What Is Money?

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Lead Article

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WHAT IS MONEY? THE DEBT--PROMISE TO PAY--ANSWER TO THE QUESTION OF OWNERSHIP

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Thomas Hobbes wrote in his *Leviathan* that money exchanging hands, monetary policies, activities, and transactions are the blood of the "Leviathan" - the eponymous subject of the book. [2] Hobbes writes that this Leviathan's "blood" includes the "collectors, receivers, and treasurers; of the second are the treasurers again, ***2** and the officers appointed for payment of several public or private ministers." [3] Hobbes, follows this with an analogy of a living man, stating that this "artificial man maintains his resemblance with the natural [man]; whose veins, receiving the blood from the several parts of the body, carry it to the heart; where, being made vital, the heart by the arteries sends it out again, to enliven and enable for motion all the members of the same." [4] Hobbes maintains a parallel between the natural man and what he calls the "artificial man", the state throughout his *Leviathan*. [5]

I. THE CURRENT MECHANISMS IN THE U.S. - AND MOST OF THE WORLD - FOR MONETARY POLICY

A. Historical Analysis of the International Monetary Legal Framework: The U.S. Federal Reserve in the Post-Bretton Woods World

Ultimately, the mechanisms of finance in the United States are the accumulation of historical precedents - both legal and non-legal (such as economic, but also social). These precedents have led to the current system, on a continuing and settled basis. The legal and economic systems merging for the best system of an international monetary order can represent a balance of legal realism and legal formalism.

"Money" is printed by the U.S. government, designated as an official note. Value is correlated with how many of those printed pieces of paper exist. [6] This is the basic concept of inflation. ***3** [7] This concept of value and inflation is said to be connected

to a commodity - such as how much gold or silver existed in the Federal Reserve's physical locations or Fort Knox. [8] Such systems have been in place since at least Mesopotamia, where clay tablets were used to represent credit, or comparable contracts that seem to resemble modern forms of fiat currency. [9]

In the United States, the Federal Reserve System is made up of twelve regional banks [10] and a board of governors appointed by the President and confirmed by the Senate. [11] However, ***4** it is not under the executive branch of government. [12] The Federal Reserve, in part, controls inflation. [13] Some inflation is essential to economic success. [14] Inflation is a concept of value. [15] Deflation is the inverse. [16] The question presented is whether the key to a little bit of inflation is actually economic success in a post-Bretton Woods system? In other words, does inflation cause economic success or does economic success cause inflation?

Historically, many of the concepts of finance came from Mesopotamia. Indeed, "[m]uch evidence from Mesopotamia, Egypt, and Ugarit supports the notion that ancient kings commonly did impose general taxes to help finance the provision of royal services." [17] Ancient Mesopotamians had to pay taxes ***5** throughout their long history. [18] Around the years of 2500-2000 B.C.E., many of these taxes were applied to various forms of physical property, income, or imposed through import duties. [19] These taxes aimed to support governmental functions that included royal activities, religious temples, and other similar services. [20]

The Mesopotamian paradigm is notable because it indicates that Bronze Age society found such systems relevant, as we do today. [21] Indeed, the system of commerce and taxation in Mesopotamia does not reflect the graduated income tax system that is currently in existence in the world, but it is surprisingly familiar. [22] Although much has changed since the Mesopotamian era, ***6** the modern system of finance and taxation's first changes date back to the 1800s. For example, the Canadian "frontier"--tracing back to the 1830s--illustrates how achieving an understanding of legal structures requires study of historical, political, and economic situations in the Canadian territories. [23] Reformers ultimately mobilized support in various Canadian territories, such as Nova Scotia, to reform such policies. [24]

Simultaneously, the United States had similar issues, but resolved them in a different fashion. [25] The debate in the United States extended beyond specific states' finances to include the role of gold and silver as a currency instead of bank-lent credit. [26] Moreover, bank panics, deflation, and the rhetoric of Jacksonian Democrats and President Jackson's war against the Bank of the United States did not add to trust of banks and credit. [27] Jacksonian Democrats lobbied for gold and silver as the ideal method of paying for land. [28]

This system of banking that was highly localized as a result of Jackson's Presidency changed during the American Civil War. The contentious banking issues returned during the Civil War under the Lincoln administration when the U.S. federal government actively sought funds to support the war; this led to Lincoln's signing the Legal Tender Act on February 25, 1862. [29] The Legal Tender Act allowed for the United States to issue "notes" and designate them legal tender for public and private debts - ***7** this replaced the specie system Jacksonian Democrats argued for in the 1830s. [30] At the time, Democrats from the remaining northern states opposed the Act, but found the unity of the Union more important and did not stage a large debate against the passage of the Act in Congress. [31] Following the Civil War, the Lincolnian system changed over time from Reconstruction to WWI and WWII. After the collapse of the League of Nations and the post-WWII era, the United Nations started changing the monetary system as technology changed the world system of finance and taxation.

The system changed after WWII. Currently, the global system of finance is historically the largest on average regarding daily turnover. [32] Indeed, this massive size is due to international trade and financial investment activity being global in nature. [33] Although the modern concepts and practices of the market originated in Egypt and Mesopotamia, the legal groundwork of the modern global foreign exchange markets have their origins in the Bretton Woods Agreement in 1944. [34] The Bretton Woods system sought to promote a uniform global monetary system, reductions in tariffs, and removal of trade barriers. [35]

Between WWII and 1971, the U.S. federal government's ability to pay its debts, concerned various stakeholders.[36] Despite concerns over the United States' ability to repay its debt and to maintain its creditworthiness, the U.S. dollar remained the world's "reserve currency."[37] Throughout the United States it was largely understood that the U.S. dollar possessed particular strength and came with a reliable security plan enabling its exchange for gold.[38] However, in 1961 such belief was put into action when there was a major run on gold and gold supplies on ***8** Fort Knox and the Federal Reserve.[39] As a result, the federal reserves were severely depleted in 1961.[40]

At the time, the U.S. government thought its international tax policy could help improve its ability to gain revenue.[41] Using tax revenue to pay debts could possibly replace the American federal government's reliance on gold reserves.[42] The notion was comprised of a restructuring of the U.S. tax system, which offered greater incentives to invest within the U.S. versus abroad.[43] Indeed, speaking to Congress, Secretary of the Treasury Clarence Douglas Dillon urged an end to the tax deferral regime because it would allow and encourage repatriation and U.S. corporations' investments in the United States.[44]

After WWII, the Bretton Woods convention seemed to address the seemingly unstable financial system.[45] The instability of the interwar period was marked by "the collapse of the gold standard, the Great Depression, and the rise of protectionist" domestic measures, and the apparent connections all these failures had with each other.[46] Regarding pre-WWII finance, governments embraced the so-called "Beggar-Thy-Neighbor" policies to address the economic effects of the Great Depression.[47] These "Beggar-Thy-Neighbour" policies included increased tariffs, "currency devaluations," and "discriminatory trading blocs."[48] However, these policies did not improve the overall economic environment for most countries, including domestically.[49] Moreover, such policies added to the instability of international affairs.[50]

***9** On the other hand, the benefit of the Bretton Woods agreement was that it created a system of fixed exchange rates that directly correlated to the U.S. dollar.[51] This fixed exchange rate allowed free trade to occur at a commensurate standard by which currencies could compare themselves to- the standard of the U.S. dollar.[52] Moreover, those participating and following the rules of the Bretton Woods system also agreed to abstain from trade wars triggered by lowering the value of their currencies - as had been done during the Great Depression.[53] It should be noted that Bretton Woods allowed countries to regulate currencies to the extent that their domestic economies would otherwise risk destabilization.[54]

The reform of the Bretton Woods system was a response to the "1971 Global Financial Crisis."[55] The 1971 monetary crisis arose when U.S. President Richard Nixon suspended the ability to convert U.S dollars into gold.[56] As a result of Nixon's suspension, floating fiat "exchange rates became the normal standard for industrialized liberal democracies."[57] This change in 1971 meant that no currency had a fixed value relating to another currency in place of the U.S. dollar.[58] In other words, all currencies had a floating value.[59] This change shaped the current global foreign exchange market.[60] Since the 1970s, the global legal structure changed as the volume and intricacy of the global market changed and communications technologies made the execution of contracts and agreements easier to more effectively complete.[61] In conjunction with the complexity, the regulatory oversight of the foreign exchange market system as well as the risk and capital requirements necessary for market entry, has significantly increased.[62]

Considering the theoretical perspective of economics, Keynesian policies historically governed those of most countries. ***10** [63] From the mid-20th century until the 1970s, Keynesian theory was used to justify "capital controls to protect domestic economic policies."[64] This was particularly true in developed countries using such theories to regulate capital flows.[65]

Ultimately, the post-Bretton Woods system after 1971 has removed the connection of currency to a tangible commodity. Now, it is a fiat system of currency. [66] Akin to an 1830s dialectic is the synthesis of the Lincoln Administration to a full post-Bretton Woods system of fiat currency.

The question remains: should there be a call for a "New Bretton Woods" system based on a dialectical connection of an understanding of legal realism and legal formalism? The answer is unclear. However, perhaps a system based on a further understanding of the balance between economic and legal theory based on logic would be beneficial and provide a method to answer the question.

II. WHAT, THEN, IS OWNERSHIP?

Ownership is a legal concept viewed from a social perspective. Without a social context, ownership would not exist. [67] ***11** From a formalistic legal point of view, ownership readily avails itself in law and contract. [68] However, from a realistic legal point of view, formalism sometimes falls short of defining and articulating what ownership is. Is ownership separate from law or is it dependent on the existence and acceptance of law in a social context? In other words, does ownership exist independently from the law? Likewise, does ownership exist independent of humans? Or does it exist only within the conception of humans' projection of what they determine as ownership?

In a search for definitions that are not readily apparent, analogous authority is more persuasive if it can be substantiated through example and demonstration of how the theory is related, and specifically in this case, related to the concept of ownership. Trust ownership delineating legal and equitable title is an example of the bifurcation of ownership. [69] Exploring the history of various types of ownership recognized in the law can illuminate ***12** a clearer definition of ownership of property that is imperative for understanding "anthropology," the *logos* of humans.

In a direct sense, Medieval and feudal law has influenced the common law English system the United States has inherited. However, this common law system that originated in the Anglo-Saxon Heptarchy had roots in the Roman codified system of law. [70] In 529 C.E., the Code of Justinian (Codex Justinianus) [71] - which is often cited as the basis for Roman law - was created by ***13** compiling previously decided cases, arguably considered to be precedent case law. [72] It can be argued civil or codified law is the compilation of judge-made law. In the Anglo-American tradition judge-made law is now referred to as common law. If this is so, then there is no difference between common law and civil law.

In terms of Medieval law, [73] ownership is control and possession of all beneficial--or destructive--uses of the property to the exclusion of all others. The sovereign guarantees private "fee" (or *faith*) possession. Further, the sovereign in a European Feudal can take property and its legal right away (*i.e.,* nullify private fee ownership). By contrast, sovereign ownership only exists by force supported by mystical ritual acceptance, either through divine right or "the consent of the governed." [74]

***14** Although the historical origin of property rights is vital for understanding ownership, demonstrating how ownership affects practical use, as well as other rights, can analogously set the stage and clarify what ownership is. Ownership of property is viewed as of significant importance in the world of tax. Identifying ownership of property is the starting point for determining whom to tax.

