determined that protective legislation for workers was unconstitutional, they held that states could nonetheless limit the type and duration of work for *women* workers. In *Muller v. Oregon* (1908), the Supreme Court – relying on the now famous “Brandeis Brief” – held that the state could cap the amount of hours a woman could work, so as to protect her fragile health and weaker constitution. The Court observed that “history discloses the fact that woman has always been dependent upon man” and that for the sake of preserving her procreative and domestic capacities, “she is placed in a class by herself, and legislation designed for her protection may be sustained.”<sup>217</sup> *Muller* opened the door to state regulation of female workers, which resulted in various states denying women the right to work the hours she wished to work, during the evening, and at certain kinds of jobs.<sup>218</sup>

This stacked deck against women’s labor rights resulted in, as Joyce Warren observes, the societal expectation “that after marriage the woman would not have to work anymore—outside the home, that is. And certainly when the alternative was a twelve- to fourteen-hour day and low pay, it is not surprising that women were willing—even eager—to comply with society’s expectation if they could.”<sup>219</sup> This discouraging saga of nineteenth-century women’s

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<sup>213</sup> Dachman, Virginia D. *Enterprising Women: 250 Years of American Business*. Chapel Hill: University of North Carolina Press, 2002, at 64.

<sup>214</sup> Persons, C. E. “Women’s Work and Wages in the United States.” *The Quarterly Journal of Economics*, Vol. 29, No. 2 (Feb., 1915), pp. 201-234, at 228.

<sup>215</sup> *Id.* at 208

<sup>216</sup> Kwolek-Folland, Angel. *Incorporating Women: A History of Women & Business in the United States*. New York: Twayne, 1998, at 93.

<sup>217</sup> *Muller v. Oregon*, 208 U.S. 412 (1908).

<sup>218</sup> *Radice v. New York*, 264 U.S. 292 (1924).

<sup>219</sup> Warren, at 56.



labor rights is a long-winded way of saying that during this era American law and society compelled women to marry. Marriage and the accompanying prospect of coverture's erasure of legal personhood was, in a relative way, a better alternative to slaving at an awful task for a fraction of a male's wages. The next section examines a cultural representation of a woman struggling to find balance between retaining her personhood and committing to a marital relationship.

#### The First Literary Fiction: Davis's *John Andross* and the Securitized Industrial Corporation

The dearth of criticism surrounding Rebecca Harding Davis's work (with, perhaps, the exception of *Life in the Iron Mills* [1861]) is difficult to explain. In the 1860s and 70s Davis was at the vanguard of literary realism and naturalism—indeed, she helped found the genres in American literature. She also had a large body of excellent work and tackled controversial political and social subjects relating to law, gender, and inequality in both her fiction and nonfiction. It is worth considering that the contemporaneous reception of her work – and the subsequent shortage of critical responses that followed in its wake – was due to the fact that Davis was a married woman trying to forge her own career in the face of gendered legal and economic restrictions. Her letters reveal that her primary editor at *The Atlantic Monthly*, James T. Fields, often dismissively overrode her decisions regarding story titles and content and that economic pressures and gender dynamics forced her to accept all of his “suggestions,” regardless of merit.<sup>220</sup> Additionally, her husband, lawyer and activist Clarke Davis, “identified her work as secondary to his own and secondary to her roles of wife, mother, and housekeeper.”<sup>221</sup> Indeed, Davis appears to be a female business woman struggling with precisely the socio-legal handicaps described in the previous section: she faced a male-dominated economic system and she was compelled to erase key aspects of her own personhood to serve her husband and family in the domestic sphere.

It should come as no surprise, then, that Davis's work addresses coverture's socio-economic and legal inequities. As early as 1868, Davis was criticizing the marital dependence and the economic handicaps that nineteenth-century women faced. In her short story “In the Market,” Davis writes “These rules of custom that face me, turn where I will, are not of [God's] making. He never meant that marriage should be the only means by which a woman should gain her food and clothes, and provide for her old age.”<sup>222</sup> Yet, regardless of god's intent, by 1874 little had changed and American society still attempted to hold women hostage in the domestic sphere. This section shows how, in her novel *John Andross*, Davis challenges this notion of separate spheres and sets up a character space whereby the men are generally hapless business practitioners while the women have the talented transactional minds. However, due to the legal restrictions of coverture, strict divorce laws, and society's denial of equal economic opportunities to women, mid-century America compelled these female characters to use their astute business sense to seek financial success through marriage—not in the traditional marketplace. Unfortunately, these business women had limited financial models to assist them in planning their business ventures. With a few exceptions (*i.e.*, railroad corporations), the 1870s were a decade of business partnerships, loosely organized cartels, and small, closely held corporations

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<sup>220</sup> Harris, Sharon M. *Rebecca Harding Davis and American Realism*. Philadelphia: University of Pennsylvania Press, 1991, at 57-58 and 66.

<sup>221</sup> *Id.* at 17.

<sup>222</sup> Davis, Rebecca Harding. *The Rebecca Harding Davis Reader: Life in the Iron Mills, Selected Fiction, And Essays: Edited, with a Critical Introduction by Jean Pfaelzer*. Pittsburg: University of Pittsburg Press, 1995, at 207.

that were not readily available to business owners and that had no public market for their securities. Corporate bodies could not readily merge and remerge with one another in the 1870s, so Davis's female characters – Anna Maddox and Isabel Latimer – were stuck with the only business decision available to them: to incorporate a single time through marriage. Davis shows how these limited corporate bodies might result in unfortunate matches, but also how certain creative business minds might pave the way for different corporate structures in the realms of both marriage and business.

*John Andross* is a little-read novel loosely based on the events surrounding William “Boss” Tweed’s “whiskey ring,” which operated in New York City during the 1860s. Tweed’s whiskey ring was essentially a group of distillers that evaded paying tax on their whiskey by bribing the tax collectors to look the other way as they sold untaxed whiskey to wholesalers and the public. The ring’s illicit proceeds helped to bankroll Tweed’s infamous political machine.<sup>223</sup> The titular character, John Andross, is the ring’s lobbyist, which is headed by Houston Laird (the Tweed-like character who also controls a railroad corporation called the National Transit Company). The novel opens with the irresolute Andross hiding from Laird in the wilds of rural central Pennsylvania. In an attempt to escape the ring’s corruption, Andross is working at the Gray Eagle Iron Works (a sole proprietorship) alongside Clay Braddock, the stereotypically priggish Calvinist who manages the Works for Judge Maddox. In an effort to keep his whereabouts secret, Andross embezzles money from the Works to satisfy a blackmail threat from a former business associate. This act sets the narrative in motion and Davis goes on to loosely depict the whiskey ring, the political corruption it spawned, and the burgeoning relationships and intersecting love triangles that arise involving both the conniving Anna Maddox and the steadfast Isabel Latimer.

The male characters in the novel are – to the man – complete failures at business. Andross is a “man of wax,” who is easily manipulated throughout the course of the novel (53). He mismanages his finances and remains a dupe until the very end. Clay Braddock squanders his life savings in an effort to cover up Andross’s embezzlement, but does so secretly and therefore with no credit or security. He spends most of the novel in economic ruins. Colonel Latimer, Isabel Latimer’s father, is a dreamer and a hapless inventor whose experiments at producing cheaper forms of iron inevitably fizzle out as his inherited wealth slowly dwindles away. Anna Maddox’s father, Judge Maddox, is a clueless financial operator who loses most of his savings, following Houston Laird’s counsel, in a bad stock investment. Laird’s assistant, Ned Willitts, is a cats-paw with no sense of what he might do without the whiskey ring’s easy money. Laird, the supposed “modern Aladdin, building palaces of jewels by rubbing on miraculous nothings called stocks, as unreal as old lamps,” is actually a business failure: the ring collapses and we find that the National Transit Company is, in fact, a bankrupt corporate shell that Laird has been using to disguise the illicit whiskey cartel (87).

Davis uses these male business failures to destabilize the notion of separate masculine and feminine economic and domestic spheres.<sup>224</sup> She shows that there are no clear-cut boundaries between the two, and that emergent industrial capitalism was blurring the spheres and challenging traditional notions of gender and economy. The first step in her critique of the

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<sup>223</sup> See generally *Conspiracy of the Whiskey Ring Against Collector J.F. Bailey. Official Reports & Confessions*. New York: Wm. C. Bryant & Co., 1869. See also, Harris, Sharon M. *Rebecca Harding Davis and American Realism*. Philadelphia: University of Pennsylvania Press, 1991, at 182-90.

<sup>224</sup> Kerber, Linda K. “Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History.” *The Journal of American History*, Vol. 75, No. 1 (Jun., 1988), pp. 9-39.

separate spheres is to have each of the male characters (*i.e.*, the business failures) ridicule a woman's ability to engage in business. In one such instance, Laird is attempting to explain the distinction between stock gambling and legitimate brokerage to Isabel Latimer, who has the most astute business mind in the novel. He refuses to go into detail, since "Young ladies hardly understand financial operations clearly enough to comprehend technicalities" (139). Later, Braddock prepares to explain the nature of mortgages to Anna Maddox (the novel's only character who rivals Isabel's business savvy) only to find his efforts pointless, for "what did this foolish, romantic child know of securities or mortgages" (208). He then talks to Andross about Anna's (feigned) fear that her father's financial trouble will force her into an arranged marriage, noting that "Her account of business matters is very unintelligible, as you may suppose" (224). Isabel later asks her father, Colonel Latimer, what is transpiring between his tax collectors and the whiskey ring, to which he responds "Nothing, my dear, nothing you could understand. Business, business" (254). As he leaves the room, Latimer turns to his associate with this sage advice: "Always keep clear of women if you want to attend to business properly, Bowyer" (288). In the final pages of the novel, Latimer declares once again that "women always do make a mess of business" (314).

The second aspect of Davis's destabilization of gendered spheres is the device that these male critiques of feminine business prowess are, in fact, self-reflexive. After having the male business failures criticize a woman's ability to conduct business, she overtly characterizes each of these male figures as feminine. Isabel tells her future husband, Braddock, that "You love like a woman, Clay" (47). Andross has a face "full of fine sensitiveness, and eager and appealing as a woman's" (49). She tells us that Andross, "like a woman, must have sympathy at every step" (76). He has "womanish, brilliant eyes" (103) and a "hand as small and nicely kept as a woman's" (268). Laird's right hand man, Ned Willitts, has "dainty feet" and is in the habit of "waving his little ringed hand" while ending his sentences in a "conscious giggle" (151). Even Colonel Latimer, the hale Civil War veteran, is susceptible to moments of feminine (or domestic) sentiment while lounging around in his slippers and morning-gown, "As soon, however, as he was out of his morning-gown, and installed in his stiff office-suit, these lax domestic feelings were sent to the right-about" (240). Davis's feminization of the failed businessmen anticipates Joan Scott's critique of the separate spheres thesis, whereby "Gender is not a fixed division of labor or a fixed ideological division between men and women; it is always being worked on and always being produced. Business is not reflecting or appealing to stable beliefs in gender, or to a set of fixed social relationships; rather it is producing these beliefs and relationships in contradictory and unstable ways."<sup>225</sup> Davis ironically shows that these chauvinistic men are the subjects of their own critique of feminine business prowess.

It is Davis's female characters who possess the real business savvy in the novel, but American law and society in the 1870s denied them access to the economic sphere and compeled them to channel those abilities into marital transactions—transactions largely limited to a single and non-severable act of incorporation. Strict divorce laws and basic corporate forms made a single bad business decision difficult to remedy, something Davis makes clear in the novel's first marriage. She also reinforces the notion that society compels women to marry. Laird refers to a woman's mandate to marry – and, in so doing, conflates marriage and business – when he observes that "The boy is trained from his cradle to make money, and the girl to marry a rich husband. It's all push, climb, heat, and struggle from the beginning" (133).

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<sup>225</sup> Scott, Joan W. "Comment: Conceptualizing Gender in American Business History." *The Business History Review*, Vol. 72, No. 2, Gender and Business (Summer, 1998), pp. 242-249, at 246.

Davis's first business-savvy female character, Anna Maddox, is a cut-throat operator who always has "her own business to transact with every man present" (160). Laird recognizes her keen mind, observing that he does not "know a shrewder little practitioner in society," to which Isabel Latimer adds "She is full of art. I never knew anybody who was more persistent in laying her plans, or showed more skillful duplicity in carrying them out" (144). Andross, Braddock, Willitts, and others each think Anna intends to marry them, but she is constantly in business negotiations with these potential targets. While considering marriage to Andross, Anna ponders how "It was so absurd in men, at any rate, to wrap themselves up in the dignity of their political schemes and business plans, 'when I can do with any of them what I please—just what I please!'" (101). Anna remains aware, however, of the limitations society places on women. When Andross speaks of his enslavement to the whiskey ring, Anna scoffs that Andross's servitude pales in comparison to a woman's compulsory dependence: "it's all nonsense to say *any man* out of jail is hampered in this free country. *You* are free. You can go into business and marry, and vote, or go to housekeeping, or be sent to the legislature, or any of those things" (106, my emphasis). Anna is far less free, of course. We know her business (and political) opportunities are limited, she cannot vote, she cannot enter a profession, and no woman was elected to a state legislature until 1894. She can, however, marry. And she makes that her business.

Anna manipulates Andross into resuming his work for Laird and the whiskey ring, only now as a state senator. When Andross steps out of line and threatens the passage of Laird's Transit Bill, Anna must intervene to ensure Andross's lucrative salary (and her father's large investment in the National Transit Company, which, recall, is the corporate cover for the whiskey ring). When she proposes to go to the state capital to manipulate Andross, one of the many paternalistic male characters, General Ralston, breaks in: "I would not encourage my child in that style of talking, Maddox. We've enough of it from petticoated brokers and reformers. You ought to have sense enough to keep your little head steady on your waltzes and dresses, Anna. A woman's strength lies in her femininity" (200). Indeed, it is her feminine business sense that leads to her cool response, when she matter-of-factly informs Ralston that, "Nevertheless, I shall pass the bill for you, General, while you sit growling at home" (200). She dashes off to Harrisburg the next morning to take care of business.

Ultimately, however, the young Anna makes a bad business decision and must deal with the consequences that the legal restrictions of the 1870s impose upon her. She ultimately passes on the volatile Andross, the low-yield Braddock, and the start-up enterprise Willitts, and clandestinely marries Julius Ware, the one-time corrupt journalist and now a con-artist preacher. Anna made the wrong investment, and she seems to sense it immediately. She longs to renegotiate, perhaps through a new marriage with Andross or Bislow, the older and wealthier suitor to whom her father is indebted. Ware, however, demands her submission, and she reluctantly complies, stating: "There are men who would not hold me in this miserable bondage, even if they had the power. They serve me as slaves—they are glad of one kind look. They do not guess what I am!" (204). Indeed, nobody guessed what she was until the end of the novel: a married woman (and, consequently, incorporated into Ware). Her poor decision ruins her father, Judge Maddox, who hoped for a more lucrative corporate venture: "Married! To a starving Preacher! How in Heaven's name am I to meet Bislow's mortgage, now?" (303). Anna begs her father to take her away and save her from the misconceived marriage, but the Judge understands the law, noting that "You will go with your husband as soon as he comes to claim you" (305). And Julius does, indeed, lay legal claim to his property. The novel ends with an impoverished Anna saddled to Ware while "she served and drudged for her big, lazy Baal" (320).

Two slowly developing institutions thwarted Anna's business progress. First, divorce law in 1870s Pennsylvania left little room to dissolve the marriage union. Though once considered a "divorce haven" to puritanical minds, Pennsylvania had very strict standards for attaining absolute divorce in the nineteenth century. In Pennsylvania, the grounds for divorce were adultery, bigamy, four years of desertion, remarriage on the false rumor of death, cruel and barbarous treatment by the husband, the wife's lunacy, and two year's imprisonment on a felony charge.<sup>226</sup> Add to these limited grounds for divorce the fact that in many cases the "guilty party" in the divorce suit could not remarry.<sup>227</sup> Men also generally retained "title" to the children and received child custody by default until late in the century.<sup>228</sup> In the rare case that a court granted alimony to a woman (in 1870s Pennsylvania judges granted alimony in only 0.4% of divorce cases),<sup>229</sup> men – especially men like Julius Ware – simply moved away and got lost in another city or "out west" to avoid making payments.<sup>230</sup> As Virginia Drachman observes, "In an age when women lacked child custody rights and property rights," even highly capable women "well understood that divorce could destroy the lives of wives more than husbands."<sup>231</sup>

Anna also lacked a contemporary business model that would allow her to restructure the principles of coverture to work toward her economic advantage. During this era, industrial and manufacturing enterprises usually used the partnership form of organization, where partners could only transfer ownership at great inconvenience and expense.<sup>232</sup> Industrial corporations in the 1870s were generally small-plant companies serving small regional markets; they were closely held (*i.e.*, only a small group owned stock in the corporation) and had no public market for their securities (stock exchanges dealt almost exclusively in railroad securities at this time).<sup>233</sup> Importantly, when Davis wrote *John Andross*, each state's corporate laws restricted one corporation from owning stock in another corporation, which means that there were no corporate subsidiaries or holding companies—and, as a result, no strategic corporate mergers. At this time, the process of even obtaining a corporate charter involved a special legislative act in the state of Pennsylvania. As such, in *John Andross* Anna had only these rudimentary instruments upon which to model her own marital transaction. Recall the other business institutions Davis includes in her text. First, the whiskey ring is a simple cartel, much like the loose federations that the railroad corporations repeatedly attempted to form (and always unsuccessfully) in order to fix prices and prevent "ruinous competition."<sup>234</sup> Next, Laird's National Transit Company was a railroad corporation, but these types of quasi-public and infrastructural businesses (*e.g.*, railroad, highway, bridge, and canal building companies) were generally the only types of companies to which legislatures granted corporate charters. As such, Laird's railroad corporation did not appear to have a truly public market for its securities, as Laird personally markets the stock for sale to his friends throughout the novel. Indeed, it surfaces that the Laird's corporation is merely a cover for the distillery cartel. Lastly, the Gray Eagle Iron Works is a basic sole proprietorship

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<sup>226</sup> Riley, Glenda. *Divorce: An American Tradition*. New York: Oxford University Press, 1991, at 45.

<sup>227</sup> *Id.* at 75.

<sup>228</sup> Warren, at 53.

<sup>229</sup> Riley, at 90.

<sup>230</sup> *Id.* at 247.

<sup>231</sup> Drachman, at 67.

<sup>232</sup> Navin, Thomas R. and Marian V. Sears. "The Rise of a Market for Industrial Securities, 1887-1902." *The Business History Review*, Vol. 29, No. 2 (Jun., 1955), pp. 105-138, at 109

<sup>233</sup> *Id.* at 107.

<sup>234</sup> Chandler, Alfred C. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge: Belknap Press, 1977, at 137.

under Judge Maddox. However, the Gray Eagle Iron Works eventually comes to offer an innovative (and historically important) corporate structure that, at least in part, Isabel Latimer helps produce and manage.

Isabel has a different approach to business than Anna; whereas Anna was an “insatiate little huntress, whose game was man,” Isabel is the patient “ox-eyed” business operator who seems to see the big picture and to have the steady hand to sort through the complexities behind each transaction she encounters. Indeed, when Laird tries to foist his National Transit stock on her father, she intervenes and prevents Colonel Latimer from taking the bait. When Laird proposes marriage (and wealth) to Isabel, she “saw no more cause for blushes than if he had consulted her on the colour of his coat or any other business” (85). She senses Laird’s proprietary motives, which his feelings upon her rejection reveal: “they quite equaled, however, the anger and annoyance he felt when his friend Patterson outbid him the week before for a Gerome which he admired...he was not quite sure that he really wanted either of them; but why should any other man have them?” (133). Later, as Laird woos Andross back into the fold, Isabel wonders how Laird could think that “because of his foundation of solid dollars that her father and Andross were to go under his yoke and become part of his machinery?” Indeed, Laird does not even have a foundation of solid dollars, and Isabel “knew well the world to which he belonged—fashion, false show, plunder—gambling in stock by the pennies or by the millions” (98).

Isabel sees through the façade in each business situation she confronts. The fact that she consistently makes the right call leads Bowyer, the tax collector who confronts the whiskey ring, to turn to Isabel when he finds that Laird and the whiskey ring plan to assassinate her father for snooping around their scheme. Bowyer approaches her and announces: “Now, I’m not like [your father]...*He* says keep women and business apart. But I say find the right cog for the wheel, and put it in—male or female” (255). And Isabel, as usual, proves to be the right cog and takes the key steps in preventing Colonel Latimer’s assassination.

