

Corporate Ideology and Legal Myth

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ABSTRACT

CORPORATE IDEOLOGY AND LEGAL MYTH

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This thesis is an analysis of the interplay of myth and ideology in the law, with special reference to problems of corporate power. The possibility of legal reform depends upon a formal autonomy of the law from the influence of ideology; because corporate law is particularly concerned with the capitalistic trends of centralization, concentration and hierarchy, liberal theory demands an especially decisive autonomy between these concerns and the interests of the ruling class. The semiological structure of law, however, has a definitively mythological character which is therefore vulnerable to ideology. The author, through an intensive study of *Lochner v. New York*, demonstrates the facilitation of corporate ideology through legal myth; in an extended survey of Supreme Court cases during the nineteenth century, he then sketches a history of myth using the Barthesian strategy of counter-myth. The author concludes with a brief discussion on the implications of myth and ideology for the opponents of corporate power.

1. Introduction

This study was developed in response to what Richard Grossman has described as “a crisis of strategy” facing the critics of corporate power. Historically, legal challenges to corporate power have failed to resist the progression and consequences of corporate capitalism, securing only limited victories for the working class. In this thesis, I will argue that such challenges, successes and failures must be understood through an ideological conception of the law, one opposed to the liberal conception of law as autonomous from class interest.

Specifically, I will describe how the operations of bourgeois ideology have historically produced an effect I will describe as the corporate myth. The relations of production which define the corporation, I will argue, determine an ideological notion of personhood that corresponds with the interests of corporate capitalism. This ideology persists within the discourse of law as the signification of the corporate myth, resisting the rigors of jurisprudence through mythological recourse to the sign of the material body.

I will begin this study by developing a theoretical framework with which to address the problems of ideology specific to corporate law. In Part I, I will elaborate upon Grossman’s crisis, and relate it to liberal and Marxist conceptions of legal reform. In Part II, I will elaborate upon the latter’s proposition that bourgeois ideology, in a capitalist

state, governs the law – and in Part III, I will identify Barthesian myth as the primary mechanism through which legal ideology operates. In Part IV, I will adopt Mark Neocleous’s analysis of personification to describe how capitalism, historically, has defined personhood and even the body in the interests of power. And finally, in Part V, I will describe how the corporation signifies the operation of ideological personification, facilitated through the mythological aspect of law, and how this process resists the possibility of legal reform. I will also explain, in Part V, how we can create a “counter-myth” of the *corpus* to reveal the operation of myth in the law.

In the second section, I will attempt an extended analysis of one case, *Lochner vs. New York*, in an effort to reveal both the operation bourgeoisie ideology and legal myth. A Marxist exposition of ideology demands an economic analysis of class conflict which is ultimately beyond the scope of this thesis; but it is worth attempting a minimal description of this conflict, if only to emphasize the relationship of legal myth to corporate power.

Having established this relation, I will, in the third section, neglect further economic analysis and limit my focus to the operation of myth in a broader survey of law, using the methodology established in Part V of the first section.

A few words on scope. This thesis is motivated, I have observed, by the specific problem addressed by Grossman: its motivation will impose on my survey certain specificities which are by no means essential to the problem of corporate power. Doubtless there is much to say about the judicial discourse of corporate power preceding

the founding of the United States, and beyond its borders; that I will limit my discussion to United States corporations law simply reflects my immediate interest, cultivated by personal experience as a subject and political opponent of American corporate power. The relation of international corporate to American imperial power is a second consideration in this regard, though one I will not elaborate upon here.

This first constraint suggests, but does not entirely justify, a second constraint on scope: a study of American judicial discourse will directly concern itself with American law. Of course, neither international nor historic law are irrelevant in this regard, and neither will be completely excluded from our discussion; but they are of interest only insofar as they relate to our primary concern. Consequentially, the earliest primary text in our survey is dated at 1799, twelve years after the adoption of the Constitution in 1787. Furthermore, to describe the operation of capitalism through Barthesian myth suggests that we should begin our analysis roughly when Barthes begins his, with the ascendancy of the bourgeoisie during the French Revolution of 1789 (137).

Beginning our survey at the turn of the eighteenth century thus has advantages of theoretical significance; that our survey ends at the turn of the nineteenth century, however, is a primarily historical consequence. In 1787, as I will demonstrate, the corporation was a point of conflict and controversy. By the time we reach the case of *Lochner*, as we will see, the ideological personification of the corporation has become a secondary mechanism of corporate power, subordinate to the growing dominance of contract law.

Our concern with jurisprudence as a check on corporate power begs a question pertinent to another constraint: “Which jurisprudence?” The volume of United States case law typically classified as “corporations law” is potentially enormous; the volume simply relevant to corporate power, standard classifications aside, even more so. The very machinery of judicial power-knowledge suggests one immediate constraint: for to engage with American jurisprudence is to engage with a legal hierarchy dominated, ultimately, by the United States Supreme Court. Furthermore, as Arthur S. Miller observes, from “the standpoint of capitalism . . . the growth of the corporation as the characteristic and dominant form of enterprise provides a basis for selecting Supreme Court decisions” (5). It is this standpoint which this thesis will engage and challenge, and therefore I have relied upon Miller’s selections, as well as that of eminent legal scholar Edwin Merrick Dodd, in compiling my own. The cases I have chosen are thoroughly canonical; whether or not they were historically decisive, they are certainly exemplary.

I will conclude, in the last section, with some remarks on the implications of my study for future resistance against corporate power.

In general, this thesis adheres to the rules of style and documentation established in the sixth edition of the MLA Handbook; however, the methodology and interdisciplinarity of my project created several problems of scholarship which MLA guidelines do not address. Some of these issues were simply technical, others were relatively superficial, and still others were intimately related to my conception of this enterprise as necessarily political. Such matters, in any case, were invariably navigated

and provisionally resolved with the guidance of my thesis committee chair Dr. Denise Albanese.

The Handbook advises that “legal documents and court cases” should be cited per The Bluebook, which is the field’s standard style guide (Gibaldi 206). Simultaneously, however, Handbook prioritizes readability: writers should “Give only the information needed to identify a source” (Gibaldi 240). This, perhaps, is objection enough to following Bluebook’s prolix format, which is ill-suited for quotation as extensive as ours – but here we come to an even more substantial consideration.

The Handbook prioritizes economy; “the purpose behind the rules” of The Bluebook, on the other hand, is “to indicate to the reader that you are relying upon authority” (Barris 3). These priorities are not only unrelated (and in practice at odds) – the latter is in direct opposition to our effort, which is not to rely upon authority, but to understand authority: to ask, as Foucault asks, “Who is speaking? . . . What is the status of the individuals who – alone – have the right, sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?” (Archaeology 50)

I have therefore used a citation format which, first, is more economical, and second, adheres to the same standards as those texts governed by the MLA. For example, in recognition that judicial opinions are more frequently experienced as material documents than transcendental proclamations existing in the sphere of Platonic forms, I have not simply included their legal notation – as Bluebook instructs – but publication reference as well. Such specificity also recognizes cases like *Santa Clara*, in which incidents of publication assume dramatic historical significance; furthermore, doing so

facilitates a second advantage. Bluebook describes an extended parenthetical citation format which invokes all kinds of extraneous details of legal codification. By documenting specific publications, however, we can adhere to the MLA's basic convention of identifying a source and page number.

Finally: as a matter of methodology, this study often draws extensively on the Oxford Latin Dictionary's exemplary quotations in an effort to relate definitions to historical usage. As a rule, I have pursued these references to their original sources, researched their context, relied on the original text in cases of discrepancy and frequently provided my own translation; therefore, I have for the purposes of citation treated them as primary sources. However, in acknowledgment of Glare's efforts in compiling these quotations, I have modified standard MLA bibliographical conventions by inserting the annotation "Qtd. OLD" where appropriate. I should also take this opportunity to acknowledge Peter Hartman, who provided indispensable assistance with my translations from Latin.

2. Theory

I. The Crisis of Legal Reform

In June of 2006, “hundreds of leading scholars, advocates and activists convened” at the Carnegie Institute of Washington, D.C. “to galvanize discussion, insight and strategic thinking about how to subordinate corporate power to the will and interests of the people” (Taming). The conference opened with consumer advocate Ralph Nader’s plea “to go beyond the usual constraints” on corporate power “such as regulation, anti-trust, litigation, etcetera” (“Welcome”) - but quickly, the discussion took a decisively legal turn.

New Jersey lawyer Carl Mayer urged that “it is time for a major national discussion of cabining and controlling corporate power through the law”. Damon Silvers, Associate General Counsel for the AFL-CIO, insisted that “we ought to have some minimal regulations at least”. Sidney Wolfe, Director of Public Citizen’s Health Research Group, advocated “government regulation and legislation, laws that are theoretically enabling the government to exert some control over the corporations”; Katharine Redford, Co-Founder of EarthRights International, concluded that “we need to protect the laws that we have, that hold corporations accountable, and to create new laws”; and investigative journalist Lucy Komisar agreed that “we need to mount support for needed legislation to be passed.”

Legal reform is not a particularly new or innovative means of resisting corporate power. One conference attendee noted that the same “people had held a similar conference 35 years ago, and nothing much has changed in the interim” (Dubro); as this thesis will document, the history of their approach extends well beyond thirty-five years to the very first appearances of corporations law in the United States. Yet the very need for such a conference is evidence that the problems of corporate power, despite persistent opposition, are still with us; by most indications, in fact, they are only getting worse.¹ This thesis begins with the conclusion of one conference speaker, historian Richard Grossman, who observes that “we’re no closer to those transitions [towards social justice] now than we were twenty years ago, and twenty years ago we weren’t any closer than we were twenty years before.” Grossman continues,

So little of the work that we do, and the work that our organizations do, is about revealing and confronting the corporate state...my interest and my focus is really not about the corporation, because it’s part of the symptoms. It’s the corporate state, it’s the structure, it’s the history, it’s how we got here that we need to be talking about...

To take up Grossman’s critique, we must first develop an analytical framework in which such cryptic terms as “the corporate state” can give us insight into the failures of

¹ The growth of corporate power has been extensively documented and can only be referenced here. For a discussion of legal challenges, see Cray and Drutman; for an excellent overview of the relationship between multinational corporations and “disaster capitalism”, see Klein; for an analysis of corporate media, see Herman’s seminal Manufacturing Consent. These are simply points of entry into a vast and ever-expanding field of literature; for further recommendations, consider works cited in this thesis.

legal reform – an enormous task that we can approach by comparing the relevant features of two conflicting theories of the state.

The very possibility of legal reform presupposes a whole field of assumptions about both the law and the state. Most significantly, Wolfe’s notion of “laws that are theoretically enabling the government to exert some control over the corporations” is one that “views government and business as two separate and distinct forces and therefore looks to the former...to keep in check private economic power” (Bunzel 379-80); because “democratic liberal society must look to public opinion, exercising its power through the instrumentality of the state, to combat private power of economic groups” (Bunzel 376) reformism must therefore treat “legal institutions as neutral and immune from the influence of the dominant class” (Collins 138).

In this sense, legal reform requires “an absolute, unqualified autonomy of the legal order” from “the capitalist society in which it is embedded” (Balbus 571); “The reformist use of law tends to assume that the legal system is a neutral instrument” (Collins 127). The independence of the law from such influence is a familiar tenant of liberal ideology, exemplified by the blindfold and scales of Justitia: here, further, we find the conception of autonomy guaranteed mechanically, by the opacity of the blindfold and the balance of the scale. These features have their ideological parallels in the mechanisms of liberal legality, which we will examine further; for now, it is enough to observe the implicit tension between the theory of the autonomous state and the proposition of a corporate state. If the mechanisms of the liberal state fail to adequately separate the law

from the influence of corporate power - if Justitia uses weighted scales – then legal reform is a futile enterprise leaning on a sham guarantee of neutrality.

Marxist theory proposes just that: “that the very development of modern industry must progressively turn the scale in favour of the capitalist against the working man” (Marx, Wages 94). In The Communist Manifesto, Marx famously declares that “the modern State is but a committee for managing the common affairs of the whole bourgeoisie” (57) – a metaphor that, while diametrically opposed to that of the autonomous state, demands further elaboration. I will not, here, attempt to present a synopsis of every interpretation or implication that has historically fallen under the designation of “Marxist” or “post-Marxist” theory, much less defend them. Instead, I will consider only those insights that demonstrate the role of capitalism, and specifically of corporate capitalism, in the crisis of legal reform and the general operation of law.

II. Law as Ideology

The problems of corporate power, I have argued, have historically been addressed through a strategy of legal reform which depends upon the liberal conception of the state as autonomous from economic power. Marxist theory challenges the possibility of legal reform by challenging the autonomy of the state, insisting instead upon a corporate state that acts a “committee” for “the whole bourgeoisie.” Having defined a relation between the corporate state and the possibility of legal reform, we must now, as Grossman admonishes, reveal the corporate state, its structure and its history.

Richard H. Miller, in his discussion of Marx's theory of state, immediately cautions against taking Marx's metaphor of the committee literally as "a conspiracy theory" or as "flamboyant hyperbole for an underlying view that money talks in politics" (66); it would be similarly untenable to propose that corporate power is propped up through the mass bribery or coincidental consensus of judges.² A closer reading can begin with Marx's proposal that "the mode of production of material life conditions the social, political, and intellectual life process in general" (Contribution 160) and "that even ideas, values, beliefs and superstitions are all dependent on a particular form of relations of production" (Collins 19). This is not, to dispel another misunderstanding, a description of humans who passively acquire knowledge through direct experience of the external world; what is important here is the observation that

in the long run men do not have the freedom to develop ideologies in any direction which appear to them to be just or true...this material determinism applies equally to legal doctrinal thought and legal reasoning.
(Collins 19-20)

To offer a vivid if perhaps trivial example, it is unlikely that a law which declared that humans no longer need to eat would last much longer than its adherents. Conversely, we can further conclude that the law must in some sense facilitate the demands of metabolism; it must provide some access to some humans to food, water and oxygen.

² Though this is not, of course, to dismiss the fact of widespread bribery of the judiciary – considering, for instance, the "academic retreats" hosted by "George Mason University's law school, which has a reputation for a pro-business leaning" in which judges are "wined and dined by corporations in the name of judicial education" (<http://abcnews.go.com/print?id=124086>).

Marx's insight has three increasingly specific consequences. First, the content of ideology will depend upon what Marx calls the relations of production, "the nature of the available resources and the knowledge of technologies for exploiting them" (Collins 19). For instance, it is easy to see how the domestication of livestock and cultivation of agriculture would also cultivate a new ideology of the earth as "the great workshop, the arsenal which furnishes both means and material of labour, as well as the seat, the *base* of the community" (Marx, Grundrisse 472); thus the Neolithic Revolution determined the ideological framework of sedentary civilization.