In determining the question of ownership in relation to taxation, the United States Supreme Court has ruled that "no one fact is normally decisive but that all considerations and circumstances of the kind [the Court had] mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue." [75] In the same case, the Court continued:

> [W]here ... the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership .... To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure

> the normal consequences of [social] solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such [cultural] arrangements. [76]

Further, the Court had a very "substance over form approach," whereby it stated,

> [s]o far as his dominion and control were concerned it seems clear that the trust did not affect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. [77]

The Supreme Court declares that "legal"--that is title ownership over property--is likely not enough on its own to amount to ownership over property. In some sense, the Court indicates that control over property is salient for determining ownership ***15** of property. Legal substantiation is not enough-- economic substance must exist as well. [78]

Regarding a similar issue, the U.S. Tax Court in its search for a definition of ownership, suggested that a benefits and burden test would be applicable for ownership of sale of property for tax purposes. [79] Indeed, how could a sale occur without ownership? [80] To find out if a sale took place, the court looked to several factors. [81] These factors were:

> (1) Whether legal title passes; (2) how the parties treat the transaction; (3) whether an equity was acquired in the property; (4) whether the contract creates a present obligation on the seller to execute and deliver a deed and a present obligation on the purchaser to make payments; (5) whether the right of possession is vested in the purchaser; (6) which party pays the property taxes; (7) which party bears the risk of loss or damage to the property; and (8) which party receives the profits from the operation and sale of the property. [82]

Like seeing various examples of what is sought, this does not give us the Platonic "form" of ownership. [83]

***16** III. BUT IF WE KNOW WHAT MONEY "IS," WHAT ARE COMPANIES? MULTINATIONALS AND FUKUYAMA

In the United States, there is a universal legal theory that corporations should be held as "persons." [84] But this is a fiction. Corporations are not people. Indeed, the concept of a corporation is a "fiction" in the sense that it is a human agglomeration. For that matter, all law must be a fiction.

Francis Fukuyama in his seminal book *The End of History and the Last Man* did not argue for an end to humanity as such, but a teleological goal for human development. He argued, in part, that history's teleology does not need to be interpreted only through an *a priori* perspective. [85]

***17** Fukuyama expands Hegelian theory by employing Kantian terminology in his works on classical liberalism and *The End of History and the Last Man*. [86] Such terminology embodies a vital element of Hegel and Fukuyama's thinking. [87] Indeed,

> [m]ost currently trenchant ideas of liberalism may be reduced to the moral individual of Kant's *Groundwork to a Metaphysics of Morals*, *Metaphysics of Morals*, and *Critique of Moral Reason*, largely familiar from John Rawls' *A Theory of Justice* and the economic individual of Hobbes's *Leviathan* and Adam Smith's *The Wealth of Nations*. [88]

Yet simultaneously declares, "[t]his is a bit unfair, both to the fonts of the liberal tradition and to contemporary scholarship" as Fukuyama in his *The End of History and the Last Man* uses Hegelian ideas intertwined with liberalism but distinguishes them from Kant and Hobbes's writings. [89] Moreover, one of the often cited forms of these theories in Ronald Dworkin's *Law's Empire* (1986) does not fit into the scholarly classification of liberalism; "nonetheless, ... [Fukuyama and Dworkin] are the scholarly exceptions that prove the political rule." [90] It is worth discussing the contours of Hegelian (and its predecessor Kantian) philosophy that influenced Hegelian thought. *A priori* refers ***18** to a judgement without reference to the outside world; they are inherently abstract thoughts and arguments. [91]

It is useful to summarize Kant's epistemology and metaphysics as it relates to idealism, which Hegel himself substantially changed. Indeed, in Kant's *Critique of Pure Reason*, he largely rejects empiricism. Empiricism theorizes that information is received through our senses. [92] In rejecting empiricism, Kant's *Critique of Pure Reason* continued Hume's critique of inductive reasoning and causality. [93] In this endeavor, Kant states that Hume awoke him from his "dogmatic slumbers." [94] Hume's skepticism demonstrates that a "cause" is not necessary for every perceived event. [95] For example, simply because a cue stick appears next to some billiard balls does not prove the cue ***19** stick caused the balls to reach their place. This is not suggesting there may have been another force, such as a human arranging the balls in a certain way on the billiard table, but rather a source that is wholly unavailable to human understanding through our senses. Kant explores the ramifications of Hume's skepticism by stating that there could be forces entirely beyond the human capacity to understand what put the balls in their place. Kant's *Critique of Pure Reason* argues that there is a *transcendental* reality that is independent of the human capacities for sensation. [96] Kant names these aspects only available to the mind through *a priori* categories. [97]

Moreover, "according to Kant, a priori concepts are part of a mental apparatus which orders the physical world into comprehensible form." [98] It would be helpful to explore a few examples to clarify Kant's notion. Julio Thompson writes, "[o]ne example of a priori knowledge is space. We cannot see space. Nor can we perceive it by any of the other senses." [99] Rather, it should be noted, "space is an 'intuition' that our mind applies to the sensory data it receives." [100] Thompson goes on to write, "[i]n Kant's view, unless we apply these a priori concepts, which he divides into various categories ... the world is an incomprehensible jumble of stimuli, which have no inherent order of their own." [101]

J. Watson's table of Kantian *a priori* categories is an excellent summation:

Quantity	Quality
Unity	Reality
Plurality	Negation
Totality	Limitation

RELATION	MODALITY
Inherence and Subsistence	Possibility and Impossibility
Cause and Effect	Existence and Non-Existence
Community	Necessity and Contingency
	102

***20** An example of *a priori* thinking is the totality of all mathematics; that is, the world completely within the minds of humans. *A posteriori* positions are based on experience of the world. An example of *a posteriori* thinking is a person perceiving rain because the *qualia* [103] indicating it is raining. Synthetic judgements are made by combining two ideas; the observations that led to the development of Newtonian physics. [104] These synthetic ***21** judgments are not inherent in their premises. [105] Analytic judgements are inherent in the abstract definitions provided. [106] Analytic judgments are inherent in their premises. [107]

Then, there is a way to combine all four terms. There can be analytic *a priori*. This would be demonstrated by a statement, such as "all kangaroos are animals." The idea of "animal" is contained in the idea of "kangaroo." Synthetic *a priori* is ***22** Kant's main interest in the *Critique of Pure Reason*. [108] That is, judgments that are known to be true independent of experience but give us knowledge of the world. [109] Examples of this are ***23** mathematics in general and Newtonian physics that are informative about the world. [110]

Fukuyama's theory of the "end of history" posits "using Hegel's historical analysis, optimistically called the post-Cold War period 'The End of History,' meaning that the direction in which we were heading was making it clear that democracy and liberty were our destiny, given their obvious superiority as systems of governance." [111] Henry Hansmann has argued an extension of Fukuyama's thesis of political history to the history and ultimate teleological goals of corporate law; "to put it differently, one's faith in reaching the end of history for corporate law may be closely tied to one's faith in achieving Fukuyama's original End of History in politics." [112] Although one can argue that ***24** corporate law and politics are separate in terms of their progression in history, [113] it seems that the two affect one another.

Though Fukuyama's thesis [114] may not be fulfilled in the modern-day, [115] it does present a compelling paradigm to interpret ***25** history and human society from an anthropological lens. Fukuyama focused his argument on the politics of society but did not contemplate the often unwritten, unsung history of corporations and corporate law. The effects of corporate law can be seen by the Dutch free state of Amsterdam issuing the first stocks, [116] the related Tulip crisis in the United Provinces of the ***26** Netherlands (commonly known as the Dutch Republic), [117] the ***28** financial speculation leading to the Mississippi Bubble in the 1700s, [118] the inflation during the U.S. Civil War, [119] the Economic ***29** Crisis in the United States in 1877, [120] the collapse of the Bretton Woods system in the 1970s, [121] and more recently the financial ***30** crisis of 2007/2008. [122] All of these events were, in part, caused by the accounting and legal structure of their respective jurisdictions and that affected political outcomes in the following years.

However, the singular concept of "one law" or one regulation [123] that leads to the change does not recognize the vast magnitude and multifarious array of the memes [124] in existence affecting society. [125] It is difficult to limit a theory of society ***31** through anthropology to one singular idea because there are many competing, and often compelling, non-contradictory, and contradictory ideas that equivocally substantiate a series of phenomena and events. This is not simply chaos theory, but an admission that one theory often is not enough to fully account for human affairs. [126]

***32** One example of corporate history that tips Marxist theories of dialectical materialism on their heads is Malcom Gladwell's description of the proxy wars that led to the development of Joseph Flom building Skadden, Arps, Slate, Meagher & Flom. [127] Historically, "white-shoe" law firms consisted of white Anglo-Saxon Protestants (WASPS). [128] Specifically, the white-shoe ***33** firms had teamed with the management of multinational corporations. [129] Indeed, when Flom was entering the legal market, the major law firms in New York operated like private social clubs - arguably akin to the private social clubs that existed in New York at the time. [130] These firms were known as "white-shoe" law firms. [131] These firms sought only to hire "lawyers who are Nordic, having pleasing personalities and 'clean-cut' appearances, are graduates of the 'right schools,' have the 'right' social background and experience in the affairs of the world, and are endowed with tremendous stamina." [132] If one did not fit into the foregoing "white-shoe" criteria, one would join a smaller firm or set up their own firm. [133]

Instead of siding with the management and general agreements, Flom "became the preeminent attorney handling proxy fights, and the white-shoe law firms were regularly outsourcing clients to him." [134] While white-shoe firms disdained proxy fights in the 1950s through the 1980s, hostile takeovers had become lucrative business, and all firms wanted to get into the game. According to Flom, "[the white-shoe firms] thought hostile takeovers were beneath contempt until relatively late in the game, and until they decided that, hey, maybe we ought to be in that business, they left me alone. And once you get the reputation for doing that kind of work, the business comes to you first." [135]

One interesting caveat of Flom's story is that it seems the Marxist theory of historical progression was not played out. Indeed, Flom did not side with management or the working side of the corporations, but he found another situation where the proxy legal attribute of the legal system allowed him to use his expertise. [136] Flom's proxy war does not seem to fit into the theory of dialectical materialism (a useful heuristic), [137] because ***34** Flom neither sided with management nor the working force. Flom completely and beneficially changed the socio-economic paradigm of several layers of society.

Flom is just one instance of multiple memes functioning simultaneously. Indeed, Flom can fit into the "great man" theory of history whereby history is guided by the decisions of individuals with great decision-making ability. [138] Yet, apart from Malcolm ***35** Gladwell's account, such stories do not often make their way to the sociological and anthropological--much less the public image--for thinking how society functions. In that sense, Flom's story comprises the "great man" theory of history. [139] Perhaps Flom's theory even dialectically represents this theory of history, which is why it is such a good example of societal historical progression. Flom's theory also fits into Tolstoy's theory of the "man" leading history featured in his second epilogue in War and Peace. [140] Flom fits into Tolstoy's theory in the second ***36** epilogue because he functions as one of many people working as a person in history.

Individuals play unique roles in memes of culture and the memes culture create systems of law - in other words, the cultural practices - anthropological memes - lead to systems of law - legal memes. [141] Law ensures ownership and ownership leads to the legally satisfied functioning of sales. Once legal structures have sufficiently evolved, taxation seems to arise - that is to say, once a system of contracts exists, then a system of corporations has the base to inherently rise as an advanced form of contract - thereafter, taxation superimposed on this causes the modern challenges of taxation. [142] Indeed, the modern form of taxation ***37** has never existed in the history of the world prior to the 19th century. [143] Taxation affects the societal structure unlike any other system. Although accounting has a longer history compared to the modern form of progressive taxation, there are hardly any philosophical or theoretical approaches to taxation and accounting.

IV. THE FUTURE OF CORPORATE LAW: SHIFTING AGENCY AND PRINCIPLES' Lenses Anthropologically

With that said, hitherto has been shown the history of corporations, the point is to use it to interpret present and future possibilities. Examining a corporation is analogous to examining a contract or the concept of ownership from a legal realistic and legal formalistic point of view. Moreover, examining the ***38** concepts of ownership and a contract from an anthropological perspective could help us understand why the legal concept of agency exists in its current legal formulation. Such a perspective on agency could inform the preferable mechanisms of taxation.

V. THE LEGAL STRUCTURE OF DEBT AND MARKET CAPITALISM

Now that a history and the possible futures of corporations and their ontology have been explored, it would suit an examination of corporations to lend itself to the money and the legal structure of debt that facilitates money. However, it is necessary to distinguish dividends from interest in a philosophical sense. Indeed, Lockean analysis - given that it is the basis of constitutional and property right interpretation - in the United States would be vital. A Lockean analysis is proper - even though Montesquieu's *Spirit of the Laws* was cited more frequently in the Federalist Papers [144] - because it provides that individuals do not need permission from the government to create private property. [145] Using this Lockean premise of what property is distinguished as created by individuals would clarify how dividends are separate from interest. Both are created by individuals and represent forms of private property - based on the intentions of the creators.