Isabel, however, nearly makes the same miscalculation as Anna. She is set to marry Clay Braddock, and she blindly defends him (as well as the marital dominance coverture bestows on the husband) throughout the first half of the novel. When her aunt questions Braddock’s character, Isabel actually embraces the notion of coverture and declares that if the local Women’s Club knew him “they would hold very different opinions on the marriage question, and the proper authority of a husband over a wife” (197). Isabel is foolishly prepared to cede her authority in her pending incorporation into Braddock. However, she soon learns that Braddock has become infatuated with Anna and reassesses the terms of the transaction. Braddock, of course, finally recognizes that Isabel would prove the better wife and that a marriage with her would result in a “solid entity in life.” To his dismay, however, when Braddock returns from the state capital to beg her forgiveness, Isabel sends him away, telling him calmly that he “has no claim” upon her and that he should go to Anna, to “see the full value of the goods for which you have sold your life” (249). Later, after Braddock, Andross, and Isabel make a mad dash to save the Colonel from assassination, Braddock again implores Isabel to return to him, and she agrees—but on very different grounds than her earlier acceptance of a husband’s proper authority over his wife. Braddock meekly asks if Isabel loves him as before, to which she responds, looking “gravely at him, deliberating,” that “I can never say that I love you as I did, Clay” (316). And the two implicitly agree to a relationship of equal managerial control within the marriage entity.

In this instance Isabel is prepared to merge with Braddock through marriage, but she does not appear ready to erase her personhood in the process. She will incorporate herself, but not into Braddock—rather, the two individuals will take equal shares of stock in a new type of corporate entity. Isabel wants to retain some control over the corporate enterprise. In fact, Isabel is what Elaine Showalter refers to as the “coming woman,” or the transition toward the emancipated woman of the future whose personhood extends outside the domestic sphere.<sup>235</sup> That is, Isabel and other such women of the 1870s were transitional figures between the early-to-mid-century “true woman” (e.g., the embodiment of submissiveness, piety, purity, and domesticity) and the “new woman” of the 1890s and beyond, who sought to disrupt traditional feminine roles while asserting female social, economic, and legal independence.<sup>236</sup>

Isabel takes part in another transitional moment when she joins her father, her husband, and Andross in a corporate restructuring of the Gray Eagle Iron Works. These four characters go into business together on an equal economic and managerial basis when they convert the business from a sole proprietorship into an industrial corporation with marketable securities, a type of corporate organization that was just emerging and becoming available to industrial enterprises in the early 1870s. Colonel Latimer proposes the idea, “The Works are in the market again. I can buy them—part cash down, and you two boys shall run them” (317). Isabel, who “had always been like a son” to Latimer, will be a part of the team, since Latimer includes her in the “fraternity” and business plan: “Confound the per cent! We four are not a money-making fraternity, Clay. We’ve enough of the eternal digging for dollars in town; now we’ll try for something better” (317). And they do produce something better—at least from an economic perspective. Industrial restructurings such as the conversion of a sole-proprietorship or partnership into a corporation with saleable securities that Davis describes were one of the primary catalysts in producing the modern business enterprise. The emergent market in the 1870s and 1880s for industrial securities revolutionized the national economy and ushered in the era of managerial and corporate capitalism. The restructured business entity has the characteristics of Alfred Chandler’s “modern business enterprise,” with differentiated business units and specific managerial specializations.<sup>237</sup> Latimer capitalizes the Works, while Braddock manages the plant and Andross “came and went” on the business of the firm, presumably in sales. Isabel appears to work in investor relations and as the firm’s strategist, and strongly advises against the Colonel’s suggestion to allow Laird to buy stock in the Works or to make unjustified charitable donations with corporate funds. This new kind of industrial corporation and the advent of industrial securities, as we shall see in the following section, led to a cataclysmic change in American business. And, when coupled with divorce reform, it would serve as a new business model for female entrepreneurs seeking to reestablish their personhood and capitalize coverture.

The Second Legal Fiction: The Standard Oil Holding Company and the Corporate Merger Wave  
Contemporaneous with Davis’s career, the corporate form began a rapid evolution shortly after the Civil War that would culminate in a complex and multilayered corporate body by the turn of the century. This section tracks the corporate form’s evolution from relatively simple to

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<sup>235</sup> Showalter, Elaine. *A Jury of Her Peers: American Women Writers From Anne Bradstreet to Annie Proulx*. New York: Vintage, 2010, at 164.

<sup>236</sup> Renfro, Alicia Mischa. “Introduction,” *A Law Unto Herself by Rebecca Harding Davis*. Lincoln: University of Nebraska Press, 2014, at xi.

<sup>237</sup> See, generally, Chandler, Alfred C. *The Visible Hand: The Managerial Revolution in American Business*. Cambridge: Belknap Press, 1977.

exceedingly complex through the model of the Standard Oil Company. Most business enterprises before the civil war were single proprietorships, small partnerships, or family owned close corporations. Successful railroad corporations indicated that corporate securities could prove profitable for business promoters, and small industrial partnerships began to convert to corporations in an effort to raise capital while still retaining control of the business enterprise. As a result of these changes, the trust company, or the large consolidated holding company, would emerge as the apex corporation that dominated the American economy. One company in particular, the Standard Oil Company, exhibits these rapid changes in the corporate form. Step by step, the Standard Oil Company serves as a metric of corporate legal innovation and exhibits each of the corporate form's evolutionary steps in the nineteenth-century corporate law.

On January 10, 1870, a little-known Cleveland businessman named John D. Rockefeller reorganized his Standard Oil Company, which started as a small partnership, into an industrial corporation. Standard Oil's corporate structure evolved over the next three decades and it emerged as an industry-dominating holding company. Its transformations helped lay the groundwork for a revolution in corporate law, whereby states began to tolerate, sanction, and ultimately encourage the organization of holding companies and giant conglomerates. Standard Oil's model also served as a catalyst for the great merger wave at the turn of the century. The merger wave transformed the American economy, and established the massive, vertically integrated corporation as the most powerful corporate structure that still dominates the world economy today.

Rockefeller's aptly named Standard Oil Company did, in fact, set the standard for nineteenth-century corporations—and it did this through creating and exploiting innovations in American corporate law. Rockefeller and his legal team made the legal fiction of the corporate person, for lack of a better phrase, *even more fictional*. What started as a simple partnership became a regional industrial corporation and that industrial corporation then became a nation-wide trust company, which ultimately became a massive international holding company. Throughout the process, Standard Oil and Rockefeller underwent unprecedented economic growth. (Rockefeller originally invested \$4,000 in Standard Oil in 1863; upon the company's court-ordered dissolution in 1911, he had an estimated net worth of \$900 million.)<sup>238</sup> As Rockefeller's biographer observes, "In responding to legal challenges, the combine had reconstituted itself many times, like some *mythical, protean creature* that could metamorphose into infinite shapes to elude lawmakers."<sup>239</sup> With each innovation in its corporate form, Standard Oil's "legal legerdemain again frustrated lawmakers who felt that the combine was so vast, slippery, and elusive that it could never be tamed or held accountable."<sup>240</sup> Rockefeller's taciturn and ice-cold operating style coupled with a malleable corporate form produced a fictional entity with constantly evolving powers that neither its competitors nor the state could check.

Rockefeller and Standard Oil had inauspicious beginnings. Like most of the "robber barons," Rockefeller hired a substitute to fight for him during the Civil War and made his initial small fortune as a war profiteer selling produce. In 1863 he entered the oil refining business as part of the partnership Andrews, Clark, & Company.<sup>241</sup> In 1865, just as the Civil War was ending, Rockefeller entered a pitched battle with Maurice and James Clark and ousted them from the partnership, which emerged afterward as Rockefeller & Andrews. Two years later, they added

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<sup>238</sup> Chernow, Ron. *Titan: The Life of John D. Rockefeller, Sr.* New York: Vintage Books, 1999, at 556-57.

<sup>239</sup> *Id.*, at 332. My emphasis.

<sup>240</sup> *Id.* at 333.

<sup>241</sup> *Id.* at 77.



another partner and became Rockefeller, Andrews, & Flagler. Rockefeller and his partners quickly became the dominant oil refinery in Cleveland, due in large part to Rockefeller's business style. The natural-born actor (a trait inherited, perhaps, from his notorious con-artist father, "Big Bill" Rockefeller) conducted each of his business negotiations with a "refusal to truckle, bend, or bow to others, [his] insistence on dealing with other people on his own terms, time, and turf."<sup>242</sup> After observing the effects of "ruinous competition" in the oil industry, the devoutly (and strategically) religious Rockefeller began preaching the advantages of "combination." If industry leaders cooperated and combined forces, Rockefeller argued, they might limit competition, control production, and increase prices.<sup>243</sup> However, the partnership did not have the financial means to buy out and absorb its numerous competitors.

Rockefeller and his partners determined that incorporating the business was the key to supplementing their capital without relinquishing control of the enterprise.<sup>244</sup> On January 10, 1870, they reorganized as an industrial corporation with marketable securities. Each partner took a share of the new stock in an amount to retain their original level of control in the enterprise. They issued \$1 million in securities, sold to select investors, and used the proceeds to acquire 21 of the 26 competing oil refineries in Cleveland. By 1872, Standard Oil had assimilated these 21 refineries and was generating massive profits after increasing its refining capacity from 1,500 barrels of crude oil a day to roughly 10,000 barrels per day. However, Rockefeller did not absorb his competitors simply to *increase* capacity. Rockefeller consolidated the industry in order to *control* capacity (and supply) to keep the demand for, and price of, oil at its highest sustainable levels. As muckraker Ida Tarbell observes:

At every refining centre [sic] in the country this process of consolidation through persuasion, intimidation, or force went on. As fast as a refinery was brought in line its work was assigned to it. If it was an old and poorly equipped plant it was usually dismantled or shut down. If it was badly placed, that is, if it was not economically placed in regard to a pipe-line and railroad, it was dismantled even though in excellent condition. If it was a large and well-equipped plant advantageously located it was assigned a certain quota to manufacture, and it did nothing but manufacture.<sup>245</sup>

In essence, Standard Oil assimilated a refinery, stripped it of its valuable assets (or, simply purchased a company to shut it down in order to reduce competition), and then controlled the amount of oil that was available for purchase.

Around this same time, Rockefeller made one of his few errors in business judgment, one that tarnished his reputation and briefly threatened Standard Oil's quest for industry dominance. Rockefeller had agreed to enter into a shady cartel with Pennsylvania Railroad president Tom Scott. The 1871 scheme, using the corporate shell of the Southern Improvement Company, involved collusion between three of the largest railroads and a group of Rockefeller-led refineries. The plan was for railroads to offer huge shipping rebates to the colluding refineries in return for predictable and uninterrupted oil traffic for the railroads. Rockefeller was to serve as umpire ensuring that the three railroads received their allotted percentage of the oil traffic. In addition to a fifty-percent shipping rebate, the colluding refineries were to receive a "drawback" on every barrel of oil non-colluding refineries shipped, such that Rockefeller's group would

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<sup>242</sup> Id. at 115.

<sup>243</sup> Tarbell, Ida M. *The History of the Standard Oil Corporation*. New York: Dover Publications, 1966.

<sup>244</sup> Chernow, at 132.

<sup>245</sup> Tarbell, at 70.

receive forty cents for every barrel a non-member shipped via the railroad—and that fee was added on to the non-member’s shipping rate.

According to business historians, this provision was “an instrument of competitive cruelty unparalleled in industry” and its primary purpose was to put the non-participating refineries and railroads out of business and to bring an end to price competition.<sup>246</sup> However, before its implementation, news of the plan accidentally leaked and created an immediate public uproar against the “Mephistopheles of Cleveland” and his “Forty Thieves.”<sup>247</sup> Rockefeller denied any and all wrongdoing and, “As always, the greater the tumult, the cooler Rockefeller became, and a strange calm settled over him when his colleagues were most disconcerted.”<sup>248</sup> Before scuttling plans for the Southern Improvement Company, Rockefeller parlayed the brief window of leverage that rumors of this vast combination gave him and compelled (or, some suggest, tricked) his competitors in Cleveland to quickly sell out to Standard Oil. In the end, even in defeat Rockefeller profited.

Taking over the refining industry was just the beginning of Standard Oil’s corporate (r)evolution. Rockefeller and Standard Oil soon began the process of vertical integration, which led to the corporation’s rapid growth and expansion. They realized that with the advent of new technologies, individual market transactions for supplies, transportation, distribution, and sales were no longer the most efficient ways to run a business. Instead, Rockefeller concluded that “they could lower costs by integrating backward to sources of supply, or forward into downstream production processes or even into distribution.”<sup>249</sup> Instead of negotiating with a company to purchase oil barrels, Standard Oil would purchase a factory that built barrels; instead of negotiating a price for using a pipeline, Standard Oil would simply buy or build a pipeline and integrate it into its operations; instead of paying a wholesale distributor, Standard Oil acquired a network of distribution facilities and sold its own product to individual purchasers.<sup>250</sup>

Standard Oil was among the first and most successful companies at innovating and perfecting the process of vertical integration.<sup>251</sup> As an Ohio-chartered corporation, however, Standard Oil’s potential for growth was limited. Recall from chapter 2, at this time state-granted corporate charters did not allow one corporation to own stock in another corporation; additionally, most corporate charters limited a corporation’s size, lifespan, and overall capitalization. The ultra vires doctrine held that a corporation could not engage in activities beyond the scope of the business purpose defined in its charter and that the state could revoke a charter if the corporation violated any of these restrictions.<sup>252</sup> There was also a vague common law restriction against corporations doing business in states beyond their state of incorporation.<sup>253</sup> Due to its program of vertical integration, Standard Oil was running up against each of these legal barriers, and states were beginning to sue and tax Standard Oil accordingly.<sup>254</sup>

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<sup>246</sup> Flynn, John T. *Men of Wealth: The Story Of Twelve Significant Fortunes From The Renaissance To The Present Day*. New York: Simon and Schuster, 1941 at 444.

<sup>247</sup> Tarbell, at 35.

<sup>248</sup> Chernow, at 140.

<sup>249</sup> Hovenkamp, Herbert. *Enterprise and American Law, 1836-1937*. Cambridge: Harvard University Press, 1991.

<sup>250</sup> Chandler, at 325.

<sup>251</sup> *Id.*, at 324.

<sup>252</sup> Collins, Wayne D. “The Goals of Antitrust: Trusts and the Origins of Antitrust Legislation,” *Fordham Law Review* (81 Fordham L. Rev. 2279 (April, 2013), at 2312-13.

<sup>253</sup> Navin and Sears, at 112.

<sup>254</sup> Chandler, at 323.

Standard Oil circumvented these restrictions when its lawyer, Samuel C.T. Dodd, invented a new corporate organizational structure in 1882. Dodd, known as “a wizard at contriving forms that obeyed the letter but circumvented the spirit of the law,” converted the Standard Oil Company into the first so-called “trust” company.<sup>255</sup> In a trust, a trustee or a group of trustees holds the legal title to the trust property for the benefit of a beneficiary or a group of beneficiaries. Essentially, the trustees manage the assets for the beneficiaries and distribute income to them on a fixed basis. Dodd simply applied this legal instrument (which had been limited to personal inheritance and family wealth applications) to the financial affairs of corporate persons. Standard Oil formed a corporation in each state where it conducted business, and then – in exchange for a trust certificate – the shareholders of these corporations (Rockefeller and his partners) gave the stock in each company to the trust for the trustees (again, Rockefeller and his partners) to manage in their best interest.

Of course, these maneuvers were only paper transactions and legal formalities; nobody’s roles within the enterprise changed due to the reorganization. This new trust company structure, however, allowed Rockefeller to aggregate all of the corporate resources into a single enterprise. In other words, the single business entity was now a trust and not a corporation. Trusts were subject only to internal regulation between the trustee (*i.e.*, Rockefeller) and the beneficiary (*i.e.*, Rockefeller) and were entirely beyond the reach of state corporate laws and regulations.<sup>256</sup> Under this new corporate form, each of Standard Oil’s subsidiary corporations limited its operations in accordance with the state law where it resided, at least technically speaking. As single-state corporations, these corporate subsidiaries were not subject to punitive state law restrictions or increased taxation as foreign corporations. However, in reality, the trust functioned as a monolithic single entity, with Rockefeller managing the trust, which included each of these smaller corporate bodies. A nineteenth-century critic described the “anomaly” of the situation: “Thirty-nine corporations, each of them having a legal existence, obliged by the laws of the state creating it to limit its operations and to make certain reports, had turned over their affairs to an organization having no legal existence, independent of all authority, able to do anything it wanted anywhere; and to this point working in absolute darkness.”<sup>257</sup> The trust made possible a nation-wide corporate structure that at its apex controlled 90% of the nation’s oil refining industry.

Most industries followed suit shortly thereafter, and the trust became the predominant corporate form in the U.S. during the late-nineteenth century. However, as public sentiment against the “trusts” grew, both state and federal governments began to crack down on this corporate structure. The Sherman Antitrust Act of 1890 authorized the federal government to investigate and dismantle trusts that amounted to monopolistic enterprises. In the same year, Ohio attorney general David Watson filed a *quo warranto* petition against Standard Oil accusing it of violating its state-granted corporate charter by transferring operational control to out-of-state trustees. The Ohio Supreme Court ordered Standard Oil to dissolve the trust, but gave them several years to do so. Due to these new federal regulations and state *quo warranto* proceedings, the trust company’s days were numbered.

Predictably, Standard Oil simply reorganized its corporate form yet again. Recall that as part of corporate law’s “race to the bottom,” New Jersey – in an effort to create revenue by attracting corporations to the state – revised its corporate laws (at the behest of men like

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<sup>255</sup> Chernow, at 226.

<sup>256</sup> Collins, at 2316-17

<sup>257</sup> Tarbell, at 157.

Rockefeller and J.P. Morgan) to allow for New Jersey corporations to hold stock in other corporations (even out-of-state, or “foreign” corporations) and to engage in any business purpose whatsoever.<sup>258</sup> So, in 1899 “undergoing yet another change in form, Standard Oil became a full-fledged holding company under New Jersey law with the legal parent, Standard Oil of New Jersey, controlling stock in nineteen large and twenty-two small companies.”<sup>259</sup> After this reorganization, Standard Oil had a market capitalization of \$643 million and – through its system of mergers and vertical integration – revolutionized the American economy. The holding company was born and consolidated corporate conglomerates rapidly took charge of the economy.

Companies quickly imitated Standard Oil’s successful business model, which catalyzed what is known today as the “great merger wave” of 1895-1904. Naomi Lamoureaux suggests that “All told, more than 1,800 firms disappeared into consolidations, many of which acquired substantial shares of the markets in which they operated.”<sup>260</sup> Lawrence Mitchell finds that somewhere between 5,300 and 2,653 firms disappeared via merger, and that “the financial economy created by the merger wave was like a tidal wave crashing over American society.”<sup>261</sup> Historians such as Alfred Chandler attribute the merger wave to the economic efficiency that firms like Standard Oil displayed through the process of vertical integration.<sup>262</sup> Theories differ, however, and other observers suggest that the promise of monopoly or supracompetitive prices were the key motivations behind the merger wave.<sup>263</sup> Even more cynically, others claim that it was promoters and investment bankers – lured by huge commissions – that convinced industry leaders to merge with one another. In any event, all of the theorists and historians agree on one major premise: the fundamental motivating force behind the merger movement was the desire to make more money. And for the corporations that survived the merger wave and successfully integrated key assets from other companies, they got exactly what they desired.

John D. Rockefeller and the Standard Oil Company provided the business model for this cataclysmic change. They restructured nineteenth-century corporate law to make this change possible. In just thirty years, the nation shifted from small, stable partnerships and closely held corporations to massive consolidation companies that subsumed and integrated assets from erstwhile competitors. The holding company – or consolidation company – made possible a new corporate fiction: a corporate person that could merge with and subsume other persons, assimilating and integrating their most valuable assets and leaving behind an empty legal shell for dissolution. The consolidation company could acquire and own other corporate persons while extracting assets and profits from these subsidiary bodies. The Standard Oil Company created the corporate conglomerate and ushered in the era of mergers and acquisitions. This new era of finance and corporate capitalism “downgraded the power of the old gentry and rural elites, substituting a new species of self-made men: economic marauders too busy making money to be overly concerned with tradition.”<sup>264</sup> Rockefeller and Standard Oil took the incorporated actor

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<sup>258</sup> (44) N.J. Pub. Law 1899, p. 473.

<sup>259</sup> Chernow, at 430.

<sup>260</sup> Lamoureaux, Naomi R. *The Great Merger Movement in American Business, 1895-1904*. Cambridge: Cambridge University Press, 1985, at 2.

<sup>261</sup> Mitchell, Lawrence E. *The Speculation Economy: How Finance Triumphed Over Industry*. San Francisco: Berrett-Koehler, 2007, at 12-13.

<sup>262</sup> Chandler, 315.

<sup>263</sup> Nelson, Ralph L. *Merger Movements in American Industry, 1895-1956*. Princeton: Princeton University Press, 1959, at 103.

<sup>264</sup> Chernow, at 98.

network to the next level. Where once the giant railroad corporations like the Southern Pacific seemed to defy contemporary logic due to their sheer magnitude, now the holding companies dwarfed even these early nineteenth-century corporation's with their seemingly endless networks of incorporated subsidiaries. As we shall see in the next section, this new corporate contrivance also made possible a new species of self-made women and produced another modality of personhood through the corporate form.