Second, Marx's insight into the relationship between the relations of production and ideology has dramatic consequences within those specific relations of production we call capitalism. On one hand, capitalism, "with the inexorability of a natural process," creates an imbalance in power between "the working class, a class constantly increasing in numbers," and the owners of production, whose numbers tend towards concentration and monopoly (Marx, Capital 929). Because physical coercion "is not enough to maintain the status quo in a society in which a minority depends on...the vast majority of working people," the dominant class will therefore also depend upon ideology to protect and advance its interests (R. Miller 74); thus the "Law not only coerces men into good behavior, but it articulates and advertises a particular definition of the right which is in tune with the dominant ideology" (Collins 92).

Since a "society characterized by such dominance will not last for long unless people believe that its continued existence is in their interest or that there is no realistic alternative to it" (R. Miller 74), the law under capitalism must therefore articulate and

advertise an ideology which denies the power of the dominant class and the possibility of revolution – which denies, that is to say, the capitalist relations of production and their consequences. Our discussion of the law under capitalism can, in this sense, draw upon Barthes' description of capitalist ideology as a “flight from the name ‘bourgeois’” and “the process through which the bourgeoisie transforms the reality of the world into an image of the world” (141).

Returning to Grossman's critique, the project of legal reform seems to depend upon a state that is autonomous from economic power; Marx, however, demonstrates that capitalist relations of production will compromise this autonomy through an ideological transformation of the “reality” into an “image”. If, as Barthes writes, semiological “myth is the most appropriate instrument for the ideological inversion which defines this society” (142), then we should expect to see the operation of myth in law through an ideological “set of signs and categories by which men interpret the world” (Collins 38).

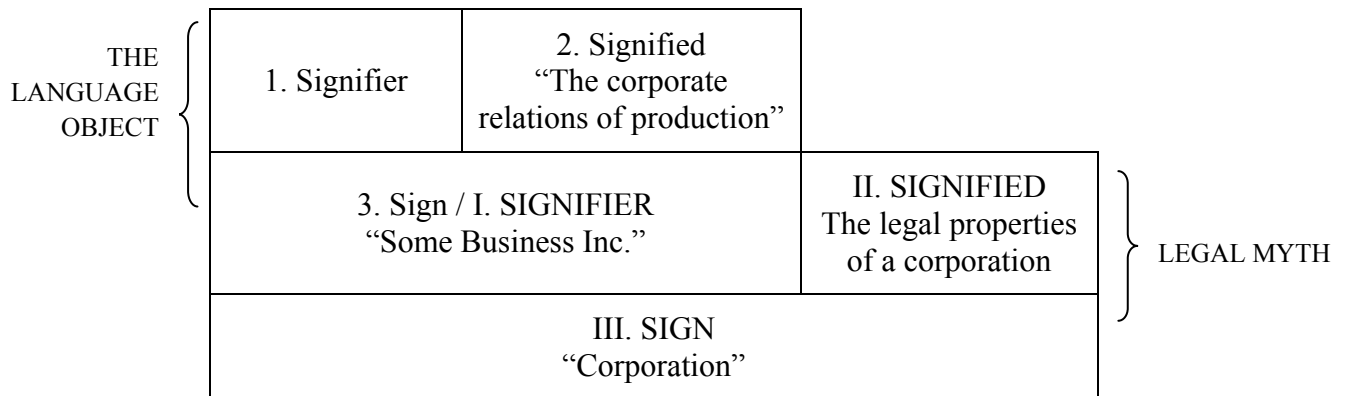
So we arrive at the third consequence of Marx's insight into the material production of ideology: as the relations of production specific to capitalism have determined ideological signs and categories specific to capitalism, so we should expect the relations of production specific to corporate capitalism to determine specific ideological signs and categories as well. This thesis will examine the material basis and operation of one such sign in particular: the legal category of the corporation.

III. The Myth of the Corporation

Corporate power, I have argued, has historically been challenged through a strategy of legal reform. I have further, through a Marxist critique of the state, attempted to develop an interpretive framework for the “crisis of strategy” that dooms legal reform – a crisis that depends, I have argued, prominently upon the role of ideology in law. Having done so, the task remains to elaborate upon the ideological mechanisms through which corporate power undermines the prospect of legal reform.

Barthes concludes that we should expect to see the operation of myth as an instrument of power in bourgeois society; let us turn this insight to our discussion of the law. In “The Nature of Legal Nonsense,” Cohen observes “that law is a separate semiological system, a system of discourse that takes the ‘real’ phenomena of the social world...and translates them into a formalized realm of abstract concepts” (Boyle 693-4). This, of course, is the precise structure of myth: if it “is characteristic of myth” to “translate a meaning into a form” (Barthes 131), we find that same operation in the legal process “that takes the ‘real’...and translates” it into a “formalized realm”.

We are now in a position to describe the semiological structure of the corporation. Through the analytical lens of historical materialism, we can understand the “real” corporation as a particular arrangement of the relations of production. I will describe this arrangement momentarily; for now, it is enough to identify it, in semiological terms, as the *meaning* of the corporate myth. The law, meanwhile, translates this arrangement into the formalized concept of the corporation: this, Barthes would call the *form*. We can represent the corporate myth using his famous diagram:



The signifier [1] is that which is signified [2] by the phrase “The corporate relations of production” – I leave the first term without a label to draw attention the fact that our analysis is an act of interpretation. As “what we grasp is not at all one term after the other, but the correlation that unites them” (Barthes 113), we can only speak abstractly about the corporate relations of production; in history, we experience them as [3] actual corporations. I have represented [3]/[I] as “Some Business, Inc.” to indicate that the law “translates” history; it deals with the corporation in a certain form. This form signifies [II] “defined functional properties” (Boyle 694) assigned to legal concepts within the law; but again, the law deals with neither of these terms independently, but as the legal concept of the corporation.

Here, we must be careful to understand this diagram as a schematic of *representation* rather than *determination*. “When it becomes form,” Barthes writes, “the meaning leaves its contingency behind” (117); within the process of representation, there is no necessary relationship between the signifier [1] and the sign [III]. There is,

however, a kind of duplicity in the signifier [III]: when, in legal discourse, we refer to “Some Business Inc.” we can refer to it as the sign of relations of production, or as the signifier of a corporation. In this sense, “if I focus on the mythical signifier as on an inextricable whole made of meaning and form, I receive an ambiguous signification: I respond to the constituting mechanism of myths” (Barthes 128). It is through this ambiguity that the corporate myth creates a space, within the law, for ideology to operate. Myth transforms the “reality” of the corporate relations of production into an “image” of a corporation defined by ideology.

IV. Ideological Personification

In this sense “myth lends itself to history” – not by determining ideology, but by facilitating it (Barthes 137). Yet this is not to say that the content of myth is acausal – on the contrary, a materialist conception of history will attempt to describe ideology as the effect of the circumstances and relations of production. In his study Imagining The State, Mark Neocleous pursues this project in an attempt to explain how “the social world as well as the political world is dominated by *non-human persons*” (73). Extending his analysis, I will propose that, historically, one such “*non-human person*” has been embodied by the corporation.

Just as our ideas are dependent upon the relations of production entailed by capitalism, Marx writes, so the

principal agents of this mode of production itself, the capitalist and the wage-labourer, are as such merely embodiments, personifications of

capital and wage-labour; definite social characteristics stamped upon individuals by the process of social production; the products of these definite social production relations. (Capital Vol. 3, 880)

Marx returns to this point “throughout the three volumes” of Capital (Neocleous 78) – but rather than dismissing it “as little more than a simple methodological device” employed towards a structural account of capitalism, Neocleous proposes that Marx’s discussion can also be understood as a description of personification as an effect of ideology. Individuals do not interact with each other in some economic vacuum, emancipated from the historical relations of production; rather, “it is as the bearers of these economic relations that they come into contact with each other,” and thus “the characters who appear on the economic stage are *merely* personifications of economic relations” (Marx, Capital Vol. 1, 179, emphasis added).

This process of ideological personification has, within our study, two significant implications. First, since “myth is the most appropriate instrument for the ideological inversion which defines” capitalism (Barthes 142), we should expect ideological personification to operate through the mythical character of law; to put it another way, the form of law is mythological, and the “content of this juridical relation...is itself determined by the economic relation” (Marx, Capital Vol.1, 178). The relations of production will tend to legislate definitions of personhood, not based upon some ideal or “true” meaning of what it is to be a person, but rather in the interests of these relations of production; here, as Hobbes writes,

A Person, is he, *whose words or actions are considered, either as his own, or as representing the words or actions of an other man, or of any other thing to whom they are attributed, whether Truly or by Fiction.* (111)

Second, Neocleous argues that the concern of both Marx and Hobbes with personification - and particularly personification's aspect of embodiment - is no coincidence. "To understand the long historical transformations of power and sovereignty," one must "interrogate the ways in which ideas based on the body have been used and refined throughout the centuries" (Neocleous, 10). The author surveys, in a few paragraphs, the "long tradition" of such ideas, "going back to classical thought", such as the Socratic parallel between the individual and the state, the Pauline doctrine of the body of the church, the Hobbesian conception of the body politic, and most recently capitalism's categories of capitalist and wage-laborer (11-2). Such ideas have appeared as justifications for hierarchy and the centralization of power; in the same way, "the corporal metaphor," Neocleous concludes, has functioned as "an ideological tool aimed at achieving good order and locating sovereignty" (38).

This second point deserves some elaboration, for it will lead us to the goal of this discussion: a mythography of the corporation. Despite his description of the corporal metaphor as a "tradition" and a "tool", Neocleous resists its characterization as some "universal metaphor which permeates all cultures and all types of social and political thought" (38); rather than dismissing its ubiquity as coincidental, or proposing the existence of some natural archetype, Neocleous seeks its origin within the relations of production.

The “fetishism of the world of persons,” he proposes, “arises from the peculiar legal character of the world of capital which produces them” (159). We can compare the process of ideological personification to Marx’s formulation of commodity fetishism, in which “the labour of the private individual manifests itself as an element of the total labour of society only through the relations which the act of exchange establishes between the products” (165); in the process of ideological personification, the individual asserts *herself* as a part of society, though again only by means of the relations of production. Therefore the “the capitalist and the wage-labourer” are ideological persons determined by “definite social production relations” between definite individuals; the material existence of individuals is a condition that ideology must both accommodate and transform in the interests of power.

Thus in capitalism, “Workers become lost in the categories of political economy because the capitalist relations of production are reified into entities and suprahuman forces” (Farr 119). We find the same mechanism in the Hobbesian ideology of the state: “The only way to erect such a Common Power” is “to appoint one Man, or Assembly of men, to beare their Person. This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person ... This done, the Multitude united in one Person, is called a Common-wealth, in latine Civitas” (120). And so Neocleous concludes that “the *person of the corporation* thus *replicates state power* through its *unity as the basis for domination*” (82).

V. The Corporate Myth

Having laid the theoretical groundwork, let us now attempt a simplified formulation of corporate power. Capitalist ideology replaces the individual, as the “bearer” of relations of production, with an image of personhood that corresponds with the interests of the ruling class. Myth facilitates this function of ideology through the operation of the law, creating legal categories of personhood in the interests of power – categories such as the corporation. The corporate myth, like all myths, is defined by its meaning and its form. The meaning of the corporation is the “monopoly capitalist system in which industry has become progressively concentrated and oligopolistic” (Goldman 112); these are the tendencies of capitalism in which “workers become lost”, and in which the bourgeoisie, “*the social class which does not want to be named*” (Barthes 138), also becomes lost. In the world of capital, the “individual asserts itself”, or rather re-asserts itself, through the form of the corporate myth as the suprahuman corporation.

It should therefore be apparent how corporate power resists the progress of legal reform: through myth, corporate power replaces the presumptive subjects of justice, the workers and the ruling class, with a subject defined in the interests of the ruling class. This ideological instrumentalism explains several features of the history of the corporation, particularly those which appear to conflict with our account. In counterpoint to our hypothesis that corporate power resists the progress of legal reform, there is, of course, a considerable history of legal reforms to corporate power that have benefited the working class; but such reforms can be explained in terms of “bourgeois interests if the need for stability makes it a concession in the interests of the bourgeoisie” (R. Miller 67).

Such explanations demand the hard work of Marxist economic analysis – work such as that undertaken by Marx himself, in Capital, to explain the origins of the 1844 Factory Act, itself a legal reform that ultimately served the interests of the bourgeoisie. The object of the survey that follows is considerably less ambitious: rather than examine the operation of ideology, I will attempt to examine the operation of myth. This focus reflects my field of study and interest in Barthesian mythology, but it is political as well. Under the regime of liberalism, the legitimacy and integrity of the rule of law are prima facie evidence against the very possibility of ideology: functionally, they serve to “deny the existence of class domination and to reaffirm the neutrality of the state” (Collins 138). Resistance against corporate power, therefore, must begin by resisting the legitimacy and efficacy of the liberal rule of law.

To “undo the signification of the myth,” Barthes writes we must “clearly distinguish the meaning and the form” (128). We can quite readily identify the form of the corporate myth: it is the legal category of the corporation, defined and redefined, ad nauseum, in the cannon of corporate law. The meaning, however, is less apparent, for it is precisely the meaning of the corporation whose presence is distorted by the corporate myth. I have loosely referred to that meaning as the individual: namely, the proletarians and bourgeoisie who, in their individuality, are “lost in the categories of political economy”. But what is this individual?

We come, then, to the final and perhaps most difficult question of this paper – one for which, I want to be clear, there is no answer. As Barthes writes, to bring the signifier from its “closed, silent existence to an oral state” is to create a myth (109); we are in no

better a position to do so than the jurists who have attempted to define the individual, and who have led us to our conception of corporate personhood today. Fortunately, the work of the mythologist is not to reveal some ultimate Truth (in this case a True identity or definition of the individual), but rather to reveal myth. The best way to do so, Barthes writes, “is perhaps to mythify it in turn, and to produce an *artificial myth*” (135); the “power of this second myth is that it gives the first its basis as a naivety which is looked at” (136). By assuming a myth of the individual, I will attempt to throw into relief the myth of the corporation.

In the survey that follows, I will compare the myth of the corporation to what I will call the myth of the *corpus*. The *corpus* is a conception of the individual defined, pragmatically, by its corresponding entry in the Oxford Latin Dictionary. To be sure, there may very well be, as the Oxford English Dictionary proposes, some etymological relationship between the Latin *corpus* and the English *corporation* (“Corporation”); there may perhaps be some a historical relationship as well, if, in the interests of power, “the body appeals because it connotes unity and integration, identity and concord, wholeness and indivisibility. In other words, *order*” (Neocleous 14). Such interpretations will likely suggest themselves in the course of this study. Nevertheless, I do not want to stake my claim on some correspondence between the definitions of the OLD and historical reality – after all, “since it is the dictionary which gives them to me, these particular concepts are not historical” (Barthes 121).

Rather, the *corpus* should be understood as a concept that is pragmatic in its definition and political in its subject. The dictionary provides, to my methodology, a

consistent, articulated and even enumerated point of reference; the subject provides a politicized conception of the individual, often in its material aspect as the body, to be set in opposition to another politicized conception of the individual – that of the corporation.