According to the United States Internal Revenue Code, a dividend is: (1) a distribution, (2) of property, (3) made by a corporation, (4) to its shareholders, (5) out of its earnings and ***39** profits in a taxable year. [146] The payment of "dividends" constitutes a distribution of a corporation's (or partnership's) earnings to its stockholders (or partnership "shareholders", as in many American jurisdictions as a "Licensed Limited Partnership"). [147] Dividends arise only from the appropriately calculated profits or "surplus income" of a corporation. [148]

Income from dividends is unearned, even if the payee is an officer, director, or employee of the corporation. This is because even officers, directors, and employees who receive dividend payments are "sharing" in the profits of another legal entity, a collective but "incorporated" effort, rather than "merely" each individuals' effort. It is absurd to assert that the only value of a product is the manual labor that creates it. The skills of a metallurgist, an engine specialist, leather specialist, and rubber specialist are all essential to make a car. However, it is essential to unify and efficiently direct, coordinate, and organize these skills. Management and planning groups bring these skilled specialists together. The investor puts up capital by ***40** means of a risk. It is a sacrifice of daily pleasures and comfort by the investor. Investing is a measurement of risk - an opportunity cost whereby money is an investment that could be used valuably. Investors are those who fund unity of the manual labor skills. It is preposterous to say that manual laborers are the only ones who bring worth. Without the risk of investment funding and planning and management, the car would not be made. The investment of capital is the *sine qua non* of capitalism. Dividends are an essential aspect. Without the investor, there is no management, planning, or workers.

Dividends are the justly earned compensation for the most careful kind of gambling. Every investor accepts the risk of losing everything he has gambled, but he would not engage in such aleatory behavior if there were no incentives of a return in excess of his investment. The shareholder's equity ownership is the body of his investment. His dividend is correlated with the time he sacrificed for the creation of a greater or entirely new and unique good for the world. This use and redirection of economic surplus with creativity advances civilization. This is antithetical to the Lockean analysis, [149]

> ***41** [I]n order to pay dividends to stockholders, corporations must pay employees a sum that is less than the full market value of what they produce. This is true if we accept John Locke's argument that the value of a good is completely due to the labor that was expended to create it. [150]

The OECD Model Convention on Income and on Capital defines dividends as,

> Income from shares, 'jouissance' shares or 'jouissance' rights, mining shares, founders' shares or other rights, not being debt/claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident. [151]

The payment of interest on bonds and other debt constitutes direct expenses of and to any corporation, such as a loan. [152] The OECD Model Convention on Income and on Capital defines interest as,

> Income from debt-claims of every kind, whether or not secured by [a] mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. [153]

Such a discussion of dividends and interest would be lacking without a brief mention of their converse, royalties and professional services. According to the United States Code Annotated, royalties are payments made for the license or use of property, such as mineral rights, copyrights, patents, etc. [154] Royalties act as a type of consideration for the use of a specialized aspect of intellectual property. [155] The OECD Model Convention on Income and on Capital defines royalties as:

> ***42** Payments of any kind received as a consideration for the use of, or the right to use, any copyright of literacy, artistic or scientific work including cinematograph films, any patent, trademark, design or model, plan, secret formula or process, or for information concerning industrial commercial or scientific experience. [156]

The two definitions for royalties are similar, except that the OECD Model does not mention mineral rights. [157] This is likely due to the phenomena that many countries do not consider minerals to be private property, although the United States does. [158] Thus, royalties are often referred to as "mineral royalties" for the right to use the land. [159]

Fees for technical services, also known as fees for services, involve the fruit of technical labor. [160] There is no set technical definition of these services, but they may include computer services, ***43** accounting, law, and agriculture. [161] Royalties are different because they involve the non-continuing creation and use of the specialized skill. [162] These are fees for technical services that are constantly in use. [163]

VI. CONCLUSION

Returning to the original analogy of Thomas Hobbes and his *Leviathan* whereby the money exchanging hands, monetary policies, activities, and transactions are the blood of the "Leviathan," it now appears there exists more and more different types of flows within the "Leviathan." From royalties, to dividends, to various forms of debt - money comes in many forms - not just one form. If one takes the analogy of the blood flows of the "Leviathan" to its extreme, then these types of income and money flows could represent different types of cells or perhaps even organs or systems within the body of the "Leviathan." Indeed, such analogies are not farfetched nor necessarily original - Plato in his *Republic* and *Phaedrus* saw the human "soul" (sometimes translated as the "psyche") as a three part entity representing the differing instincts and drives we have - *eros*, *logos*, and *thymos*. [164] Plato in the *Phaedrus* suggests a mythical metaphorical method of interpreting the soul as a chariot drawn by two horses whereby the charioteer guiding the horses is the *logos* - the logical portion of the soul guiding the overall soul's ***44** direction - and where the two horses represent *eros* and *thymos*. [165] The *eros* horse needs constant reigning in due to its

erratic actions and the *thymos* horse drives the chariot forward with zeal - and sometimes humility - but often this *thymos* of the horse needs to be reined in by the charioteer. [166] Moreover, Freudian psychoanalysis seems to employ a similar "tripartite" solution to interpreting the human "psyche" through metaphors - where Freud employs similar terms of *ego* (Plato's *logos*), *id* (Plato's *eros*), and *super ego* (Plato's *thymos*). [167] Furthermore, combining myth and metaphor, Jungian psychoanalysis searches for underlying currents and paradigms in various cultures to explain how societies can develop methods of governing themselves. [168]

Perhaps, the major organs - such as the heart and brain - could come in the form of the executive branch of government, whether it comes in the guise of a monarchy - as found in 16th century England - or an executive similar to one that exists in the United States. In either case, the executive often furnishes the needs of monetary supply through a central bank or treasury - such a treasury could be seen as one of the chambers of the ***45** heart or the impulse of the heart to action. [169] Likewise, the legislative branch of government could appear in the form of the Plato's *eros* [170] could analogously be construed as the digestive organs. [171] The *thymos* could perhaps appear as a conception of the mind or judiciary. [172]

However, the fundamental necessity is that all these different instruments of the body and forms of government in some sense rely on each other in the formation of the "Leviathan." To further mix some metaphors used thus far, indeed, some organs or systems of government and law could temporarily not function as well as the others to meet their respective goals. But down the minute sub regulatory guidance defining the miniature actions of a "red blood" cell or "mitochondria" - that is to say what would analogously be a mitochondria, metaphorically similar to currency regulations - often engages with every other portion of the "Leviathan." In other words, the most minute sub regulatory guidance could have implications for the highest levels of the *logos* or *thymos* representations in a polity.

Overall, as a denouement, analogies and metaphors could provide a use heuristic for interpreting difficult and complex subjects - not only interpreting what money is. However, it may be functionally impossible to provide a useful theory that encompasses a productive way to interpret the functioning of government, law, and the economy in how they all interact with each other. [173] Such an endeavor would be the project for another article.

Footnotes

1 Charles Lincoln is a Ph.D. student at the University of Groningen studying and researching international tax law. This article is intended to run parallel to a book to be published by Rowan & Littlefield on October 15, 2021, titled *The Dialectical Path of Law* (2021) by Charles Lincoln. In part, the book focuses on concepts of money and debt as a system to analyze tax law from a dialectical perspective. At the same time, the book considers the literary and legal concepts of topics from Hegelianism, sanctuary, Shakespeare, and Ludwig Wittgenstein's language games. Specifically, the author hopes that this article will be read with one of the pivotal chapters - Chapter 4: What Is Money? The Debt - Promise to Pay - Answer to Anthropological Legal and Historical Analysis of *The Dialectical Path of Law* (2021). The chapter from *The Dialectical Path of Law* examines the questions posted in this article from a different lens. Likewise, this article examines the questions in that chapter from a different angle.

2 THOMAS HOBBES, LEVIATHAN CHAPTER XXIV OF THE NUTRITION AND PROCREATION OF A COMMONWEALTH (1651).

3 *Id*. at 230.

4 *Id*. at 194.

5 Hobbes widely uses this parallel of natural humans and the state throughout *Leviathan,* "Hobbes repeatedly advanced the parallel between natural individuals and states, describing the international order as anarchic, just as he did the state of nature in civil society before the institution of political sovereignty." David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618, 628 (2016).

6 Value in this sense is correlated with inflationary nominal quantities of paper money. "Inflation in the range to which we have become accustomed, let alone in the hyperinflationary range, became feasible only after paper money came into wide use. The nominal quantity of paper money can be multiplied indefinitely at a negligible cost; it is necessary only to print higher numbers on the same pieces of paper." John J. Chung, *Money As Simulacrum: The Legal Nature and Reality of Money*, 5 HASTINGS BUS. L.J. 109, 152 (2009) citing to MILTON FRIEDMAN, MONEY MISCHIEF 16 (1992). Professor Friedman was awarded the Nobel Prize in Economics in 1976.

7 "A basic financial concept is that money today is worth more than money a year from now due to inflation and opportunity costs." Cynthia Kern Woolverton, *Mortgages & Mentoring: My Career with Judge Barry S. Schermer*, 55 WASH. U. J.L. & POL'Y 155, 158 (2017). "The value of money is considered 'preserved' by the fact that banks generally offer savings account interest rates that equal the inflation rate. The inflationary aspect of the time value of money impacts funds sitting in a savings account to the same extent as funds being invested in the marketplace, illustrating the concept that the purpose of inflation-related interest is to maintain the value of one's money - not to increase it. Even the Bankruptcy Code itself recognizes inflation and its impact on the 'real value' of amounts it uses in parts of the Code." Karen E. Nelson, *Turning Winners into Losers: Ponzi Scheme Avoidance Law and the Inequity of Clawbacks*, 95 MINN. L. REV. 1456, 1479 (2011). *Cf. Tort Law in New York Today Public Policy Report*, N.Y. ST. B.J., April 1999, at 8, 24.

8 Indeed, saying there is gold or silver in Fort Knox as an exchangeable asset for fiat currency is no longer valid.

Such language may have been appropriate in earlier eras, when the U.S. dollar was legally backed by or convertible into real assets such as gold and silver, and thus the funds available for spending by the Treasury were limited by external resource considerations. Nevertheless, it is clearly inapplicable today, as the modern U.S. dollar is a floating, fiat currency, whose nominal value is not tied to any fixed commodity or commitment to maintain a certain amount of real purchasing power. In place of stacks of gold bars in a vault deep underground at Fort Knox, the modern symbolic manifestation of America's monetary power is a computer at the Federal Reserve, where, in Chairman Bernanke's words, bank accounts are simply 'mark [ed] up' as necessary in a manner tantamount to printing money.

See Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, 109 KY. L.J. 229, 259-60 (2021). *See* United States Mint Public Enterprise Fund 31 U.S.C.A. § 5136 (West).

9 Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 YALE J.L. & HUMAN. 97, 98-99 (2012).

10 *The Twelve Federal Reserve Districts*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (Apr. 24, 2017), https://www.federalreserve.gov/otherfrb.htm. *See* Jessica Bulman-Pozen, *Our Regionalism*, 166 U. PA. L. REV. 377, 442 (2018).

11 *See The Twelve Federal Reserve Districts*, FED. RES. BOARD, http://www.federalreserve.gov/otherfrb.htm (providing a map of the current districts and noting that "the Board of Governors revised the branch boundaries of the System in February 1996."). *Compare* Sandra Kollen Ghizoni, *Reserve Bank Organization Committee Announces Selection of Reserve Bank Cities and District Boundaries*, FED. RES. HIST. (1914), https://www.federalreservehistory.org/essays/reserve-bank-organization-committee. *See also* Clark Hildabrand, *The Geographic (Un)representativeness of the Federal Reserve Board of Governors*, 34 YALE L. & POL'Y REV. 155, 185 (2015).

12 *See* Peter J. Boettke & Daniel J. Smith, *Federal Reserve Independence: A Centennial Review*, 1(1) J. PRICES & MKTS. 31, 31-48 (2013). *Cf*. Kevin Morrissey IV, *Is the Federal Reserve Truly Independent from Executive Pressure? Executive Influence on the Federal Reserve*, 38 REV. BANKING & FIN. L. 37, 47 (2018).

