FLIPPING THE FIELD: USING FOOTBALL TO EXPLAIN CORPORATE PERSONALITY THEORY AND THE ABILITY TO OPT OUT OF THE SHAREHOLDER WEALTH MAXIMIZATION NORM

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I. INTRODUCTION

In his article, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization,*[2] Professor Stefan J. Padfield suggests that corporate personality theory should be considered when determining a corporation's ability to opt out of shareholder wealth maximization.

In response to both Professor Padfield's article as well as his presentation at the University of Tennessee's continuing legal education seminar, *Business Law: Connecting the Threads*, this comment seeks to further explain the different corporate personality theories and rank them in terms of support for opting out of shareholder wealth maximization.

After the Introduction, Part II will examine the four corporate personality theories introduced by Professor Padfield, including the collaboration theory propagated by Professor Eric Chaffee, and draw parallels between each theory and an aspect of football. This section will also weigh the amount of support each theory gives to opting out of shareholder wealth maximization.

Lastly, the Conclusion will review and rank the theories according to the level of support that each theory gives to opting out of shareholder wealth maximization via private ordering.

Using a common and well-known sport analogy, this comment seeks to help explain each corporate personality theory and how the per-

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[2] Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 Tenn. J. Bus. L 415 (2017).

sonality of a corporation may lend support to private ordering, and in turn, to opting out of shareholder wealth maximization.

II. CORPORATE PERSONALITY THEORIES AND FOOTBALL

A. Artificial Entity Theory

The first corporate personality theory is the artificial entity theory. [3] This theory states that the corporation is an entity that has been created by and for the state, and receives its authority from the state.[4] When considering this theory in terms of football, this theory may be most likened to the National Football League ("NFL"). Much like the way the players, coaches, and the game itself are all governed by the NFL, so too is the corporation, the individual actors, and the regulations it must adhere to governed by the state.

Assume that winning football games is the equivalent of maximizing shareholder wealth. In the NFL, the ultimate goal is to win football games. There is no room for players or coaches to pursue another goal other than winning. Tom Brady does not get to decide that he is going to do something other than win when he goes onto the football field. He cannot choose to play a game simply to get exercise or to see some old friends. Tom Brady, like his coaches and the team owners, intends to win every game because that is what the governing body has determined is the goal.

Thus, this theory of corporate personality would lend the least support to opting out of the shareholder wealth maximization norm. If the corporation is completely run and managed according to regulations promulgated by the state, then it would be unlikely that the individuals of the corporation would be able to "opt out" of any prescribed norm. The main actor in the artificial entity theory is the state, which means that what the state would require from a corporation would preclude any private ordering of the individuals of the corporation, making the possibility

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[3] *Id.* at 22.

[4] Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 67 (2005).

of opting out of the shareholder wealth maximization norm far less likely.

B. Aggregate Theory

The second corporate personality theory is the aggregate or contractarian theory.[5] Where the artificial entity theory is state-based, the aggregate theory views the corporation as an "association of individuals contracting with one another in organizing the corporation."[6] This theory "places the corporation squarely on the private side of the citizen/state divide, and supports granting corporations many of the same rights to resist government regulation as natural persons."[7]

Unlike in the NFL, a pick-up game of football allows the individual players to decide the goal of the game. In a pick-up game, the individual players have the ability to organize their team and define the rules of each game in any way they choose. Maybe the players want an all-time quarterback. Maybe the players decide to shorten the length of the field. Maybe the players decide to play two-hand touch rather than tackle. All of these preferences are permitted because a pick-up football game is an association of individual players who together decide the organization of the game.

Because the aggregate theory largely puts control in the hands of individuals, it would lend the most support to private ordering and, therefore, to opting out of the shareholder wealth maximization norm.

C. Real Entity Theory

The third theory is the real entity theory.[8] This theory views the corporation as a natural entity, distinct from its shareholders and the state.[9] The collective spirit of the group of individuals who own and op-

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[5] Padfield, *supra* note 1, at 445–46.

[6] Krannich, *supra* note 4, at 72 (quoting Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 293 (1990).

[7] Padfield, *supra* note 1, at 445.

[8] *Id.* at 447.

[9] Krannich, *supra* note 4, at 80.

erate the corporation give the corporation its own identity.[10] Additionally, rather than being governed by individuals, under the real entity theory, the corporation is guided by the corporation itself.[11]

The real entity theory can be likened to football as a sport. Football the sport is separate and apart from any one team or player or coach. The sport of football is not the NFL or Little League or the Miami Dolphins or Peyton Manning. The sport cannot be defined by one team or one player or one rulemaking body. Football is distinct from any individual aspect of the sport that may describe it and exists as its own being.