Ultimately, such politicization is intrinsic to the work of mythology. “The unveiling which it carries out is therefore a political act: founded on a responsible idea of language, mythology thereby postulates the freedom of the latter” (Barthes 156). To challenge corporate power, one must first, I propose, free language from the formalism supposed by liberal ideology – a formalism in which the strategy of legal reform necessarily participates. And to problematize those notions of individuality imposed by capitalism is to demand a responsible idea of language, one that recognizes the dangers of mythology and ideology, within and beyond the law.

3. A Case Study: *Lochner v. New York*

I. Ideology and Myth

Having dedicated this project to a study of myth – as opposed to ideology – it is nevertheless worth attempting the briefest look at one specific instance in which the corporate myth has facilitated the ideology of capitalism. This, I hope, will help clarify the relevance of the mythography that follows, while perhaps pointing the way towards a more extensive history of corporate power.

To that end, *Lochner* is a particularly useful subject of analysis for several reasons. First, class struggle, in *Lochner*, is extraordinarily transparent: the story of *Lochner* is a story of workers unionized against the owners of production. The law's intervention on behalf of the latter is not only similarly transparent, but largely depoliticized – so much so that even conservative jurist Robert Bork, hardly an ally of the working class, famously described *Lochner* as “the quintessence of judicial usurpation of power” (44). Most importantly for our study, this intervention is largely accomplished, in *Lochner*, through what will be referred to as a “right to classify”. In a myriad of ways, that right will sanction the creation of a second semiological order of legal myth; and we can compare the political expedience of several classifications that appear in *Lochner* to that of one in particular, the classification of personhood.

Our case history will begin when, “in November, 1901, Joseph Lochner was arrested for violating the ten-hour-day law” (“Made”). The law in question, the New York Bakeshop Act, specified that “No employee shall be required, permitted, or suffered to work in a biscuit, bread or cake factory more than sixty hours in one week, or more than ten hours in one day” (Brief 2). Justice John Davy’s 1902 opinion described the law’s necessity thus:

When we consider the intense heat of the rooms where baking is done, and the flour that floats in the air and is breathed by those who work in bakeries, there can be but little doubt that prolonged labor day and night, subject to those conditions, might produce a diseased condition of the human system . . . the Legislature evidently reached the conclusion that more than ten hours labor each day might be injurious to the health of the employees. (People 8)

A contemporary photograph affirms Davy’s description: Lochner’s Home Bakery appears as a dark, cavernous room lit only by a single window in a far door and a light bulb hanging from exposed plumbing by a thin cable; in the background, a man attends to a yawning brick oven with a blackened bread peel; and over the work counter, the rolling pins, trays, aprons, and the hardwood floor, a thick layer of flour. (Kens front.)

In 1881, Bewig writes, the Journeymen Baker’s Union “held a general strike whose primary demand was the twelve-hour day” (429). Bewig places the drafting of the Bakeshop Act in the context of a series of strikes and civil actions, including the Journeymen strike of 1881; litigation brought by the Bakers’ Progressive Union in 1883;

lobbying by the Central Labor Union in 1885; a successful strike by the Journeymen bakers of Washington, D.C. that same year; and an escalation of widespread strikes, from 1886-1887, in “Nashville, San Francisco, East Saginaw, Michigan, New York City... Detroit, Cincinnati, Pittsburgh, and Denver” (431). “In the rain and mud,” The New York Times reported, “with banners streaming and bands playing, 2,000 journeymen bakers marched through the streets of the City yesterday that the public might know a strike was at hand” (“Points”). One baker complained,

we have been obliged to work from 16 to 18 hours a day. Extra work has not infrequently been forced upon us, and I myself, within the last 10 days, was required, in a rush of work at my shop, to put in three straight days, during all of which time I had but seven hours for my meals and sleep.

(“Points”)

Before the strike, the shop owners were defiant; one explained, “We bosses are all practical bakers ourselves and will go into our shops and roll up our sleeves if need be. We will put our wives, our sons, and our daughters to work” (“Points”). Within a day, however, a Times headline would proclaim “Boss Bakers Yielding” and report the growing consensus that “the journeymen must be re-employed, whatever their demands”; the Associated Press noted that “the bosses had baked but one-tenth of their usual quantity of bread since the strike, and they could not help but yield if they wished to continue their business” (“Bakers”).

A somewhat limited Marxist analysis would interpret the New York Bakeshop Act as a genuine instance in which the working class successfully lobbied for a legal

reform in their own interests, and against those of the bourgeois Boss Bakers; we do not, however, need to trivialize the struggle of the unions, the necessity of humane working hours and the substantiality of their victory to notice the advantages the bourgeoisie drew from it as well. The New York Bakeshop Act was a concession to the proletariat offered to maintain the stability of the capitalist order. On this point Edmund Kelly, for instance, was quite explicit: the strikes impressed him with “the tremendous power of the workingman,” and he warned that “if allowed to run riot in their war on capital, it would destroy the very foundation upon which society is built” (Kens 61). Kens further notes that the law was only drafted by a Republican legislature who realized that “The proposed law was unlikely to harm any of the organization’s major contributors, but it might draw some support from the working class” (64). In that light, we can see that the Bakeshop Act was passed with little consideration for the well-being of the working class, and almost exclusively in the interests of power.

Moreover, the gain was short-lived - only a few years later, the New York Bakeshop Act was famously ruled unconstitutional in the case of *Lochner v. New York* - but before we arrive at 1805, let us turn our attention to 1804, when *Lochner* unsuccessfully appealed his conviction under that law. In that case, the act is upheld as “reasonable, and therefore...valid” (13). Judge Vann insists that

The published medical opinions and vital statistics bearing upon that subject standing alone fully justify the section under review as one to protect the health of the employees in such establishments (14);

elsewhere, he appeals to what “vital statistics show” (14), “data presented” (16) by “authorities” (14), and “tables” (16), all of which collectively decree that “there can be no doubt of the causal relationship” (15) between the emiseration of the bakers and their working conditions. This “appeal to supposedly objective social science data” (Boyle 697) will characterize much of the survey that follows, for

in terms of liberal political theory, it is in some sense necessary that we translate the struggles, conflicts, and politically contentions values of everyday life into the supposedly neutral semiological system of the law (696);

nevertheless, “the choices that were to be made using these data remained,” and remain, “just as politically loaded as they had always been” (697).

This thesis is interested in how law, as a second semiological system, functions as myth. Vann’s reference to “vital statistics” supposedly alludes to “human relations in their real, social structure” – but the opacity of his appeal (exemplified by the lack of actual, controversial statistics) “represents an operation movement, it permanently embodies a defaulting ... it gives” his appeal “a clarity which is not that of an explanation but that of a statement of fact” (Barthes 143).

Here, we do not see the process of ideological personification that will come to characterize corporate power. We do, however, see how the law, through the creation of a second semiological system, can function as myth. Further, if we consider Kelly’s analysis of the Bakeshop Act’s political expedience, the passage in question demonstrates how legal myth facilitates capitalism’s demand of economic stability. The meaning of

those “vital statistics” which “alone fully justify” the Bakeshop Act are depoliticized when they are translated into the “supposedly neutral semiological system of law” – a system that does not require Vann to defend or even cite them, which will enforce them, and which, most significantly, derive their authority from liberal ideology’s insistence that such judgments are, at least in a binding sense, true. Myth thus allows Vann to insist that the arguments which justify the stability of the capitalistic order are true – without argument.

Now, let us turn to instances in the *Lochner* case where ideological notions of personhood *are* at stake. T.S. Adams, writing on the contemporary labor movement, argued that the deaths resulting from strikes

are amply sufficient to disclose...that the typical strike is waged in an atmosphere so surcharged with menace, that widespread intimidation and sporadic acts of violence are precipitated as inevitably as the atmosphere of the earth precipitates dew (179).

Adams cites statistics collected by Slason Thompson – among others, four “killed” in New York state in consequence of labor disputes between 1902 and 1904 (969). If, however, we expand our conception of murder to include not only incidents of criminal homicide, but also the very stakes of the baker’s strikes, the figures expand exponentially. Consider, for example, the consequences of poverty: the decennial census records, in New York, 985 deaths by inanition in 1900, and 44 by exposure (US Census 184). Additionally, to consider Justice Holmes’ observation in *Lochner* that

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes . . . the long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs . . . during periods of epidemic diseases the bakers are generally the first to succumb to the disease (23)

is to include in the stakes of the baker's strikes all kinds of maladies: diseases of the lungs, for example, which caused 1,438 deaths, and rheumatism, which caused 493 (US Census 184-6).

We need not attempt to establish some specific, determinate relationship between labor disputes and the statistics above to observe that Thompson's analysis excludes the very possibility of such a relationship *a priori*. The victims of poverty and poor working conditions are non-persons in his estimation, their deaths unworthy of tally; this denial is utterly predictable, for as Barthes observes, the "bourgeoisie never uses the word 'Proletariat', which is supposed to be a Left-wing myth" (138). Simultaneously, however, capitalist ideology must deny bourgeoisie domination as well; it does so by denying the presence of the bourgeoisie itself. This, again, is another definition of personhood: to deny class struggle, capitalist ideology must invent what Barthes called "Eternal Man, who is neither proletarian nor bourgeois" (140).

Again, this thesis is primarily interested in the role that myth plays in facilitating ideology: let us examine with greater rigor the semiological mechanism at work. On the plane of language, the meaning is completely contingent. The sign – "4" – signifies a sum derived through a controversial methodology: from "published accounts" found "in the

files of leading newspapers” (24), Thompson made a subjective evaluation of what deaths are “due to labor disturbances” (22), one with which I have taken issue. Here, we find ourselves “before a simple system, where the signification becomes literal again” (Barthes 128); here, Thompson’s figure is politicized, we can evaluate its relevance because its contingency is before us.

On the plane of myth, however, Thompson’s figures take on a new significance: not of meaning, but of form. Where once they were contingent and controversial, now they are depoliticized; they are “stern and inexorable facts” (21), “concrete facts” (24), and “incontrovertible facts” (26); here, myth “stiffens, it makes itself look neutral and innocent” (Barthes 125). This duplicity of signification performs a useful ideological function: one moment Thompson insists that his statistics “prove that if strikes can be conducted without violence ... they are not, and...they never have been” (21), but the next, he is able to dismiss the burden of proof by remarking that his “table conveys its own analysis” (24). Thus myth “freezes into an eternal reference meant to *establish*” (Barthes 125) Thompson’s notion of personhood, rather than justify it.

Thus we find, in our history of *Lochner*, ideological personification facilitated through the operation of myth. But how does this relate to corporate power? Let us turn to a less oblique instance of personification in *Lochner* – one which proves decisive, not only to this case, but to the future of corporate law. The plaintiff’s counsel, Henry Weismann, argued that the Bakeshop Act, by categorizing bakers into two categories – those who work in hazardous conditions, and those who do not - ran afoul of the Fourteenth Amendment’s provision that no State shall “deny to any person within its

jurisdiction the equal protection of the laws” (4). Here, we find a similar rhetorical maneuver to Thompson’s: Weismann defines personhood by disqualifying a distinction that acknowledges the victims of class oppression, and insists that the Fourteenth Amendment can only apply to a kind of “Eternal Man”. It is worth noting that Weismann does not even object to distinctions as such; laws may, of course, make reasonable distinctions and classifications, but as *Santa Fe R.R. Co. v. Matthews* established,

Classification must be based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted, but no mere arbitrary selection can ever be justified by calling it a classification. (*Lochner* 5)

Weismann’s conception of personhood is “reasonable and just” in precisely the same way that Thompson’s is a “fact” – not by virtue of contingency, but rather through the depoliticization of myth. In this instance, myth operates through legal, rather than statistical, formality. On the plane of language, the Fourteenth Amendment’s “person” has a history, a richness: the Amendment, ratified after the Civil War, effectively overturned the Supreme Court’s infamous *Dred Scott* decision, which concerned itself with the proper “description of persons” (8) and concluded that African-Americans were only persons in the trivial sense that they were “persons whom it was morally lawful to deal in as articles of property and to hold as slaves” (8). On the plane of myth, the sign of the “person” becomes, simultaneously, a legal formalism; thus, even though the Fourteenth Amendment was a legal reform enacted to protect the victims of class oppression, Chief Justice Peckham is able to argue just the opposite.

What is critical, here, is that Peckham's conception of personhood is that of "persons who are *sui juris* (both employer and employe [sic])" (7). The only essential feature of personhood in *Lochner* is that a person is something that possesses "the right of contract" (7); this definition will come to enfranchise the personhood of the corporation as well.

II. A Counter-Myth

By tracing the operation of ideology, governed by the imperatives of capitalism, we have exposed the presence of myth in the law. But such an attempt to "vanquish myth from the inside," Barthes writes, "is extremely difficult," for "the very effort one makes in order to escape its stranglehold becomes in turn the prey of myth: myth can, as a last resort, signify the resistance which is brought to bear against it" (135). Thus, when John Mitchell, President of the United Mine Workers of America, objects, as we have, to Thompson's statistics, Thompson replies that "the facts ... argue that Mr. Mitchell is singularly blind to what has been going on about him" (22). He appeals to his statistics, not in their contingency but in their facticity, incorporating Mitchell's very resistance into his mythology. In the same way, Peckham, rather than defending his conception of personhood, anticipates his critics by insisting that he has made no judgment at all: "This is not a question of substituting the judgment of the court for that of the legislature" (9). Peckham's opinion is betrayed as myth in his insistence that it should not be "read as motive, but as reason" (Barthes 129); myth depoliticizes his conception of person and presents only reason, factual and natural.

There is, to be sure, a certain expository utility in such efforts as John Mitchell's, or in the dissent of Justice Holmes; but the survey that follows will attempt something different. Instead of trying to vanquish myth from the inside, I will try to lay hold of "the best weapon against myth" (Barthes 135) – a counter-myth. Since "everything can be a myth" (109), we need only take the corporate myth "as the departure point for a third semiological chain, to take its signification as the first term of a second myth" (135).

To demonstrate, let us apply this approach to *Lochner*. Peckham wants the sign "person" to refer to that which is "*sui juris*", that which can assume the responsibility of the "right of contract" – let him do so. But let us adopt Peckham's "person" as the signifier of a new myth: as explained previously, that myth, in this thesis, will be the myth of the *corpus*. We will assume that Peckham's invocation of the person signifies an appeal to a very particular notion of personhood, specifically, the person in its aspect of the body, as catalogued in the Oxford English Dictionary's definition of the *corpus*.

Peckham's notion of the person as *sui juris* seems to refer to something like the *corpus* as a "human being ... where the emphasis is on the treatment received by the individual" ("Corpus," def.9); in *Lochner*, the individual is treated as something responsible, something that can contract. Consider one of the exemplary passages cited in the OLD's definition: of the daughters of Anius, Ovid writes that their "*corpora poenae dedidit*" (18.663-664) 'their bodies are given to punishment' – when they are enslaved by Agamemnon. Critically, Ovid uses the word *poena* "punishment" rather than, say, *dolor* "pain" or *possessio* "possession" – the bodies of the *Oenotropae* exist within an economy of justice, an economy to be described with terms like "responsibility".