13 Harry Stein, *America Can Still Do Big Things: Dispelling the Fiscal Hysteria That Thwarts Good Public Policy*, 11 HARV. L. & POL'Y REV. 141, 153 (2017). "The Federal Reserve uses interest rates to strike a balance in monetary policy: interest rates that are too high will increase unemployment, but interest rates that are too low risk sparking rapid inflation." *Id*.

14 Ajay K. Mehrotra, *Lawyers, Guns, and Public Moneys: The U.S. Treasury, World War One, and the Administration of the Modern Fiscal State*, 28 LAW & HIST. REV. 173, 183 (2010). Indeed, "if one measures the economic success of wartime financing by focusing on the state's ability to extract tax revenue from a broad base of citizens/taxpayers while limiting the costs of inflation, the U.S. financing of World War I was not nearly as successful as World War II." *Id*.

15 *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1981 (1996). *See* also Richard S. Markovits, *On the Economic Efficiency of Using Law to Increase Research and Development: A Critique of Various Tax, Antitrust, Intellectual Property, and Tort Law Rules and Policy Proposals*, 39 HARV. J. ON LEGIS. 63, 92 (2002).

16 *See* Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511, 619 (2005).

17 *See* Robert C. Ellickson & Charles Dia. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI. KENT L. REV. 321, 375 (1995). These tax or tax substitutes represent the vast amount of centralized wealth accumulated in Mesopotamia from public works to valuable pieces of art - much of which was unknown until the past two decades. *Id*. It has been suggested that there is some, albeit limited, potential "light at the end of the looted-art tunnel," even in conflict areas in the Middle East. *Id*. As described in the World Policy Blog authored by Professor Mark Vlasic, a leading human rights scholar, and his associate Helga Turku, the combined efforts of the United States Departments of Justice, State, and Homeland Security succeeded in securing the return to the people of Iraq the ancient carving of Assyrian King Sagan (itself worth between $1-2 million on the black market) and 64 other looted antiquities. *Id. See also* Mark V. Vlasic and Helga Turku, *Countering IS's Theft and Destruction of Mesopotamia*, WORLD POLICY BLOG (July 7, 2015), http://worldpolicy.org/2015/07/07/countering-iss-theft-and-destruction-of-mesopotamia. At the same time, the authors suggest, ISIS has intensified its looting of treasure to "finance their reign of terror in Syria and Iraq." *Id*. The organization in effect "licenses" approved middle-men to deal with the looted artifacts. *Id*. Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art: Altmann, Benningson, Portrait of Wally, Von Saher and Their Progeny*, 15 J. MARSHALL REV. INTELL. PROP. L. 394, 434 (2016).

18 *See* Russ VerSteeg, *Early Mesopotamian Commercial Law*, 30 U. TOLEDO. L. REV. 183, 212-13 (1999).

19 *See id*. at 212-13.

20 *See id*.

21 The history of taxation to support centralized governmental services has a deep history going back millennia.

For millennia, dating back as far as when Mesopotamia was in its vibrancy, civilized societies have implemented tax collection to fund essential governmental services such as the military, judicial systems, and garbage collection.

There has been a host of ways that governments have levied tax burdens. For example, in ancient Egypt, taxes were largely agrarian based; whereas during the Greek and Roman Empires, taxes were frequently assessed on property ownership. Shortly after the Norman Conquest in 1066, when feudalism came into full vogue, the so-called product tax--the predecessor of the modernday income tax--came into existence.

See Jay A. Soled, Kathleen DeLaney Thomas, *Automation and the Income Tax*, 10 COLUM. J. TAX. L. 1, 5 (2018). *See generally* JOEL SLEMROD AND MICHAEL KEEN, REBELLION, RASCALS, AND REVENUE: TAX FOLLIES AND WISDOM (2021). Slemrod and Keen outline historical examples of taxation throughout history. Their account is especially compelling because it lays out difficult economic theories in readable terms - while also being an entertaining read; a doubly difficult task.

22 There is no evidence that graduated income tax systems existed in Mesopotamia or in any country prior to the 1800s. Regarding Mesopotamian tax,

The two major business organizations in ancient Mesopotamia - the palace and temple - received the lion's share of their income from rents and taxes on agricultural estates. To be sure, the palace was a tremendous business organization. It received tribute from abroad, produce, rents, and taxes from its land, and goods produced in the royal workshops.

See Russ VerSteeg, *Early Mesopotamian Commercial Law*, 30 U. TOL. L. REV. 183, 203-04 (1999). Regarding, "adoption by Congress of the first graduated federal income tax in 1914," such an income tax dramatically changed the economic and business landscape in the United States. Thomas R. Hurst, *Teaching Limited Liability Companies in the Basic Business Associations Course*, 34 GA. L. REV. 773, 780 (2000).

23 Jim Phillips & Bradley Miller, *''Too Many Courts and Too Much Law'': The Politics of Judicial Reform in Nova Scotia*, 1830-1841, 30 LAW & HIST. REV. 89, 91 (2012).

24 *Id*.

25 Hon. Randall T. Shepard & Douglas Fivecoat, *Indiana's Supreme Court in the Civil War: How Can the Constitution Be Unconstitutional?* RES GESTAE, 29, 32 (2006).

26 *Id*.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

32 David T. Bloom, *The Legal Underpinnings of the Global Foreign Exchange Market*, 23 N.C. BANKING INST. 27, 28 (2019).

33 *Id*.

34 *Id*.

35 *Id*.

36 Paul W. Oosterhuis, *The Evolution of International Tax Policy-What Would Larry Say?*, 33 OHIO N.U. L. REV. 1, 2-3 (2007).

37 *Id*.

38 *See id*.

39 *See id*.

40 *See id*.

41 *See id*.

42 *See id*.

43 *See id*.

44 *See id. See also Revenue Act of 1962: An Act To Amend the Revenue Act of 1954 To Provide A Credit For Investment In Certain Depreciable Property, To Eliminate Certain Defects And Inequities And For Other Purposes, Hearings Before the Committee on Finance, U.S. Senate*, 87th Cong. 4250 (1962) (statement of Hon. Douglas Dillion, Secretary, U.S. Treasury). *See also* S. REP. NO. 87-1881, at 3662.

45 *See* Bloom, *supra* note 32, at 27-28.

46 *See* Bloom, *supra* note 32, at 27.

47 *See* Bloom, *supra* note 32.

48 *See* Bloom, *supra* note 32.

49 *See* Bloom, *supra* note 32, at 27-28.

50 *See* Bloom, *supra* note 32, at 27.

51 *See* Bloom, *supra* note 32, at 28.

52 *See* Bloom, *supra* note 32.

53 *See* Bloom, *supra* note 32.

54 *See* Bloom, *supra* note 32.

55 *See* Bloom, *supra* note 32.

56 *See* Bloom, *supra* note 32.

57 *See* Bloom, *supra* note 32.

58 *See* Bloom, *supra* note 32.

59 *See* Bloom, *supra* note 32.

60 *See* Bloom, *supra* note 32.

61 *See* Bloom, *supra* note 32.

62 *See* Bloom, *supra* note 32.

63 *See* Philip J. MacFarlane, *The IMF's Reassessment of Capital Controls After the 2008 Financial Crisis: Heresy or Orthodoxy?*, 19 UCLA J. INT'L L. & FOREIGN AFF. 167, 179-80 (2015).

64 *See id*.

65 *See id*. at 180. *Cf*. Mark J. Wolff, *Failure of the International Monetary Fund & World Bank to Achieve Integral Development: A Critical Historical Assessment of Bretton Woods Institutions' Policies, Structures & Governance*, 41 SYRACUSE J. INT'L L. & COM. 72, 96-97 (2013) (providing a succinct and lucid history of the IMF and the economic theories that have guided its approach).

Prior to an examination on the impact of neoliberalism on the policies of the IMF and World Bank, it is worth discussing the evolution of political economics. During a time when government regulations were desired Keynesian economics became the most popular. From the Great Depression until the end of World War II, Keynesian economics had its primary influences on economic policies. Keynes presumed that in order to correct market imperfections, state intervention had to be implemented. One of the most important lessons which Keynes helped teach was that markets are not self-correcting and government intervention is required to ensure recovery and a return to full employment.

66 *See Fiat Money,* CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/knowledge/economics/fiat-money-currency/ (last visited Aug. 29, 2021).

67 "This echoes an old idea in anthropology, namely, that the social implications of property and ownership differ across (though they may be a universal psychological construct at the individual level)." Amnon Lehavi & Amir N. Licht, *Bits and Pieces of Property*, 36 YALE J. INT'L L. 115, 145-46 (2011).

68 Indeed, consider the legal and social implications of *Pierson v. Post*, 3 CAI. R. 175 (N.Y. Sup. Ct. 1805). But for Pierson's first possession, the court may have decided differently. *See* Amnon Lehavi & Amir N. Licht, *Bits and Pieces of Property*, 36 YALE J. INT'L L. 115, 145-46 (2011). From a social perspective, Justice Livingston in the dissenting opinion makes a reasonable point that "pursuit" alone established ownership. Moreover, Justice Livingston suggests that the custom of sporting itself may have resulted in a different outcome as well supporting Post and his pursuit. Justice Livingston indicates that the case,

> should have been submitted to the arbitration of sportsmen, without poring over *Justinian*, *Fleta*, *Bracton*, *Puffendorf*, *Locke*, *Barbeyrac*, or *Blackstone*, all of whom have been cited; they would have had no difficulty in coming to a prompt and correct conclusion. In a court thus constituted, the skin and carcass of poor *reynard* would have been properly disposed of, and a precedent set, interfering with no usage or custom which the experience of ages has sanctioned.

See Pierson v. Post, 3 CAI. R. 175 (N.Y. Sup. Ct. 1805). After discussing the custom of sporting, Justice Livingston extends his analysis to the need to promote hunting in order to take care of the environment - another potential social argument. Nevertheless, *Pierson v. Post* provides a unique insight to the cross-roads of property ownership within a legal and social perspective. But ultimately, even the majority decision represents another social norm represented in law that the majority found more convincing. Undoubtedly, such questions are part of the case's popularity as one of the first cases read by first year law students in American law schools.

69 Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1315 (2016). However, Harrington was the first theorist to make explicit - even more so than Aristotle - that the forms of government were based on property ownership. "If one man be sole landlord of a territory," he wrote, "his empire is absolute monarchy." He continued on to say,

> If the few or a nobility, or a nobility with the clergy, be landlords ... the empire is mixed monarchy .... And if the whole people be landlords, or hold the lands so divided among them, that no one man, or number of men, within the compass of the few or aristocracy, overbalance them, the empire ... is a commonwealth.

Id.; Cf. Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983, 1000-01 (1990).

> Although Aristotle did not elaborate on the role of the particular virtue of liberality in the public realm, the Politics reveals his assumptions about moderation in the pursuit of money and the objects of moderation in its retention. For example, in describing the household, Aristotle makes the point that wealth is limited to the resources necessary for its subsistence. He distinguishes the accumulation of wealth obtained by trade, which is potentially unlimited, and concludes that people pursue the accumulation of excessive wealth due to anxiety about their livelihoods, an anxiety so great that they neglect their moral well-being. In response to this problem, Aristotle reiterates the theme of moderation. Disputing Plato's scheme in the Republic of common ownership of property, Aristotle distinguishes between the love of money, which he accepts as universal, and the "excess" of such love, which he condemns. Immediately thereafter, he reminds the reader that the function of the form of goodness he calls liberality 'consists in the proper use which is made of property.'

Id. See also Maxwell M. Garnaat, *The Republic of Virtue: The Republican Ideal in British and American Property Law*, 51 CORNELL INT'L L.J. 731, 735 (2018). "Property ownership in Aristotle's republicanism mirrors his larger

conception of politics: it encourages a middle ground that avoids both 'rule of the people in its extreme form,' a crude and destructive anarchy, or 'unmixed oligarchy' that - without the restraint of a mixed government - results in 'tyranny.'" *Id*.