#### The Second Literary Fiction: Wharton's *The Custom of the Country* and the Apex Consolidation Company

The government ordered the breakup of the Standard Oil Company in 1911, at precisely the time that Edith Wharton was drafting *The Custom of the Country* (1913). Like John D. Rockefeller and the other "economic marauders" of her time, Edith Wharton's Undine Spragg is not overly concerned with tradition. Indeed, the young woman from the nondescript Midwestern "Apex City" has much in common with the oil tycoon.<sup>265</sup> They are both unflappable business negotiators with reddish-gold hair, each has a knack for acting a part, and they are capable of adapting quickly to unexpected scenarios. This section argues that Undine, like Rockefeller's Standard Oil Company, is "in constant metamorphosis," such that through corporate contrivances she becomes the "archetypal figure of the *protean* woman" who overcomes the strictures of marital coverture.<sup>266</sup> In *The Custom of the Country*, Undine embarks on a corporate campaign remarkably similar to that of Rockefeller and his Standard Oil Company. In doing so, Undine turns the doctrine of coverture on its head. Using her business savvy, Undine turns marriage and divorce into a series of mergers and acquisitions. Like Rockefeller, she has a long-term vision for vertical integration, whereby she takes what is best from each transaction and creates a wealthier, more powerful, and highly efficient corporate body at each step. Also like Rockefeller, she has a knack for turning rare strategic defeats into financial profits. Undine uses her era's dominant corporate form – Rockefeller's innovative holding company – as a model in her process of embodying the Apex Consolidation Company. The nereid-like businesswoman, whose name comes from the French for "wavelike," creates her own great merger wave and comes to dominate her industry. As a cool corporate operator armed with the suddenly empowered female corporate body, she turns coverture's legal restrictions into an economic weapon and helps to reincorporate female personhood.

Elizabeth Ammons first observed in 1977 that "Endowed with a cunning business sense, Undine makes marriage her business in life."<sup>267</sup> And there has been no shortage of critical commentary on Undine and the "business of marriage" ever since. However, despite the fact that turn-of-the-century feminist criticism identified that there "is no profession open to [woman] that is nearly as lucrative as marriage," each of these critical studies negatively identifies Undine as either a speculator, a commodity, a "limited" businessperson, a product, a "cocktail bitch" (whatever that might be), a "gold digger," or even an *employee* subjugated by managerial capitalism.<sup>268</sup> The novel's critics repeatedly short-change Undine's business capacities and they

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<sup>265</sup> Some critics suggest Apex is in Kansas; however, there is no evidence, circumstantial or otherwise, in the text to confirm such claims.

<sup>266</sup> Waid, Candace. "The Devouring Muse," in *Edith Wharton's Letters from the Underground: Fictions of Women and Writing*. Chapel Hill: University of North Carolina Press, 1991, 127-172, at 136. My emphasis.

<sup>267</sup> Ammons, Elizabeth. "The Business of Marriage in Edith Wharton's 'The Custom of the Country'" *Criticism*, Vol. 16, No. 4 (Fall 1974), pp. 326-338, at 337.

<sup>268</sup> Ammons, Elizabeth. "The Business of Marriage," in *Edith Wharton's Argument with America*. Athens: The University of Georgia Press, 1980, at 97. Ammons had earlier argued that Undine sees marriage as a "speculative

do so, I argue, because she fails to see just how closely and adeptly she models her business affairs after the vertically integrated consolidation company that the Standard Oil Company brought to life during this era. These critics fail to observe that Wharton repeatedly and conspicuously evokes the “Apex Consolidation Company” as the novel’s driving economic and narrative force and, in so doing, invites the reader to imagine Undine as the very embodiment of the holding company. As a holding company, Undine exploits coverture’s legal fiction that marriage incorporates the woman into her husband and turns marital unity into a financial instrument. Wharton imagines the possibility of a woman engaging in a series of mergers and acquisitions to produce vertically integrated economies of scale within the marriage industry. Indeed, Undine corners the “marriage market” such that by the end of the novel a gossip magazine following her career asks how other women in the market can “stand for such a monopoly?” (179). Whether or not other women (or the reader) can stand Undine’s actions, as the Apex Consolidation Company she grows increasingly powerful with each new acquisition and emerges as the dominant economic body at the end of *The Custom of the Country*.

Edith Wharton was all too familiar with coverture’s restrictions. Her mentally unstable husband, Teddy Wharton, was the trustee of her inherited estate, and refused to relinquish control over her trust fund (or his decision-making authority over the couple’s domestic affairs) even after his nervous breakdown and trip to a sanatorium.<sup>269</sup> Wharton – known amongst publishers as an accomplished business negotiator – was the couple’s breadwinner and felt dismayed over Teddy’s repeated attempts (and failures) to manage her financial affairs. Her friends and family generally rejected and disapproved of divorce, despite the fact that she was in a hurtful and lopsided marriage. These conditions led biographer Cynthia Wolff to ask (and answer): “As a woman—a successful, ambitious woman—did [Wharton] have the right to a self-determined, autonomous, even competitive life? Society said no.”<sup>270</sup> Wharton rejected this social imperative of female passivity and eventually divorced Teddy, despite the prevailing customs of the country. During these years of marital conflict, Wharton created a character who likewise disregards coverture’s restrictions. Undine uses her business acumen, her ability and willingness to divorce, and the model of the consolidation company to harness the power of one legal fiction in order to eradicate another legal fiction’s debilitating effects. In the end, Undine’s successful use of the holding company’s organizational structure to reincorporate her female personhood demonstrates the evolving corporate form’s power to augment a human being’s economic power

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economic institution,” whereas consolidation companies and their operators are not *speculating* at all. They are taking speculation and uncertainty out of the financial equation by consolidating market forces in order to control them. See Ammons, Elizabeth. “The Business of Marriage in Edith Wharton’s ‘The Custom of the Country’” *Criticism*, Vol. 16, No. 4 (Fall 1974), pp. 326-338, at 338. For Undine as a commodity, see MacComb, Debra Ann. “New Wives for Old: Divorce and the Leisure-Class Marriage Market in Edith Wharton’s *The Custom of the Country*.” *American Literature* 68.4 (1996): 765-97, at 777 and Sassoubre, Ticien Marie. “Property and Identity in the Custom of the Country.” *MFS: Modern Fiction Studies* 49.4 (2003): 687-713 at 703. For Undine as a limited business person and a “product” see Preston, Claire. “Ladies Prefer Bonds: Edith Wharton, Theodore Dreiser, and the Money Novel.” *Soft Canons: American Women Writers and Masculine Tradition*. Ed. Karen L. Kilcup. Iowa City, IA: U of Iowa P, 1999. 184-201, at 185. For Undine as a “cocktail bitch,” see Edmund Wilson, *The Wound and the Bow: Seven Studies in Literature*. Cambridge: Houghton Mifflin, 1941, at 202. For Undine as a “gold digger,” see both Wilson at 202 and Preston at 195. For Undine as an employee dominated by managerial capitalism Patterson, Martha H. “Incorporating the New Woman in Wharton’s *The Custom of the Country*.” *Studies in American Fiction* 26.2 (1998): 213-36, at 233.

<sup>269</sup> Wolff, Cynthia Griffin. *A Feast of Words: The Triumph of Edith Wharton*. 2<sup>nd</sup> Ed. New York: Addison-Wesley Publishing Company, 1995, at 216.

<sup>270</sup> Id., at 219.

and social agency. It also reinforces the artificiality of personhood, as the corporate form augments personhood beyond supposedly “natural” or “essential” attributes by augmenting all bodies alike, be they male, female, or fictional.

With the model of the holding company in mind, Undine embarks on a calculated career trajectory toward engineering her vertically integrated corporate body. Like Rockefeller, who claimed that he wanted only to rationalize and improve the oil industry, Undine repeatedly tells her parents that “all she sought for was improvement: she honestly wanted the best” (32). To this end, Undine works at honing her business skills throughout the novel and prepares herself for each phase of her merger-driven corporate consolidation. Undine’s first engagement is to the hapless Millard Binch back in Apex. She admits that it was a bad engagement, and that she “knew nothing” at the time. Her first husband, Elmer Moffatt, agrees and notes that “I don’t suppose it *would* teach a girl much to be engaged two years to a stiff like Millard Binch” (65). Undine did, however, learn something (to properly assess a person’s “worth”) and after this experience she pursues Moffatt because she senses in him a “great sweeping scorn of Apex, into which her own disdain of it was absorbed like a drop in the sea” (312). She appreciates that Moffatt’s “head was always full of immense nebulous schemes for the enlargement and development of any business he happened to be employed in” (311). Moffatt’s desire to enlarge and develop business ventures (*i.e.*, to consolidate and vertically integrate them) seems to inspire Undine’s own drive for consolidation such that she elopes with him. Moffatt recounts their elopement in terms of coverture’s merger doctrine: “Undine Spragg and I were *made one* at Opaque, Nebraska” (264, my emphasis). However, before she can extract additional lessons or assets from Moffatt, her disapproving parents drag her back to Apex and use their local political clout to compel Moffatt to divorce Undine. As such, as Moffatt succinctly puts it, “we unlooped the loop” (264). The merger was terminated before Undine and Moffatt could synergize their assets.

After these initial ventures in the Midwest, Undine, again mirroring Rockefeller and the Standard Oil Company, moves her base of operations to New York City. Undine and Rockefeller were not alone, and, according to Amy Kaplan, when the rapid influx of these modern business persons “turned New York into the finance and trust center of the country in the late nineteenth century, the older families lost their authority to control the admission of an elite coterie.”<sup>271</sup> Despite this changing of the guard, Undine is not an immediate business success in New York and is forced to operate on the fringes of high society. She foolishly engages herself to Aaronson, a riding-master she meets in Central Park. However, after the due diligence of one of her financial advisors, Undine finds that Aaronson is actually a conman who fled Cracow after swindling servant-girls out of their savings. Wisely, she does not consummate the merger. Nonetheless, as a result of the incident, Undine continues to sharpen her business acumen, noting that through the transaction “she had learned a great deal” (8). Soon thereafter, Undine develops the same taciturnity that made Rockefeller an infamous negotiator. Listening to a showy friend at the opera “there dawned on Undine what was to be one of the guiding principles of her career: *‘It’s better to watch than to ask questions’*” (40). Through her “quick perceptions and adaptabilities” she takes on the ability of “adapting herself to whatever company she is in” (91-2). As such, she gains entrée to the elite social circle in New York. She makes connections; she networks.

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<sup>271</sup> Kaplan, Amy. *The Social Construction of American Realism*. Chicago: The University of Chicago Press, 1988, at 92.

Her next engagement is to Ralph Marvell, a descendant of the prestigious Dagonet family (who, Undine's manicurist informs her, are "sweller than anyone"). The Dagonet family is indeed prominent; however, the family is also a member of the old New York elite that Kaplan identifies as losing their social authority with the onset of corporate capitalism. The Marvell-Dagonets hold a "tranquil disdain for mere money-making" and "an archaic probity that had not yet learned to distinguish between private and 'business' honor" (45). As her wedding date approaches, Undine shows an acute awareness of the limitations that coverture will place upon her during the duration of her marriage. True to her character, she exhibits an immediate disregard for those limitations during her engagement. Upon the announcement of Undine's engagement to Ralph, the portrait artist Claude Popple jokingly laments losing Undine, but adds "But I've got one pull over the others—I can paint you! He can't forbid that, can he? Not before marriage, anyhow!" Undine responds, in "joyous defiance" that "I guess he isn't going to treat me any different afterward" (59).

Once married, Ralph does try to take patriarchal control over the marital unit, but Undine repeatedly resists his attempts. Ralph disapproves of Undine's chosen set of friends and forbids her from continued relations with them. Undine makes clear that she will continue to make her own decisions, but Ralph informs her that "No, you can't, you foolish child," adding that "it's my affair to look after you, and warn you when you're on the wrong track" (94). Undine dismisses his proprietary claim, declaring that she means to follow her own set of rules. Ralph was "used to women who, in such cases, yielded as a matter of course to masculine judgments," but Undine undercuts any such expectations time and again throughout the text. Indeed, she views coverture's incorporation as if through a *camera obscura*: when she sees Clare Van Degen longing for Ralph, Undine feels a sense of satisfaction as she "liked to know that what *belonged to her* was coveted by others" (130, my emphasis). Undine understands marital unity in a new way. When she engages in a corporate merger, Undine intends to remain the chief executive of the combined entity and will not take a subsidiary role. She, and not her husband(s), will dictate the new enterprise's corporate strategy.

Undine can retain this control in part because Ralph and his aristocratic (or, more fittingly, anachronistic) compatriots have failed to keep up with the times—they were still operating within a "mediaeval cosmogony." The Marvells and their kind fail to comprehend that Undine is armed with new legal weapons: the migratory divorce decree and the business model of the holding company. And she has every intention of using these weapons to create her own personal merger wave in the event that her husband "don't come up to what she expected" (and, in her own words at her earlier engagement dinner, Undine expects "Why, *everything!*") (57). Divorce law followed a similar trajectory to corporate law in the late-nineteenth century. Just as corporate law underwent a "race to the bottom" where states fought for revenue by offering increasingly lax corporate laws, states also engaged in a race toward laxity with regard to divorce law. Prior to the liberalization of divorce law, states like New York only granted absolute divorces in cases of adultery (as opposed to "divorces from bed and board," which functioned like today's legal separations and barred the parties from remarrying). But as demand for easier divorces increased, emerging western states were only too happy to supply more lenient divorce laws to attract revenue and to encourage population growth. Debra Ann MacComb observes that the "western states' divorce industry arose because it became increasingly adept at modifying its product to meet new consumer requirements and diversifying its offerings to capture an even



greater market share.”<sup>272</sup> The Dakotas offered the most lenient divorce laws between 1880 and 1907, while Reno, Nevada took the lead soon thereafter.<sup>273</sup> The Constitution’s comity clause generally forced states to respect each other’s laws, so a South Dakota divorce decree was by and large legally binding on a person who had married in New York.

Gone too were the days when adultery or insanity were the only grounds for divorce. In 1877 the Dakota Territory granted divorces for “mental suffering” and states began to include statutory divorce “omnibus clauses,” where a judge could grant a divorce if he felt the couple could no longer “live in peace and union together and their welfare requires a separation.”<sup>274</sup> Soon thereafter, statutes provided for usefully vague divorce grounds such as “wilful neglect” and “wilful desertion.”<sup>275</sup> The net effect of these western “divorce mills” was that the divorce rate skyrocketed, and women initiated two-thirds of the divorces between 1887 and 1906.<sup>276</sup> During these same years, “the number of divorces nationwide increased at a ratio of approximately 30 percent every five years.”<sup>277</sup> The times had changed rapidly, and although coverture was still in place, a woman could reclaim her personhood and *feme-sole* status more easily through the utilization of these less restrictive divorce statutes. However, Undine does not view divorce as a means to regaining her independence—she understands the marriage and divorce cycle as an economic system. This business-like irony is on display when the novel’s best sociologist, Charles Bowen, responds to his French friend’s query as to why “the obsolete institution of marriage” still survives in America: “Oh, it still has its uses. One couldn’t be divorced without it” (160). This is how business is done in a world where, in Ralph’s own words, marriages “ought all to have been transacted on the Stock Exchange” (47).

During Undine and Ralph’s honeymoon, Undine quickly comes to realize just how limited Marvell’s fixed-income assets actually are. She begins to take financial matters into her own hands and learns to bargain with dressmakers, proudly declaring that Ralph “ought to see how I’ve beaten them down” (97). Ralph is surprised to see how quickly Undine “had learned to bargain, pare down prices, evade fees, brow-beat the small tradespeople and wheedle concessions from the great” (105). The “business shrewdness that was never quite dormant in her” allowed her to abandon the pretense of having scruples (201). This unfettered business morality maximizes her advantage over the old guard. When she and Ralph need more money during their honeymoon, she suggests that he reach out to his sister, Laura Fairchild, to supplement their income. Ralph is ashamed to do so, but knows both that Laura is their only hope for more money and that the overture is certain to be successful. Upon hearing Undine’s suggestion, Ralph finds that “what hurt him most was the curious fact that, for all her light irresponsibility, it was always she who made the practical suggestion, hit the nail of expediency on the head. No sentimental scruple made the blow waver or deflected her resolute aim” (96). Undine simply has a knack for money-making; she is a corporate pirate in the industry of marriage. Over the course of the marriage, Undine extracts immense goodwill and cultural capital from the intangible asset of the Marvell name. She also goes about modernizing and incorporating tangible assets from the marriage. Just as Rockefeller unabashedly retrofitted and even closed facilities that he had

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<sup>272</sup> MacComb, Debra Ann. “New Wives for Old: Divorce and the Leisure-Class Marriage Market in Edith Wharton’s *The Custom of the Country*.” *American Literature* 68.4 (1996): 765-97, at 772.

<sup>273</sup> See, generally, Blake, Nelson Manfred. *The Road to Reno: A History of Divorce in the United States*. New York: Macmillan, 1962.

<sup>274</sup> Riley, at 96.

<sup>275</sup> *Id.*, at 102.

<sup>276</sup> *Id.*, at 124.

<sup>277</sup> *Id.*

acquired to serve his own business needs, Undine likewise refuses to leave well enough alone. Ralph gives her a family heirloom, a sapphire ring with a “quaint” setting that belonged to his grandmother. He makes Undine promise she will not reset the family relic “kept unchanged through several generations.” Undine makes the promise and almost immediately has the ring secretly reset and brought up to her more exacting standards.

Despite the arrival of a child, Undine comes to realize the merger with Ralph was a mistake since she had learned “to make distinctions unknown to her girlish categories. She had found out that she had given herself to the exclusive and the dowdy when the future belonged to the showy and the promiscuous” (111). Ralph, too, seems to recognize their incompatibility, but his lack of business sense leads him to conclude “They were the fellow-victims of the *noyade* of marriage, but if they ceased to struggle perhaps the drowning would be easier for both” (129). His gruesome reference to the drownings at Nantes, or the “underwater marriages,” where French revolutionaries tied together royalist sympathizers (usually a Catholic priest and a nun) and drowned them together in the Loire, shows how antiquated Marvell’s principles truly are. As Ralph sits around sentimentalizing their relationship, Undine simply turns to her account books and realizes that she, “hitherto, had found more benefits than drawbacks in her marriage; but now the tie began to gall...Ralph had gone in to business to make more money for her; but it was plain that the ‘more’ would never be enough” (131). As Marvell anticipates the couple’s lonesome watery grave, Undine – whose parents unknowingly named her after a water sprite compelled to marry in order to live – sees a different image of water: a merger wave. To this effect, Undine proactively begins searching for another corporate target ripe for takeover.

Undine recognizes that the market is robust and that the climate is perfect for new corporate mergers. After playing a key role in helping Ralph earn a \$10,000 commission from a shady real estate deal, she uses the money to follow her target, investment banker Peter Van Degen, to Europe where “all about them couples were unpairing and pairing again with an ease and rapidity that encouraged Undine to bide her time” (165). Van Degen is no novice in the corporate world. The son of monolithic banker Thurber Van Degen, he is elbow deep in many of the novel’s corporate transactions. He shows early on that he will present a challenge to Undine. He gifts her \$1,000 to help with her money troubles, but it carries with it expectations Undine is unwilling to meet until they are both divorced. Unhappy, Van Degen cynically informs her that “the installment plan’s all right; but ain’t you a bit behind even on that?” and adds “Anyhow, I think I’d rather let the interest accumulate a while. This is good-bye until I get back from Europe” (133). Undine, “too sternly animated by her father’s business instinct,” reengages him in negotiations, and has him on the verge of agreeing to divorce his wife, Clare Van Degen (135). The negotiations reach a climax and “for a moment she thought he was swaying to her in the flush of surrender. But he remained doggedly seated, meeting her look with an odd clearing of his heated gaze, as if a shrewd businessman had suddenly replaced that pining gentleman at the window” (135). Undine recognizes he is still the stronger of the two.

Undine, truly beginning to embody the the Apex Consolidation Company, shifts her business tactics and continues to develop her corporate strategies. She identifies “that her last talk with Van Degen had taught her a lesson almost worth the abasement. She saw the mistake she had made in taking the money from him” and determined in her next attempt to “lay solid foundations before she began to build up the light superstructure of enjoyment” (135). She spends the summer subtly working on Van Degen and during their next climactic negotiation Undine shows that her business sense has evolved, such that “she felt within her a strange lucid force of resistance. Because of that sense of security she left her hands in Van Degen’s. So Mr.

Spragg might have felt at the tensest hour of the Pure Water move” (168). (Abner Spragg made his initial fortune in a shady real estate transaction that Wharton refers to throughout the novel as the “Pure Water Movement.”) Van Degen agrees to Undine’s terms and the foundations are set for a divorce and remarriage. Meanwhile, just before she and Van Degen take a whirlwind trip through Europe, Undine reads and discards, in Van Degen’s presence, a telegraph message from the Marvells begging her to come home to Ralph’s sickbed, where he lays on the brink of death fighting pneumonia.