Both Peckham and Ovid, in that sense, seem to be talking about the same type of thing: the *sui juris* individual, the individual that is defined by its responsibility. But is this not the precise opposite of another concept of personhood we've seen in *Lochner* – that of the bourgeois bakers in Thompson's statistics, whose killings go uncounted? Do we not, to put it another way, see an emphasis on personal responsibility in Peckham's enforcement of contract which is at best neglected in Thomson's exclusive indictment of the strikers?

It will, of course, be objected that Peckham and Thompson likely have different ideas of personhood, and by extension different ideas of personal responsibility, in mind, that they are using their words in two different ways, and thus that there is, here, no necessary contradiction. But the point of the myth of the *corpus* is not to prove a contradiction: rather, the "power of the second myth is that it gives the first its basis as a naivety which is looked at" (Barthes 136). By comparing the instances of ideological personification which appear in *Lochner* to an ultimately utilitarian³ definition of personhood, I do not expect to reveal some true nature of the person, but rather to reveal the possibility of myth. This approach may seem over-elaborate given only two

³ My creation of the counter-myth of the *corpus* is utilitarian, but it is not completely arbitrary. Most etymological histories identify the word "corporation" as a borrowing from the Late Latin *corporātiōnem* – which can be traced back to the Latin root *corpus*. Though certainly interesting from a historical perspective, etymology has also become a matter of some consequence among adherents to the Plain Meaning legal doctrine, which proposes that "words are so plain that they cannot be misapprehended when given their usual and ordinary interpretation" (Caminetti 11). Lest this be mistaken by those acquainted with New Criticism and modern linguistics as an antiquated philosophy, consider, for instance, Justice Scalia's concern with what "the etymological meaning of section 5 may favor" (Tennessee 37-8), Justice Thomas's claim that "understanding finds support in the etymology of the word" (Lopez 23) and his "etymological inquiry into the proper meaning of the terms" (IBM 13). Thus, while primarily invoked as a counter-myth, my use of the *corpus* simultaneously participates in a struggle against legal and interpretive doctrines that still resonate in our highest court.

examples; given sheer diversity and proliferation of form assumed by the corporate myth through a hundred years of law, however, I hope that it will be up to the task of to destabilize the latter, to turn, as Barthes puts it, our “gaze on the myth” (136); to break through the formalism of the law, which denies the possibility of ideology; and thus to clear a space for an archaeology of corporate ideology. This may seem a trivial achievement; it is nevertheless, I think, a necessary demonstration for those still committed to the potential of legal reform.

As I will elaborate upon in my conclusion, this demonstration is all the more the necessary for opponents living in the post-*Lochner* era, where the operation of ideology has grown quite subtle. This latter development can be accounted for by three aspects of corporate mythology that appear in *Lochner*. First, the proposal of the right to contract as the *sine qua non* of personhood will, after *Lochner*, become the almost exclusive justification for corporate personhood; previously, as we shall see, such justifications were far more prolific and diverse. Second, the Fourteenth Amendment, which was only ratified near the end of our survey, will become the almost exclusive Constitutional vessel through which the rights of corporate personhood are guaranteed. These two legal mechanisms (particularly the former) will become assume such prominence in corporations law that we have seen, ever since, a third feature of corporate mythology: the reification of the corporate person. Corporate personhood becomes, during the *Lochner* era and thereafter, such a standard assumption of corporations law that the myth only appears quite rarely: the work of ideological personification has, today, been largely accomplished.

4. Cases

1799 - *Turner v. President, Directors, & Co. of Bank of North America*

Since we will encounter the so-called “diversity clause” throughout our survey, the subject deserves some minimal introduction. The United States Constitution, article three section two, states in part that

The judicial Power shall extend...to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. (United States NARA)

The jurisdiction of federal courts, therefore, is broadly contingent upon diversity between parties to the case; but specifically, it is also contingent upon the definition of words like “citizens” and their jurisprudential relation to the notion of “controversy.” Like much jurisprudence, much of the diversity clause is bereft of literal meaning. How the spatial preposition “between” applies to the abstract notion of “States,” for example, is uncertain unless we take the latter term in its geographic sense – and in that sense, we typically find borders or bodies of land and water between states, but rarely

controversies. Instead, a controversy between states is often understood through an elaborate metaphor, which first personifies states, and then relates a controversy to something that has come between them, a kind of wall or barrier to concord, like a disputed border.

What it means to have a controversy “between” parties depends, then, on a metaphor with an indefinite referent: a conflict exists because something has come between the parties, but it does not seem to matter so much what that something is. In *Turner*, identified by Dodd as the earliest Supreme Court case “in which a question of significance to business corporation was involved” (12), the corporation emerges as another such metaphor. *Turner*’s controversy turned upon a promissory note drawn by the plaintiff which only referred to a corporation named “Biddle & Co.” as “they [that] used trade and merchandize in partnership together, at Philadelphia, or North-Carolina” (Turner 1). Given such a description of the payee(s), the Court asked, does this controversy qualify under the diversity clause as one “between Citizens of different States”?

Turner does little to resolve the problem of number reflected parenthetically above. The Chief Justice offers little clarification: one moment he contemplates whether “the promisees . . . are citizens . . . or aliens” (3) and later, in parallel phrasing, he concludes that “the promisee” was not averred to be “a citizen . . . or an alien” (4). A similar discrepancy appears in his misquote of the promissory note: the note reads “they used trade,” but Ellsworth proposes that “the description given of the promisee only is,

that ‘he used trade’” (4). Not only the has the corporation’s number changed – now, it has been assigned a gender as well.

There is, perhaps, a significant distinction between the semantic ambiguity of reference in the metaphor of a controversy between parties, and this decisively syntactic ambiguity of the corporate metaphor. The former can be explained as a kind of idiom, or a generalization of “between” to indicate relationships both spatial and abstract; the latter ambiguity, however, seems to lack the necessary properties “of a minimal pronominal element: namely, the features person, number and gender, which must of course match those of the coindexed antecedent in a well-formed LF-representation” (Chomsky, Lectures 20). In other words, even assuming that the personification implied in a controversy “between States” is *merely* figurative, in a completely incidental way that offers no insight into the way that the Constitution conceptualizes states or makes use of the notion of personhood – even so, it is difficult to extend that logic and its conclusion of incidentality to Ellsworth’s phrasing of number. If, as Chomsky argues, the former metaphor is “well-formed” in a way that the latter phrasing is not, then we must conclude either that Ellsworth is speaking nonsensically when he refers to the corporate defendant in both the singular and the plural, or that he has in fact two different referents in mind, that he is using them words like “promisee(s)”, “citizen(s)” and other conceptions of the person in different ways.⁴

⁴ Though the focus of this paper shifted, in its composition, towards a broader discussion of the corporation as discourse, it began with the specific observation of such issues of grammatical number. Findings such as that quoted are exemplary of the tremendous progress generative grammar has made towards understanding language as “an innate component of the human mind” (Chomsky, Knowledge 3).

Such confusion can just as easily be understood in terms of language performance rather than competence; Ellsworth's first reference can be taken to refer to the titular Biddle and company distinctly, or to all of those employed under that corporate name – or perhaps he simply employs the English plural⁵ in reference to collective nouns. Whatever he means, in any case, the function of the corporation in *Turner* is not to serve, as Deiser describes it, as a “convenient factor in legal reasoning” (131), like a simple variable representing a complex expression – on the contrary, here the corporation obscures legal reasoning, shrouding the subject in ambiguity. We cannot be even sure whether that subject is even one subject or many; because it is corporate, it can be referred to one moment as a “citizen”, as if it were a person in and of itself, and the next as “citizens”, as we were not concerned with just one person, but many.

1804 – *Head & Amory v. The Providence Insurance Company*

In 1801 *Nueva Empressa*, a Spanish cargo ship, was captured by a British cruiser. As the ship rotted away in a Newfoundland harbor, its owners, a Mr. Head and a Mr. Amory, attempted to negotiate with its insurers, the Providence Insurance Company, to

This progress, as we have noted, accounts for issues of syntax in a way that it has not yet accounted for issues of semantics. Chomsky goes on to observe that such issues, understood in terms of Universal Grammar and “conducted within the framework of individual psychology, allows for the possibility that the state of knowledge attained may itself contain some kind of reference to the social nature of language” (18); problems of number, therefore, may offer a more penetrating route of investigation into the discourse of the *corpus* than broader issues of semantics.

⁵ Whereas American English “generally treats singular collective nouns as singular” (Quirk 758), Sorensen's survey of 19th century texts concludes that British English also employs the plural (Orianne).

cancel their policy. Providence responded with a letter of consent. Upon learning that their boat had been confiscated by the cruiser, however, Amory and Head brought an action against the defendants, insisting that the policy was still in effect and that they were therefore entitled to its benefit, on the argument that Providence's secretary had neglected to sign their letter of termination (*Head*). Justice Marshall, evaluating whether the latter's "unsigned note...be a corporate act obligatory on the company" (22), wrote that

Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. (22)

Marshall's opinion presents something different than what we saw in either *Lochner* or *Turner*: the corporation as "the mere creature," as a creature and merely a creature, the corporation which "owes its existence" as such. Marshall's "body", in other words, is a metaphor: the corporation has a body as creatures have bodies, and owes its existence to its incorporating act in the same way that a creature owes its existence to a creator.

Marshall's metaphor is useful because it defines the unfamiliar concept of the corporation with reference to the familiar concept of the created body. The creature

which has a “body” and “faculties” corresponds closely to The Oxford Latin Dictionary’s definition of the *corpus* as “The body as distinct from, or as the abode of, the life or soul” (def. 2a). Here we find, in Oxford’s catalogue of examples, Virgil’s “*Animae, quibus alta fato corpora debentur*” (Aen. 6.713), the bodies which must be provided to souls by fate, and Tacitus’s “*non cum corpora extinguuntur magnae animae*” (46.1), the body which, as opposed to the soul, perishes; here is the body of Platonic dualism, the corporation which “derive[s] all its powers from” its charter just as the body derives its life from the Fates or the demiurge, the body which has “faculties” just as the body has a soul. Marshall’s ruling in *Head* thus appeals to a quite specific notion of what it means to be a person as a conceptual metaphor for investing the corporation’s “body” with given “powers”.

1809 - *The Bank of the United States v. Deveaux et al.*

When Savannah tax collector Thomas Robertson, an agent of state officer Peter Deveaux, “with force and arms entered” the premises of the Bank of the United States, and “seized, took, and detained, two boxes . . . containing each one thousand dollars in silver” in taxes owed, its “president, directors and company” sued in federal court to recover (Deveaux 1). Deveaux, however, argued that the jurisdiction of a federal court was contingent upon the diversity clause’s requirement that the parties from the case be citizens of different states, and that the “president, directors, and company” of a

corporation were not proper averments of citizenship (1). The federal court agreed, and thus the plaintiffs appealed to the Supreme Court. There, Chief Justice Marshall held that,

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name . . . (15)

for in the latter case

the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. (15)

Marshall concludes, “for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities” (16).

As in *Turner*, *Deveaux* uses the metaphor of the body to describe the corporation – and as in *Turner* that metaphor facilitates substantial ambiguity. Thus, for instance, Marshall proposes the idea of an “incorporeal creature...having corporeal qualities” (16); of the corporation which, though “invisible,” may “appear, as a corporation, in any court” (15); and of that “which is certainly not a citizen” but which, on the other hand, “is considered an inhabitant, where the general spirit and purpose of the law requires it” (16).

In one sense, then, any such definition of the corporation is difficult to follow given the semantic contradiction of incorporeal corporation. But even if we accept its

incorporeality, Marshall offers only negative metaphor. The corporation is not like “the body as presented to the sight of others” (“Corpus,” def.4a), but invisible; it is not “a concrete object” (def.11a) but intangible; it is not even natural, but artificial, precluding a whole field of reference (such as “the body of a man or beast” (def.1a) and “flesh” (def.5a)). Further, the corporation is “not a citizen” – it is not a “body regarded as denoting the whole man” (def.8a). The incorporeal corporation is the semantic corollary to the genderless, numberless *corpus* of *Turner*: the former is semantically indefinite, and the latter is syntactically indefinite.

In another sense, however, the *corpus* of *Deveaux* presents a superabundance of meaning: it can be neither, or it can be both. The corporation can be incorporeal “where” the law requires it; elsewhere it has “corporeal qualities”. Through a kind of abstract spatial compartmentalization, the contradictory meanings are isolated from each other, like matter and antimatter in juridical containment fields.

However we understand the operation of contradiction within *Deveaux*, the corporate metaphor has expanded to encompass a whole range of both corporeal and incorporeal qualities. Still, that Marshall proposes a corporation which “may be considered” the former “for the general purposes and objects of the law” implies a subject of consideration beyond the law, as if the corporation did not, as he will elsewhere contend, exist “only in the contemplation of the law” (9) Further, Marshall’s subjection of the corporation to the consideration of law reveals the corporate myth in its provisionality, unconstrained by any conceptual definition of the body. Thus even as the

metaphor expands, it gains a kind of objective presence beyond the register of jurisprudence; and even as it reifies, it maintains its provisionality.

1813 – *The Bank of Columbia v. Patterson’s Adm’r*.

Already corporate law had begun to facilitate such loopholes as that exploited by the stockholders of the Bank of Columbia, who, after contracting Patterson to build their bank, attempted to renege on payment by claiming, “We never put our [corporate] seal to the contract, and, therefore, you cannot hold us” (Lawson, 54). Justice Story, however, disagreed, ruling that “the committee were fully authorized to make agreements” (Columbia 5), and that “all parol contracts made by its authorized agents, are express promises of the corporation . . . for the enforcement of which, an action may well lie” (6).

As in Marshall’s ruling on *Turner*, there is an inconsistency in the grammatical number attributed to the corporation: initially Story asks, in the plural, whether “the corporation were capable of contracting, except under their corporate seal” (5); but ultimately the corporation is a singular entity which may be referred to in terms of “its institution” and “its authorized agents” (6). Unlike *Turner*, however, Story’s inconsistency cannot simply be dismissed as one of convention, as a fluctuation into the American singularization of collective nouns – for in his references to the committee he remains quite consistent, referring to it in terms of “their own names” and “their express contract” (6), and as a multiplicity that “expressly agree” and that “were fully authorized” (5).

Thus, among collective nouns in Story's ruling, singularity, that necessary qualification of personhood, is the exclusive province of the corporation. Conversely, the judge only uses the plural in two specific circumstances: first, in his discussion of "the technical doctrine" of corporate agency, in which he observes that

Antiently it seems to have been held, that corporations could not do any thing without a deed . . . afterwards the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed. [emphasis added] (5)

Story appeals to Marshall's earlier conception of the corporation as a "mere creature of the act to which it owes its existence" and is thus "capable of exerting its faculties only in the manner which that act authorizes"; he also demonstrates Marshall's conceptual pragmatism, for just as Marshall was willing to adapt the nature of the corporation "where the general spirit and purpose of the law requires it," so Story can do so "for conveniency's sake." But returning to our examination of number, it is sufficient to observe that the plural "they" refers to the plural "corporations." Story continues:

At length it seems to have been established that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent . . . [emphasis added] (5)

Beneath the ambiguity of reference he makes a conceptual shift: “they” parallels his previous reference to the “corporations that could not do any thing without a deed,” but in his reference to “their” corporate seal Story refers not to some single seal mutually shared by every corporation, but rather to singular seals possessed by singular corporations. Yet he refers to only one corporate seal, only one “mere vote or corporate act,” and only one act of appointment – thus by extension, the subject of possession and action is the corollary corporation in abstract. We can therefore only conclude that Story’s conception of the corporation, though hidden behind his changing referent in “they,” has changed: the collective noun has become a multiplicity.