70 Thornton M, Hinkle, *Magna Charta*, 8 YALE L. J. 262, 264-65 (1899).

Who were the people that gave to all time this model for bills of rights and constitutions? The prior history of the island is that of a series of conquests, beginning with that of the Romans, who found a rude, savage people, whom they left four centuries later, more civilized, but less brave and warlike, to become an easy prey to foreign invasion. To protect themselves from the Picts and Scots of the north they called in the aid of the Anglo-Saxons, who drove out not only the Picts and Scots, but the majority of those who had invited them there. They founded the Heptarchy, which 450 years of Danish invasion and other exciting causes gradually welded into one kingdom, whose people were to remain the same Anglo-Saxon people through Danish invasions and Norman Conquest.

Id.

71 Code of Justinian, ENCYC. BRITANNICA, (Nov. 12, 2014) http://www.britannica.com/topic/Code-of-Justinian (last visited Oct. 15, 2018).

72 Code of Justinian, ENCYC. BRITANNICA, https://www.britannica.com/topic/Code-of-Justinian (last visited Mar. 8, 2020). "Rather, Justinian's committees of jurists provided basically two reference works containing collections of past laws and extracts of the opinions of the great Roman jurists." *Id*.

73 Roscoe Pound, *Fifty Years of Jurisprudence*, 50 HARV. L. REV. 557, 582 fn. 129 (1937). Medieval law in this sense is a combination of "canon and feudal law," particularly in the Anglo-Saxon Heptarchy that would later be united under Alfred the Great in 800 A.D. into England. Vol. 1 (1920). Vol. 2, The Jurisprudence of the Greek City (1922), deals with the second of six types of law, as determined by types of society, of which he had proposed to treat. He projected an ideological study of law as related to those types, namely, (1) origins in totemic society, (2) tribal law, (3) civic law, i.e., a type of legal order determined by the 'social tie of the city state', (4) medieval law in its combination as canon and feudal law, (5) 'individualist jurisprudence', i.e., the law as determined by a competitive individualist organization of society, and (6) the beginnings of socialistic jurisprudence. True to the tradition of historical jurisprudence, it is a survey of social control as a whole. True to the British tradition it is a political interpretation or better political-sociological. Philosophically its pluralist idealism has some affinity to Kohler's neo-Hegelian "complex idea." Indeed, Kohler might unify Vinogradoff's six types by the idea of civilization. *Id*.

74 Thomas T. Ankersen & Thomas Ruppert, *Tierra Y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 92-93 (2006). After Feudalism, the Enlightenment produced differing conceptions of ownership and property.

With the demise of feudalism, the Enlightenment saw emergence of an alternative view of the state and land ownership, grounded in the theory of natural law. This view, which arose largely in reaction against the arbitrary absolutism associated with feudalism, asserted that land ownership emerged independently of the state and that the state only exists because of a 'social contract' and with the 'consent of the governed.' The phrase 'the consent of the governed' is found in The Declaration of Independence para. 2 (U.S. 1776).

See generally Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997). The author's theory of consent of the governed is as follows, "despite the ingenuity and intensity with which strong presidentialism is advanced, it is premised upon a fundamentally untenable conception of the consent of the governed. The 'will of the people,' as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities - in short, fabricated."

75 *See* Helvering v. Clifford, 309 U.S. 331, 336 (1940).

76 *Id*. at 336-37. (author replaced word "family" with "social" and word "household" with "cultural").

77 *Id*. at 335. *See also* Comm'r v. Sunnen, 333 U.S. 591, 595 (1948).

78 *Helvering*, 308 U.S. at 255 (1939).

We think the Board justifiably concluded from its findings that the transaction between the taxpayer and the trustee bank, in written form a transfer of ownership with a lease back, was actually a loan secured by the property involved. General recognition has been given the 'established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money.' In the field of taxation, administrators of the laws and the courts are concerned with substance and realities, and formal written documents are not rigidly binding. Congress has specifically emphasized the equitable nature of proceedings before the Board of Tax Appeals by requiring the Board to act 'in accordance with the rules of evidence applicable in courts of equity of the District of Columbia.'

Id. See also Revenue Act of 1928, 45 Stat. § 601; 26 U.S.C. §§ 456, 611 (LEXIS through Pub. L. No. 116-344).

79 Calloway v. Comm'r, 691 F.3d 1315, 1327 (11th Cir. 2012).

80 *Id*.

81 *Id*.

82 *Id*. (citing Grodt & McKay Realty, Inc. v. Comm'r, 77 T.C. 1221, 1237-38 (1981); Anschutz Co. v. Comm'r, 664 F.3d 313, 324-25 (2011)).

83 Defining Plato's forms, Kenji Yoshino writes:

In the Republic, Plato describes the existence of immutable, abstract, and invisible Forms. These Forms are the ideals to which Plato seeks to anchor the state and the human soul, which is the microcosm of the state. The highest Platonic aspiration for human beings is to bring us closer to these Forms. The difficulty is that our ordinary modes of perception - such as our senses - cannot seize these ideas. Only right reason, as exercised through dialectic, can do so in any systematic way.

Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1843 (2005).

84 Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug's City Making*, 56 STAN. L. REV. 231, 232 (2003) quoting GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 39-50 (1999). Historically, the history of corporations is derived from the medieval concept of a university. Meaning, Universities, such as the University of Paris, were considered the first corporations.

City Making consists of four large parts. The first is an intellectual history of Anglo-American local government law. Frug traces the city as a legal concept from its origins in the medieval law of corporations. The medieval municipal corporation was formally a type of chartered corporation, governed by the same law that covered business enterprises and

universities: All of these entities were voluntary associations of citizens - private enterprises - and agents of government in the sense that they operated according to charters granted by the state and were required to serve the public interest. The corporation was a hybrid of what we now think of as public and private; it was an agent of government and an association of citizens. A radical turning point in Frug's history comes with the development of a sharp public/private divide in the nineteenth century that redefined American cities as purely public governmental entities or 'creatures of the state.' The public/private division of corporations initiated a change in local government doctrine that deprived cities of much of the formal autonomy they enjoyed as chartered corporations and submerged the associational aspects of cities in favor of their more technocratic, governmental qualities.

Id.

85 Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 fn. 9 (1988) (*available at* https://repository.law.umich.edu/mlr/vol86/iss6/42).

According to Kant, a priori concepts are part of a mental apparatus which orders the physical world into comprehensible form. A few examples should clarify this notion. One example of a priori knowledge is space. We cannot see space. Nor can we perceive it by any of the other senses. Instead, space is an 'intuition' that our mind applies to the sensory data it receives. In Kant's view, unless we apply these a priori concepts, which he divides into various categories, ... the world is an incomprehensible jumble of stimuli, which have no inherent order of their own. It may be helpful to consider a rather American application of this German philosophy. Mom places her famous apple pie in the refrigerator and closes the door. Our sensory data tell us that this time-honored delicacy has disappeared. Yet this observation never develops into a thought because we apply the a priori concept that the world has continuity to it. Thus, Kant concludes, what we consider reality is really a synthesis of a priori concepts and the constant flow of sensory data. Scholars differ over whether Kant believed the light went out when the refrigerator door was closed.

Having reviewed Kant's basic stance, the notion of *causality* as an a priori concept is easier to comprehend. Just as the a priori concept of space operates as a lens through which we view the jumbled physical world in spatial terms, so does the a priori concept those events have causes render our view of reality in causal terms. *See* I. KANT, CRITIQUE OF PURE REASON 189-211. For a concise exegesis of the six proofs Kant employed to establish his theory. *See also* N. SMITH, A COMMENTARY TO KANT'S 'CRITIQUE OF PURE REASON' 363-81 (1918).

86 Fukuyama employs Hegel's idea of the teleological end of history in the bestselling book from the 1990s, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (arguing that liberal-democracy had won in the marketplace of ideas). D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 B.Y.U. L. REV. 1713, 1772 n.,28 (2009).

87 David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 682 n.,161 (1994).

88 *Id*.

89 *Id*.

90 *Id*.

91 *See* Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 fn. 9 (1988) (*available at* https://repository.law.umich.edu/mlr/vol86/iss6/42).

92 Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 fn. 9 (1988) (*available at* https://repository.law.umich.edu/mlr/vol86/iss6/42).

93 Steven D. Smith, *Believing Like A Lawyer*, 40 B.C. L. REV. 1041, 1111-12 (1999). *See also* Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 fn. 9 (1988) (*available at* https://repository.law.umich.edu/mlr/vol86/iss6/42).

94 F.S.C. Northrop, *Law, Language and Morals*, 71 YALE L.J. 1017, 1028 (1962). *See also* Chapter I. the General Concept of Rights, 58 STAN. L. REV. 2000, 2006 (2006) (*available at* https://1.next.westlaw.com/Document/Ib37d4a014a8511dba16d88fb847e95e5/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=58+Stan.+L.+Rev.+2000).

95 A. Kocourek, *Lezioni Di Filosofia Del Diritto. by Giorgio Del Vecchio. Città Di Castello, Società Anonima Tipographica "Leonardo Da Vinci", 1930. Pp. IV, 351*, 40 YALE L.J. 1129, 1130 (1931) (*available at* https://1.next.westlaw.com/Document/I8a81f1a376cc11dca51ecfdfa1ed2cd3/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.DocLink)&userEnteredCitation=40+Yale+L.J.+11290)

Kant's system arose somewhat as an historical accident. Hume had arrived at skepticism in dealing with the concept of causation. Kant sought to solve Hume's problem (i.e., to show a necessary connection a priori between cause and effect) and in that effort (that he succeeded is doubtful) found a single principle for the deduction of concepts of pure understanding. He developed a system of a priori synthetical principles which are the basis of possible experience but which cannot be referred to things in themselves. Mind was set apart from outward things. Kant's principal work appeared before the discovery of the conservation of matter and energy, the doctrine of evolution, the laws of thermodynamics, the electronic theory of matter, and the more recent theories of special and general relativity. The newer ideas do not abolish the Kantian system, but, on the whole, they have tended to diminish its influence. Kant formulated his ideas with amazing confidence in his own position and with extraordinary care and skill, but yet as one attempts to follow him into the transcendental atmosphere where his reasoning leads, and as one contemplates the luxuriant manifoldness of all that which lies beyond the mind, the reflection intrudes itself that *subtilitas naturae subtilitatem argumentandi multis partibus superat*.

Id.

96 *See generally* Frederick C. Beiser, GERMAN IDEALISM: THE STRUGGLE AGAINST SUBJECTIVISM 1781-1801 (2002).

97 *See* Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 n.9 (1988).

98 Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 n.9 (1988).

99 *See id*.

100 Julio A. Thompson, *Essays on Kelsen*, 86 MICH. L. REV. 1470, 1474 n.9 (1988).

101 *See id*.

102 *See id. at* 1474 n.10. Author noting that "Kant divided his twelve a priori categories into four sets of three." *Id*.

103 The word "Qualia" is used here in the sense of David Hume's view of the world. *See* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS (Lewis W. Beck ed., trans. 1985) (*available at* https://en.wikisource.org/wiki/Prolegomena_to_Any_Future_Metaphysics/Introduction). Kant wrote in his *Prolegomena to Any Future Metaphysics*, "I freely admit that it was the remembrance of David Hume which, many years ago, first interrupted my dogmatic slumber and gave my investigations in the field of speculative philosophy a completely different direction." *Id*.

104 *See id*. Indeed, "[t]he "synthetic a priori," Kant's technical term for a basis of knowledge that is given rather than derived, thus removes from Newtonian physics any experiential constraints. *Id. See also* Wai Chee Dimock, *Rethinking Space, Rethinking Rights: Literature, Law, Science*, 10 YALE J.L. & HUMAN. 487, 493 (1998). As Kant himself makes clear, this nonempirical form of knowledge is not adequate to physics; he insists, however, that it is adequate to ethics. *Id*. at 493. Natural science "may accept many propositions as universal on the evidence of experience," Kant says, "[b]ut it is otherwise with Moral Laws. These, in contradistinction to Natural Laws, are only valid as Laws, in so far as they can be rationally established à priori and comprehended as necessary." *Id*. at 494. *See also* Wai Chee Dimock, *Rethinking Space, Rethinking Rights: Literature, Law, Science*, 10 YALE J.L. & HUMAN. 487, 493-94 (1998). "The moral universe is a universe unindebted to empirical observations." *Id*. at 494. "In its preassigned domain, it can enjoy that loftiest of privileges, the privilege of "'apodeictic certainty."' *Id. See also* IMMANUEL KANT, THE PHILOSOPHY OF LAW 15 (W. Hastie trans., Edinburgh, T. & T. Clark 1887). This is a translation of Kant's Metaphysische Anfangsgrunde der Rechtslehre (1796), also translated as The Metaphysical Elements of Justice. *Id*.