Instead of returning to Ralph, Undine decides to strike while the iron is hot and once again “unloop the loop.” After her summer-long affair with Van Degen, Undine returns to America and hops aboard the symbolic “Twentieth Century” locomotive to Sioux Fall, South Dakota. A few months later, a healthier Ralph “received a registered letter, addressed to him at his office, and bearing in the corner of the envelope the names of a firm of Sioux Falls attorneys” and “as he wrote his name in the postman’s book he smiled grimly at the thought that the stroke of his pen was doubtless signing [Undine’s] release” (194). And in signing her release from marriage, Ralph was setting the stage for Undine’s rapid rise to the top of the economic world.

However, like John D. Rockefeller, Undine hits one major bump in the road to fortune. An unknown source informs Van Degen of the contents of the letter that Undine read and discarded in his presence. In light of such a callous response to her husband’s possible demise, Van Degen dismisses the possibility of marriage to so heartless a wife and fails to join her in Sioux Falls as planned. Undine, then, encounters her business career’s debacle equivalent to Rockefeller’s Southern Improvement Company misstep. She stands disgraced with a tarnished reputation after filing for her divorce from Ralph. She looks at her flight with Van Degen as a “part of her career that, since it had proved a failure, seemed least like herself and most difficult to justify” due to the fact that her strategy was “as carefully calculated as the happiest Wall Street ‘stroke’” (206). However, just as Rockefeller used his short-lived defeat to his advantage in consolidating Cleveland’s oil refineries, Undine takes an asset from her Van Degen enterprise as seed money for yet another business venture. Always cognizant of her asset sheet, her “one desire was to get back an equivalent of the precise value she had lost in ceasing to be Ralph Marvell’s wife” (205). To accomplish this aim, she examines the exquisite pearl necklace Van Degen had given her and “for the first time she saw what they might be converted into, and what they might rescue her from” (214). She sells the pearls and with the proceeds returns to Europe, where – after another round of networking – she begins her courtship of the French Comte Raymond de Chelles. After all, she has her divorce, and as her friend and advisor Indiana Rolliver (née Frusk; née Binch) observes, there must be somebody “else it would come in handy for” (198).

Undine uses another unexpected asset to secure the merger with Raymond: her son Paul. Undine had won custody of Paul in her divorce from Ralph, but he remained living with the Marvell’s in New York due to Undine’s maternal indifference. Knowing that his “father takes considerable stock in him,” Undine arranges to *sell* Paul’s custody rights to Ralph in order to raise the necessary funds to secure a Papal annulment, which is required for a Catholic marriage to Raymond. Undine’s behavior seems cruel, but it should be remembered that in the nineteenth century men usually held legal “title” to the children by default, and often used such property rights as leverage to prevent women from seeking divorces from unpleasant marriages.<sup>278</sup> In Undine’s defense, if observers can praise the amoral business maneuvers of the Rockefellers, Goulds, and Morgans of the world, why not Undine’s? To raise the funds to purchase Paul’s

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<sup>278</sup> Warren, at 53.

custody, Ralph purchases stock in, of all things, the volatile Apex Consolidation Company, which sees its stock price plummet shortly after Ralph's investment in it. Purely from a business perspective, Undine's proposed transaction to sell Paul nonetheless works out better than planned, as Ralph's response to the stock's collapse is to commit suicide. His death negates the need for an annulment. Shortly after Ralph's suicide the Apex Consolidation Company, after a sudden rebound in its stock price, pays to Paul's estate \$100,000, the sum of which comes under Undine's management. Then, when the Marvell's sue for custody of Paul, Undine goes on the offensive and not only retains custody, but also extracts an annual allowance of \$5,000 from the Marvell's for Paul's living expenses. Her initial merger with Ralph continues to pay future dividends.

Marriage to Raymond is not what Undine had hoped, as he holds to the traditional marital roles that arose under coverture. Coverture was operative in her new culture and Raymond's cousin reminds Undine that "a woman must adopt her husband's nationality whether she wants to or not. It's the law, and it's custom besides" (273). Living on the family's estate, the desolate St. Desert, Undine takes on a new understanding of financial maneuvers and begins to formulate her next business transaction. Undine, always "absorbed in the economic aspect of the case," saw that there were long-term and short-term uses to which money should be put to use in business (282). Upon witnessing the complex nature of running the family estate, Undine "found herself in a world where [money] represented not the means of individual gratification but the substance binding together whole groups of interests, and where the uses to which it might be put in twenty years were considered before the reasons for spending it on the spot" (279). Undine comes to see the bigger financial picture, and understands the long-term need for the consolidation and vertical integration of each of the assets she has acquired through her various mergers and acquisitions. She sees finally that reckless acquisition is not the best method for accumulating lasting power and wealth, calculated long-term planning is the key to financial success. This lesson finishes her business training and Undine emerges with a full comprehension of precisely how her legal personhood can function as a holding company.

The most valuable assets at St. Desert are the tapestries that King Louis XV had given the Chelles family over a century earlier. At times during her unhappy marriage to Raymond, a "blind desire to wound and destroy replaced her usual business-like intentness on gaining her end," but suddenly Undine's "eyes fell on the storied hangings at [Raymond's] back" (297). She realizes in an instant that the tapestries are worth a large fortune, and sends word to Paris to have them appraised. The appraiser arrives from Paris with, who else, Elmer Moffatt—now a billionaire railroad king after his own campaign of corporate consolidation. ("The Consolidation set me on my feet," he informs Undine.) Raymond discovers Undine's intent to sell the tapestries, and Moffatt's desire to buy them, and immediately forbids the sale at any and all costs.

Shortly thereafter, Undine's inverted sense of coverture arises once again and, when talking to Moffatt in Paris about her unhappy marriage to Raymond, she feels "the instinctive yearning of her nature to be one with [Moffatt]" (321). Moffatt is receptive to the idea of a second joint venture, but Undine intimates that her religious conversion to Catholicism bars her getting a divorce. The billionaire Moffatt knows otherwise: "If you'll come along home with me I'll see you get your divorce all right. Who cares what they do over here? You're an American, ain't you? What you want is the home-made article" (324). They leave Europe and arrive in Reno, Nevada, where Moffatt's personal friend, Judge Toomey, fast-tracks their divorce case through the court in just fifty minutes. He and Undine remarry and, as merger consideration, Moffatt transfers to Undine a "necklace and tiara of pigeon blood rubies belonging to Queen

Marie Antoinette, a million dollar check and a house in New York” (330). Moffatt and Undine then arrange to buy, through a secret third party, the Chelles tapestries when Raymond’s family hits hard economic times in the wake of his divorce from Undine. The newlyweds hang the tapestries in their recently built French mansion, where Undine observes “with a tinge of disappointment,” that “Somehow they look smaller here” (331).

Of course, all is not bliss for Undine after her marriage to, and merger into, Elmer Moffatt. In a pensive mood, she ponders that: “Even now, however, she was not always happy. She had everything she wanted, but she still felt, at times, that there were other things she might want if she knew about them. And there had been moments lately when she had to confess to herself that Moffatt did not fit into the picture” (333). Like Rockefeller, Undine never sits complacently admiring her work; there were always ways to improve the company, if only incrementally. She notices Moffatt’s crude ways and decides he does not quite live up to his two predecessors, “*who were gradually becoming merged in her memory*” (333, my emphasis). Like Ralph and Raymond before him, it seems all but certain that Undine will consolidate Moffatt’s assets and eventually look for her next takeover target. He will likewise become merged with Ralph, Raymond, Aaronson, Binch, Van Degen, and still, probably, others yet to come. In fact, Moffatt sets Undine’s transactional mind going when he points out that her old acquaintance “the pitiful nonentity” Jim Driscoll has been appointed Ambassador of England, making Driscoll’s “commonplace” wife the Ambassadors. Undine tells Moffatt he should seek an ambassadorship, but he informs her that divorcees cannot be Ambassadors. Fuming, Undine greets their dinner guests, but her thoughts are filled with resentment that “She had learned that there was something she could never get, something that neither beauty nor influence nor millions could ever buy for her. She could never be an Ambassador’s wife; and as she advanced to welcome her guests she said to herself that it was the one part she was really made for” (335). And there the novel ends, but only the uninitiated would continue to short-change Undine Spragg. It seems but a matter of time before the Apex Consolidation Company finds a way to diversify its operations and branches out into the business of acquiring ambassadorships.

Rebecca Harding Davis and Edith Wharton turn to the novel’s fictive space to represent the strange personhoods that collided in nineteenth-century America. They use their respective novels to imagine a way for women to overcome the debilitating restrictions that coverture imposed on them and other women of their era. In doing so, each shows the power inherent in the legal fiction of corporate personhood. Davis’s Isabel Latimer challenges coverture’s restrictions and models her marriage to Clay Braddock after the securitized industrial corporation that emerged in the 1870s. Isabel embraces the new corporate form’s separation of ownership and control to carve out permanent managerial rights for herself in the new marital body. Wharton’s novel reveals corporate personhood’s amplifying power through her portrayal of the holding company, as embodied by Undine Spragg. This new kind of corporate person could consolidate other corporate persons, integrating their assets into its monolithic and vertically integrated corporate body. The late-nineteenth century corporate person created the possibility of reincorporating personhood over and over again, growing more efficient, powerful, and wealthier with each acquisition. Undine Spragg takes this corporate device and uses it to invert the merger doctrine of marital unity. These narrative evolutions provide imaginative schematics that show other women how to escape their subsidiary roles in marriage (and society). As divorce became an increasingly viable option for women, they could use the principles inherent in corporate structures to vitiate coverture’s restrictions and turn marriage into a lucrative modern business enterprise. Davis and Wharton use nineteenth-century corporate law’s invention of the

securitized industrial corporation and the holding company to pave the way for married women to reincorporate their personhood, one venture at a time.

## Chapter 4 - The Twilight Zone of Nineteenth-Century Labor Law and Science Fictional Personhood

Summary: Chapter 4 examines labor unions, the one group of natural persons that had no access to the corporate personality and its networked subjectivity in nineteenth-century America. The judiciary forced labor unions to live in a “legal twilight zone,” constructively denying them access to incorporation and its legal protections. As such, union members were consistently enjoined from striking, boycotting, and often even organizing as a group. Labor’s futility in late nineteenth-century America is apparent in countless naturalist novels, but perhaps no more so than in two science-fiction novels written by naturalist authors: Edward Bellamy’s *Looking Backward* (1887) and Ignatius Donnelly’s *Caesar’s Column* (1890). The “cognitive estrangement” inherent in science fiction texts enables authors to propose new, imaginative, and radical possibilities for humanity by transcending the fixed concepts of their empirical environments. However, even in this radically free fictive space, labor cannot overcome corporate law’s overwhelming presence and debilitating effects. *Caesar’s Column* shows labor organizing on a world-wide scale, but with no access to corporate personhood. When the “Brotherhood of Destruction” rises up, the organization immediately unravels and Armageddon ensues. *Looking Backward* presents labor’s uprising as a ringing success: the nation actually becomes a corporation and functions as a single, efficient corporate person. However, a closer look at the “utopia” in this text reveals that the corporate person has enslaved the working classes, enlisting them in a fascist “industrial army” against their will. Even in the revolutionary fictive space of science fiction, labor cannot imagine a way to access or defeat the corporate person. Nineteenth-century labor associations ultimately failed because they could neither access nor emulate corporate personhood’s incorporated actor networks.

In 1888, Samuel Gompers, the president of the American Federation of Labor issued a nationwide call for America’s scattered labor unions to affiliate into a single national federation. Gompers recognized that corporate capital was undergoing a radical process of consolidation, and that labor stood no chance of protecting workers’ rights unless it likewise combined into large associational bodies. He was undoubtedly correct in this recognition; Gompers was mistaken, however, in his belief that these new corporate conglomerates and the American legal system would allow labor to consolidate in a similar fashion. Rather, throughout the nineteenth century, labor unions existed in a zone of legal indeterminacy that Christopher Tomlins provocatively calls a “legal twilight zone.”<sup>279</sup> As corporations were merging and growing unchecked in size and power over the course of the nineteenth century, the legal system simultaneously took a draconian stance against labor consolidations. Whether due to corporate influence, growing fears of communism, or outdated and misapplied ideologies of republican individualism, the legal system generally and the judiciary more specifically refused to recognize or validate bodies of labor and placed them in a strange category of semi-illegality. Corporations became legal persons with rights surpassing natural persons, while nineteenth-century American law not only constructively denied labor the right to legal personhood, but also consistently

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<sup>279</sup> Tomlins, Christopher L. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*. Cambridge: Cambridge University Press, 1985, at 33.

threatened labor unions' very right to exist. As the law allowed corporate networks to proliferate, it stunted the growth of labor networks at every opportunity.

In this chapter, I journey into the legal twilight zone of labor law and emerge with the conclusion that the nineteenth-century labor movement stood little chance against the legal barriers that organizations of capital and the judiciary erected against its success. Corporate economic and political dominance in the late nineteenth century resulted in a confluence of factors that eviscerated the labor movement and denied labor the collaborative status it sought to engender. The large corporation's perceived efficiency, its role as the central actor in the emergence of the modern state, and its organizational capacities made it too powerful a foe for relatively disorganized and legally enfeebled labor unions. The nineteenth-century legal system refused to fully recognize labor unions as legal associations, and via charges of conspiracy, legal injunctions against boycotts and strikes, and debilitating constitutional interpretations, the American judiciary ensured the corporation's socio-economic preeminence at the expense of the labor movement and general population. This judicial antagonism would last at the very least until Franklin D. Roosevelt's reforms that arose during the New Deal.

The era's literary works of fiction accurately capture and reflect labor's relative futility. As the previous chapters have established, literary texts and the imaginative space they open enable us to grasp an historical moment in vivid detail in a way that legal history alone does not provide. Naturalist fiction's graphic depiction of the labor movement portrays labor's Sisyphean quest for legal equality. Time and again in these bleak texts, we witness – as Theodore Dreiser puts it in *Sister Carrie* – labor “having its little war” against capital, and emerging weaker after each successive defeat. These authors provide a contemporary cultural commentary that reveals that Americans perceived labor's hope for success at the end of the nineteenth century to be chimerical, at best.

Indeed, one form of nineteenth-century literary fiction – that is, *science fiction* – truly exhibits the labor movement's hopeless legal plight in America at turn of the century. Taking Tomlins' notion of the legal twilight zone to its outer limits, I argue in this chapter that the early naturalist science fiction that inhabited this twilight zone best demonstrates the nineteenth-century labor movement's legal, social, and economic impotence. Two populist authors made use of the emerging genre of science fiction and its unfettered imagination space to construct a plan for labor's victory. However, even in science fiction's radically free space for future building they could not envision a way to overcome the unassailable power of the corporation. Ignatius Donnelly envisions Gompers' world-wide federation of labor in *Caesar's Column* (1890).<sup>280</sup> This federation, like most labor unions of the time, did not (and, really, could not) engage in the act of incorporation, which meant it enjoyed neither corporate personhood nor the networked subjectivity that accompanies this legal personality. As such, when the Brotherhood of Destruction seeks to overthrow the corporate plutocracy, it reveals itself as a dysfunctional “conspiracy” and anarchical organization that brings about Armageddon instead of the dictatorship of the proletariat it had hoped to achieve. In his utopian *Looking Backward* (1888), Edward Bellamy uses science fiction's extensive imaginative possibilities to portray a future society where labor has indeed incorporated (in fact, the entire nation incorporates into the “Great Trust”).<sup>281</sup> Bellamy presents a futuristic society that appears to be a highly educated, extremely just, and classless industrial community. Closer inspection of the novel reveals,

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<sup>280</sup> Donnelly, Ignatius. *Caesar's Column: A Story of the Twentieth Century*. Ed. Nicholas Ruddick. Middleton: Wesleyan University Press, 2003.

<sup>281</sup> Bellamy, Edward. *Looking Backward*. New York: Dover, 1996.



however, that his corporate society is not an inspirational avatar of the technological sublime, but is instead an instantiation of the grotesque, a monstrous amalgam of angst-inducing technology.

Just as real-life labor leaders feared would be the case, the incorporation of the labor movement results in a fascist corporate takeover and the unwitting enslavement of the proletariat. Labor's desperate legal plight becomes shockingly apparent when, even in the nearly unrestricted realm of science fiction's imagination space, the corporate form (in both its absence and presence) crushes the American working class—just as it did in historical reality. As these novels suggest, the Gilded Age labor movement could not even imagine an incorporated future whereby they might exist on equal footing with corporate capitalists, let alone begin to bring that future about. Corporate law and labor law colluded to prevent labor from associating on the terms it desired, imposing instead debilitating legal restraints on the various brotherhoods of labor that arose across the nation.

### Labor Pains: Judicial Hostility toward the Labor Movement in Nineteenth-Century America

In an era when the American government significantly expanded the rights of corporations, the nineteenth-century judiciary engaged in a relentless battle against labor unions that prevented them from engaging in concerted actions against corporate interests. At the end of the century, labor unions existed in a state of “semioutlawry” as they fought for their basic legal right to exist.<sup>282</sup> The judicial assault on labor unions throughout the nineteenth century changed the very shape of the labor movement, forcing labor to abandon hope of legislative reform and to turn instead to economic tactics, such as strikes and boycotts, to improve their bleak working conditions. These tactics also came under fire as the judiciary essentially banned labor unions from engaging in concerted work stoppages or public campaigns against certain business entities. In some cases, courts actually went so far as to enjoin individual employees from quitting their jobs. This section examines in detail the judicial evisceration of the labor movement in late nineteenth-century America. Corporate infiltration of the government apparatus and outdated political ideologies were the social and economic conditions that produced legal antagonism toward the labor movement and catalyzed the judiciary's relentless assault on unions. The judiciary attacked labor unions as criminal conspiracies and effectively created a “government by injunction,” whereby judges banned unions from grappling with corporate interests. The courts ultimately challenged the very principle of labor unionism, constructively denying unions the same legal personhood and corporate form that corporations used to accumulate power, influence, and wealth.

A cynical explanation for the disparity in the law's treatment of organizations of capital and labor lies in the corporation's post-Civil War influence over the political process. Legal historians such as J. Willard Hurst point to the national government's reliance on private enterprise to undertake public projects such as building railroads, canals, telegraph lines, and similar infrastructural enterprises.<sup>283</sup> The conflation of the private and public spheres necessarily led to conflicts of interest, as in the case of Senator Chauncey Depew of New York. Depew served as a U.S. Senator while working as general counsel for Cornelius Vanderbilt's railroad companies and sitting on the board of directors of over 70 business corporations.<sup>284</sup> The labor movement fell victim to such conflicts of interest all too often. For instance, U.S. Attorney

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<sup>282</sup> Forbath, William. *Law and the Shaping of the American Labor Movement*. Cambridge: Harvard University Press, 1991

<sup>283</sup> Hurst, James Willard. *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970*. Charlottesville: University Press of Virginia, 1970, at 23.

<sup>284</sup> Phillips, David Graham. *The Treason of the Senate*. Chicago: Quadrangle Books, 1964, at 63.

General Richard Olney famously broke up the 1894 Pullman railroad strike by convincing President Cleveland to call in federal troops to end the largely peaceful protest, all but destroying Eugene Debs' American Railroad Union in the process. At the time, Olney remained the general counsel of the Chicago, Burlington, and Quincy Railroad Corporation. Richard White writes that "Olney joined a cabinet full of men with close ties to corporations, particularly railroad corporations, and with a common hostility to antimonopoly. While Debs was organizing railroad workers, and while the Populists and other antimonopolists were organizing western states, the railroads were organizing the cabinet and federal bureaucracy."<sup>285</sup> Gabriel Kolko goes a step beyond claims of undue corporate influence, and actually makes the case that most government "regulation" of industry is actually in the *service* of the very corporations the government claims to regulate.<sup>286</sup> According to these theories, capital's infiltration of politics and labor's disproportionate financial clout resulted in its unequal treatment at the hands of the U.S. government.