This change is more evident when, after Story dismisses “an acquiescence to such technical niceties” as the corporate fiction, he turns to the actual “evidence in this case”: that “the contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter.” [emphasis added] (6)

Justice Story’s reconceptualization of the corporation is decisive: by referring to The Bank of Columbia in the plural, he collapses that distinction the plaintiffs propose between the singularity of the corporation and the multiplicity of its committee. Whether this re-conceptualization is an expression of the “spirit and purpose of the law” is a question of ideological analysis; for the purposes of this discussion, it is enough to observe that the corporate metaphor facilitates multiple interests, not excluding the interests of power.

1819 - *The Trustees of Dartmouth College v. Woodward*

New Hampshire “Governor William Plumer and the Republican legislature of 1816”, Stites writes, attempted to amend Dartmouth College’s charter “in hope of realizing the Jeffersonian ideal of a state college” (1). The charter had been granted well before the Revolutionary War by King George III to Reverend Eleazar Wheelock in aid of the latter’s “design of spreading the knowledge of the only true GOD and SAVIOR among the American Savages” (Chase 647). After the Reverend’s death, a power struggle over the college’s presidency ensued between the Board of Trustees and Eleazar’s son and heir, John Wheelock, who “appealed to the New Hampshire legislature in 1815 for a final solution” (Stites 1). Miller’s case summary is typical:

. . . the Court held that a royal charter granted to the College in 1769 could not subsequently be altered by New Hampshire; the charter, according to Chief Justice Marshall, was a contract within the meaning of the Constitution. (38)

Attention to the case itself finds Justice Marshall, once again, endeavoring to define “the act of incorporation” (38) – here as something “whence . . . can be derived the idea” asserted by the defendants “that Dartmouth College has become a public institution” and is thus subject to the governance of the state. (40) *Dartmouth* further manifests that same conceptual tension, as in *Deveaux*, between the corporation which is a “mere creature of law” and the corporation “whence can be derived” the law, between

the corporation as an object of appeal and as the subject of definition. Marshall's unique innovation in the *Dartmouth* case, however, involves a new distinction:

If the act of incorporation be a grant of political power . . . the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States. (. . .) But if this be a private eleemosynary institution . . . there may be more difficulty in the case . . .

(38)

Ellis notes that “much is made of the distinction raised in the case between a public and private corporation” (808). Marshall goes on to describe an opposition between a corporation that “be a grant of political power” and a corporation that “does not share in the civil government of the country” (41); the corporation that is “endowed with a capacity” (38) by King George III and the corporation that “is really endowed by private individuals” (40); and the corporation whose “beneficial interest is in the people of New-Hampshire” (41), as opposed to the corporation which does not pursue “the interests of New-Hampshire particularly” (42). His considerations, that is, first appeal to a private-public dichotomy within sixteenth and seventeenth century discourses of statecraft and economics (Cutler 42); then to an indefinite conception of endowment which encompasses everything from charitable donations to royal proclamation; then to broad ideas about equity based on the “benefit” and “interests” of the people of New Hampshire.

Whatever their relevance to *Dartmouth*, these are considerations which have nothing to do with a personified corporation or the body. Consider the corporation in *Head*: to determine whether an “unsigned note . . . be a corporate act obligatory on the company,” Marshall need only appeal to the creaturely aspect of the body, the “mere creature” with “existence”, “powers”, and “faculties”. He may be accused of extending his metaphor well beyond the bounds of utility, and specifically into that distinctly Western mystic conception of the body as created and animated; but he has retained the same conceptual referent we’ve seen previously.

Marshall makes no such pretense in *Dartmouth*. In his discussion of the corporation’s “endowment,” for example, one might expect him to propose some kind of “private” character assumed by a body that is produced by, say, “private” parents as opposed to King George III; in his discussion of “benefit,” he might have appealed to a body which was “incorporated” for the exclusive benefit of its parents, as opposed to the general public. How he might have done so without engaging in precisely those “perplexing intricacies” (40-41) which the corporate metaphor is supposed to simplify is another matter.

1819 - *McCulloch v. The State of Maryland et al.*

In *Dartmouth*, the operative characteristic of Marshall's corporation – both legally and grammatically - is its perfection: “the proposition” of incorporation “is considered and approved” (41); “its existence, its capacities, [and] its powers are given by law” (41) and thus “an artificial, immortal being was created” (42) and “placed beyond legislative control” (37). When we speak of a corporation in *Dartmouth*, we can speak of “the purpose for which it was created” (41): namely “the purpose of clothing bodies of men” with new “qualities and capacities” (41), that is, with redefining personhood. The corporation, in *Dartmouth*, is a purpose that has been accomplished by its very creation.

In *McCulloch*, however, “the power of creating a corporation is never used for its own sake, but for the purpose of effecting something else” (33). Incorporation “is calculated to subserve the legitimate objects” of “the general government” (33); the corporation in question, the Second Bank of the United States, was created by Congress not to possess those properties which are “incidental to its very existence” (Dartmouth 40) but rather for the “execution...of raising revenue, and applying it to national purposes” (McCulloch 32).

Jurisprudence may insist that the distinction, here, is a distinction between “public” and “private” corporations – but as noted in *Dartmouth*, this is a distinction which has little to do with the metaphors of corporeality and personifications have seen elsewhere. To reconcile *Dartmouth's* perfected corporation to that conceptual framework, we would have to compare it, quite tenuously, to something like La Mettrie's

corps animé (14), the “body [that] is a machine that winds its own springs” (21), the “body [that] has taken the place that its nature assigned” (54). *McCulloch*’s corporation, on the other hand, “is never an end...but a means by which other objects are accomplished” (33); this conception most resembles “the body regarded as the actual instrument of possession or control” (“Corpus,” def.10a), as in the Justinian legal formulation of the *ingressum corpus*, the body that moves in upon something and thereby claims possession (41.2.25.2), and the “*animo et corpore*” (50.17.153), the mind and body which are the agents of possession.

We thus find, in *McCulloch*, the continuation of a kind of rhetorical departure from the explicit use of metaphor and personification we described in previous cases. This can be taken as evidence of the inconsistency of ideological personification as a useful way of understanding the operations of corporate law – or conversely, it simply demonstrates the instrumental use of rhetoric in the law, one unconstrained by those formalities that might, for instance, demand metaphorical consistency.

1829 – *The President and Directors of the Bank of the Commonwealth of Kentucky, Plaintiffs in Error vs. John Wister, John M. Price and Charles J. Wister, Defendants*

In *Kentucky* we a strange conceptual tension between two unities, both of which have been represented in the figure of the person: that of the corporation as a “company of individuals” and the state as “a body corporate and politic” (1).

The case history recounts that some five years before, John T. Drake, an “agent” of John and Charles Wister, “deposited in the bank of the commonwealth of Kentucky...\$7,730.81” (1). When, only two months later, Drake “demanded payment of the sum...in gold or silver,” the cashier refused – offering only bank notes passing at half their nominal value – and Drake brought the Bank of Kentucky to court. (1) At that point, the defendants entered a remarkable plea:

. . . the court ought not to have or take cognizance of this action, because the defendant is a body corporate and politic . . . the state of Kentucky in her political sovereign capacity as a state, is the sole, exclusive, and only member of the said corporation. (1)

Because the state of Kentucky was the sole owner of the Bank of Kentucky, the latter argued that the former must recuse itself from jurisdiction – thereby depriving Wister of legal standing in Kentucky.

In a relatively brief opinion, Associate Justice William Johnson would develop a concept borrowed from the defense – that of the “corporator” – in ruling against them. The term had, in fact, only appeared seven times previously in the Supreme Court. It first appears in an 1815 dispute over property owned by the Episcopal Church of Alexandria, Virginia, when Justice Story ruled that he was “not prepared to admit” that a state legislature can divest a corporation of property “without the consent or default of the corporators” (Terret 7). This language is echoed in *Dartmouth* in Washington’s formulation of the “the consent or default of the corporators” (50), and in Webster’s

reference to “the consent of the corporators” (25). The corporation of Story, is like *Dartmouth’s*, definitively consensual: it is something like the Justinian notion of the body as an “instrument of possession or control” (“Corpus,” def.10a) by virtue of its agency, its capacity to possess and control.

Though seemingly related (lexically, at least) to the corporation, the relationship of the “corporator” to body is in any case uncertain. The Oxford English Dictionary describes the corporator as an “agent . . . [formed from] *corporāre* to embody” (“Corporator”) but there seems a certain redundancy in appealing to the agent of the body’s agency. A much more concise formulation would be to propose that “a state legislature cannot divest a corporation of property without the corporation’s consent,” but this is perhaps too plain an assertion of power for either Story or Marshall to state directly.

Nearly a decade after Story’s ruling, the Episcopal Church of Alexandria (now the Christ Church of Alexandria) appeared again as a defendant in another property dispute. In *Mason v. Muncaster*, the attorneys for the appellant, John Mason, would argue that “If then the parish of Fairfax was a corporation . . . all the corporators have equal rights, and no part of them could exercise the rights which belong to the whole” (4). Here the corporator is a “part” of the “whole” corporation; as against previous notions of personhood, here the corporation is an aggregate of persons. The corporation is something like “body regarded as denoting the whole man” (“Corpus,” def.8) in his wholeness, and the “corporator” is comparable to the *corpusculum* or “the little

corpuscles” of Isaac Watts “that compose and distinguish different bodies” (39). Story’s response would elide this metaphor, though Marshall, three years later, would challenge it in his opinion that

In some corporations . . . bodies constitute the corporation itself . . . There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions . . . but they do not constitute the corporation . . . (Dandridge 9)

Thus, in opposition to the corporator which is a “part” of a “whole” corporation, Marshall proposes “corporations of another sort” which, on one hand, may be understood as an “aggregate . . . of corporators,” but which on the other is not “constituted” thereby. Whatever distinction he makes between an aggregation and a constitution is unclear, though this new, almost mystically paradoxical relationship between the corporator and the corporation facilitates Marshall’s conclusion that “the Bank of the United States . . . is not a corporation of the former description” (9).

Marshall would develop this notion of “corporations of another sort” in *Bank of United States v. Planters' Bank of Georgia*. The details of *Georgia* are broadly identical to *Kentucky*: in both, the bank alleges that the state has no jurisdiction to hear their case by virtue of being a shareholder. In *Georgia* the situation is less categorical than in *Kentucky*, where the state is the sole shareholder; here, the defendant notes that both “the State of Georgia and certain individuals . . . are members” (3) of the corporation.

In *Georgia*, the Chief Justice concedes that the corporator is “a member of a corporation,” but goes on to rule that the “State does not by becoming a corporator, identify itself with the corporation” (4). Noting that Marshall’s distinction between “become” and “identify” is functionally analogous to that between “aggregate” and “constitute,” we gain a clearer idea of the discursive role of the corporator: to provide a kind of semantic reconciliation of conflicting notions of the corporation within the polemy of a single sign. We find, in the very tautology of his conclusion that “a member of a corporation...acts merely as a corporator” (4) the imposition of a sign over any possible signification.

1836 – *The Proprietors of the Charles River Bridge, Plaintiffs in Error v. The Proprietors of the Warren Bridge, and Others*

Over fifty years before *Charles*, the Massachusetts legislature had granted to the plaintiffs “an act for incorporating certain persons, for the purpose of building a bridge over Charles river, between Boston and Charlestown” (1) and declared that “a toll be, and thereby is granted and established, for the sole benefit of the proprietors, for forty years from the opening of the bridge for travel” (100). Later, in 1792, the legislature declared “that the proprietors of the Charles River Bridge shall continue to be a corporation and body politic, for and during the term of seventy years” (1) thus extending the original “term” by thirty years. Within this latter term, however, the legislature “incorporated another company for the erection of another bridge” (5), the Warren Bridge – which,

though built directly adjacent to the former, “was to be surrendered to the state,” and any passage tolls thereby lifted, “as soon as the expenses of the proprietors in building and supporting it” were reimbursed (74). Having lost its monopoly, Charles River Bridge was soon no longer able to compete with free passage over the Warren Bridge, and the case syllabus concludes that the “value of the franchise granted by the Act of 1785 is now entirely destroyed” (5).

Thus the plaintiffs charged “that the act for the erection of the Warren Bridge impaired the obligation of” Massachusetts’s incorporation of the Charles River Bridge (74). In the first case bearing on corporations law since John Marshall’s death, Chief Justice Taney presided over a divided court. Writing the majority opinion, Taney ruled that “there can be no ground for presuming a conveyance to the plaintiffs” (76) of an “exclusive right of ferry between Boston and Charlestown” (77); dissenting, Justice Story countered “that the Court must, in the construction of this very act of incorporation, resort to common principles of interpretation” (100) which “expands the terms into an exclusive right” (116).

We have described, in *Dartmouth*, *Georgia* and *Kentucky*, a double movement within the discourse of corporate power: the proliferation of a corporate metaphor in its polysemy, a kind of inflation of signification which encompasses, for example, both the constitution and the atomicity of the *corpus*; and upon this proliferation, the superimposition of idiom, such as that of the “corporator,” whose relationship to the corporate metaphor is indeterminate at best. This double movement continues in *Charles*:

even as an inflation of signification “expands the terms” of incorporation, what Barthes calls the “sensory reality” (177) of the word itself remains as a kind of “frozen speech” (125).

Charles presents us not with a single corporation, but with a diversity of corporations. Both Taney and Story speak of the corporation as a creation, as the creaturely *corpus* of *Head*, the corporation that is “chartered” (73) and “created” (79); both further speak of the corporation as the teleological creature of *Dartmouth* and *McCulloch*, the creature that was “incorporated for the purpose” (73) of “the functions it was designed to perform” (79), even though, as in those former cases, there is some confusion over whether Charles River Bridge was created “for incorporating certain persons” or “for the purpose of building a bridge” (100). *Charles* also invokes *McCulloch*’s conception of the corporation as an instrument of possession. The corporation may possess “property, corporeal, and incorporeal” (129); we may speak “of the corporations which owned the ferry” (77) and acknowledge such “incorporeal rights” (113) as the “ferry rights [that] can be held by a corporation” (76).