105 *See* André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics*, 31 B.Y.U. J. PUB. L. 111, 199 (2016). In terms of inferential philosophical syllogistic logic, "a synthetic judgment, in Kantian terms - that cannot be reduced to a logical, syllogistic form solely on the basis of premises." *Id*.

106 *See* Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 618 n.152 (2010). For a discussion defining and distinguishing the concepts of analytic and synthetic judgements see below:

> This distinction is similar to Kant's distinction between analytic and synthetic judgments. For Kant, an analytic judgment is one that breaks a concept down into its constituent parts. For example, all bachelors are unmarried. On the other hand, Hedge is using these terms to describe not just statements but a method. For example, an analytic method is one that focuses on a single conception and lays out its constituent parts.
>
> *Id*.

107 *See* L. Amede Obiora, *Reconstituted Consonants: The Reach of A "Common Core" Analogy in Human Rights*, 21 HASTINGS INT'L & COMPAR. L. REV. 921, 955 n.13 (1998). Further clarifying the theory of analytic judgements, see below:

> Kant sorted theory as involving: "[A] distinction according to content, by virtue of which they are either merely explicative and add nothing to the content of knowledge, or ampliative and enlarge the given knowledge; the former can be called analytic judgements, the latter synthetic judgements." Thus, there could be a theory of form or content. Pure mathematics and logic in their syntactical dimensions are disciplines of form that do not add content to knowledge. Synthetic theory, on the other hand, is a theory of content. The content of theory is constituted by its elements or parts. The basic elements of a theory are its concepts. The concepts of theory are general ideas that describe the properties of the object of the theorizing. Concepts are related to form universal generalizations that describe relations between properties. Universal generalizations related to form systems entail selections that require discrimination or exclusion.

Id.

108 Angelica Nuzzo, *The Critique Of Judgment: Reflective Judgment, Determinative Judgment, And The Problem Of Particularity*, 6 WASH. U. JUR. REV. 7, 21 (2013). For an in-depth discussion of Kant's idea of synthetic *a priori* see the following,

In the first *Critique a priori* principles and judgments make experience possible insofar as - and precisely because - they are *synthetic*. In the horizon of the *Critique of Judgment*, Kant contends that those synthetic *a priori* principles contain that which all our empirical cognitions '*have necessarily in common*;' hence that on the basis of the synthetic *a priori* principles (the transcendental laws of nature), 'the *analytic* unity of all experience' first becomes possible. Strikingly, however, Kant now admits that the synthetic *a priori* principles still do not make possible 'that *synthetic* unity of experience as a system that connects under one principle empirical laws *also according to that in which they differ*.' Clearly, in this passage, Kant presents as analytic what the first *Critique* claims instead to be synthetic (i.e., the unity of nature--whereby the ambiguity of 'nature' once taken as nature in general, once taken as nature in its empirical laws should be underscored), thereby advancing the further need to guarantee the *synthetic* unity of the manifold empirical forms of experience. Those same transcendental principles that the first *Critique* demonstrates to be synthetic are recognized here as a merely analytic function. Although logically their synthetic nature is not repealed, Kant now assesses their transcendental role within the process of our *empirical* cognition of nature. The focus has changed from the order of nature in general to the manifold of nature's empirical forms. With regard to this further problem, those transcendental principles provide (only) the *analytic* unity of experience in general by expressing that which all experiences have in common. Yet, since they cannot say anything regarding how different empirical laws actually *differ* from each other, they cannot ground the *synthetic* unity of empirical cognitions or the system of empirical laws of nature.

Id.

109 Wai Chee Dimock, *Tenth Anniversary Symposium: New Direction: Rethinking Space, Rethinking Rights: Literature, Law, Science*, 10 YALE J.L. & HUMAN. 487, 493-94 (1998). Providing a definition of synthetic *a priori* in a Kantian sense see the following within the context of ethics,

The "synthetic a priori" - Kant's technical term for a basis of knowledge that is given rather than derived - thus removes from Newtonian physics any experiential constraints. As Kant himself makes clear, this nonempirical form of knowledge is not adequate to physics; he insists, however, that it is adequate to ethics. Natural science 'may accept many propositions as universal on the evidence of experience,' Kant says, 'but it is otherwise with Moral Laws. These, in contradistinction to Natural Laws, are only valid as Laws, in so far as they can be rationally established a priori and comprehended as necessary.' The moral universe is a universe unindebted to empirical observations. In its preassigned domain, it can enjoy that loftiest of privileges, the privilege of "apodeictic certainty.

Id.

110 *Id. Cf*. Jeffrey M. Lipshaw, *The Epistemology Of The Financial Crisis: Complexity, Causation, Law, And Judgment*, 19 S. CAL. INTERDISC. L.J. 299, 314 n.53 (2010). Lipshaw compares and contrasts a priori knowledge in Kant's thinking and Hume's thinking,

What we can know a priori was a subtle move on Kant's part. He criticized Hume first for failing to acknowledge that mathematics involves synthetic a priori knowledge, i.e., concepts not otherwise self-evident that can be derived purely through the exercise of reason. The question then is not whether synthetic a priori knowledge is possible (because it is with respect to mathematics), but how, and whether we might have synthetic a priori knowledge beyond the examples of mathematics .... The answer is a cautious 'yes.' We can have metaphysical knowledge of synthetic a priori concepts like substance or causality 'on which alone experience is possible, but never of the laws to which things may in themselves be subject, without reference to possible experience.'

Id. at 53-54. Kant emphasized this point later in the Prolegomena,

Hence if the pure concepts of the understanding do not refer to objects of experience but things in themselves (noumena), they have no significance whatsoever. They serve, as it were, only to decipher appearances, that we may be able to read them as experience. The principles which arise from their reference to the sensible world, only serve our understanding for empirical use. Beyond this they are arbitrary combinations, without objective reality, and we can neither cognize their possibility a priori, nor verify their reference to objects, let alone make it intelligible by any example ....

See Thompson, *supra* note 98, at 1474.

111 Max M. Kampelman, *Entering New Worlds: A Challenge*, 32 COLUM. J. TRANSNAT'L L. 457, 458 (1995).

112 Henry Hansmann, *How Close Is the End of History?*, 31 J. CORP. L. 745, 749 (2006) (stating that one's faith in reaching the end of history for corporate law may be closely tied to one's faith in achieving Fukuyama's original End of History in politics). Curiously, Hansmann's commentary could be seen to parallel that expressed in Francis Fukuyama, *The End of History and the Last Man* (1992), which served as the inspiration for the title of Hansmann and Kraakman's article, *The End of History for Corporate Law. See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439, 468 (2001). *See* FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION (2002). This book qualifies Fukuyama's original "end of history" thesis, much like Hansmann may have qualified the strength of the original "end of history for corporate law" prediction that he and Kraakman made in 2001. *Id. Cf.* Leonard I. Rotman, *Debunking the "End of History" Thesis for Corporate Law*, 33 B.C. INT'L & COMP. L. REV. 219, 272 n.45 (2010).

113 Leonard I. Rotman, *Debunking the "End of History" Thesis for Corporate Law*, 33 B.C. INT'L & COMP. L. REV. 219 (2010). Rotman discusses alternate theories of the "end" of history. Perhaps a better way to phrase this would be the "goal," as in the teleological goal of history. Rotman discusses this "end" within the concept of jurisprudence and law,

This Article debunks Hansmann and Kraakman's "end of history" thesis on both U.S. and Canadian corporate law grounds. A critical examination of high-profile U.S. corporate law jurisprudence indicates that the shareholder primacy norm cannot be supported, even by cases such as *Dodge v. Ford* and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* which exist at the foundation of shareholder primacy arguments. Further, Canadian corporate law jurisprudence and the structure of Canadian corporate law statutes reveal the complete lack of support for shareholder primacy arguments north of the forty-ninth parallel, further impeding Hansmann and Kraakman's claim. This state of affairs demonstrates that Hansmann and Kraakman's "end of history" thesis is, at best, premature and at worst, incorrect.

Id.

114 Charles Edward Andrew Lincoln IV, *Hegelian Dialectical Analysis of U.S. Voting Laws*, 42 U. DAYTON L. REV. 87, 111 n.31 (2017). "Fukuyama's definitive thesis of his work is that the capitalist liberal democracy paradigm is the teleological last, or end form, of political economy; meaning that political economies have reached their end form - teleologically speaking." *Id. Cf.* Chapter 4 of *The Dialectical Path of Law* discussing Fukuyama and the Hegelian dialectic. Charles Lincoln, *The Dialectical Path of Law* (2021).

115 Brooke Overby, *Contract, in the Age of Sustainable Consumption*, 27 J. CORP. L. 603, 626 (2002). Overby succinctly discusses the critiques of Fukuyama's theory of the end of history,

Recent events in the United States and abroad have caused many to speculate as to whether Fukuyama or Huntington has accurately set forth the appropriate paradigm for viewing the post-Cold War era. As just discussed, the debate brings with it not only broader issues regarding international politics, but also issues regarding the role that Western capitalism, consumer culture, and materialism play in the post-Cold War era. With the latter set of issues comes the connection between globalization and the domain of domestic contract law. Law, including contract law, is a significant force that has aided in the creation of the Western consumer society and that advances Western capitalism. Domestic commercialism does have a cultural dimension, a point that both Fukuyama and Huntington recognize, and sterile assumptions that

markets are not impacted by culture simply are not sustainable. Domestic contract law, in other words, is as much an expression of American culture and economic beliefs as it is an expression of ostensibly neutral, universal market principles.

Id.

116 Charles R. P. Pouncy, *Contemporary Financial Innovation: Orthodoxy And Alternatives*, 51 SMU L. REV. 505, 521-22 (1998). Pouncy provides an account of the history of corporations within the context of corporate and fiscal law,

The modern period saw the introduction of many new devices to permit intermediated investment. The Muscovy Company, which was founded in 1553, is believed to have issued the first modern equity instrument. It was followed by the East India Company in 1600 and the first permanent joint-stock company, the Dutch East India Company, in 1602. What is believed to have been the first negotiable bond, the "Grand Parti," was issued by the French government in 1555. Unlike earlier bond-like instruments, the Grand Parti could be purchased by almost anyone, not just the large banking houses. Secondary trading of securities was formalized with the opening of the Amsterdam Bourse in 1611, and the negotiation of options and futures contracts were conducted soon thereafter. The first stock exchange in London specifically built for that purpose was opened in 1802. However, in the United States, stock trading transactions were conducted literally on the streets of New York City prior to the creation of the New York Stock Exchange in 1817. Convertible securities and preferred stock were developed and popularized in the seventeenth and eighteenth centuries.

Id. Cf. Id. at 521, n.91. Pouncy further discusses how ideas and laws of corporations changed over time moving from less and less government oversight - especially with the advent of corporate shares,

The gestation and birth of what would become the modern corporation can be observed in the history of the East India Company. The early voyages of the East India Company were treated as individual ventures in which investors subscribed, and, if the voyage was profitable, received their principal and profit upon the voyage's conclusion. This process would soon become unwieldy as it became increasingly difficult to strictly segregate the accounts attributable to each individual voyage, so in 1613, the East India Company stopped selling shares in individual voyages, but sold four-year subscriptions. Permanent capital stock was established in 1657. Shares became freely transferable at prices periodically established by the company. In 1661, the company began distributing dividends rather than divisions of profits and assets. *See* Michael Chatfield, *A History of Accounting Thought 5* (photo. Reprint 1979) (1977). *See* Jonathon Baskin & Paul J. Miranti, Jr., *A History of Corporate Finance 313* (1997).