Because "[t]he real entity theory underemphasizes the role of the state and individuals in organizing, operating, and owning the corporation,"[12] and is neither more public nor more private, this theory would be less supportive of opting out of the shareholder wealth maximization norm. It is difficult to determine the influence of individuals on decisions made by the corporation in the real entity theory. However, any ascertainable influence of an individual is only compounded by other individuals' influence, thus creating a "collective spirit."[13] This would mean that there would no longer be individual influence, only the influence of the group.[14] Therefore, the "collective spirit"[15] of the corporate group transforms any potential private ordering into decisions made by and for the corporation, rather than the individuals. Thus, the real entity theory would likely only be somewhat supportive of opting out of the shareholder wealth maximization norm.

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[10] Padfield, *supra* note 1, at 447.

[11] Krannich, *supra* note 4, at 82.

[12] Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 355 (2017).

[13] *See id.* at 365 (discussing German legal theorist Otto von Gierke's use of the term).

[14] *Id.*

[15] *Id.*

D. Collaboration Theory

The last theory, proposed by Professor Eric Chaffee, is a new corporate personality theory called the collaboration theory.[16] This theory "views the corporation as a collaborative effort among a state government and those individuals organizing, operating, and owning the business entity."[17] In his article, Professor Chaffee suggests that this collaborative effort may also extend beyond the immediate corporate entities to the "customers, debtholders, and society in general."[18] Thus, the collaboration theory may be compared to the National Collegiate Athletic Association ("NCAA").

The NCAA manages, regulates, and supports collegiate athletic programs, specifically college football programs.[19] Each program represents a collaborative effort between the NCAA, the university, the players and coaches, and the fan base. For example, individual college football programs solicit monetary donations from individuals, while also accepting funding from the NCAA itself.[20] Additionally, while student athletes are recruited by coaches, players are often drawn to a school based on a combination of the scholarship amount offered, the success of the program, the academic prestige of the university, and the support of the fan base. Lastly, unlike in the NFL, some programs' ultimate goal is not to win football games. In fact, some smaller schools' teams are paid substantial amounts to play larger schools' teams simply so the larger schools' team does not have to travel and is likely to secure a win.[21]

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[16] *Id.* at 370.

[17] Chaffee, *supra* note 12, at 371.

[18] *Id.*

[19] *What is the NCAA?*, NCAA (2015), http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa.

[20] *Division I Finances*, NCAA, http://www.ncaa.org/about/resources/finances?division=d1.

[21] Darren Rovell, *'Guarantee' games to fetch $12.9M*, ESPN (Aug. 29, 2014), http://www.espn.com/college-football/story/_/id/11430182/college-football-teams-paying-opponents-least-128m-combined-weekend.

The NCAA provides for a collaborative effort between multiple parties related to college football, providing a level of private ordering among universities, coaching staff, and student athletes, while maintaining its regulatory role.

Because the collaboration theory states that the individuals organizing and operating the corporation, along with the state, are engaged in a "common effort . . . to accomplish a task or a project,"[22] this theory would allow greater flexibility for opting out of shareholder wealth maximization. While there is state presence and influence in the collaboration theory, the "common effort"[23] between the individuals and the state requires that the influence and presence of the individuals of the corporation be equal to the influence and presence of the state. This mutuality of influence allows for a certain level of private ordering, so long as the common task or project is accomplished. Thus, the collaboration theory, to an extent, would permit private ordering and opting out of the shareholder maximization norm.

III. CONCLUSION

The corporate personality theory which offers the most support for private ordering is most obviously the aggregate theory. As in a pick-up game of football, there is little input and oversight by a regulatory body in this theory of the corporation, and the corporation is seen as an association of individuals. Thus, opting out of shareholder wealth maximization is left to the individuals owning and operating the corporation. The theory that is second in terms of support for private ordering would be Professor Chaffee's collaboration theory. That theory recognizes both the role of the state and the role of individuals in the owning and operating of the corporation and requires a "common effort"[24] between the two. Since, according to the theory, the corporation is not merely a product of the state and still places an emphasis on the individuals of the

[22] Chaffee, *supra* note 12, at 371.

[23] *Id.*

[24] *Id.*

corporation,[25] the collaboration theory provides some support for private ordering and opting out of shareholder wealth maximization. The personality theory, lending little support to private ordering, would be the real entity theory. Although under the real entity theory the corporation is not a product of the state, the corporation is also not a product of the individuals who own and operate the corporation. The real entity theory takes decision-making away from individuals and places it in the hands of the corporation itself, which is an entity other than individuals or the state. Thus, the real entity theory provides little support for private ordering. Lastly, the theory which lends the least support to opting out of the shareholder wealth maximization would be the artificial entity theory. That theory states that the corporation is a product of the state, and leaves little to no governing power to individuals. Therefore, the artificial entity theory lends the least support to private ordering and the corporation's ability to opt out of shareholder wealth maximization.

Professor Padfield makes a logical proposal that the different theories of corporate personality should be taken into account in determining the ability of the corporation to opt of shareholder wealth maximization. In order to define how the individuals of a corporation may exercise their power, it is important to define the scope of that power, namely by defining the corporation.

[25] *Id.* at 374.