There is also some difference between the corporation of Story and that of Taney; in the “act for incorporating” Charles River Bridge, for example, Taney maintains that “This act of incorporation . . . confers on them the ordinary faculties of a corporation, for the purpose of building a bridge” (7); but Story sees “no where, in terms, in any of the enacting clauses” the conferral of “any authority upon the corporation, thus created, to build any such bridge” (100). He seems to have abandoned the teleological notions of the

corporation we encountered before, ones which drew upon the metaphor of the corporation as a created body. Story does quote the “act of for incorporating certain persons, for the purpose of building a bridge” (100); but he does so only to maintain a distinction between Charles River Bridge’s “purpose” and what he previously referred to as its “authority.” Incorporation is a conferral of the former, but not the latter; deprived of authority, Story’s corporation is quite different from that of *McCulloch*, which was created “for the purpose of effecting”.

Story cites the distinction he maintains between the corporation’s “purpose” and its “authority” as “irresistible proof that the Court must . . . resort” to those “principles of interpretation” which allow him to “expand” incorporation’s meaning (100). Yet all of these semantic maneuvers, as we have noted, occur within the double movement of the corporate myth. The *corpus* is an enunciation of power, a lexicon of legal idioms which subjects the audience “to its intentional force, it summons [the audience] to receive its expansive ambiguity” (Barthes 124); this force and summons emerges in the supposed irresistibility of Story’s “irresistible proof,” in that register of jurisprudence which empowers Story with the “principles of common reason” (129) and “the common principles of interpretation,” which leaves us “at liberty” to “imply and presume things” (100) – or not.

1839 - *The Bank of Augusta, Plaintiffs in Error, vs. Joseph B. Earle, Defendant in Error*

As in *Deveaux, Earle* “turned on the nature and extent of the powers which belong to the artificial being called a corporation,” specifically the “privileges and immunities of citizens” (48). Marshall, in *Deveaux*, described a corporation that “for the general purposes and objects of the law . . . may be considered” such that the court, in Dodd’s words, “may, for some purposes, disregard the fictional unitary personality of the corporation and treat it” (43) otherwise - as if there were a subject of treatment, the corporation, which exists beyond the corporate fiction.

In *Earle*, the corporation’s identity was once again challenged in the defendant’s “opinion that a bank incorporated by the laws of Georgia, with a power among other things to purchase bills of exchange, could not lawfully exercise that power in the state of Alabama” (48). The corporation “with” power and that “exercises” power is most analogous to the *firmum corpus* of Cicero⁶, the body “as the seat of strength” (“Corpus,” def.1b), the body which is understood in terms of its power. And in the very formulation of their complaint, the defendants invoke yet another notion of the *corpus* by appealing to the presence of a corporation beyond the jurisdiction of “the act to which it owes its existence” – of a body that is imminent beyond the register of jurisprudence.

Daniel Webster, as counsel for the plaintiffs, countered that the “power conferred upon” the corporation should be understood “to place the bank upon the same footing as the individual” (26). The power of Webster’s corporation is not, that is to say, an intrinsic property; it is “conferred upon this bank by its charter” (26). Webster’s distinction

⁶ Cicero writes of a friend who “nondum satis firmo corpora cum esset” ‘has not yet quite recovered his strength’ (496).

between the corporation and its powers echoes that of *Head*, which appealed to a “body as distinct from, or as the abode of, the life or soul,” but the two conceptions also differ: the corporation of *Head* is so defined by powers that it may be understood “without ascribing” them to it; the powers of Webster’s corporation, however, are explicitly “conferred upon” it.

Without assuming that Webster and the defendants share some common signifier, some objective body from which their notions of power derive, both share the common metaphor of a body which is known, at the very least, to have been created in one state and to exist in another. Both Ingersoll, counsel for the defendants, and Webster, counsel for the plaintiffs, speak, in the former’s words, of a “corporation . . . out of the state which chartered the banking corporation” (40), and in the latter’s, of a corporation that may “exercise in the state of Alabama any of its corporate functions” (25).

Elsewhere, Ingersoll develops a different notion of the corporation, one in opposition not only to Webster’s, but which opposes the corporation to the person itself. “Persons go anywhere,” he argues; “Corporations are localised and stationary” (43). The person that can “go anywhere” is comparable to the *corpus* as an “animate body” (“Corpus,” def.2b), the *corpus* of Ovid’s declaration “*Corpus erat!*” ‘It was a body!’ (10.289) when Venus answers Pygmalion’s prayer and brings his once motionless statue to life; it is the *corpus* in its mobility. Indeed, this is almost the exclusive attribute of the *corpus* in this conception: when Ingersoll proposes that “corporeal being, and powers of motion, are the attributes of persons, but not corporations” (43), his parallel defines a

strict identity between animacy, corporeality, and personhood. Further, the judge's discussion of the animate body is uncharacteristically opposed to the corporation; the corporate metaphor is not only rejected but turned against the law, its artifice thrown into relief against the certainty of reality. "Can a corporation do any act of humanity?" Ingersoll asks – and answers, "Certainly not" (43).

Taney's discussion of the corporation is much closer to Webster's than Ingersoll's, in that he rejects such a strict identity. "The principle" of corporate citizenship, he rules, "has never been extended any farther than it was carried in" (43) *Deveaux*, which concluded that "the corporation might sue in its corporate name in the Courts of the United States (Earle 49). To extend Taney's metaphor, corporate identity may be "extended" and "carried" beyond the limits of such principles as that of corporate animacy or inanimacy. When Miller later writes of "what Taney had refused to do in *Earle* – call the corporation a citizen" (54), he means only that Taney refuses to call the corporation a citizen in every sense of the word. Contrary to Miller's reading, Taney affirms, "We fully assent to the propriety of that decision" (49) promulgated in *Deveaux* that "corporations composed of citizens are considered by the legislature as citizens" (Deveaux 17).

Thus, Taney, as Ingersoll, rejects the corporate metaphor – though where Ingersoll rejects the metaphor in its artificiality, Taney rejects its "principle" - that is, its instrumental - limitations. In this way, Taney affirms the expansiveness of Webster's notion, though unlike Webster, Taney makes little effort to rationalize his conception in

terms of the corporate metaphor. The law, Taney writes, “never intended to give to” corporations “the privileges of citizens...and at the same time to exempt them from the liabilities” of citizenship (49). Taney’s appeal, instead, is to what “the Constitution . . . intended” (49) – a personification of a different sort.

1839 – *The Louisville, Cincinnati, and Charleston Railroad Company, Plaintiffs in Error, v. Thomas W. Letson, Defendant*

The ambiguous polysemy of the corporation continues to proliferate. In *Earle* alone, it took on at least four forms: the *firmum corpus*, the body as opposed to its spirit or animating power, the body in its very animation, and the body in its imminence. Along with this polysemic proliferation, however, the double movement of the *corpus* is characterized by what Barthes calls an “intentional force,” perhaps best exemplified in Taney’s appeals to what the law “intended” – an appeal that should not be understood as an appeal to legislative authority or even textual determinacy so much as an appeal to meaning, an appeal to some kind of conceptual objectivity. To that end, we have seen the invocation of legal precedent, quotation, political authority, reason, and science, all within the second semiological order of legal myth.

Thus in *Letson* we find Justice J.M. Wayne preoccupied with the law’s definition and integrity. Poring through a number of cases in our survey, including *Georgia*, *Deveaux* and *Dartmouth*, Wayne concludes, “We confess our inability to reconcile these qualities of a corporation – residence, habitancy, and individuality – with” yet another

conception, “that a corporation aggregate cannot be a citizen for the purposes of a suit” (36). The Associate Justice proposes that *Georgia* “was founded upon principles irreconcilable with” precedent (35), and questions the “correctness” (35) of *Deveaux*, appealing to the misgivings of the late Chief Justice Marshall: “It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made” Wayne recalls, and adds that “a majority of the members of this court have at all times partaken of the same regret” (35). In this way, his critique is not of the corporate fiction as such, but rather of its misformulation – which he blames, in the case of *Georgia*, on a passive-voiced failure to follow precedent, and in the case of *Deveaux* on a passive-voiced over-adherence to precedent, which “was yielded to, because the decision had been made, and not because it was thought to be right” (35).

Our discussion of *Lochner* explored a relationship between ideological personification and its material conditions; let us return to them, if only briefly. At stake in *Deveaux*, for example, was not simply the legal proposition that a corporation is or “certainly is not a citizen,” but specifically thousands of dollars of silver. *Deveaux* denied the court’s jurisdiction on the grounds of the bank’s lack of citizenship. While challenging the principles of *Deveaux*, Wayne remarks that “Fortunately, a departure from them involves no change in a rule of property” (35) – but this “departure” does not, of course, remedy that change in property itself which followed the Court’s judgment.

We must therefore distinguish between the proclamations of corporations law and its correlative effects: for in *Deveaux*, the function of the *corpus* is not to provide some

kind of jurisprudential consistency, but rather to change, and specifically to justify an award of several thousands of dollars to the Bank of the United States; and, in *Letson*, to justify an award to the defendant of \$18,140.23 “with costs and damages at the rate of six per centum per annum” (37)⁷. Both Marshall’s conclusion that “a corporation aggregate, is certainly not a citizen” and Wayne’s conclusion that “it is substantially, within the meaning of the law, a citizen” (37) are ideological notions of personhood facilitated by the corporate myth – in the first conclusion, the body is appealed to in its imminence, in opposition to the abstraction of the corporation; in the second, the corporation’s identity with the body is assumed, and thus its citizenship follows as one of the “qualities of a corporation”.

Still, even as Wayne attempts to reformulate the corporate metaphor, it expands beyond his new conception of the person as a citizen. We even find multiple significations of that person’s body in a single sentence:

A corporation aggregate is an artificial body of men, composed of divers constituent members *ad instar corporis humani*, the ligaments of which body politic, or artificial body, are the franchises and liberties thereof, which bind and unite all its members together; and in which the whole frame and essence of the corporation exist. [emphasis in original]⁸

⁷ Both awards, of course, are much more substantial adjusted for inflation - \$36,456.52 and \$378,959.75, respectively.

⁸ Bacon 437 qtd. in Letson 33.

First, he speaks of “a corporation aggregate,” invoking that Marshallian description of the body in its aggregation, composition and constituency. Then, he describes the corporation that “is an artificial body,” the *corpus fecerimus* ‘body made’ of Livy⁹, the body in its artificiality and madeness.

Most interesting, however, is Wayne’s third metaphor, which he extends from his comparison of the corporation to the *humanum corpus*, the ‘human body’. The “ligaments” of this body “are the franchises and liberties” of the corporation, though Wayne does not explain whether they are only to be understood as such insofar as they “bind and unite,” or whether his metaphor also extends to the elasticity of ligaments – whether, that is, his metaphor can also be taken as explicit reference to the expansiveness of corporate franchises and liberties. (Ligaments, we may note, only lengthen (Hall 116) – like corporate power, they do not contract.) By analogy, the “members” of this body compose that skeletal “frame” united by these ligaments; actual people are not to be understood as the animating power of the corporation, for that function belongs to the “name” of the corporation, which is “the heart of their combination, without which they could not perform their corporate acts” (33).

Thus, even Wayne’s detailed exposition of the corporate metaphor admits two interpretations. A jurisprudential interpretation simply relates the legal mechanism of incorporation to the binding quality of ligaments upon bones, and identifies the corporate

⁹ Who writes of Lacedaemon’s incorporation into the Aetolian League, “*concilii nostri eam fecerimus et nobis miscuerimus, ut corpus unum*” (39.7.7) ‘we made it part of our concilium and integrated it within ourselves as a single body’ (Hartman).

fiction, manifest in the convention of naming a corporation as one names an individual, as incorporation's essential legal property. A mythological interpretation, however, observes the elasticity of corporate power, the utilitarian function of humans as the "bones" of the corporation, and the name of the corporation, the very word itself, as its heart - as the intentional force which superficially constrains the expansive ambiguity of the corporation within the definition of a single word.

1852 - *George Rundle and William Griffiths, Trustees of the Estate of John Savage, Deceased, Plaintiffs in Error, v. The Delaware and Raritan Canal Company*

"My disagreement with my brethren," Associate Justice Peter Daniel writes in his dissent, "has its foundation in a reason wholly disconnected with the merits of the parties" (12). This disconnection, which Daniel relates to some assessment of "merits", can be better understood in terms of subject matter: as opposed to his own discussion, there is little use of corporate metaphors in the case's majority opinion, or in the arguments of counsel. The counsel for the plaintiffs, Mr. Ashmead and Mr. Vroom, speak of the corporation as something that "action" may be taken "against" (5), like the body as "a thing capable of acting or being acted upon, a real entity" ("Corpus," def.11b), and as something that has "liability" (5), something like the *poenae datum corpum* that Peckham appeals to in *Lochner*. Associate Justice Robert Grier mostly uses the word idiomatically, invoking, for example, Marshall's category of the "private corporation" (11). Such references, in any case, are mostly tangential to the jurisprudence of *Rundle*, which is

more concerned with issues of interstate sovereignty and eminent domain. Daniel, however, affirms that he “should have coincided in the conclusions of the majority” (12) but for one “proposition”: that “The Delaware and Raritan Canal Company is either a citizen of the United States, or it is a citizen of the State of New Jersey” (13).

Thus far, such contested propositions of the corporation have appeared explicitly in the text of the case: as early as *Turner Ellsworth* contemplated whether the corporation is “a citizen...or an alien,” and in the most recent case of our survey Wayne asked the same question - whether or not a corporation is “a citizen of the state”. In *Rundle*, however, we do not even encounter the word “citizen” until the first dissent by Justice Catron, made largely on the same grounds as Daniel. “The record” Daniel cites which “discloses the fact, that . . . the appellee before this court, is a corporation”(13) can be inferred from the case name, and is alluded to several times throughout the case – but never with regard to questions of citizenship.

Here, the corporate myth has passed into that “closed, silent existence” (Barthes 109) of nature that myth approximates: the corporation’s meaning “is no longer open for question” (14). Daniel proposes that this reification is simply the ratification of precedent – he speaks of “what this court has propounded in reference to” (14) corporate personhood. But before he offers his legal challenge, Daniel undertakes a quite different task. As opposed to *Rundle*’s previous references to “a New Jersey corporation” and “Pennsylvania corporations” (5), “a corporation chartered by New Jersey” (8), a “private corporation” and “a corporation” (11), and “this corporation” (13), the Associate Justice

begins his discussion by speaking of that which is “designated by the name of corporations” and what “are called corporations” (13). It is almost as if Daniel must develop new signs for the corporation which declare themselves in their very redundancy – that he must invoke “the name of corporations” and what “are called corporations” instead of simply “corporations.”

Now, in the middle of the century, let us pause to consider Justice Daniel’s achievement. Since *Turner*, we have seen the corporation described in many ways – but never, in our survey, as a word. This lacuna is not, of course, proposed as some kind of absolute historical absence; on the contrary, even in the very first appearance of the corporation in the Supreme Court, the 1793 case of *Chisholm v. Georgia*, Justice Iredell makes the perhaps unintentionally insightful remark that “The word ‘corporations,’ in its largest fense [sic], has a more extensive meaning than people generally are aware of” (18). But what is remarkable is not that the corporation should be spoken of as a word, a sign, a simple token of signification; what is remarkable is that it is spoken of otherwise. To speak of the corporation as a word is to situated it within an chain of signification; there, it “has its own value, it belongs to history . . . it postulates a kind of knowledge, a past, a memory, a comparative order of facts, ideas, decisions” (117). To speak of the corporation otherwise is to speak of alienate it from such meaning.