There are, of course, less cynical justifications for government and judicial antagonism toward labor unions. As corporations began to rapidly consolidate after the 1873 financial crisis, their vertical integration of supply and distribution chains resulted in huge economies of scale and new degrees of efficiency. Labor unions offered no such economies of scale or market efficiencies; indeed, many Americans viewed unions as terribly inefficient and bad for the economy. Economists viewed corporate efficiency as a new way to produce more of life's necessities at lower costs. Labor unions, on the contrary, as economist Arthur Eddy argued, "are all in the direction of less for more money."<sup>287</sup> A large portion of the population was led to believe that labor unions sought to improve their own standard of living at the expense of the general citizenry by striking for shorter hours and higher wages. As these unionized workers got paid more and worked less (so the argument went), the cost of necessities would increase at the expense of the average consumer, who was now subsidizing the union member's lifestyle. In an era dominated by political economy, the perception of labor's inefficiency accounted in part for the judicial hostility toward the labor movement. William Forbath offers yet another explanation for this fervent judicial antagonism: judges feared the direct challenge that the labor movement posed to state authority. That is to say, judges "shrewdly understood that trade unionists presented a far greater threat to the courts' definition of law and order, insofar as they believed that their unions stood for an alternative, and truer, 'legal' order."<sup>288</sup> The government (and judges in particular) viewed the labor movement's appeal to a "higher law" of human brotherhood as an act of defiance against the state. As a result, the strange body of nineteenth-century labor law "emerged from contests among competing state actors, politics, and normative orders."<sup>289</sup> Judges viewed labor unions as a challenge to their authority and used their position of power within the state to extinguish that challenge. In all probability, all three of these factors played a role in governmental and judicial hostility toward the labor movement in the second half of the nineteenth century. The confluence of corruption, ideology, and state sovereignty produced one of the most lopsided bodies of law in our nation's history.

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<sup>285</sup> White, Richard. *Railroaded: The Transcontinentals and the Making of Modern America*. New York: W.W. Norton and Co., 2011, at 418.

<sup>286</sup> Kolko, Gabriel. *Railroads and Regulation: 1877-1916*. New York: W.W. Norton & Co., 1965.

<sup>287</sup> Arthur Eddy quoted in Hovenkamp, Herbert. "Labor Conspiracies in American Law, 1880-1930." 66 *Tex. L. Rev.* 919 (April, 1988), at 941.

<sup>288</sup> Forbath, at 65.

<sup>289</sup> *Id.* at 66.

The precise source of the law's enmity toward labor organizations may be unclear, but it is unambiguously evident that labor unions were under constant legal attack throughout the late nineteenth century. The legal system used two key weapons in its attacks on labor: charges of criminal conspiracy and equitable injunctions that prevented unions from striking or boycotting.<sup>290</sup> In basic legal terms, a "conspiracy" is an agreement among two or more persons to engage in an illegal act (they need not engage in the act, only agree to the illegal act and take a substantial step toward accomplishing it). Courts interpreted labor strikes (concerted work stoppages) and secondary boycotts (a call to voluntarily abstain from dealing with a particular business entity) as criminal conspiracies. That is, if two members of a union agreed to quit work or abstain from doing business with an entity, they were agreeing to do something illegal. The judiciary held such actions as conspiratorial, notwithstanding the fact that both actions were in and of themselves perfectly legal. Courts held that quitting work and avoiding a business were legal acts for an individual person to engage in, but that they somehow (inexplicably) became illegal acts when a *group* of persons engaged in these activities.

Judges necessarily had to base this new definition of conspiracy on non-legal standards, stating simply that such labor tactics were "morally wrong," were carried out for "evil purposes," and employed "reprehensible means."<sup>291</sup> To make otherwise legal acts into illegal ones, the courts invented new "entrepreneurial property rights," whereby an employer began to possess an inalienable property right in uninterrupted access to the labor pool and a right to sell his goods or services without the threat of peaceful public coercion against his business practices.<sup>292</sup> Such "coercion" could include a picket of two quiet marchers or a single sign supporting a boycott in a barbershop window.<sup>293</sup> These supposedly coercive acts interfered with the employer's right to have unfettered access to new workers. These entrepreneurial property rights allowed judges to use their power of judicial review to invalidate as unconstitutional roughly 60 pro-labor laws that state legislatures passed in the 1880s and 1890s.<sup>294</sup> Legal historians observed that this new "definition of conspiracy and the pliable standards for its application gave state courts almost unlimited authority to counteract union pressures" and meant "that a combination might be proclaimed criminal although its actions did not violate even the most trifling of civil laws."<sup>295</sup>

Federal courts also attacked labor unions as conspiracies under the Sherman Antitrust Act of 1890. The Sherman Act was designed to prevent monopolistic business trusts by making illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations."<sup>296</sup> Federal judges unabashedly turned this piece of antimonopoly legislation against the very antimonopoly organizations it was designed to protect—the labor unions themselves. In the first seven years of the Sherman Act, federal courts found thirteen antitrust violations, *twelve* of which involved labor union "conspiracies" in restraint of trade.<sup>297</sup> Congress, seeking to remedy the "conspiracy" loophole in the Sherman Act that judges used to pervert its intent, later passed the Clayton Act to

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<sup>290</sup> Hurvitz, Haggai, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Juridical Reorientation of 1886-1895," 8 *Berkeley J. Emp. & Lab. L.* 307 (1986), at 317.

<sup>291</sup> *Id.* at 326.

<sup>292</sup> *Id.* at 358.

<sup>293</sup> *Id.* at 359.

<sup>294</sup> Forbath, at 38.

<sup>295</sup> *Id.* at 326.

<sup>296</sup> Sherman Act, 26 Stat. 209, 15 U.S.C. § 1.

<sup>297</sup> Hovenkamp, at 950.

exempt labor unions from antitrust legislation.<sup>298</sup> The Supreme Court, however, reached the inexplicable conclusion that despite the clear exemption for labor unions against charges of conspiracy in restraint of trade, the Clayton Act did not change the law at all and coercive strikes and boycotts remained illegal conspiracies.<sup>299</sup> And, since concerted action was labor's most powerful weapon, the very act of unionizing remained legally dubious. Indeed, the judiciary actually interpreted the Clayton Act as expanding the use of antimonopoly legislation against unions, holding that private parties – not just the government – could now initiate actions for injunctive relief against striking or boycotting unions.<sup>300</sup>

Such equitable injunctions against labor “conspiracies” in restraint of trade (*i.e.*, strikes and boycotts) proved to be capital's most powerful weapon against the labor movement. Court-ordered equitable relief is traditionally reserved for extraordinary situations where a plaintiff can show that a property right is being violated and that no adequate legal relief exists to stop the violation. The injunction, a court order that compels a person to do or refrain from doing some specific act, is one such form of equitable relief. Under the Sherman Act (and the constitution's interstate commerce clause) the government began issuing injunctions against labor strikes and boycotts. Courts held anybody in violation of the broad injunctions to be in contempt of court and subjected them to fines and imprisonment. The injunctions need not even name specific individuals or labor organizations, and in some cases were held to apply to any of the “mob” who participated in the concerted action.<sup>301</sup> Indeed, Eugene Debs served a six-month jail sentence for contempt of court after ignoring a labor injunction not to strike during the Pullman Strike.<sup>302</sup> The labor injunction proved so powerful because a judge could issue the injunction based entirely on an employer's testimony; no jury need approve the act. Likewise, federal marshals and troops could immediately begin to enforce the injunction once a judge issued it. In many cases, the injunction even suspended the legal rights of union members during the strike or boycott. For instance, one justice of the peace “was enjoined by a federal court from issuing warrants against strikebreakers carrying concealed weapons, while one in West Virginia was enjoined from hearing criminal charges against private police.”<sup>303</sup> Through the “government by injunction,” the judiciary forced labor to live in a zone of legal indeterminacy, suspending the law to effect a favorable economic outcome for corporate interests.

A corporation armed with the equitable injunction could stop concerted labor actions without a trial or jury. In fact, eliminating the jury trial was one of the most important steps in the legal war against labor. Juries were often sympathetic toward strikers, and were reluctant to agree that labor unions were criminal conspiracies or that their actions were illegal *per se*. After one strike that resulted in nearly a thousand criminal charges, jury trials resulted in only two convictions. During that same strike, equity judges (without juries) heard 258 cases for contempt of the labor injunction and reached 255 convictions.<sup>304</sup> The non-juried government by injunction against labor's “criminal conspiracy” to organize into associational bodies large enough to challenge corporate organizations proved too powerful a weapon to overcome for the late nineteenth-century labor movement.

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<sup>298</sup> 15 U.S.C. § 17.

<sup>299</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).

<sup>300</sup> Hovenkamp, at 964.

<sup>301</sup> Forbath, 67.

<sup>302</sup> *In re Debs*, 158 U.S. 564 (1895).

<sup>303</sup> Forbath, 103.

<sup>304</sup> *Id.* at 100 – 101.

At the same time, courts held that the owners, directors, and officials of a business corporation who agreed to fix prices or to affirmatively restrain trade were not engaging in a criminal conspiracy. Aggregations of capital avoided charges of conspiracy in restraint of trade due to one key legal technicality: corporate personhood. The legal fiction of corporate personhood, as explained throughout the course of this study, dictates that corporations are by law a single “person” and its constituent members (while acting within the scope of their corporate duties) are merged into that individual legal personality. Recall, a conspiracy is an agreement between *two or more persons* to engage in an illegal act. However, since all the persons associated with the corporation are legally a single person, they cannot conspire with one another. Likewise, two (or ten, for that matter) corporations that agree to join together to reduce competition and raise prices are not conspiring to restrain trade, because upon merger they become a single person who cannot, by legal definition, conspire (because there is no multiplicity of actors).<sup>305</sup> Corporate personhood meant that “any number of capitalists united in one corporation could bargain with labor. But the instant the laborers joined forces to strengthen their bargaining position, they formed a conspiracy.”<sup>306</sup> The legal fiction of corporate personhood “fatally tilted the scales” in the struggle between capital and labor.<sup>307</sup>

At first glance it would seem that labor unions simply needed to incorporate to enjoy the same legal protections against criminal conspiracies in restraint of trade. Predictably, however, late nineteenth-century American law and economics constructively denied labor unions the right to incorporate. States did not offer labor unions the right to incorporate until the early twentieth century, and even then only a smattering of states made such offers.<sup>308</sup> A federal statute in 1886 appears to have made federal incorporation a possibility, but no unions availed of this opportunity, since it is not clear how a federal corporation would operate given that corporate governance is a matter of state law.<sup>309</sup> Even if statutes in some jurisdictions eventually allowed labor unions to incorporate, the unions could not avail themselves of the opportunity. Labor unions were fundamentally different entities to business corporations. They did not generate large profits, and therefore could not attract investors to purchase their securities. Indeed, profit was not the labor union’s intended purpose. Unions sought, instead, to foster brotherhoods of workers to bring about more humane working and social conditions. Second, even if labor unions could issue securities they recognized that they would be immediately susceptible to a hostile corporate takeover. There would be no mechanism to prevent shareholders from selling their shares to non-union members. If a union member who held shares died, his family might sell his shares. If he were fired or quit the union, he might sell his shares in order to simply put food on the table. In other words, the vastly larger and wealthier organizations of capital could purchase shares of the incorporated union whereby “control of the corporation might pass into hostile hands.”<sup>310</sup> Fearing that a large union’s leaders might sell them out to corporate interests, members of labor unions insisted on systems of small and loosely organized associations governed under local “home rule,” so that they could keep an eye on the organization’s behavior.<sup>311</sup>

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<sup>305</sup> Hovenkamp, at 959.

<sup>306</sup> *Id.* at 960.

<sup>307</sup> White, at 420.

<sup>308</sup> Cooke, Frederick Hale. *The Law of Combinations, Monopolies and Labor Unions*. 2<sup>nd</sup> Ed. Chicago: Callaghan and Co., 1909, § 52, at 105 n.13.

<sup>309</sup> *Id.*

<sup>310</sup> Wambaugh, Eugene. “Should Trade Unions Be Incorporated?” *15 Green Bag* 260 (1903), at 263.

<sup>311</sup> White, at 416.

In addition to economic fears that incorporation would subject them to corporate takeover, many in the labor movement saw the possibility of incorporated labor unions as a legal trap. They viewed the otherwise hostile legal system's sudden offer to allow incorporation as highly suspicious. As Eugene Wambaugh noted in the early twentieth century, the presumption against incorporation had to remain strong because "the suggestion comes not from workmen, but from capitalists, and somewhat suddenly."<sup>312</sup> The supporters of union incorporation were overwhelmingly in the anti-labor camp. Indeed, these advocates went beyond encouraging incorporation by calling instead for the mandatory incorporation of labor unions: "Labor unions should be required to organize legally, like other individuals who associate for a distinct industrial purpose, so that responsibility may attach to their conduct."<sup>313</sup>

"Responsibility" was capital's oft-repeated justification for encouraging labor unions to incorporate. As a corporation, a labor union's internal management would be subject to judicial control and they would also have to attain state-granted corporate charters, drastically limiting the incorporated union's freedom of action and its overall size.<sup>314</sup> Moreover, once the union became a legal person, it could be sued and would be criminally and financially liable for damages that occurred during strikes. The costs surrounding labor strikes like the one at Pullman, which totaled nearly \$340,000 in damages to railroad property, would become the "responsibility" of the labor union that authorized the strike, despite the fact that federal investigations showed that such damages were mostly the result of non-union members' actions.<sup>315</sup> Such vicarious liability would quickly diminish the labor unions' small financial reserves, essentially eliminating strikes as an economic weapon and unraveling the union itself. In a 1902 debate regarding labor union incorporation with Louis Brandeis, Samuel Gompers squarely addresses the widely held belief that labor incorporation was a trap:

Our friend says that this proposition to incorporate the trades unions ought to be welcomed by them. Well, we have not reached that stage of appreciation of this kind offer which is made to us... Do you blame us if we fear to place further power in the courts and judges of our country when they have gone so far, stretching their power to an extent never contemplated by the law, never contemplated by the constitution of our country, for on no statute books in the whole land can you find one provision upon which is based any authority for the issuance of injunctions in these labor disputes. When courts so far transgress upon the rights of wage earners, when they will invade the rights to which the toilers are entitled, you must excuse us, if you please, if we decline your invitation to step into your parlor.<sup>316</sup>

Gompers recognized that the legal system's sudden offer of incorporation was a Trojan horse, and, based on labor's experience with the judiciary, aptly closed his speech in stating that "we fear the Greeks even when they bear us gifts."<sup>317</sup>

As Herbert Hovenkamp observes, labor was "caught between a rock and hard place," because they either faced criminal conspiracy charges as unincorporated associations, or state

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<sup>312</sup> Wambaugh, at 264.

<sup>313</sup> Bolles, Albert S. "The Rights and Methods of Labor Organizations." *The North American Review*, Vol. 176, No. 556 (Mar., 1903), pp. 410-421, at 420.

<sup>314</sup> Hovenkamp, 961-62.

<sup>315</sup> White, 442.

<sup>316</sup> Gompers, Samuel and Louis D. Brandeis. "The Incorporation of Trade Unions: 'No, Thank You!' Says Gompers," *The Green Bag: An Entertaining Journal of Law* (Spring, 1998) 1 Green Bag 2d 306, 311-14.

<sup>317</sup> *Id.* at 311.

control, corporate takeover, and financial ruin as incorporated unions.<sup>318</sup> Oliver Wendell Holmes commented on the legal double standard (as well as the double-bind of union incorporation) in his 1896 dissenting opinion in *Vegeahn v. Guntner*.<sup>319</sup> Holmes argued that “if the battle is to be carried on in a fair and equal way” the American legal system would have to be more evenhanded and allow unions to organize, strike, and boycott.<sup>320</sup> But the judiciary did not seem overly concerned with allowing a “fair and equal” battle between capital and labor. Throughout the course of the late nineteenth century, the supposedly laissez-faire judiciary engaged in “differential and selective interference, intended above all to shield entrepreneurs.”<sup>321</sup> Both federal and state courts made it abundantly clear that “the law was opposed to broad unionism and the kinds of aggressive, industry-, community-, and class-based tactics it often entailed.”<sup>322</sup> Labor could have its “little war,” but the American legal system would not permit it to keep a standing army or use weapons to defend itself. At least at the end of the nineteenth century, the labor movement appeared relegated to small economic concessions instead of broad ideological change.

Late nineteenth-century American literature is an excellent source for observing the culturally ubiquitous sense of labor’s desperate struggle at the turn of the century. The novel serves as a cultural mirror that allows us to reflect on the contemporary understanding of labor’s efficacy in Gilded Age America. Overtly anti-labor novels like Thomas Bailey Aldrich’s *The Stillwater Tragedy* (1880) and (future Secretary of State) John Hay’s *The Bread-Winners* (1883) were, in Laura Hapke’s terms, nothing more than “Gilded Age agitprop.” These novels and their ilk portrayed members of the labor movement as “scheming malcontents” who needed to adopt a “philosophy of humble compliance as atonement for conduct at once dangerous and childish.”<sup>323</sup> Such viewpoints are not surprising given their relatively conservative sources. It is the texts of more sympathetic and progressive authors that make evident that cultural commentators perceived the nineteenth-century labor movement’s apparent futility in the face of the law. Theodore Dreiser’s chapter “The Strike” near the end of *Sister Carrie* (1900) is among the novel’s bleakest moments.<sup>324</sup> In this chapter, the beleaguered Hurstwood contemplates going out as a scab to earn some money during a street-car strike. While reading about the strike in the paper, Hurstwood, “a great believer in the strength of corporations,” predicts the strike’s inevitable outcome: “They can’t win... They haven’t any money. The police will protect the companies. They’ve got to. The public has to have its cars” (376). Dreiser adds that Hurstwood “didn’t sympathize with the corporations, but strength was with them” (376). Hurstwood’s prediction proves correct and ultimately the striking street-car workers stand around angered by “the sight of the company, backed by the police, triumphing,” and they gloomily recognize that police intervention on behalf of the company meant “that the companies would soon run all their cars and those who had complained would be forgotten” (386). Dreiser addresses the fact that the state consistently intervened on behalf of corporations during strikes in order to protect newly invented “entrepreneurial property rights.”

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<sup>318</sup> Hovenkamp, 960.

<sup>319</sup> *Vegeahn v. Guntner*, 167 Mass. 92 (1896).

<sup>320</sup> *Id.* at 1081.

<sup>321</sup> Hurvitz, 349.

<sup>322</sup> Forbath, 94.

<sup>323</sup> Hapke, Laura. *Labor’s Text: The Worker in American Fiction*. New Brunswick: Rutgers University Press, 2001, at 62.

<sup>324</sup> Dreiser, Theodore. *Sister Carrie*. New York: Signet, 1980.

Frank Norris paints a similarly grim picture of organized labor at the turn of the century in *The Octopus* (1901).<sup>325</sup> In this novel, the Pacific and Southwestern railroad corporation runs roughshod over the wheat ranchers of California's San Joaquin Valley, stealing land and destroying lives. The ranchers decide to fight back, and one of them gives a stirring speech that results in the formations of a new labor organization:

"ORGANISATION," he shouted, "that must be our watch-word. The curse of the ranchers is that they fritter away their strength. Now, we must stand together, now, NOW. Here's the crisis, here's the moment. Shall we meet it? I CALL FOR THE LEAGUE. Not next week, not to-morrow, not in the morning, but now, now, now, this very moment, before we go out of that door. Every one of us here to join it, to form the beginnings of a vast organisation, banded together to death, if needs be, for the protection of our rights and homes. Are you ready? Is it now or never? I call for the League. (275-76)

Six-hundred ranchers join the league and they begin concerted efforts – lobbying, boycotting, etc. – in preparation for their impending confrontation with the railroad corporation. The railroad makes its move, taking possession of the ranches, and the League is summoned. Of the six hundred members, only nine heed the call. The irascible rancher Annixter exclaims "ALL. Is this all of us?...Where are the six hundred men who were going to rise when this happened?" (507). When Garnett bitterly asks what has become of the League, Annixter responds "It's gone to pot—went to pieces as the first touch" (509). The corporation, armed with injunctions and represented by the marshal and its local representatives, proceed to gun down the ranchers, take the lands, and face no punishment for their actions. The League never had a chance. Norris identifies time and again that the corporation has captured the government apparatus and enjoys legal impunity as a result.

*The Jungle* (1906) by Upton Sinclair is usually remembered for its gruesome portrayal of Chicago's meatpacking industry, but the novel also depicts the ineffectiveness of labor unions against large cartels, trusts, and corporations.<sup>326</sup> Through the eyes of the novel's protagonist, Jurgis Rudkus, Sinclair walks us through the long and complicated Beef Strike that the unions waged against the Beef Trust. Sinclair portrays familiar tactics: the corporation paying off politicians, the press, and using the police to protect strikebreaking scabs. Public outrage eventually forces the mayor to investigate unsafe conditions inside the packing house, but "the packers got a judge to issue an injunction forbidding him to do it!" (270). Throughout the strike "the unions watched in sullen despair" and eventually give up the cause, with the end result that half the striking workers lose their jobs. Indeed, Sinclair concedes that the labor "organizations did the workers little good, for the employers were organized...so the strikes generally failed" (308). Lamenting the oligarchical control of the nation, Sinclair writes that corporations "own not merely the labor of society, they have bought the governments; and everywhere they use their raped and stolen power to intrench themselves in their privileges, to dig wider and deeper the channels through which the river of profits flows to them!" (301). In the end, we find that "That was their law, that was their justice...it was only force, it was tyranny, the will and the power, reckless and unrestrained" (161). Sinclair focuses on the power of the government by injunction and, like Norris, reflects the commonly held belief that corporate influence directed government actions against labor. As a result, labor could not organize in the same way as capital, and were doomed to "generally fail" as a result.