Id. This has a parallel history with the Dutch religious expansion into what is modern New York,

First settled by the Swedes in 1638 in an effort to compete with Dutch trade, Delaware (originally named "New Sweden") was home to the first Lutheran minister in America. The colony was small and poorly supported by Sweden. Survival consumed the attention of the settlers, eliminating any substantial development in the nature of church expansion. The irritation of the Dutch governor in New Amsterdam just to the north culminated in an attack on tiny New Sweden in 1655 and its surrender to Dutch authority. The governor would have only nine years to savor his victory. In 1664, the surrender of New Amsterdam to England placed control of all modern New York, Pennsylvania, and Delaware in the hands of James, Duke of York (soon to be James II). When William Penn asked Charles II for a grant in the New World, he was given control of Pennsylvania in 1681, and Delaware was ceded by James to Penn in 1682. Thus, territory which had already passed from Swedish Lutheran to Dutch Reformed to Anglican control was now under the jurisdiction of a Quaker proprietor. So ended any further flirtation in Delaware with a church established by law.

Id. Furthermore,

Concerning the attitude of the Dutch governor in New Amsterdam, Munroe records: The death blow to New Sweden came from the very people who had inspired its birth; Dutch it had been, and to the Dutch it was returned. Peter Stuyvesant, who became governor of New Netherland in 1647, was annoyed by the Swedish presence on the Delaware. He was experienced in colonial affairs through service in the West Indies, where armed combats were frequent and islands passed back and forth between the European powers like pieces in a game. He had also become crippled in such service, losing a leg in battle with the French on the island of St. Martin. Concerning the surrender, Munroe relates: On

September 15, 1655, near Fort Christina, Stuyvesant and [Johan] Rising met to sign the capitulation, and at three o'clock on that afternoon the Swedes marched out of the fort with drums beating, fifes playing, banners flying. In ensuing days Rising did his best to urge all Swedes to return to their homeland, but he had little influence. In the end only thirty-seven people comprised his party when he left New Amsterdam for Europe on October 23.

Id. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, BYU L. REV. 1385, 1459-61 (2004).

117 Marvin N. Bagwell, *Unsettling Mortgage Law: Implications for Practitioners and title Insurers: Can't Live Without Air: Title Insurance and the Bursting of the Real Estate Bubble*, 30 PACE L. REV. 180, 200-201 (2009). It has been noted,

No discussion of financial speculation can begin without taking note of the tulip mania that gripped Holland in the seventeenth century. Mark Frankel, in his review of Mike Dash's 1999 book, Tulipomania: The Story of the World's Most Coveted Flower & The Extraordinary Passions It Aroused, tells the story. Tulips had been prized since the mid-1550s for their extraordinary beauty, purity and sharpness of colors, and extravagant presentation. The fact that it took seven years to grow a tulip from seed to bulb only added to its allure. By the beginning of the seventeenth century, Holland was at the peak of its power, with the merchants in Amsterdam making 400% profits on their East Indies trading. These wealthy Dutch displayed their riches by building grand estates surrounded by elaborate flower gardens that featured rare and exquisite tulips. In 1624, a man in Amsterdam who owned the only twelve bulbs of a midnight blue tulip topped by a band of pure white and accented by crimson flares was offered as high as 3,000 guilders for one bulb. By comparison, Rembrandt received only half that amount when he painted his masterpiece, the Night Watch. Prices rose steadily throughout the 1630s and speculators entered the marketplace. In the winter of 1636-37, one rare tulip bulb that was about to split in two was sold at auction for 5,200 guilders. Some bulbs were changing hands in the marketplace ten times a day. Then came the crash. All it took was one buyer in Haarlem who refused to pay for a bulb that he had purchased at auction. Panic struck, and within days, the marketplace had all but vanished. Bulbs, which had routinely commanded 5,000 guilders days before, began to trade for fifty guilders. Great fortunes evaporated overnight.

Id. Hon. Richard D. Cudahy, *Retail Wheeling: Is This Revolution Necessary?* 15 ENERGY L. J. 351, 356 n.26 (1994). Indeed, although Amsterdam may have some of the roots of the modern form of capitalism and corporate legal entities, it also has shown the beginning of one of the first modern economic crashes. This has been explained in different ways before, “efficient Capital Market Hypothesists and other classical economists have a difficult time explaining phenomena like “tulipmania,” Amsterdam's 17th century frenzy of trading in tulip bulbs.” *See* Charles Mackay, Extraordinary Popular Delusions and the Madness of Crowds 1-97 (1980). The 18th century's Mississippi and South Sea Bubbles also present similar puzzles. *But see* ROBERT FLOOD & PETER GARBER, SPECULATIVE BUBBLES, SPECULATIVE ATTACKS AND POLICY SWITCHING (1994) (endeavoring to “rationalize” these seemingly irrational market behaviors).

Id. Cf. Jan Sitmaartensdijk & Yfke Nijland, *Operatie Black Tulip: De uitzetting van Duitse burgers na de oorlog* (Amsterdam: Boom, 2009). Ronen Palen, *International Financial Centers: The British-Empire, City-States and Commercially Oriented Politics*, 11 THEORETICAL INQUIRIES L. 149, 154 (2010). Such examinations of economic crises are vital to the understanding of the world history and economy in terms of corporate law, which is really an advanced form of agency law. Exploring the history of the British Empire in relation to economics and law's confluence with currency, Ronen Palan has noted,

The argument is that hegemonic states go through historical cycles, known as the hegemonic cycle theory. According to the theory, hegemonic states rise to power on the back of a vibrant manufacturing sector; they then develop a strong commercial sector; and finally they end up with a strong financial sector. The result is that during a period of decline, a hegemonic power tends to maintain a disproportionately bloated, politically powerful commercial and financial sector. This was true of the declining Dutch, as well as the British hegemonic, states. Nevertheless, while Amsterdam was the largest financial center of its day, and experienced the first serious financial crises (the Tulip mania), Holland was still largely a trading state and as a result was dominated during and after its decline by commercially oriented elites. London, by contrast, emerged as a truly global financial center during the heyday of the British Empire, and as a result

the British state has been dominated politically by a financial elite. This theory may then explain the specific British link discussed in this article.

Id.

118 Richard Sylla, *Economy of Supplying Money to a Growing Economy: Monetary Regimes and the Search for an Anchor to Stabilize the Value of Money*, 11 THEORETICAL INQUIRIES. L. 1, 23 (2010). The Mississippi Company bubble has been explained in terms of printing and currency credit crises,

> Law's money-printing (credit-creating) operations were used to support the price of the Mississippi Company shares at a high level through late February 1720. That allowed the French ruler to sell his shares at that level and, in a rather personal version of public finance worthy of Henry VIII, to book a nice profit. Thinking that his credit creation might have gone too far, Law then stopped supporting the share price. When it plunged by 25 percent in a few days, shareholders protested against the measures that had caused the drop, so Law reinstituted the share price-support program, fixing the price at 9,000 livres. That meant that Law had to buy Mississippi Company shares at that price if it threatened to slip any lower. Effectively, shares and paper banknotes became one and the same. By May, if not earlier, all of the money creation produced financial overheating and price inflation. Law then decided to try to cool the overheated economy by having the government announce that Mississippi share prices would undergo a phased reduction totaling 44 percent of their value, and banknotes would undergo a similar phased reduction to 50 percent of their face value by December 1720. As a result of the announcement, Mississippi Company shares lost half of their value in the market in a few days. Although the Regent, against Law's wishes, revoked the phased-reduction edict, the market price of Mississippi shares never recovered enough to reach even the prices proposed in the phased reduction. Confidence in the value of both paper money and shares had been irreparably damaged. At the same time, though, the French state had greatly reduced the burden of its debts.

Id. The Mississippi Crisis in 1720 is compared with the risks of having a centralized banking and monetary reserve system in relation to the desideratum of identifiable monetary regimes.

> The power of a central bank to create money in the modern fiat money regime is vastly greater than it was under a commodity-based standard, and the money can be supplied at a far lower cost. That was John Law's great insight long ago, one demonstrated again in the panic of 2008 when the U.S. central bank expanded its balance sheet by a factor of more than two in just a few months. But Law in practice failed to answer the question regarding how much fiat money should be created. Instead, in an effort to implement another part of his plan, conversion of France's public debt to equity shares in the Mississippi Company, he oversaw the creation of far too much fiat paper money. As a result, both he and his money lost credibility. Law left France, and his fiat money - banknotes and shares in the company, which were equivalent at the height of his system in May 1720 - lost almost all of its value by the end of the year. Paradoxically, the French state that sent Law into exile benefited from his failure: “Law's System certainly bankrupted the creditors of the state; the state, however, as debtor, was a net gainer.”

Id.

119 Indeed, the story of the Civil War's costs from an economic perspective is embedded in the introduction of the IRS and the first tax--a shift from the former economic base of tariffs and bonds that the U.S. government used to rely on.

120 Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151, 179 (2013). Banta excellently describes the various issues and problems that citizens faced throughout the United States during this era and how it affected Constitutional interpretation from both the executive and judicial branches of government,

> From 1873 to 1877, land speculation and bank failures caused an economic crisis; three million workers lost their jobs and thousands of farmers lost their farms. With President Hayes's promise to remove federal troops from the South, Reconstruction ended. As Cruikshank signaled in 1876, the Court intended to end Reconstruction by denying federal

protection through the Fourteenth Amendment and the Due Process Clause to blacks attempting to exercise their rights to peaceably assemble and bear arms. The Court's language in Cruikshank broadly conceptualized due process, but the Court avoided asserting the protections of due process by characterizing the violation as private rather than state action.

Id.

121 G. Boyd Tarin, *The Bank for International Settlements: Keeping A Law Profile?*, 5 TRANSNAT'L LAW. 839, 851-52 (1992). Tarin provides an overview of what occurred to the Bretton Woods Agreement after the end of the Bretton Woods System,

The collapse of the Bretton Woods System did not abrogate the Bretton Woods Agreement. The method of indexing currencies to gold, and the U.S. dollar, changed to a floating exchange rate system. Despite conversion to a floating system, the BIS maintained a gold pool until 1986, ensuring that prices on private markets corresponded to official gold prices according to the directives issued by the Governors of G-10 central banks. However, during the post Bretton Woods era the actions of the BIS can be characterized as reactive rather than preventative measures. The shift to floating exchange rates in March of 1973 highlighted the need for coordination among central banks of major trading countries, and for regular exchanges of information about the exchange markets and about central banks' interventions in those markets.

Id.

122 George A. Walker, *Financial Crisis-U.K. Policy and Regulatory Response*, 44 INT'L LAW. 751, 751-52 (2010). Walker connects the 2007 financial crisis with the Great Depression based on risk assessment,

The global financial crisis that began in summer 2007 has continued to wreak devastating loss and damage across all markets, all economies, and all countries. An initial liquidity contraction in the financial markets was transformed into a full solvency crisis following the collapse of Lehman Brothers on September 15, 2008, which was a precursor to the most savage global recession since the Great Depression during the 1930s. This crisis was almost wholly unpredicted and led to a massive collapse in growth and investment across the world. Leading emerging markets were not immune as any possible decoupling or separation evaporated. It was not until the end of the second quarter of 2009 that some stabilization in the financial sector was detected. Any full recovery within the real economy would be postponed until 2010 or later.

Id.

123 Indeed, it is often difficult to single out one law. Is it one section? One code? One entire U.S. Title?

124 Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291, 292 (1999).

Legal theorists have long invoked evolution as a metaphor for the development of the law, particularly for the common law system that is the hallmark of Anglo-American jurisprudence. Few, however, have applied the principles of natural selection as a tool for legal analysis. Moreover, apparently none has considered the impact of Dawkins' meme-based theory upon an evolutionary analysis of the law. This Article undertakes such a study. Part I discusses the mechanism of natural selection. Part II applies the principles of natural selection to certain nonbiological entities. Dawkins' concept of the meme is explored and critiqued, and similarities and differences between memetic and genetic evolution are discussed. Part III surveys the literature of the evolutionary tradition in jurisprudence and concludes that the memetic perspective has much to offer that tradition. This Part also demonstrates that the difficulties inherent in developing a science of memetics are greatly reduced in the context of the law.

Id.