One might be tempted to assume that Daniel’s discussion of the corporate metaphor could thus become the basis of the kind of rational, autonomous jurisprudence envisioned within the discourse of state power; that the ideal of justice is simply a matter

of sufficiently rigorous attention to semiology, perhaps of populating the Supreme Court with enough Daniels and Bartheses. Even in the former's discussion, however, the corporate myth encroaches upon his analysis. When Daniels speaks of "the name of corporations," he is not attempting some kind of deconstruction of the term – on the contrary, he does so to establish "the meaning of the term" which, "in contradistinction" to "persons in their natural character" refers to "artificial or fictitious persons created by law" (13), to the created *corpus* and the *corpus fecerimus*. His project is the project of myth:

Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact. (Barthes 143)

Nothing is actually more striking in Daniel's dissent than his incredulous statements of fact, his appeal to a "plain, common acceptance of terms", "well ascertained truths", and "indisputable and clearly stated positions" (14), as well as "correct definition" and "all the known definitions and adjudications with respect to the nature of corporations" (15). Of course, those facts which Daniel promulgates are ones which the critics of corporate power are often quick to endorse, even today: Nader, for example, writes that the "Equality of constitutional rights plus an inequality of legislated and de facto powers leads inevitably to the supremacy of artificial over real persons" (79). But we have repeatedly seen how such an enunciation can become a tool of power:

it “could very well be self-sufficient if myth did not take hold of it and did not turn it suddenly into an empty, parasitical form.” (Barthes 117) In this instance, we can observe that, despite the qualification of artificiality, the corporate myth retains even in Nader’s formulation its reference to the person.

Thus, even as he denies the citizenship of the corporation, Daniel concedes that it is “deemed an inhabitant” (15) – that it is Justice Wayne’s *humanum corpus*, “the body as representing the mere physical presence of a person” (“Corpus,” def.8c). And even as he holds that a citizen “can, by no violence of interpretation, be made to signify artificial, incorporeal, theoretical and invisible creations” (14), he proposes that this description belongs to the corporation – echoing *Deveaux*’s paradoxical proposition of the “incorporeal corporation.”¹⁰ Even, then, as Daniel challenges both *Deveaux* and *Letson* as “equally erroneous” (153 Dodd), the corporation assumes many of the same forms.

1854 – *The Ohio Life Insurance and Trust Company, Plaintiff in Error, v. Henry Debolt, Treasurer of Hamilton County, Defendant in Error*

One provision of the charter of incorporation granted to the founders of The Ohio Life Insurance and Trust Company stipulated that “no higher taxes shall be levied on the Trust Company than on the capital dividends of incorporated banking institutions in the

¹⁰ Ironically, Daniel seems aware of this conflict in his remark that *Deveaux* presents “the anomaly of a being existing and not existing at the same time” (14), but does not extend this criticism to his own discussion.

State” (Debolt 21). When, seventeen years later, the Ohio legislature adjusted its taxation scheme, resulting in a substantial tax increase (though the actual figure is itself a subject of controversy in the ruling), the Trust Company filed suit against the county treasurer, claiming that the “incorporated banking institutions” referred to in the charter were those “existing at the time the charter was enacted, or that may exist at the time of the levy” (7) – and that the adjustment signified an increase relative to the rate that had been charged to said banks.

As in *Dartmouth*, *Debolt* presents the corporation in its temporal dimension – but unlike *Dartmouth*, which treated the *corpus* in its perfection, *Debolt* is concerned with the corporation as a presence, as “existing at the time”. Worthington, counsel for the plaintiff, insists that the reference to the banking corporations “must be to incorporated banks, existing at the time” (7); the possibility of the corporation as an atemporal abstraction is simply not in view. Worthington’s corporation is something like the *humanum corpus*, “the body representing ... mere physical presence”. We find a similar notion of personhood in Velleius, for example, who opposes the absence of the *corpus* – “*Nusquam erat Pompeius corpore*” he writes, “Pompey was no more in a body” – with the presence of his name, “*adhuc ubique uiuebat nomine*” ‘but he lived everywhere by means of his name’ (2.54.2).

Chief Justice Taney, in judgment for the defendant, opposes this conception of the corporation in his opinion that the clause in question is “confined to corporations”, specifically those “authorized to issue bills or notes”, in contrast to “a particular bank or

banks” (18). If we understand his distinction as against the temporality of banks “existing at the time,” his corporation is less characterized by its abstraction than by its eternity: it is the converse of Pompey’s *corpus*, the *uiuens corpus*, the *corpus* that lives as Pompey’s name lives, in perpetuity.

Justice Daniel, along with five other judges, dissents from Taney’s opinion, but Justice John Catron – who is better known for his approving references to “the protection of slave property” (81) in the infamous *Dred Scott* decision – offers the most aggressive critique of corporate power. Catron writes,

I have become entirely convinced that the protection of State legislation and independence . . . against monopolies . . . is illusory and nearly useless, as almost any beneficial privilege, property, or exemption, claimed by corporations or individuals in virtue of State laws, may be construed into a contract . . . (20)

Or as we have put it: the liberal rule of law (“legislation”) and the autonomy of the state (“independence”) are both “illusory”, for the semiological operation of myth allows the bourgeoisie to “construe into a contract” “any beneficial privilege, property, or exemption” it is inclined to claim.

Even in his opposition to corporate power, however, we find the operation of ideological personification in Catron’s discourse – here the corporation “claims” as individuals claim, it is the *ingressum corpus*. Catron warns against “the doctrine” that “the corporation holds its granted franchises under the Constitution” (20), but not in

objection to the notion of the corporation that can “hold” anything at all; rather, because in so doing, it “holds and maintains the portion of sovereign power” (20) reserved for the state. We do not need to propose anything so controversial as a criticism of slavery to note that Catron speaks of the corporation that “holds” things in much the same way as he speaks of “the right to hold slave property” (Scott 81) – neither, that is to say, is a proposition so much as the assumed premise in a broader discussion of ownership.

1854 – *Alexander J. Marshall, Plaintiff in Error, v. The Baltimore and Ohio Railroad Company*.

The text of *Marshall* begins with a series of letters between Alexander J. Marshall, who describes himself as having “considerable experience as a lobby member before the legislature of Virginia”, and L. McLane, the president of The Baltimore and Ohio Railroad Company, discussing how the latter’s “much desired ‘right of way’ through this State might [b]e procured from our legislature” (1). Marshall remarks that various “interests, acting in concert, have heretofore successfully combated ‘the right of way’” (2). Initially, he proposes “to surround the legislature with respectable and influential agents, whose persuasive arguments may influence” (3) them otherwise – but upon elaboration, his plan takes on a different character:

I should like to have the services of [Sen.] Major Charles Hunton, of this county . . . if I could offer him two thousand [dollars], it would become an object of great solicitude. It would pay all his debts and smooth the path of

an advancing old age . . . Under this plan you pay nothing unless a law be passed which your company will accept. (3)

Though the majority opinion turns on Justice Grier's conclusion that such "contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators, is void by the policy of law" (17), much of his discussion, and almost the entirety of the dissent, involves a familiar question: whether the "averment [of corporate citizenship] is insufficient to show jurisdiction" (11).

Instead of pursuing such legalities, let us compare this discussion of the corporation to Justice Daniel's discussion of the corporate metaphor. His dissent in *Rundle* marked the rare appearance of the corporation referred to as a sign rather than a signifier; again in *Marshall* Daniel's dissent speaks of "corporations" in terms of "legal definition or conception" (21), and explicitly invokes "the language, the plain words, or what may be termed the body, the *corpus*" (of the Constitution) (22). And again Daniel criticizes the corporation of *Deveaux*, which is held "as residing or being located in any State", for "no intimation of" the corporation's "'whereabout' is alluded to . . . whether that be in the moon or in terra incognita, is no where disclosed" (22). The corporate metaphor, in Daniel's dissent, is just that: a metaphor, a process of definition subject to minimal constraints of consistency, coherency, and correspondence with reality – such as the demand that residence and location refer to an actual "whereabout."

Daniel even elaborates upon the double movement of the corporate myth in his discussion of the "corporation [that] claims to extend its property, its powers, and

operations, and of course its locality”, a claim that is, however, “calculated to end in a deeper and more dense obscurity” (22). But there is a certain conceptual dissonance in his description of a corporation that “extends” into something “dense”; it is almost as if Daniel notices the semiological “turnstile” movement of the corporate myth (Barthes 123), but fails to recognize it as such. Here is the ambiguity of the corporate myth’s “expansive ambiguity,” the “obscurity” of its “dense obscurity.”

Reference to the corporation as a word rather than an entity appears elsewhere in *Marshall*: for example, in the dissent of Justice Campbell, who speaks of the “legal name” (24) of the corporation as opposed to “The word ‘citizen’” (27), and in Grier’s repeated references to the “collective or corporate name” (12-13). And as with Daniel, the corporate myth infiltrates the opinions of both judges. Daniel speaks of the corporation that “claims,” the *ingressum corpus*, and the corporation that “calculates,” the *humanum corpus*; in Campbell’s conception of the “corporation before the court as a party” (25) he appeals to the corporation which has “size, bulk, volume; also, density, mass” (“Corpus,” def.14a), the *corpus* that can be “before” something.

Grier invokes another spatial metaphor: “the court,” he writes, “in deciding the question of jurisprudence, will look behind the corporate or collective name” (13). Clearly, the object of Grier’s proposition is not a corporation but the name itself – but is this not conclusive evidence of the operation of myth in law? Here, there is both the sign, which is the corporate name, and the insistence that there is, “behind” that sign, the objective signifier, which awaits only the law’s discovery.

1854 – *The Northern Indiana Railroad Company, and the Board of Commissioners for the Western Division of the Buffalo and Mississippi Railroad, Appellants, v. The Michigan Central Railroad Company*

Justice Campbell, in *Railroad*, dissents that “the court has declined to determine any question . . . in regard to the citizenship of the parties” (14) both of which are corporations; but this declination stands in curious contrast to Justice Catron’s reference to the Court’s “assumption of citizenship for a corporation” (13), which he disputes in his conclusion that “this cause should have been remanded to the Circuit Court, with directions to dismiss it, as one over which the courts of the United States can have no jurisdiction with respect to the parties” (14).

Rundle set the precedent of a case in which concerns about the corporation were “disconnected with the merits” discussed in the majority opinion. In *Railroad*, it is as if this disconnection has become an absolute rupture: “no longer open for question,” the corporation of Campbell can only be understood as something prior to “assumption” itself, the ultimate signifier, nature in its very self-evidence.

Catron’s dissent invokes the created *corpus* in his formulation of “citizenship and corporate existence, created by State authority” (13), though in the service of a new (if insincere) proposition: the former, he writes, is “to some extent at least, identical” (13) with the latter. Possessing “a portion even of his corporate attributes, the citizen may be deemed a quasi corporation . . . as the latter” may “identify” as “a quasi citizen” (14).

Just as, in *Marshall*, the operation of myth in law became nearly explicit, here we find a vivid formulation, however unintentionally, of ideological personification. The corporation and the person (as a citizen) are functionally “identical”; abandoning the assumption that these distinct signs necessarily indicate distinct signifiers, we can conclude that they are “deemed” one way or another in the service of ideology.

There is, of course, an intentional equivocation in Catron’s discussion: he is less interested in establishing some identity for the corporation than in revealing the corporate metaphor through a definition of personhood; taking an approach similar to ours, he endeavors “to expose the incongruities involved in, and incident to” the corporation (13) Alluding to *Deveaux*, for example, he writes that

a corporation is an invisible, intangible, and artificial creature. In one sense, at least, the citizen may render himself invisible and intangible – he may abscond. In what signification he must become artificial . . . will present a question more difficult to be determined. (14)

As in his discussion of quasi corporations and quasi citizens, Catron writes facetiously: how a citizen “may render himself invisible” is, of course, a question less difficult than impossible. That we typically speak of a corporation in such terms, but not a person, reveals a distinction obscured by the corporate metaphor; and that Catron can make such a distinction identifies the corporate metaphor as such, as a legal instrument rather than some ultimate signifier.

Nevertheless, it is perhaps significant that the word "metaphor" is nowhere to be found in his opinion. We find, in Catron's argument, only the copula, though no explanation of in what sense the corporation "is" anything at all. The corporation that he criticizes is simply an "anomalous conception" (13) - implicitly, there is one that is "normal."

1873 – *Slaughter-House Cases*

The *Slaughter-House Cases*, a block appeal maintained by thirteen butchers and several butcher associations against a monopoly granted by the Louisiana legislature to The Crescent City Live-Stock Landing and Slaughter-House Company, is best known as one of the first judicial rulings on the newly adopted Fourteenth Amendment. (Aynes) The significance of the Fourteenth Amendment's prohibition against depriving "any person of life, liberty, or property, without due process of law" and denying "any person within its jurisdiction the equal protection of laws" (United States NARA) will become evident by the end of the nineteenth century; for now, it is enough to note Griffin's standard interpretation that "the precise question" of corporate personhood "was not presented to the Court in the celebrated *Slaughter-House Cases*" (Griffin 985).

That is not to say that the *humanum corpus* is entirely absent from *Slaughter-House*; when, for example, Justice Miller writes of "the interested vigilance of the corporation" (19), he refers to some notion of an interested, vigilant body which corresponds most closely to that of a person. Elsewhere, as opposed to "natural persons"

and the “corporation as a citizen”, Justice Field describes corporations as “artificial persons created by the legislature” (35), something like Nader’s “artificial person; the corporation is comparable to the *corpus* as a “human being, person, individual . . . where the emphasis is on the treatment received by the individual” (“Corpus,” def.9).

1886 – *Santa Clara County v. Southern Pacific Railroad Company*

Santa Clara confronts our survey with a unique challenge. We have, thus far, consistently (if arbitrarily) proceeded from the opinion of a given case, to the dissent, and only from there expanded our discussion to the counsel arguments, the synopses and abstracts, journal discussions, academic analyses, newspaper reports, and so on, as they have thrown light on the subject; we have done so as a necessary constraint on the scope of our discussion, but also, of course, privileging the “primary” texts as the legally binding proclamations of state sanctioned judges. What, then, are we to make of a statement found exclusively in the case headnotes? There, in *Santa Clara*, Chief Justice Morrison Waite declares that

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of laws, applies to these corporations. We are all of opinion that it does. (1)

Thus Waite gives that “precise question” of corporate personhood, evaded in *Slaughter-House*, a precise and emphatic answer; thus ideological personification proclaims itself – in a headnote. The corporation is the person of the Fourteenth Amendment that can be “born and naturalized in the United States”; corporations are thereby “citizens of the United States, and of the State wherein” a corporation can now be understood to “reside”. Corporations have “privileges and immunities”, and they have “liberty”, “property”, and even “life” which the State cannot deprive them of without due process. They are further accorded “equal protection” under the law, with anything else that falls under the court’s expansive conception of a “person” (United States NARA).