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<sup>325</sup> Norris, Frank. *The Octopus: A Story of California*. New York, Penguin, 1986.

<sup>326</sup> Sinclair, Upton. *The Jungle*. New York: Signet, 1990.



Finally, Robert Herrick's unfairly forgotten masterpiece *The Web of Life* (1900) dramatizes the Pullman Strike and portrays the labor movement in equally pessimistic terms.<sup>327</sup> Herrick's protagonist, Dr. Sommers, cynically watches the strike develop and dissipate over the summer of 1894. Discussing the strike with a member of the American Railroad Union, Sommers predicts that "And that is why this row will be ended on the old terms: the rich will buy out the leaders. Better times will come, and we shall all settle down to the same old game of grab on the same old basis" (101). He proves correct, as his friend is bribed by a wealthy capitalist and ultimately begins to write anti-labor propaganda for the press. Herrick demonstrates that the corporate takeover of labor was perceived as inevitable. A group of wealthy capitalists scoff at the strike, knowing that, "if need be, the courts, the state, the federal government, would be invoked for aid. Law and order and private rights must be respected" (110). The government will intervene to protect judicially manufactured entrepreneurial property rights, and Herrick identifies the judiciary's now-familiar weapons. He notes that "It was a war of injunctions and court decrees. But the passions were the same as those that set Paris flaming a century before, and it was a war with but one end: the well-fed, well-equipped legions must always win" (137). Indeed, "Sommers could see the signs of a speedy collapse," since "it was becoming a matter of the courts now" (158). Herrick shows that judges and their government by injunction had the power to conquer labor time and again, and that both sides in the battle knew very well that capital would be victorious thanks to these legal interventions.

This brief survey of turn-of-the-century literature reveals the cultural perception that the labor movement could not defeat corporate organizations in the socio-legal system as it existed at the end of the nineteenth century. The themes in these novels capture the legal history surrounding the battle between labor and capital. First, corporations had undue influence – perhaps even control – over the government. The judicial system created and protected entrepreneurial property rights against "conspiracies of labor" through the equitable injunction. This government by injunction and similar legal weapons prevented labor from organizing in the same way as capital. As such, the scales were fatally tipped in capital's favor and labor stood little to no chance of effecting meaningful change in working conditions and the distribution of wealth. These naturalist novels paint a bleak image of the labor movement's power and efficacy. As cultural markers, they reveal the common perception of hopeless inevitability with regard to corporate dominance over labor in late nineteenth-century America.

### Imagine the Possibilities: Nineteenth-Century Science Fiction and Labor's Possible Futures

Authors like Dreiser, Norris, Sinclair and Herrick use the fictive space of their novels to present a vivid and detailed picture of the labor movement's bleak legal status in the U.S. at the turn of the century. As naturalist authors, they were committed to portraying through literature the world as it actually was—or, at least, as they perceived it to be. The same nineteenth-century industrial upheaval and resulting social angst that produced the naturalist literary movement catalyzed another literary genre as well: American science fiction (sf).<sup>328</sup> As a cultural mode, sf emerged in response to new technologies and forces that shocked the populace with new speeds, scales, and seemingly endless scientific possibilities.<sup>329</sup> Unlike literary naturalism, sf's fictive space is not bound by the constraining principles of verisimilitude and familiarity. Instead, sf allows an

<sup>327</sup> Herrick, Robert. *The Web of Life*. New York: Dodo Press, 2014.

<sup>328</sup> Franklin, H. Bruce. *Future Perfect: American Science Fiction of the Nineteenth Century—An Anthology*. Revised and Expanded Edition. New Brunswick: Rutgers University Press, 1995, at 1.

<sup>329</sup> Id.

author to produce a ludic free play of the imagination, whereby the text serves as a thought experiment for generating and testing future possibilities.<sup>330</sup> A contemporary examination of historical sf “shows how an age determines and displays itself though what it sees as remote possibilities.”<sup>331</sup> Reading historical sf enables us to see what those nineteenth-century authors imagined to be at the outer boundaries of possibility. In some cases, the future that these authors imagine serves as an inducement to social praxis because the literary act of producing the future can “stimulate notions of social and political alternatives.”<sup>332</sup> In other words, sf authors imagine a future that can motivate their readers to bring the imagined state of affairs to fruition.

This section examines sf’s potential to mobilize social change through an analysis of two of America’s earliest sf texts: Ignatius Donnelly’s *Caesar’s Column* (1890) and Edward Bellamy’s *Looking Backward* (1888). This analysis shows that nineteenth-century populist authors failed to imagine a way to overcome the power of the law and the corporation, even in sf’s radically free fictive space for engineering possible futures. These early sf authors perceived aggregations of capital and the legal system’s hostility toward labor to be so profoundly powerful that the law and the corporation invade sf’s imagination space, polluting and corrupting it. Unable to see clearly through these polluting influences, the social and political alternatives that these authors imagine turn out to be monstrous future worlds where labor’s uncertain legal status results in the movement’s cataclysmic failure. In *Caesar’s Column*, Donnelly portrays the possible future of an unincorporated worldwide brotherhood of workers in the year 1984, only to have the workers’ revolution end in the destruction of civilization due to their lack of corporate organization. As an unincorporated body, the brotherhood has no legal personality and remains a conspiratorial body, which dissolves into self-interested factionalism when the revolution most requires concerted effort. In *Looking Backward*, Bellamy chooses to imagine a future (in the year 2000) where the labor movement embraces the corporate form, despite its recognition that incorporation was a legal trap set by organizations of capital. On the surface, his utopia seems to be an idyllic vision of incorporated brotherhood. However, a closer inspection of Bellamy’s “utopia” reveals the very future the labor movement feared: corporate domination, indentured servitude, and an empty and alienated existence. The era’s labor laws were so distorted in the service of capital, that authors could not envision a successful future for the labor movement even in sf’s ludic free space. The twilight zone of nineteenth-century labor law emerges once again in the pages of Gilded Age sf. It was not until decades later that labor could imagine a “new deal” with society that made progress seem like a viable possibility.

Darko Suvin defines the genre of sf as a fictional tale determined by a hegemonic literary device (a novum, or a “new thing”) that is radically different from the empirical times, places, and characters of mimetic (or naturalist) fiction, but that is perceived as *not impossible* within the cognitive norms of the author’s epoch.<sup>333</sup> That is, sf is the genre of *cognitive estrangement*. The novum (or fictional environment) is stranger than our present reality, but scientifically possible (if, however, unlikely). The scientific novum can be a gadget, technique, phenomenon, setting, character, or even new social relations (see utopian fiction, for instance). The genre lies somewhere between naturalistic (or “mundane”) fiction and fantasy/myth. In Suvin’s words,

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<sup>330</sup> Csicsery-Ronay Jr., Istvan. *The Seven Beauties of Science Fiction*. Middletown: Wesleyan University Press, 2008, at 1 and 6.

<sup>331</sup> Franklin, at 1.

<sup>332</sup> Pfaelzer, Jean. *The Utopian Novel in America, 1886 – 1896: The Politics of Form*. Pittsburgh: The University of Pittsburgh Press, 1984, at 14.

<sup>333</sup> Suvin, Darko. *Metamorphoses of Science Fiction*. New Haven: Yale University Press, 1979, at vii.

“Naturalistic fiction does not require scientific explanation, fantasy does not allow it, and sf both requires and allows it.”<sup>334</sup> Carl Freedman extends this definition by calling cognitive estrangement a dialectical process, whereby the author creates an alternative fictional world which performs an estranging critical interrogation of our mundane environment. He believes the “critical character of the interrogation is guaranteed by the operation of cognition, which enables the science-fictional text to account rationally for its imagined world and for the connections as well as the disconnections of the latter to our own empirical world.”<sup>335</sup> Disciplinary debate rages as to when sf emerged as a genre, with some like Suvin dating it back to at least Moore’s *Utopia* (1516), with others like Samuel R. Delany insisting that the genre coincided with Hugo Gernsback’s publication of *Amazing Stories* in 1926. In any event, it is not so much what sf is that is of interest here, but rather what sf *does*.

Sf allows for a radical free space of imagination, in which an author can create a possible future or alternative world with characteristics that lie at the boundaries of human imagination—but which, nonetheless, we might conceivably attain at some point in time. More typically realist or naturalist fiction allows for the free play of the imagination, but always within the strict parameters of society as it is. Sf casts off the shackles of the “real world,” and imagines society as it might be instead. To this effect, Joanna Russ sees sf as participating in a kind of subjunctivity, that is, of painting a picture of “life-as-it-might-be.”<sup>336</sup> Turning again to Suvin, the father of sf theory, sf’s novums, “the aliens—utopians, monsters, or simply differing strangers—are a mirror to man just as the differing country is a mirror of his world. But the mirror is not only a reflecting one, it is also a transforming one, virgin womb and alchemical dynamo: the mirror is a crucible.”<sup>337</sup> The crucible of sf’s fictive space allows human beings to “engineer reality to meet their felt social needs against antagonistic forces.”<sup>338</sup> Sf’s imagination space allows for an unbound aesthetic experience, which is free from preexistent concepts, purposes, and laws—it serves as a “boot-up disk for conceptual thought.”<sup>339</sup> Though sf so often imagines the future, its real concern is the present and how we can act in the here and now to unlock the imagined potentialities presented in the text. In Frederic Jameson’s words, sf allows us “to fix this intolerable present of history with the naked eye,” because sf’s future world transforms our actual present into the past. Sf allows us to historicize the present because it temporarily transports us to the future, whereby we can turn the historical gaze on our own spatiotemporal environment.<sup>340</sup>

Sf’s imagined and potential futures and alternative realities serve as thought experiments that allow us to test hypotheses for a better form of life in a free conceptual space. Istvan Csicsery-Ronay Jr. argues that sf “is a social-scientific thought experiment in an attempt to conceive of new possibilities in a conceptual space and to encourage mobilization of that thought experiment in reality.”<sup>341</sup> He cites examples where sf texts actually induced scientific innovation.

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<sup>334</sup> Id. at 65.

<sup>335</sup> Freedman, Carl. *Critical Theory and Science Fiction*. Middletown: Wesleyan University Press, 2013, at 16-17.

<sup>336</sup> Russ, Joanna. “Towards an Aesthetic of Science Fiction,” *Science Fiction Studies*, Vol. 2, No. 2 (Jul., 1975), pp. 112-119, at 117.

<sup>337</sup> Suvin, at 12.

<sup>338</sup> Csicsery-Ronay Jr., at 85.

<sup>339</sup> Kaufman, Robert. “Red Kant, or the Persistence of the Third ‘Critique’ in Adorno and Jameson,” *Critical Inquiry*, Vol. 26, No. 4 (Summer, 2000), pp. 682-724, at 711

<sup>340</sup> Jameson, Frederic. “Progress versus Utopia; or, Can We Imagine the Future?” *Science Fiction Studies* 9: 147-58, at 152-153.

<sup>341</sup> Csicsery-Ronay Jr., 122.

In a relatively recent example, he identifies the key role of texts like Brunner's *Shockwave Rider* (1974) and Gibson's *Neuromancer* (1984) in producing the hacker community's group consciousness and the subsequent creation of novums like Wikipedia and other interconnected global networks, or networked forms of consciousness.<sup>342</sup> Similarly, members of this "hacker community" have argued that sf texts (novels, movies, etc.) actually serve as platforms for a surprisingly large percentage of software development.<sup>343</sup>

The novums in sf texts function as avatars of what David Nye calls the American technological sublime. Nye condenses and translates Kant's and Burke's notions of the natural (both mathematical and dynamic) sublime into post-industrial technological innovations, whereby our encounter with a technological marvel produces "a healthy shock, a temporary dislocation of sensibilities that force[s] the observer into mental action."<sup>344</sup> Sf's ludic and free imagination space allows authors to conceive of experimental and profound possible futures and novums, and the reader's encounter with these technologically sublime concepts motivates her to imitate or reproduce the inspirational model of the future. In her analysis of the utopian novel, Jean Pfaelzer identifies that the utopian novum "shatters the notion of determinism and reinforces a creative and rebellious subjectivity."<sup>345</sup> The utopian novum not only conceives of a better future, but also in its very sublimity drives the reader to take steps to achieve that future.

If we take seriously, at least to some degree, this theory of sf inspiring steps to producing a better future, analysis of the two most influential (in terms both of copies sold and impact on American politics) sf utopias in late nineteenth-century America reveals the deeply ingrained perception of labor's dismal future. Populist sf authors who fully sympathized with the labor movement could not transcend the bleak historical moment that the legal system's draconian attack on labor generated. Corporate dominance and the resulting judicial antagonism toward labor restrained and polluted sf's otherwise free and ludic imagination space. As a result, Donnelly's and Bellamy's imaginations fail and their respective visions of the future show the labor movement facing the same legal double-bind that it faced at the turn of the century. Even when supplemented by sf's imaginative possibilities, labor unions in the literature of the period still had to choose between avoiding incorporation and remaining a criminal conspiracy or to incorporate, thereby submitting to the corporate state's control. As the following analysis of *Caesar's Column* and *Looking Backward* reveals, corporate power turns intended utopias into unanticipated dystopias.

### *Caesar's Column* (1890)

*Caesar's Column* was a huge success, selling over 700,000 copies and going through twelve editions in under a year.<sup>346</sup> The novel was written by Ignatius Donnelly, a colorful character and a notorious crank who, in addition to "proving" the existence of the lost city of Atlantis, served as the lieutenant governor of Minnesota, a railroad lobbyist, a Republican congressman, a state senator, and a marginal vice presidential candidate.<sup>347</sup> Donnelly wrote *Caesar's Column* after one

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<sup>342</sup> Id. at 133.

<sup>343</sup> Pesce, Mark. "Magic Mirror: The Novel as Software development Platform" [Presented at the Media in Transition Conference at MIT, 1999], [web.mit.edu/m-i-t/articles/pesce.html](http://web.mit.edu/m-i-t/articles/pesce.html).

<sup>344</sup> Nye, David E. *American Technological Sublime*. Cambridge: MIT Press, 1994, at 6-7.

<sup>345</sup> Pfaelzer, at 25.

<sup>346</sup> Ueda, Reed T. "Economic and Technological Evil in the Modern Apocalypse: Donnelly's *Caesar's Column* and *The Golden Bottle*." *Journal of Popular Culture* 14.1 (Summer 1980): 1-9, at 1.

<sup>347</sup> Saxton, Alexander. "'Caesar's Column': The Dialogue of Utopia and Catastrophe," *American Quarterly*, Vol. 19, No. 2, Part 1 (Summer, 1967), pp. 224-238, at 232.

of his many political defeats, and the text is full of venom against what he considered to be America's corrupt political system.

The novel tells the tale of a Ugandan sheep farmer named Gabriel Weltstein, who in 1984 comes to New York City in a transatlantic "air ship" to sell his wool directly to U.S. manufacturers in an effort to escape the dominion of the international "wool ring." (The ring had been fleecing him for years, it seems.) Gabriel is in awe of the city's technological marvels, but quickly comes to find that the city (and America) is not as glorious as it seems. A corporate plutocracy rules the nation and oppresses the working classes. Coincidence quickly brings Gabriel into intimate friendship with Maximilian Petion, one of the leaders of a secret world-wide labor organization known as the Brotherhood of Destruction. The brotherhood is planning a revolution against the plutocracy, which in turn is planning to destroy the brotherhood with an air-raid of poison bombs. The brotherhood's revolution results in bloody anarchy when its system of governance collapses into self-interested conspiratorial acts of greed and revenge.

The brotherhood's failure suggests that Donnelly was incapable of using sf's ludic and free imagination space to engineer a future where the labor movement peacefully and successfully overcomes the nineteenth-century barriers of corporate influence and judicial antagonism. Donnelly suffers from the same constrained imagination space as the characters in his novel, because the obtrusive labor laws regarding conspiracies precluded a truly optimistic vision of the future. With his corrupted imagination, Donnelly cannot use sf's radical fictive space to envision a future for labor, and instead turns to Armageddon and sends his few surviving characters to a small, racially "pure," and isolated Jeffersonian pastoral republic on the plains of Uganda. Donnelly's imaginary "future" resides entirely in the past, and for that reason it fails to provide any motivation for engineering a new version of the present.

Not surprisingly, Donnelly's first object of critique in his future world of 1984 is the law. Gabriel intervenes to save Max from being trampled by a carriage, but the carriage belongs to Prince Cabano (formerly Jacob Isaacs, who purchased his title), the leader of the corporate plutocracy. Gabriel believes the courts will protect him since his actions in saving Max were just, which spurs Max into his first diatribe against the legal system: "Our courts, judges and juries are the merest tools of the rich. The image of justice has slipped the bandage from one eye, and now uses her scales to weigh the bribes she receives. An ordinary citizen has no more prospect of fair treatment in our courts, contending with a millionaire, than a new-born infant would have of life in the den of a wolf" (24). Subtle combinations, rings, trusts, and above all, corporations have captured the government apparatus, in the same way that many believed that corporate influence unduly influenced the judiciary against labor unions in nineteenth-century America. The plutocracy dictates the law; it is in Prince Cabano's home where "political parties, courts, juries, governors, legislatures, congresses, presidents are made and unmade" (50). Cunning laws transfer the fruits of the working man's labor into the pockets of corporations. Donnelly and his characters see no way past the corrupt legal system:

As the domination and arrogance of the ruling class increased, the capacity of the lower classes to resist, within the limits of law and constitution, decreased. Every avenue, in fact, was blocked by corruption. Juries, courts, legislatures, congresses, they were as if they were not. The people were walled in by impassable barriers. Nothing was left them but the primal, brute instincts of the animal man, and upon these they fell back, and the Brotherhood of Destruction arose. (76)

For Donnelly, Max, and the brotherhood, the law is an impassable barrier. Judicial antagonism and the government by injunction leave the labor movement with no hope for reform or change.

The law's corrupting influence obscures their ability to think rationally, forcing them to rely on their brute instincts of violence and destruction.

This oppressive legal system has snuffed out the working class' imagination—they see no future but one of anarchy. Gabriel is an outsider and, at first, retains his imaginative capacities; his imagination allows him to envision alternative realities, new possibilities, and available futures. He foresees the horrible outcome of the brotherhood's revolution. As he puts it, “my imagination was always vivid, and I saw the whole horrid reality unrolled before me like a panorama” (14). Gabriel, the only character imbued with an imagination, spends the better part of the novel asking Max and his cohorts to abandon destruction and to embrace instead a Brotherhood of Justice. Gabriel's brotherhood would be “composed of all men who desire to lift up the oppressed and save civilization and society. It should work through governmental instrumentalities. Its altars should be the schools and the ballot-boxes” (131). Gabriel retains the ability to use his imagination to build a future that uses political reform to mobilize change. Like early labor movement leaders, he believes that such reforms might improve the conditions for the laboring classes. However, like those early labor leaders, Gabriel's faith in political reform to improve labor's lot proves unfounded.<sup>348</sup> After witnessing the injustices in 1984 America, Gabriel sees that in this environment of legal antagonism, the “illusions of the imagination, which beckon all of us forward, even over the roughest paths and through the darkest valleys and shadows of life, had departed from the scope of their vision. They knew that to-morrow could bring them nothing better than today—the same shameful, pitiable, contemptible, sordid struggle for a mere existence” (32). Corporate influence and judicial antagonism choke off the laborer's imagination space, suffocating its power to imagine a brighter future.

Instead of imagining political or legal avenues for change, Donnelly's brotherhood operates (just as nineteenth-century unions operated) as a criminal conspiracy, loosely organized and lacking a legal personality through which to exercise its rights. From the onset of the novel, each of the characters – plutocrat or proletariat – rightly refers to this clandestine and loosely organized brotherhood in conspiratorial terms. At a meeting of the plutocrats, Prince Cabano asks his spy to recount what he has discovered about the extent and personality of the brotherhood and to disclose “who are the leaders of the miserable creatures in this new conspiracy” (95). Andrews, the spy, replies that the brotherhood is composed of over one-hundred million working men across the globe. There is an executive committee of three “chief conspirators”: Caesar Lomellini, commander-in-chief; a nameless “Russian Jew,” vice-president; and Max, treasurer. The executive committee orchestrates a group of one hundred leaders, who anonymously relay orders to sub-groups of ten (each individual armed with a state-of-the-art gun that the brotherhood designed and produced) scattered across the globe. The brotherhood does not function like a corporate hierarchy of managers and integrated business units with a distinct legal identity, but instead operates in society's shadows in fractured and anonymous groups. The brotherhood soon discovers the spy and learns of the plutocrats' plans, Caesar uses his bare hands to rend the spy limb from limb, while the blindfolded Gabriel could “hear the hoarse shouts of the triumphant conspirators” (123). When Gabriel makes a keen observation that proves useful to Max, he responds, “my dear Gabriel, you would make a conspirator yourself. We will have to get you into the Brotherhood” (69). Donnelly takes the unfair judicial

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<sup>348</sup> See Forbath, at 135. See also, Hattam, Victoria C. *Labor Visions and State Power: The Origins of Business Unionism in the United States*. Princeton: Princeton University Press, 1993, at ix. Both authors make the general argument that political reform failed to overcome judicial antagonism against the labor union. As such, labor was compelled to turn to economic means rather than political means to effect change, and very little change, at that.

construction of labor unions as criminal conspiracies and, instead of reconstructing that identity, only exacerbates it by imagining the worldwide federation of labor as a blood-thirsty cabal hell-bent on revenge.