Hartmann writes that “100 years of American – and now, worldwide – law [has] been based on” (109) Waite’s assertion, and aptly summarizes the recent history of legal reform: “for the past 100-plus years corporate lawyers and politicians have claimed that Chief Justice Waite turned the law on its side and reinvented America’s social hierarchy” (106). Miller adds that “the ramifications have been considerable,” for Waite’s remark “was the basis for corporate protection of liberty and property against violations of due process of law-but a process of law that had no historical antecedent” (54). Douglas contends that such rulings as *Santa Clara*

may have changed the course of our industrial history. Corporations were now armed with constitutional prerogatives. And so armed, they proceeded to the development and exploitation of a continent in a manner never equalled before or since. (738)

Still, our survey has witnessed the expansion of corporate power not through “a process of law” grounded in “historical antecedent,” but rather through ideology facilitated by legal myth, ideology which operates through transformation and proliferation, which defies legal etymologies and precedents and pronounces ever-changing significations beneath the signifier of the “corporation.”

We may, perhaps, glimpse a measure of this proliferation in Hartmann’s estimate, in the quarter century following *Santa Clara*, of 288 “suits brought by corporations seeking the rights of natural persons” (105). Hartmann compares this to the “only 19” Fourteenth Amendment cases in that time period which “dealt with African Americans” (18) – but if, instead of assuming that ideological personification operates only through those corporate law cases which appeal to the Fourteenth Amendment, we propose that *all* corporate law cases, as episodes in the same bourgeois legal regime, entail an encroachment upon the personhood of the working class, then our survey widens. Within that same time-frame, the corporation appeared in at least 2,953 Supreme Court cases.¹¹ Whatever role the corporation assumes therein – we will explore this in the final cases of our survey – the corporation has, by Hartmann’s count, only explicitly appealed to the Fourteenth Amendment’s guarantee of personhood in less than a tenth of those cases.

As Hartmann and other have observed, Waite’s pronouncement was “rather odd” in that it was “merely announced at the beginning of the case” (Gerencser 627); even as

¹¹ LexisNexis reports, between 1886 and 1910, 2,953 cases which make explicit reference to a corporation using the legal abbreviations “co.,” “corp.,” “inc.” and “Ltd.” This figure necessarily excludes non-standard abbreviations (EG “chtd.,” “p.c.” etc.) and direct references to the corporate name (“Microsoft” instead of “Microsoft Inc.”)

jurisprudence Douglas describes it as “cryptic and oracular, without exposition or explanation” (737), but Hartmann explains that such headnotes don’t even qualify as jurisprudence: “They are not the precedent. They are not the law. They’re just a comment, with no legal status” (109). This lack of legal status may seem significant, but without lingering upon the problem of liberal ideology addressed in the first section of this thesis, one point is worth note: the same law which refuses to formally sanction this supposed lynchpin of corporate power has, for a hundred years, functioned as the futile point of appeal for generations of would-be legal reformers.

1889 – *Minneapolis and St. Louis Railway Company v. Beckwith*

A brief item in the January 8, 1889 edition of the Washington Post, Because Three Hogs Were Killed, concludes that *Beckwith* “has excited great interest, as the amount involved is but \$24 dollars and the costs of the litigation have been thousands.” When three hogs owned by Iowa farmer Oliver Beckwith were killed by a passing train, the Court ruled that the Minneapolis and St. Louis Railway Company, having failed to fence off their tracks in accordance with Iowa state law, were liable for the damages. (Beckwith 8) The disproportion of a costly action litigated against the resources of a wealthy corporation in pursuit of a relatively trivial remedy would soon become a familiar spectacle in U.S. law, but today *Beckwith* is more remarkable for its affirmation of the doctrine of corporate personhood.

Juridically, Hartmann's disputation of precedent in *Santa Clara* is a moot point given Field's reiteration in *Beckwith*: "corporations" he writes, "are persons within the meaning of the clause in question . . . corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons" (4) said benefits. Consider the distinction between this proclamation and the previous emergence of ideological personification through metaphor. In *Letson*, for instance, the corporation was an explicit metaphor for the body: the corporation had ligaments, members, a frame and a heart; its unity and identity were derived from the unity and identity of the human body. In *Beckwith*, on the other hand, as in *Santa Clara*, the metaphor of the body is only hinted in the etymology word itself: "corporations are persons" (4) not by virtue of some extended analogy, but "by judicial fiat" (Griffin 987).

1897 – *Allgeyer v. Louisiana*

In 1894, the same year that the Louisiana legislature passed a bill prohibiting "any person, firm or corporation" (Allgeyer 1) from conducting business with marine insurance providers who had failed to meet the state's legal and regulatory standards, the E. Allgeyer & Company corporation bought a \$200,000 policy from The Atlantic Mutual Insurance Company – a New York corporation which, the case history notes, "has not complied with the conditions required by the laws of" (2) Louisiana. When the state filed a complaint against Allgeyer finding them in violation of the law, however, Allgeyer demurred, claiming that the newly passed statute was a violation of the corporation's

rights as a person under the Fourteenth Amendment; (3) the court, under *Lochner*'s Judge Peckham, ruled in his favor.

“The difficulty with that formulation,” Miller writes of Allgeyer’s argument, is “wholly obvious: calling a corporation a person is a convenience, not a fact, and to equate the power of the natural person with the artificial person is utterly fallacious” (60). Superficially, Miller’s objection would seem to follow from our conception of ideological personification, which argues that “calling a corporation a person is a convenience” exploited by the ruling class. But here, we also see the difference between a Marxist conception of corporate power and the liberal critique of corporate personhood: for the corporation is not only revealed as a convention, but as a convention that we can contrast to the reality of “the natural person.” Thus, in place of one mythical image, ideology simply substitutes another; and that natural person, as it has throughout our survey, becomes the content of a new corporate myth. We, on the contrary, have simply contrasted the corporation with a definition of the person that, too, is utterly artificial, that of the Oxford Latin Dictionary. Instead of asking “Which is true?”, we have asked: “Why should one be true, as opposed to the other?”

1897 – *United States v. Trans-Missouri Freight Association*

The Trans-Missouri Freight Association, a price-fixing cartel formed by fifteen railroad companies “to establish and maintain arbitrary rates” (5), insisted in *Freight* that they were a “public” corporation, and thereby “denied that they were subject to those

provisions of the” Sherman Antitrust Act which prohibited such an association (6).

Justice Peckham, in his opinion, admitted that their distinction between private and public corporations “may be well founded”, but ruled that “the conclusions sought to be drawn therefrom need not be conceded” (18), and came in fact to quite a different conclusion: “the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads in the purview of that act” (19).

Thus that distinction we saw in *Dartmouth* and *Rundle* between what Justice Peckham variously calls “the two classes of corporations” (19) and “kinds of corporations” (18), the “public” corporation and the “private,” reappears in *Freight*. Peckham defines the “kinds” and “classes” of corporations in terms of “points of difference” and “points of resemblance” (18), but often tautologically: “a public corporation,” for example, has “business [that] pertains to and greatly affects the public” and “is of a public nature” (18) – it is “created for the express purpose of carrying on public enterprises” (24), whereas a “private” corporation has “a private nature” and is “engaged in private pursuits” (24). Such tautologies aside, however, and as in *Dartmouth*, neither category is described in relation to personhood. We find similar references to the corporation elsewhere: later, for example, he invokes Justice Field’s distinction between “railroad and other corporations” and offers a taxonomy of “Trading, manufacturing, and railroad corporations” (18).

The corporate law cases of the early nineteenth century we encountered in the beginning of our story went to great rhetorical lengths to personify the corporation –

typically through metaphor and particularly with reference to the body. Here, we find little evidence of such efforts; on the contrary, when the corporation is at all used with reference to the person, the two are simply used interchangeably, as in *Freight*'s inclusive appeal to to "corporations or persons" (19) and "individuals or corporations" (23, 28, 33). *Freight* was decided by an adamantly split court - with Justices White, Field, Gray and Shiras vigorously holding that the case's decision was "utterly irreconcilable [sic]" with their view of "freedom" and "the public interests" (41) – but the formulation of "persons and corporations" (33) appears in their dissent as well.

What has changed? Why is the corporate metaphor so proliferate in the beginning of the century, and so rare by the end? This is a question that we will explore with greater scrutiny in our conclusion, but *Freight* offers a hint: the case begins by quoting the Sherman Antitrust Act's provision that "the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations" (*Freight* 2). Ideological personification has not, in *Freight*, ceased: but where once it operated through metaphor, now it operates through decree. The law's second semiological order, once insinuated and rhetorically defended, is now explicitly defined: myth, here, is less a jurisprudential puzzle for legal reformers to solve than an order that "shall be" obeyed.

5. Conclusion

I began this study by addressing the “crisis of strategy” facing those who would resist corporate power.

Historically, that strategy has pursued a course of legal reform. Typically, this approach is exemplified by such cases as *Turner*, *Rundle* and *Marshall* in which individual plaintiffs filed suits against corporate defendants; we can also consider the converse strategy of legal defense, exemplified by cases such as *Dartmouth, Kentucky*, and *Earle*, in which individual defendants appeal to the protection of the law against corporate plaintiffs. In practice, however, the stakes of corporate power are considerably more complex and cannot be reduced to a simple identification of plaintiffs and defendants. In our extended analysis of *Lochner*, for example, we found corporate power exercised in a judgment for the plaintiff, who was an individual; the *Lochner* ruling affirmed a laissez faire formulation of a “freedom of contract” that will become a vehicle for corporate power throughout the twentieth century. Moreover, even cases which appear to enact genuine reforms cannot necessarily be understood as challenges to the bourgeoisie, since sometimes “it is not in the interests of the bourgeoisie for the state to use its coercive power to stop a phenomenon whose occurrence would be preferable, all else being equal, from the standpoint of bourgeois interests” (Miller 67). We observed

this dynamic in the passage of the very law that *Lochner* ruled against: the Bakeshop Act was passed given explicit concerns about the “tremendous power of the workingman.”

Thus, corporate power cannot be understood as a simple function of case rulings, to be interpreted through the lens of jurisprudence; on the contrary, it demands a tremendously sophisticated analysis of the relations of production and the respective interests of the working class and the ruling class. I have not attempted such an analysis in this paper – on the contrary, I have, with the exception of *Lochner*, deliberately distanced myself from such an analysis. The topic deserves further consideration, but is well beyond the scope of this thesis.

Rather, I’ve focused on a slightly different problem: how the semiological structure of law has historically facilitated the operation of ideology. I’ve attempted to make this demonstration, not by proving how the ideology in law departs from some ground of truth, but rather by comparing it to a countermyth; to reveal myth in its instability, an “instability [that] forces the mythologist to use a terminology adapted to it” (Barthes 120). The concepts of the corporation, the person and the body I have opposed to those which appear in our survey are not proposed as truth, but rather as alternatives that politicize what has been depoliticized. Certainly there has been a kind of tension in my project between the fact that it seemingly “unveils – or does it?” (Barthes 156) and its deliberately political object; thus, Barthes writes of “something a little stiff and painstaking, muddled and excessively simplified which brands any intellectual behavior with an openly political foundation” (156).

Having so episodically unveiled the operation of myth in law, I would now like to propose a quite tentative summary in the form of a history. In the first part of the nineteenth century, where our survey began, the corporate myth was characterized by appeals to the sign of the “person”: in *Head*, for instance, the corporation is defined as against the person’s bodily form, and in *Deveaux* as against the person-as-citizen. Elsewhere, this simile becomes a metaphor: in *Wister* the corporation is not like something that can consent, but is represented as something that can consent; in *Rundle* the corporation “is a citizen”. In both cases, the corporation is the sign of the myth; the corporate relations of production, the signifier; and to this myth, history supplies ideological notions of personhood as that which is signified.

The difference between simile and metaphor hints at a kind of rhetorical shift that will become pronounced by the latter part of the century, most vividly demonstrated in *Santa Clara*’s direct proclamation of corporate personhood. We also find this shift in another feature of our survey: an increasing poverty of the corporate simile in the second half of the century.

A jurisprudential history would likely attribute this change to the ratification of precedent: as those controversies which define corporate law, and by extension the attributes of the corporation, are settled, the corporation becomes less a subject of definition than a point of reference. But this interpretation relies on precisely that formalistic conception of law we have challenged: if, after all, the mechanism of precedent can sufficiently govern the controversies of corporate law, then legal reform is only a matter of establishing the right precedents.

I would therefore like to use the theoretical apparatus we've developed to propose an alternative explanation, one in which jurisprudence reflects but does not govern the progress of corporate power. Barthes writes of "the force needed by myth to distort its object" (144) – this is the force of ideology, of the bourgeoisie's imposition of "a certain regime of ownership, a certain order, [and] a certain ideology" on the world (138). Now if, as Marx, we assume "a tendency for productive resources to be concentrated in fewer hands as capitalism evolves" (R. Miller 58) then we can describe the force of ideology in terms of class antagonism. On the one hand, it will require increasing ideological force to maintain the increasing consolidation of bourgeoisie power in the face of increasing inequity – but on the other, that the bourgeoisie will consolidate power indicates the bourgeoisie ideology will become increasingly entrenched. Myth will require less force to distort its object as capitalism progresses; until "the bourgeoisie eventually strikes against a resisting core which is, by definition, the revolutionary party" (Barthes 139) the history of myth will be a history of reification. Thus Barthes writes of the progress of myth in France, "transient awakenings might happen, but the common ideology was never questioned again" (141).

The history of the corporate myth has thus been a history not of ratification, but of reification. During the first half of the nineteenth century, myth needed a tremendous amount of force to impose corporate power. Direct proclamations of corporate personhood of the sort we encounter by 1889 in *Beckwith* were untenable, not because of a lack of precedent, but because the relations of production had not yet imposed the ideological regime that could both demand and enforce this conception. By the latter half

of the century, that ideological regime is in place. The concentration of wealth in fewer hands demands ideological justification, which corporate personhood provides by manipulating notions of personhood in ways that distort the inequities of distribution. Just as importantly, this concentration of wealth provides the force which myth needs to accomplish this distortion – force exercised, here, through the coercion of law.

Let us return, then, to our crisis of strategy. Those who would resist corporate power, by our analysis, are not confronted with problems of jurisprudential formulation; Grossman's colleagues at the conference where this thesis began have proposed a staggering array of laws and legal remedies with which to confront corporate power, but the very law upon which they depend can, as myth, always “signify the resistance which is brought to bear against it” (135). Rather, they are confronted with the very “force needed by myth” – they are confronted with ideology, and with the capitalist order which produces that ideology.

By this analysis, the ultimate solution to the problems of corporate power will come, not in court, but when the ruling class encounters that “resisting core which is, by definition, the revolutionary party.” In that light, let us conclude where we began with the remarks of Richard Grossman. “Of course,” he explained, “it’s not exactly the law. The law is literal, it’s also a metaphor. And of course,” he added, “the culture has to change to change the law.”

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