Gabriel does join the brotherhood and the revolution commences. Using gold from the nation's looted treasury (and information that the plutocrats plan to kill him after thwarting the rebellion), the brotherhood bribes air force general Quincy to stay out of the fight and to give them three dirigible airships – or *Demons* – for the executive committee's personal use during the attack. With the *Demons* and their poison bombs removed from the equation, the brotherhood defeats the plutocracy in terrible and gory fashion. The brotherhood's loose organization and informal structure results, however, in its almost immediate collapse. Instead of an efficiently run corporate enterprise, the brotherhood proves the model of inefficiency and waste (the very defects nineteenth-century economists ascribed to labor unions). Caesar gets wildly drunk and orders the men to take the rotting corpses of the murdered upper classes and to use them to construct a giant obelisk in Union Square. This new monument will be called Caesar's Column, and will serve as a warning to future societies to avoid oppressing the working classes. During construction of the hideous monument, Caesar occupies the slain Prince Cabano's palace, while continuing to drink, rape, and pillage. Meanwhile, the unnamed Russian Jew absconds with his *Demon* and one-hundred million dollars (and proposes to make himself king of Jerusalem). Fearing Caesar will also flee the anarchy, the brotherhood's rank and file capture and kill him. Rather than the brotherhood establishing order and functioning as a personified corporate body, it was instead "Anarchy personified: the men of intellect were doing the work; the men of muscle were giving the orders. The under-rail had come on top" (214). Mayhem overtakes the city and spreads throughout the nation and, finally, across the globe.

Seeing the bloody writing on the wall, Gabriel and Max load their own dirigible with literature, science, art, and "all the treasures of the world's genius...and all other great inventions which the last hundred years have given us" (189-190). As the world falls into chaos and barbarism, Gabriel, Max, and their two young Aryan wives fly to Uganda and – after walling themselves behind the mountains and setting up Gatling guns – establish an idyllic Jeffersonian Republic of small, largely independent, agrarian communities. Donnelly closes his final chapter, "The Garden in the Mountains," with Gabriel stating "And how little it cost to make mankind happy!" (241). Indeed, it took only the death of three-fourths of humanity, a zeppelin, and a colonized Uganda awaiting the return of a small party of white conspirators with the world's pilfered knowledge and technology in hand. Donnelly's vision of the future turns out to be no vision at all, but a nostalgic reminiscence for post-revolution America coupled with bitter gratification at the fall of a corrupt corporate government. Donnelly's stunted vision results in part from the pessimism that the morass of labor law in late nineteenth-century created in America. The labor movement, denied legal personhood and, therefore, the right to engage in concerted action, could not stretch their collective imagination beyond the constraints that corporate organizations and a hostile legal system imposed upon them. Seeing no possible future, Donnelly takes the conspiracy theory of labor to its extreme before simply retreating to the past.

### *Looking Backward (1888)*

In *Looking Backward*, Edward Bellamy presents a science-fictional future where the labor movement has chosen the other legal option the late nineteenth-century system offered to it: incorporation. This highly influential novel sold nearly a million copies and inspired the founding of the Nationalist Party, which enjoyed rapid growth in the years after the novel's

publication.<sup>349</sup> John Dewey considered it the second most influential book published after 1885, behind only Marx and Engels' *Das Capital*.<sup>350</sup> In this text, Bellamy describes a future Boston (and America) in the year 2000, where his protagonist, Julian West, awakens after an accidental hypnosis-induced, century-long slumber. Like Donnelly's Gabriel Weltstein, Julian is in awe of the modern wonders he encounters. Unlike Gabriel, however, Julian does not find a dark secret beneath the seemingly perfect social system he encounters in future America.

The labor movement (indeed, the entire nation), comes to recognize the efficiency and wealth-generating capacities of corporate conglomerates, and accordingly decides to incorporate—with America emerging as the “Great Trust.” The nation becomes one giant corporate monopoly, which results in equality for all and a relatively luxurious existence for each of the corporation's citizen-employees. However, a closer examination of the text reveals that Bellamy's novel – like Donnelly's text – suffers from an incomplete and stunted imagination. Bellamy's stifled imagination fails to grasp that by choosing to incorporate, the labor movement has actually submitted to the corporate state. Incorporation proves the very trap Gompers and other labor leaders suspected it to be. Instead of a free, wealthy, and classless society, Bellamy's future America appears to be a fascist corporate regime, and the laborers are slaves caught in a prison of their own device. *Looking Backward* attempts to portray a sublime future, but in reality produces a grotesque vision of the enslavement of labor through the legal act of incorporation.

Bellamy's hero, Julian West, wakes up in a strange room to find that, due to hypnotic treatment for his insomnia and a series of accidents, he has slept for 113 years and that instead of his 1887, he awakes in the year 2000. His house had burned down, and a new home has been erected in its place. The new resident, Dr. Leete, discovers Julian in his entombed basement while doing construction in the backyard. The novel proceeds as a discussion between Julian, Dr. Leete, and the doctor's daughter, Edith about how society has changed during Julian's slumber. Julian fell asleep at a time when “the relation between the workingman and the employer, between labor and capital, appeared in some unaccountable manner to have become dislocated” (7). Since 1873, labor unions had been engaging in fruitless strikes and “though they knew something of what they wanted, they knew nothing of how to accomplish it” (7). In the year 2000, however, the social, political, and economic landscapes have undergone revolutionary change. There are no longer class distinctions, money has been eliminated, and everybody lives on equal terms and contributes equally to the general wellbeing of the nation (and the whole world functions similarly, as each nation has modelled themselves after the new American way).

Dr. Leete explains how the nation solved the “labor problem” just a few years after Julian fell into his century-long sleep. Dr. Leete admits that in 1887 “The labor parties, as such, never could have accomplished anything on a large or permanent scale. For purposes of national scope, their basis as merely class organizations was too narrow” (123). However, it seems, unbeknownst to Americans at the time there was a natural progression underway and the solution to the labor problem “came as a result of a process of industrial evolution which could not have terminated otherwise” (24). Corporate consolidations and monopolies proceeded to grow, and “without being in the smallest degree checked by the clamor against it, the absorption of business by ever larger monopolies continued” (26). Indeed, as Dr. Leete continues, “the fact that the

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<sup>349</sup> Bowman, Sylvia E. *The Year 2000: A Critical Biography of Edward Bellamy*. New York: Bookman Associates, 1958; pp. 87-89. See also Pfaelzer, Jean. “Edward Bellamy and the Progressive Utopia,” in *The Utopian Novel in America, 1886 – 1896: The Politics of Form*. Pittsburgh: The University of Pittsburgh Press, 1984, 26-51, at 49.

<sup>350</sup> Sadler, Elizabeth. “One Book's Influence Edward Bellamy's ‘Looking Backward’” *The New England Quarterly*, Vol. 17, No. 4 (Dec., 1944), pp. 530-555, at 553.



desperate popular opposition to the consolidation of business in a few powerful hands had no effect to check it proves that there must have been a strong economical reason for it” (26). Though the great consolidations of capital seemed oppressive, “even its victims, while they cursed it, were forced to admit the prodigious increase of efficiency which had been imparted to the national industries,” as well as the new economies of scale and the end result that “the wealth of the world had increased at a rate before undreamed of” (27). The labor movement recognized at last that the “process only needed to complete its logical evolution to open a golden future to humanity” (27). Upon this recognition, the labor movement embraced the concept of incorporation and they, too, became corporate bodies. Soon thereafter, there came to be one great corporation, the Great Trust, in “which all other corporations were absorbed” (27). The golden age of humanity had arrived.

The new system, due to its economies of scale and nationwide efficiency, was the model of simplicity. Most laws withered away. Women and men became equals. All citizens came to join the industrial army and served as equals in the army of production, and all according to the same terms of service. As Dr. Leete explains:

The period of industrial service is twenty-four years, beginning at the close of the course of education at twenty-one and terminating at forty-five. After forty-five, while discharged from labor, the citizen still remains liable to special calls, in case of emergencies causing a sudden great increase in the demand for labor, till he reaches the age of fifty-five, but such calls are rarely, in fact almost never, made. (31)

The workers choose their own industry and job based on personal preference. To keep equal demand for all jobs, the president (chosen from a pool of the nation’s top chief-executive officers) and his officials create incentives for choosing hard or dangerous jobs (*e.g.*, the harder the task, the shorter the hours). Indeed, if “any particular occupation is in itself so arduous or so oppressive that, in order to induce volunteers, the day’s work in it had to be reduced to ten minutes, it would be done” (xx). Every citizen – retired or active – receives a credit card with an equal amount of credit, which is an ample sum to live in relative luxury. Promotions at work are based on merit, and people work hard out of patriotism and pride. Without money, corruption disappears. Prisons have been eliminated, since any remaining crime is treated in hospitals as a form of atavism. Youth is spent in education, and retirement is spent enjoying the rich and diverse culture that has arisen under the new system. As if invoking Bellamy’s own use of sf’s ludic and free imagination space, Dr. Leete concludes his description of society by stating that “In place of the dreary hopelessness of the nineteenth century, its profound pessimism as to the future of humanity, the animating idea of the present age is an enthusiastic conception of the opportunities of our earthly existence, and the unbounded possibilities of human nature” (142).

A closer reading of *Looking Backward* reveals, however, that Bellamy’s imagination might be as corrupted as Donnelly’s, having likewise been polluted by the legal miasma that resulted from the nineteenth-century corporate capture of government. Bellamy’s future fails to envision what labor leaders like Samuel Gompers saw all too vividly: the corporate form was a Trojan horse, and incorporation would be capital’s endgame maneuver in its war with labor. As Dr. Leete provides more detail about his society, it becomes alarmingly clear that labor has lost its battle with capital and the incorporated future is, in fact, a grotesque nightmare. A sudden gestalt shift changes the “golden age of humanity” into a fascist state under the thumb of a corporate plutocracy. Take the primary law of Bellamy’s society and see it from a new perspective: every person is compelled to work for twenty-four years (and perhaps thirty-four year) during the prime of their lives. Indeed, the workers are slaves in every sense of the word.

Julian brings up the issue of “free riders” and the worker who might “rest back on his oar,” but Dr. Leete assures him that civic pride allows for no such problems. However, just in case civic pride proved an insufficient goad, the golden age of humanity has a few other fail-safe devices in place. For instance, Dr. Leete tells Julian that, “As for actual neglect of work, positively bad work, or other overt remissness on the part of men incapable of generous motives, the discipline of the industrial army is far too strict to allow anything whatever of the sort. A man able to do duty, and persistently refusing, is sentenced to solitary imprisonment on bread and water till he consents” (61). So much for a society without prisons. The president relies on the inspectorate to ensure there is no lack of industrial discipline. The inspectorate investigates complaints of “dereliction of any sort in the public service. The inspectorate, however, does not wait for complaints. Not only is it on the alert to catch and sift every rumor of a fault in the service, but it is its business, by systematic and constant oversight and inspection of every branch of the army, to find out what is going wrong before anybody else does” (93). The presence of this ominous inspectorate suggests that civic pride might not always be enough to compel workers to give up their prime years to compulsory labor in Dr. Leete’s utopia.

Based on the evaluations of the inspectorate and superior officers, industry leaders “agree in a general division of their workers into first, second, and third grades, according to ability, and these grades are in many cases subdivided into first and second classes” (60). Dr. Leete’s claims of a classless society seem to have been a little disingenuous as well, it would seem. Each class is given a compulsory badge to wear: “the badge of the third grade is iron, that of the second grade is silver, and that of the first is gilt” (60). In addition to these badges of honor and dishonor, the “superior class of men” enjoy “special privileges and immunities in the way of discipline” that are “intended to be as little as possible invidious to the less successful” while still “having the effect of keeping constantly before every man’s mind the great desirability of attaining the grade next above him” (61). The result of the constant discipline and surveillance is an industrial corps that resembles a “disciplined army under one general—such a fighting machine, for example, as the German army in the time of Von Moltke” (118). Bellamy, of course, did not enjoy the ironic hindsight to know that Helmuth von Moltke’s theory of military discipline resulted in the *Truppenführung*, the army field manual that the Nazi’s used leading up to and during World War II.

Dr. Leete casually mentions in passing that there are also a few unfortunate exceptions to the rule that each worker chooses his industry and job based on personal preference. If a sudden shortage of volunteers for a particular trade arises, the president “holds always in reserve the power to call for special volunteers, or draft any force needed from any quarter” (33). The use of this power, Leete assures Julian, is rarely necessary. Alternatively, if there is a glut of volunteers for a job, “often [a worker] has to put up with second or third choice, or even with an arbitrary assignment when help is needed” (60). Despite these shortcomings, the workers can always count on their equal pay; unless, of course, “if a man showed himself a reckless spendthrift he would receive his allowance monthly or weekly instead of yearly, or if necessary not be permitted to handle it all” (43). Not only might his pay be withheld, this new society would very likely withhold his right to have sex and procreate. America in the year 2000 takes seriously its eugenic program of “race purification.” Indeed, a mother’s responsibility to pass along the art of untrammelled sexual selection “is a cult in which they educate their daughters from childhood” (131). This new cult of sexual selection means that “every generation is sifted through a finer mesh than the last,” with the result that “Celibates nowadays are almost invariably men who

have failed to acquit themselves creditably in the work of life” (130). The lowest class of workers are effectively sterilized and denied even the basic joys of sexual intercourse.

The question as to why the industrial army would consent to such a state of affairs necessarily arises, but the simple answer is that they, in fact, gave no such consent. Members of the industrial army have no vote, for “that would be perilous to its discipline, which it is the business of the President to maintain as the representative of the nation at large” (93). As such, the president is “elected by vote of all the men of the nation who are not connected with the industrial army” (93). Citizens only receive the franchise upon retirement from the industrial army, assuming they are in good standing. Meanwhile, members of the “liberal professions,” such as doctors (like Dr. Leete), teachers (which is what Julian becomes because of his knowledge of history), artists, and men of letters receive remissions from industrial service, but they *do* have the right to vote for the president of the industrial army. No wonder Dr. Leete so strongly proselytizes on the system’s behalf, and no less wonder that Julian is so easily converted to the cause.

Bellamy – a transcendentalist – falls into the trap that Christopher Newfield describes as the “Emerson Effect.” Having too much faith in a transcendental oneness of being that comes through submission to a corporate Over Soul, people develop “a corporate notion of individualism in which individuality consists of obeying a massive (yet benevolent) administrative power which is private and out of one’s control.”<sup>351</sup> Bellamy’s future for labor is actually a forecast for the private sector’s complete takeover of the governmental apparatus. The result is a docile worker subjected to constant discipline and surveillance. Bellamy has merely magnified that state of affairs that existed in the nineteenth century, such that the upper classes retain all the privileges, and to find oneself at the bottom of the social curve results in a life of forced labor and genetic termination. Bellamy fails to offer us a glimpse at the future’s technological sublime, providing instead a future that is a horrific vision of the technological grotesque. In Bellamy’s future, capital uses the legal technology of the corporate form to finally eviscerate the labor movement.

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To the nineteenth-century imagination, the vision of an optimistic future for the labor movement appears to have been a chimera. As capital was aggregating into larger corporate bodies, the legal system – spearheaded by an antagonistic judiciary – denied the labor movement the same rights and opportunities it afforded entrepreneurs and businesses. In brief summary, the nineteenth-century legal system offered labor unions the right to exist under only two possible legal definitions: that of an illegal conspiracy or as a particular sort of docile corporate body with no ability to strike or take other concerted economic actions. Labor existed in a legal twilight zone and in a strange state of semioutlawry. Naturalist fiction – such as *Sister Carrie*, *The Jungle*, *The Octopus*, and *The Web of Life* – reflects the pessimistic contemporary viewpoint regarding labor’s war against capital. Resistance, naturalist author’s supposedly thought, was futile. However, the social upheaval of the late nineteenth century produced a different literary genre that had the potential to see a brighter future for labor: American sf. Sf allows for a more radical imagination space than mundane, or naturalist, fiction. The cognitive estrangement inherent in sf lets an author engineer a future that transcends the constraints of their present reality. It enables the author to build a future or alternate reality that exists near the boundaries of the possible—to stretch the fictive space to the limits of scientific optimism. Two of the most influential sf texts

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<sup>351</sup> Newfield, Christopher. *The Emerson Effect: Individualism and Submission in America*. Chicago: University of Chicago Press, 1996, at 63.

of the era show that even in this free and ludic imaginative realm, populist authors could only imagine labor's course within the corrupted legal twilight zone in which capital and the judiciary had imprisoned them. Donnelly's *Caesar's Column* envisions only a bloody and fruitless rebellion that results in a return to the past. Bellamy's *Looking Backward* steps into the very trap that the corporate-influenced legal system had laid for the labor movement. He naively incorporates the labor movement, which results in the corporate takeover of labor and, ultimately, the end of public government.

Donnelly and Bellamy could not overcome the law's oppressive restraints on the imagination. However, all was not lost. Surprisingly, another sf text that was published in the year between *Looking Backward* and *Caesar's Column* offered a wedge, an unexpected little novum, which perhaps opened the door to a brighter future for labor and the nation. It took the imagination of one of America's literary greats to plant a seed of hope for the future. Mark Twain's sf novel, *A Connecticut Yankee in King Arthur's Court* (1889), is also a time-travel tale, but one that goes *back* in time to sixth-century Arthurian England to build its utopia.<sup>352</sup> Twain's protagonist, Hank Morgan, meets with the same failure as Donnelly and Bellamy's characters when it comes to building his utopia. His scientific knowledge from the nineteenth century (*e.g.*, telephones, revolvers, electrical fences, etc.), while initially useful, results ultimately in catastrophe and genocide. Morgan looks upon the serfs and working classes – whom he calls the “actual nation” – and determines that it is only “by sarcasm of law and phrase they were freemen,” as the nobles and upper classes unjustly took the fruits of their labor (65). Twain's pessimistic ending portrays the failure of the proletariat revolution and seems to leave the reader with the same sense of hopelessness that Donnelly and Bellamy evoked. In dismay, Morgan directly invokes the corporate form and America's corporate plutocracy:

And now here I was, in a country where a right to say how the country should be governed was restricted to six persons in each thousand of its population. For the nine hundred and ninety-four to express dissatisfaction with the regnant system and propose to change it, would have made the whole six shudder as one man, it would have been so disloyal, so dishonorable, such putrid black treason. So to speak, I was become a stockholder in a corporation where nine hundred and ninety-four of the members furnished all the money and did all the work, and the other six elected themselves a permanent board of direction and took all the dividends. *It seemed to me that what the nine hundred and ninety-four dupes needed was a new deal.* (67-68, my emphasis)

Franklin D. Roosevelt has cited this passage as the origin of the phrase “New Deal” that he used in his speech when accepting the Democratic nomination for the presidency in 1932.<sup>353</sup> The New Deal, of course, would alter the course of our nation's history through its progressive measures to end the Great Depression and to ensure great social security. As part of the New Deal, congress passed the *National Labor Relations Act of 1935*, which affirmatively granted private sector employees the basic right to organize as trade unions, engage in collective bargaining for better terms and working conditions, and engage in concerted economic action, including strikes.<sup>354</sup> In true sf fashion, the smallest of novums (a passing phrase regarding the future, uttered in a fictional past) produced massive change in the most unexpected way. Though written in a time with little hope for labor's future, sf retained the capacity to inspire change in another

<sup>352</sup> Twain, Mark. *A Connecticut Yankee in King Arthur's Court*. New York: W.W. Norton and Company, 1982.

<sup>353</sup> Clemens, Cyril. *Mark Twain and Franklin D. Roosevelt*. Webster Groves, Mo: International Mark Twain Society, 1949, at 19-20.

<sup>354</sup> (49 Stat. 449) 29 U.S.C. § 151–169.

time and place. A single reader encountered Twain's phrase in sf's ludic and free imagination space, and emerged with a new idea that motivated historic changes in our nation. Over fifty years after Twain wrote his sf novel, the novum he planted amidst the despair of the nineteenth century, blossomed into the actuality of better, alternate reality. Donnelly, Bellamy, and Twain all emerged from sf's imagination space with a hopeless future for the labor movement, but, in at least one case, a tiny, seemingly insignificant novum they left behind helped engineer a better future for labor.

## Conclusion: The Incorporated Actor Network, Today

That little breath of Nyodene has planted a death in my body. It's now official, according to the computer. I've got death inside of me. It's just a question of whether or not I can outlive it. It has a lifespan of its own. Thirty years. Even if it doesn't kill me in a direct way, it will probably outlive me in my own body. I could die in a plane crash and the Nyodene D. would be thriving as my remains were laid to rest. (Don DeLillo, *White Noise*, 150)<sup>355</sup>

"It's all a corporate tie-in," Babette said in summary. "The sunscreen, the marketing, the fear, the disease. You can't have one without the other. (Don DeLillo, *White Noise*, 264)

Citing the seemingly untrammelled power of corporations in America at the turn of the nineteenth century, Herbert Hovenkamp observes that corporate law "seemed to be a failure—or, to view it another way, to have succeeded so well that it had unleashed a power it could no longer control."<sup>356</sup> This dissertation attempts to demonstrate the power that nineteenth-century corporate law unleashed on the nation through the socio-legal production of corporate personhood. The previous chapters showed how corporate personhood evolved over time in various guises and permutations. At its fundamental core, however, corporate personhood's power lies in the fact that this "person" exists simultaneously in two ontologically real states. On the one hand, it is a legal person that bears socio-economic, legal, and even constitutional civil rights. Thanks to the basic tenets of corporate law, the corporate person is immortal, specifically designed to accumulate wealth, has the ability to merge with and subsume other persons, and has no body for the state to discipline or punish. On the other hand, the corporate person exists as a massive actor network of persons, things, and assets. This distributed-centered subject can disseminate itself throughout its incorporated network, augmenting its legally enriched personhood with the capacities of each of its constituent parts.

As its network grows larger, the corporate person grows more powerful, methodically subsuming additional competencies as it enrolls more assets. All the while, the corporate person oscillates freely between the two states of being and evades (or captures) the state's disciplinary apparatuses as a matter of course. If the state reaches for the legal person, it becomes a "legal fiction" and recedes into the network. If the state removes part of the network, the legal person simply replaces that piece of itself with another fungible asset. At the same time, corporate personhood produces a whole array of new modalities of personhood. Certain natural persons can inhabit and control the corporate body to augment their own personhood and extend their capacities through the incorporated actor network. Indeed, personhood becomes an artificial legal prosthesis that benefits a few at the expense of the many.

To grasp the complex multiplicity of the corporate person, I supplement conventional legal, historical, and sociological aspects of the corporation with literary analysis that allowed me to tap into the nineteenth-century naturalist novel's fictive space in order to grasp the cultural presence and significance of corporate personhood as it emerged as a dominant force in

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<sup>355</sup> DeLillo, Don. *White Noise*. New York: Penguin Books, 1986.

<sup>356</sup> Hovenkamp, Herbert. *Enterprise and American Law, 1836-1937*. Cambridge: Harvard University Press, 1991, at 263.

American society. The novel's fictive space allowed me to produce a cultural narrative and origin story of corporate personhood.

These origins are on full display in the first constitutional corporate person: the Southern Pacific Railroad Corporation. This primal corporate person illustrates how the corporation is a liminal subject, existing somewhere in the interstices between the corporate personality and its vast network of constituent parts. Beyond this admittedly complex dual subjectivity, the incorporated networks that emerged in the middle of the nineteenth century were actually quite rudimentary. Put simply, the Southern Pacific, like its mid-century brethren, enrolled countless executives, employees, tracks, locomotives, construction companies, politicians, judges, court reporters, and – perhaps – even a constitutional amendment or two into its network. The more agents it enrolled, the richer, more powerful, and legally unassailable it became. The Southern Pacific continually fed off the network housed within its legal body and emerged as a socio-economic force that overwhelmed the state and the nation's citizenry (Chapter 1). As the corporate person increased in both size and complexity over the course of the century, states engaged in a “race to the bottom,” whereby restrictions on corporate size and structure fell by the wayside. Suddenly, one corporate person could purchase another. Whole networks of subsidiary corporate persons could reside in a single, massive corporate body. The networks proliferated, as did corporate power.

The corporate person, as such, has powers that no natural person – by themselves – could ever attain. Certain natural persons, however, can access, navigate, or emulate corporate personhood's networks and partake in the increased socio-economic and legal agency they produce. Inside the teeming corporate networks, some natural persons found ways to produce unprecedented amounts of wealth—seemingly out of thin air. Selling and trading paper stocks and bonds, financiers helped extend corporate networks into the general public. With the rise of the modern securitized industrial corporation, more and more natural persons became shareholders, or “owners” of corporations. Of course, under corporate law these owners had little to no control over the corporate person, but they contributed their wealth to it and tied themselves to its economic fate.<sup>357</sup> As the networks grew, the law adjusted (or, more precisely, the corporate persons modified the law) to enable still larger and more intricate corporate networks to emerge. Upon the emergence of the vertically integrated holding company at the end of the century, corporate economic dominance reached its apex and has not receded since. Behemoth corporate bodies like Rockefeller's Standard Oil Corporation incorporated the entire process of supply, manufacture, marketing, and sales in a single corporate body, thus paving the way for industry-wide oligarchies and corporate dominance of the American economy. Larger and larger corporate networks – housed in their legally privileged corporate bodies – continued to capture the economy, regulators, government, and the very society in which they exist.<sup>358</sup>

Contemporary corporate persons are now much larger than they once were, but they remain fundamentally similar to the corporate persons that this dissertation analyzes. As such, comprehending America's original corporate persons allows us to clearly grasp contemporary corporate persons too, despite their seemingly opaque complexity. Once there was the Southern Pacific Railroad Corporation spanning the continent, and now there is IBM, with its 400,000

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<sup>357</sup> For an early but still excellent discussion of this “agency” problem, see, generally, Berle, Adolph A. and Gardiner C. Means. *The Modern Corporation and Private Property*. New York: Macmillan, 1932.

<sup>358</sup> For a book-length discussion of how corporations within an industry capture the regulatory bodies that are meant to reign them in, see Kolko, Gabriel. *Railroads and Regulation: 1877-1916*. New York: W.W. Norton & Co., 1965. Kolko shows how regulators ultimately end up serving the corporations they are meant to regulate.

employees, selling and placing millions of its machines in 175 countries around the world.<sup>359</sup> Where Standard Oil seemed to grow larger and larger such that it confounded contemporary observers, today a corporate person like Walmart serves 260 million customers *each week* while generating \$486 billion in annual revenue and employing an astounding 2.2 million employees.<sup>360</sup> The wealth of Jay Gould, Andrew Carnegie, and J.P. Morgan seemed in the nineteenth-century to be the stuff of legend. Using essentially the same methods as these “robber barons” (see the financier’s legal methods and business model in Chapter 2), contemporary financiers continue to navigate corporate networks extracting nearly unimaginable amounts of wealth. Microsoft’s Bill Gates, for instance, has a net worth of \$79.2 billion, Berkshire Hathaway’s Warren Buffett’s net worth is \$72.7 billion, and Oracle’s Larry Ellison rounds out the triumvirate with a \$54.3 billion net worth.<sup>361</sup>

Just as the first corporate conglomerates, robber barons, and holding companies evaded discipline and punishment via their personified actor networks, so too do modern corporate persons. These contemporary corporate persons proliferate their networks of persons and things by enrolling as many strategic actors and assets as they can into their corporate bodies. Foremost among the actants that they enroll are government officials, politicians, and key regulatory agencies. Attaching these particular types of actants to their networks again allows them to evade financial and criminal liability—in short, to escape punishment.

Take, for instance, the 1980s banking corporations and the savings and loans crisis they produced via their volatile networked subjectivity. These particular corporate persons produced what contemporary critics see as “complex networks of insiders and outsiders who conspired to abuse their institutions.”<sup>362</sup> This network of insiders (corporate directors, officers, shareholders, and employees) and outsiders (agents, brokers, appraisers, account holders, and borrowers) together enrolled favorable legislation through political lobbying to make their banks ideal sites for risk-free fraud and generating massive profit. Through lobbying and enrolling political agents, the banks secured legislation that allowed them to offer interest rates as high as 15% to their depositors, while also providing the banks with federal insurance for deposits up to \$100,000. As a result, banks easily attracted a slew of \$100,000 deposits from individuals with the promise of excessively high interest-rate returns on their savings and financial nest eggs. The bankers then extracted the money for themselves, by using the deposited money for “construction” and “land development” projects that they never intended to finish (*e.g.*, they paid themselves bonuses, inflated constructions costs, and salaries through their other corporations that provided project services). When the project inevitably failed (as it was designed to do), the bank had “lost” all the depositor’s money (well, paid it to themselves for acting in another capacity) and the government (*i.e.*, the taxpayer) picked up the tab through the federal deposit insurance. This, of course, is *precisely* the same scheme that Andrew Carnegie, the Southern Pacific Railroad Corporation, and other corporate persons employed throughout the nineteenth century (Chapter 2).

Also like Carnegie, the Southern Pacific, and countless others in the nineteenth century, these contemporary corporate persons used a network of political influence to limit their

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<sup>359</sup> Form 10-K (2015 Annual Report), International Business Machines Corporation.

<sup>360</sup> Form 10-K (2015 Annual Report), Wal-Mart Stores, Inc.

<sup>361</sup> Peterson-Withorn, Chase. “Forbes Billionaires: Full List Of The 500 Richest People In The World 2015.” *Forbes*. March 2, 2015.

<sup>362</sup> Calavita, Kitty, Henry N. Pontell Robert H. Tillman. *Big Money Crime: Fraud and Politics in the Savings and Loan Crisis*. Berkeley: University of California Press, 1997, at 47.



financial and criminal liability. One banker, Charles Keating of Lincoln Savings and Loan, paid \$1.4 million in “campaign contributions” to the Keating 5: Senators John McCain, John Glenn, Alan Cranston, Dennis DeConcini, and Donald W. Riegle, Jr. (Keating’s “campaign contributions” were notorious: he once made a \$50,000 campaign contribution to a state attorney general who was running *unopposed*, and therefore had no “campaign” to which Keating could even contribute.)<sup>363</sup> Similar to the nineteenth-century Pacific railroad network’s government obstruction through its Credit Mobilier bribery campaign, the Keating 5 obstructed a federal investigation into Keating’s fraudulent banking activities.<sup>364</sup> The subsequent congressional investigation into this obstruction resulted in a finding that Glenn and McCain had used “poor judgment,” that DeConcini and Riegle improperly interfered with the investigation in the bank, and went so far (short) as to give Cranston a “formal reprimand.”<sup>365</sup> All told, the government bailout of the savings and loans banking corporations cost the taxpayers \$132 billion dollars, with shockingly few persons, corporate or natural, serving jail time or even paying fines.<sup>366</sup>

By the turn of the nineteenth century, the Standard Oil Company had grown so large that the government eventually broke it up in 1911 (Chapter 3). The modern corporate person, however, has grown even larger such that the government claims it can no longer afford to break them up—they are now “too big to fail.” In America, the ten largest banking corporations hold \$11 trillion of the nation’s total \$13 trillion in banking assets.<sup>367</sup> So, when these banks make highly risky investments with investor money – as they did during the most recent financial crisis in 2008 – and then face collapse when these investments fail, the government simply steps in to bail them out. However, just as in the nineteenth century and then again in the 1980s, some government officials appear to be integral (if clandestine) parts of these corporate persons, and the “bailouts” seem more like self-dealing within a corporate network than economic necessities. In the case of the 2008 financial crisis, Secretary of the Treasury Henry Paulson authorized payments of \$23 billion in government funds (*i.e.*, again, taxpayer money) to save Goldman Sachs from financial collapse due to its failed risky investments. The Secretary of the Treasury, it so happens, was the former chairman and chief executive officer of, you guessed it, Goldman Sachs.<sup>368</sup> Paulson unsurprisingly paid far more attention to Goldman Sachs during the financial crises than its corporate person rivals, such as Lehman Brothers and Bear Stearns. In fact, Paulson allowed Lehman Brothers and Bear Stearns to fail and collapse, resulting in many raised eyebrows within the industry (ironically, the corporate person JPMorgan, of all people, purchased Bear Stearns for pennies on the dollar—meaning that J.P. Morgan had a hand to play, however indirectly, in two corporate conspiracies across the centuries).<sup>369</sup> Like the natural person J.P. Morgan in the nineteenth century, Paulson was lauded for ending the financial crisis, despite the glaring appearance of self-dealing and corporate-political networking. (Chapter 2). And, like Morgan before him, Paulson faced no financial or legal repercussions for his seeming abuse of

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<sup>363</sup> *Id.* at 106.

<sup>364</sup> *Id.* at 107.

<sup>365</sup> Regens, James and Ronald Gaddie. *The Economic Realities of Political Reform: Elections and the U.S. Senate*. Cambridge: Cambridge University Press, 1996, at 6.

<sup>366</sup> “Financial Audit: Resolution Trust Corporation’s 1995 and 1994 Financial Statements.” U.S. General Accounting Office. July 1996. pp. 8, 13, table 3.

<sup>367</sup> Seo, John. “Everything Will Be Too Big to Fail.” *Foreign Policy*, No. 188 (September/October 2011), pp. 74-75, at 75.

<sup>368</sup> Morgenson, Gretchen and Don Van Natta Jr. “Paulson’s Calls to Goldman Tested Ethics.” *The New York Times*. August 8, 2009.

<sup>369</sup> *Id.*

political power. Meanwhile, Goldman Sachs continues to make record profits, thanks in large part to its two major rivals' serendipitous demise.

Indeed, rather than fixing the problem at hand the government bailouts create even larger corporate networks that will be, of course, *too* too big to fail. In addressing government bailouts of industry crises, Darren Bush notes that “the cure may be an exacerbation of the very concern necessitating the bailout. At least with respect to the financial industry, it could be said that a crisis begets a bailout which begets consolidation, which in turn makes it more likely that a future crisis will beget a bailout.”<sup>370</sup> It seems, moreover, that contemporary corporate persons and their networks have become so large that they are not only too big to fail, but also “too big to jail.” Some corporate persons are deemed too big to jail because “they are considered to be so valuable to the economy that prosecutors may not hold them accountable for their crimes.”<sup>371</sup> For instance, the Siemens corporation engaged in an audacious scheme of bribing (or, enrolling into its incorporated actor network) government officials across the globe in an effort to entice them into entering government contracts with the company. From 2002 to 2007, Siemens made at least \$1.6 billion in bribes to various government representatives. When investigated, Siemens quickly admitted to the crimes, but was not convicted of any of these admitted offenses. Instead, the U.S. government granted it a “deferred prosecution,” which are agreements that “allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the board room.”<sup>372</sup> In other words, the government allows corporate persons to commit crimes with no real repercussions, considering that the \$1.6 billion fine was unquestionably just a drop in the bucket compared to the income those bribes generated for the corporate person over the years.<sup>373</sup> Corporations often use the settlements as tax right offs, and sometimes even *profit* from them as a result.<sup>374</sup>

The justification the government offers for granting these deferred prosecution agreements is that the corporate personality is too complex to locate the bad actor when the corporate person commits a crime. That is, “not enough is known about how to hold complex organizations accountable,” making it difficult “to hold employees accountable in complex cases where many people took part in decisions.”<sup>375</sup> Of course, when it comes to punishing the concerted action of labor unions or other natural persons who take part in “criminal” decisions, this “complexity” immediately dissipates. Inexplicably, once the corporate personality is taken out of the legal equation, the law quickly deems these “complex cases” (in which many people take part in the criminal decision) to be a basic criminal conspiracy and the natural persons in question are charged with – and *convicted* of – these straightforward crimes (Chapter 4). The complexity of corporate personhood – its liminal status as both the legal person and the incorporated actor network – appears to produce this strange legal complexity. The end result is that “corporate complexity may not only enable crime on a vast scale but also make such crimes difficult to detect, prevent, and prosecute.”<sup>376</sup>

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<sup>370</sup> Bush, Darren. “Too Big to Bail: The Role of Antitrust in Distressed Industries.” *Antitrust Law Journal*, Vol. 77, No. 1 (2010), pp. 277-312, at 278.

<sup>371</sup> Garrett, Brandon L. *Too Big To Jail: How Prosecutors Compromise with Corporations*. Cambridge: The Belknap Press of Harvard University Press, 2014, at 1-2.

<sup>372</sup> *Id.* at 6.

<sup>373</sup> *Id.* at 11.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 2 and 14.

<sup>376</sup> *Id.* at 18.

There is, however, one development in contemporary corporate personhood that distinguishes it from the original corporate personalities discussed throughout this dissertation: some corporate persons now enter natural bodies and attach them to the network on a cellular level. This new corporate person is the pharmaceutical (“pharma”) corporation, and it is leading American toward a brave new world. Pharmaceutical corporations engage each year in a \$900 billion industry.<sup>377</sup> Like all corporate persons, both present and past, who exercise such financial clout (and engage in such high economic stakes), pharma persons enroll government regulators in their incorporated actor networks to help them overcome regulatory obstacles. In the case of the pharma industry, the captured regulatory body is the Food and Drug Administration (FDA). To get a drug approved for sale by the FDA, a pharma person has to conduct two successful clinical trials of that drug (“successful” being defined as just *barely* outperforming the controlled placebo study).<sup>378</sup> In achieving those two successful trials, the pharma corporation can have up to 98 *failed* studies, in which the drug fails to outperform the placebo, injures people, or even kills study participants.<sup>379</sup> The law allows corporations to keep the details of these failed studies – and the full extent of any adverse side effects – private, deeming them to be the corporate person’s personal proprietary information.<sup>380</sup>

Once a drug is (inevitably) approved, pharma persons seek to sell as many of their drugs to as many people as possible. Indeed, they claim that corporate law and market forces require them to constantly extend their incorporated actor network in order to “maximize shareholder value,” one of corporate law’s great canards.<sup>381</sup> To grow, pharma persons do not seek to cure diseases, but instead to treat the “risks” of disease for as long as possible. Through marketing campaigns that employ “strategic ubiquity,” pharma corporations create awareness of risks for chronic conditions (restless leg syndrome, ADHD, autism, stress, depression, fibromyalgia, “pre-diabetes,” Mitochondrial disease, high cholesterol) and then create demand for their drugs through direct-to-consumer advertising (*e.g.*, “Ask your doctor if...”).<sup>382</sup> These corporate persons have been wildly successful at convincing Americans to take their drugs; indeed, “the average American is prescribed and purchases somewhere between nine and thirteen prescription-only drugs per year, totaling over 4 billion prescriptions,” and growing.<sup>383</sup> This growth in pharmaceutical usage is shocking, given that many of these drugs have little or no effect beyond that of a placebo, and that pharma persons’ admitted goal is to produce and sell “the most minimally effective, the most ineffective effective drug” possible.<sup>384</sup> In other words, to extend their corporate networks, pharma persons seek to create conditions under which a natural person will remain on a “drug for life that will have no discernible effect on you, and by taking it you neither return to health nor are officially ill, only at risk.”<sup>385</sup> As one insider to the medical-industrial complex puts it, “We are quite literally taking pills to save the lives of companies who

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<sup>377</sup> Healy, David. *Pharmageddon*. University of California Press: Berkeley, 2012, at 10.

<sup>378</sup> Dumit, Joseph. *Drugs for Life: How Pharmaceutical Companies Define Our Health*. Durham: Duke University Press, 2012, at 100.

<sup>379</sup> Healy, at 77.

<sup>380</sup> *Id.* at 118.

<sup>381</sup> This is the legal responsibility that allegedly arises from *Dodge v. Ford Motor Company*, 170 NW 668 (Mich 1919), but which is clearly eliminated by the business judgment rule and subsequent rulings such as *Shlensky v. Wrigley*, 237 NE 2d 776 (Ill. App. 1968).

<sup>382</sup> Dumit, at 41.

<sup>383</sup> *Id.* at 2.

<sup>384</sup> *Id.* at 206-7.

<sup>385</sup> *Id.* at 8.

have a greater interest in the vitality of the diseases they market drugs for than in our well-being.”<sup>386</sup> Corporate persons are extending their networks into our bodies to further increase their own wealth and socio-economic power. The natural person’s intentionally diminished health actually nourishes the corporate person’s vitality.

And there is no end in sight for these expanding corporate networks. As each natural person is 100% at risk of dying, there will always be something to treat. The result is an incorporated actor network – a corporate person – whose continued growth, through perpetual treatment, is “virtually without limits.”<sup>387</sup> This is your contemporary corporate person: too big to fail, too big to jail, and literally feeding off of natural persons’ bodies to support its own growth. It is the nineteenth-century U.S. corporate person – the first of its breed – that enables us to grasp the nature, power, and methodologies of contemporary corporate personhood. Under current socio-economic and legal conditions, the corporate person (the liminal subject that exists simultaneously as both a legally augmented person and a personified actor network) can conceivably extend its network forever—but at the general population’s financial and physical expense. Which harkens back to the question that appears at the beginning of this section: is the power of corporate personhood that nineteenth-century corporate law made possible an epic failure or a resounding success? Well, I guess it all depends on which *person* you happen to ask.

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<sup>386</sup> Healy, at 10.

<sup>387</sup> Dumit, at 96.

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