125 *Cf*. LEO TOLSTOY, WAR AND PEACE, Epilogue, pt. II (War and Peace, Project Gutenberg, The Internet Archive, https://archive.org/details/warandpeace030164mbp (file size for "epub" version)) (1868). Tolstoy provides an alternate interpretation of history that focuses on many multifarious factors and individuals rather than solely on "great men" that guide history. Tolstoy spends most of this second part of the Epilogue discussing his theory of the "great man" theory of history and the idea that heroes guide history. He sums it up in Chapter IX of the second part of the Epilogue stating, "The Austro-Prussian war appears to us undoubtedly the result of the crafty conduct of Bismarck, and so on. The Napoleonic wars still seem to us, though already questionably, to be the outcome of their heroes' will." *Id*.

Cf. Still, Tolstoy seems to contradict himself in the same book in Chapter XXVII where he writes that at the Battle of Borodino, French soldiers who fought did not fight because of Napoleon's orders, but "their own volition." Tolstoy writes,

The French soldiers went to kill and be killed at the battle of Borodinó not because of Napoleon's orders but by their own volition. The whole army--French, Italian, German, Polish, and Dutch--Hungary, ragged, and weary of the campaign, felt at the sight of an army blocking their road to Moscow that the wine was drawn and must be drunk. Had Napoleon then forbidden them to fight the Russians, they would have killed him and have proceeded to fight the Russians because it was inevitable.

See LEO TOLSTOY, WAR AND PEACE, Chapter XXVII (War and Peace, Project Gutenberg, The Internet Archive, https://www.gutenberg.org/files/2600/2600-h/2600-h.htm#link2HCH0354) (1868). Moreover, Tolstoy further seems explicitly to contradict his "great man" of history in that heroes' will guides history in Chapter XXVIII. In that chapter Tolstoy writes that Napoleon's will had nothing to do with what occurred at the Battle of Borodino nor Charles IX's will even though both gave an order for it. Tolstoy writes,

Strange as at first glance it may seem to suppose that the Massacre of St. Bartholomew was not due to Charles IX's will, though he gave the order for it and thought it was done as a result of that order; and strange as it may seem to suppose that the slaughter of eighty thousand men at Borodinó was not due to Napoleon's will, though he ordered the commencement and conduct of the battle and thought it was done because he ordered it; strange as these suppositions appear, yet human dignity--which tells me that each of us is, if not more at least not less a man than the great Napoleon--demands the acceptance of that solution of the question, and historic investigation abundantly confirms it.

See LEO TOLSTOY, WAR AND PEACE, Chapter XXVIII (War and Peace, Project Gutenberg, The Internet Archive, https://www.gutenberg.org/files/2600/2600-h/2600-h.htm#link2HCH0354) (1868).

126 Walter D. Schwidetzky, *The Partnership Allocation Rules of Section 704(b): To Be or Not to Be*, 17 VA. TAX REV. 707, 739 (1998).

Chaos theory provides that causes have effects, and a small cause can generate a large impact. While what is taking place in the universe may not be predictable, the system is nonetheless not random. The appearance of disorder is a masquerade for what is in fact an orderly process. Under chaos theory, a butterfly flapping its wings in Brazil might, by generating a large series of steps, cause a typhoon in the Pacific Ocean. In the tax world chaos theory has comparable application. The Crane case is the butterfly. Everything else is the typhoon.

Id.

127 Andrew Bolson, *Lessons from an Outlier What Young Lawyers Can Learn from the Story of Joe Flom*, N.J. LAW., Aug. 2013, at 57.

128 *Id*. at fn. 2. "According to Malcolm Gladwell, white-shoe law firms were those traditional, old-line law firms that populated downtown Manhattan. The nickname, white-shoe is a reference to the type of shoe favored by those attorneys

who staffed the traditional law firms." *Id. See also* Eli Wald, *The Rise and Fall of the Wasp and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1812 (2008).

Nor was the religious identity of the large firms superficial. While the merit-based hiring and promotion criteria of the Cravath System purported to ignore irrelevant considerations such as social standing and religious affiliation, its "carefully prescribed path" was never based on merit alone. Rather, "[i]n addition to academic credentials [the young men] were expected to possess 'warmth and force of personality' and 'physical stamina." These hard-to-quantify and difficult-to-assess qualities were a cover for, or at least directly correlated with, certain religious, socioeconomic, and cultural characteristics. In other words, large firms used the "warmth of personality" standard to systematically exclude candidates who satisfied their merit-based criteria but nonetheless were not considered among the "best men"--young, white, Anglo-Saxon Protestant men from affluent socioeconomic backgrounds.

Id. See also Justice Crucified: The Story of Sacco and Vanzetti by Roberta Strauss Feuerlicht, 92 HARV. L. REV. 781 (1979).

To Feuerlicht, the two great villains of the case are A. Lawrence Lowell, president of Harvard and chairman of the Governor's advisory committee which approved the death sentences, and Justice Oliver Wendell Holmes, who refused to grant a stay of execution and bring the case before the full Supreme Court. Although her venom seems more justifiably directed against the former than the latter, both are representatives of the author's ultimate bogeyman, the White Anglo-Saxon Protestant. In the first third of the book, in which Feuerlicht offers a caustic survey of American history, the "WASPs' sting" is the dominant force, bringing injustice wherever it strikes. In fact, while making a casual digression to current events, the author goes so far as to blame the WASP's for the Boston busing crisis, since they allegedly taught the Irish how to persecute others. In case any reader has missed the point, she makes her focus explicit while fixing a place in history for Sacco and Vanzetti: 'But the reach of the WASPs exceeded their grasp; in winning the case they lost their souls, and their moral authority passed to immigrants like Sacco and Vanzetti.'

Id.

129 Bolson, *supra* note 128.

130 *Id*.

131 *Id*.

132 *See id*. at 32.

133 *See id*.

134 *See id*.

135 *See id* at 128.

136 *See id*.

137 Jeffrey C. Schank & William C. Wimsatt, *Evolvability: Adaptation and Modularity, in: Thinking About Evolution: Historical, Philosophical, and Political Perspectives*, 323 (R. S. Singh et al. eds., 2001). Overall, dialectical materialism is a useful heuristic. Discussing the usefulness of dialectical materialism, evolutionary biologist Richard Lewontin wrote,

Dialectical materialism is not, and never has been, a programmatic method for solving particular physical problems. Rather, a dialectical analysis provides an overview and a set of warning signs against particular forms of dogmatism and narrowness of thought. It tells us to, 'remember that history may leave an important trace. Remember that being and becoming are dual aspects of nature. Remember that conditions change and that the conditions necessary to the initiation of some process may be destroyed by the process itself. Remember to pay attention to real objects in time and space and not lose them in utterly idealized abstractions. Remember that the qualitative effects of context and interaction may be lost when phenomena are isolated.' And above all else, 'Remember that all the other caveats are only reminders and warning signs whose application to different circumstances of the real world is contingent.'

Likewise, Stephen Jay Gould wrote that dialectical materialism is useful as a heuristic for analyzing philosophical and holistic changes of various interactions of parts in a system. Thus, one could interpret this to mean that it has a great value for social commentary:

[When] presented as guidelines for a philosophy of change, not as dogmatic precepts true by fiat, the three classical laws of dialectics embody a holistic vision that views change as interaction among components of complete systems and sees the components themselves not as a priori entities, but as both products and inputs to the system. Thus, the law of 'interpenetrating opposites' records the inextricable interdependence of components: the 'transformation of quantity to quality' defends a systems-based view of change that translates incremental inputs into alterations of state, and the 'negation of negation' describes the direction given to history because complex systems cannot revert exactly to previous states.

See Stephen Jay Gould, NURTURING NATURE AN URCHIN IN THE STORM: ESSAYS ABOUT BOOKS AND IDEAS 153 (Penguin 1990).

138 Thomas Carlyle, *On Heroes, Hero-worship, And The Heroic In History* (Lecture V, 1840), *available at* http://gutenberg.net/ (Project Gutenberg). Overall, there are many objections to this theory. Perhaps the most concise definition of the theory of the "great man" comes from Thomas Carlyle. This theory does not necessarily rely on "men" as in males. It should be more synonymous with "heroes". Thus, females should be included in this definition. In defining the theory of history as guided by "great men," Carlyle wrote:

Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here. They were the leaders of men, these great ones; the modelers, patterns, and in a wide sense creators, of whatsoever the general mass of men contrived to do or to attain; all things that we see standing accomplished in the world are properly the outer material result, the practical realization and embodiment, of Thoughts that dwelt in the Great Men sent into the world: the soul of the whole world's history, it may justly be considered, were the history of these.

Id.

139 Philip Bobbitt, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002). In summary, Bobbitt takes an empirical theory of history that includes Tolstoy's theory of history.

140 *See* David J. Bederman, *The New International Law in an Old Age of Indeterminacy*, 81 TEX. L. REV. 1521, 1533-34 (2003) (reviewing PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002)). Bobbitt disagrees with Tolstoy's assertion of the "great man" theory of history. Bobbitt argues that while history is often influenced by the decisions of "great men," Bobbitt approaches history from a more holistic point of view, taking in social, legal, jurisprudential, and constitutional changes and moments that should be considered together in an empirical way and categorized in a similar fashion as the taxonomic system of biological classification found in the Linnaean system for naming biological beings. Although Bobbitt is careful to disclaim that he has "discovered an historical law of general application," there is a feeling of historic inexorability in his narrative. It is true, he observes, that crucial decisions were made at certain junctures - usually by the great men of history he focuses on - and those choices did influence the course of events. Bobbitt's chronicle thus blends Leo Tolstoy's historic egoism and Bruce Ackerman's theory of "constitutional moments" as applied to state systems. When Bobbitt rhetorically asks, "[b]iogenetic evolution

is punctuated; why can't the evolution of states also be?" he invokes the sense of decisive, but somehow historically predetermined, junctures in history. In truth, Bobbitt is really a Hegelian metaphysician. His is a history of sweeping movements caught in a dialectic of conflict and change. Sometimes he clearly embraces this view, as when he observes (in the context of the Westphalian confirmation of the legitimacy of the kingly state): "the triumph of one constitutional order ... germinates the form that will ultimately vanquish it." Such statements evoke our old friends, thesis and antithesis and synthesis. Bobbitt's metaphysic is to take bundles of strategic, legal, and historical phenomena and distill their first principles. With a keen eye to categories and types, almost Linnaean in its attention to detail, Bobbitt succeeds in fashioning the empiric database that supports those first principles. And despite his protestations to the contrary, make no mistake: Bobbitt offers a unified field theory of the fate of nations. What plate tectonics did for our understanding of geology or Freudian psychology for our insights into human behavior, this book makes a powerful case for a single set of explanations for the rise and fall of different kinds of state regimes. *Cf.* Michael Clifford, *Hegel and Foucault: Toward a History Without Man* 29Michael Clifford, *Hegel and Foucault: Toward a History Without Man* 29 CLIO 1 (1999). *See also* EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (1776). Although the article above indicates that the fall of the Roman Empire was due to excessive taxation and abuse of the tax farming system, Edward Gibbons provides a different theory for the fall of the Roman Empire as shown below - Gibbons suggests that the fall of the Western Roman Empire was due to lack of interest in civic virtue:

The story of its ruin is simple and obvious; and, instead of inquiring why the Roman empire was destroyed, we should rather be surprised that it had subsisted so long. The victorious legions, who, in distant wars, acquired the vices of strangers and mercenaries, first oppressed the freedom of the republic, and afterwards violated the majesty of the purple. The emperors, anxious for their personal safety and the public peace, were reduced to the base expedient of corrupting the discipline which rendered them alike formidable to their sovereign and to the enemy; the vigour of the military government was relaxed, and finally dissolved, by the partial institutions of Constantine; and the Roman world was overwhelmed by a deluge of Barbarians.

Id.

141 *See* Michael S. Fried, *The Evolution of Legal Concepts: The Memetic Perspective*, 39 JURIMETRICS J. 291, 300-01 (1999). Such as the evolution of legal concepts, memes represent similar "traits" (akin to genetic traits) that either become more applicable or not in a given social context:

While the underlying laws governing the natural selection of memes are identical to those that apply in genetics, important differences between the two replicators create practical difficulties in developing a rigorous memetic science. These difficulties have led some theorists to question whether memetics could feasibly be developed into a practicable tool for prediction and control. These problems are, however, greatly reduced for memes in the legal system.

Id. at 301.

142 *See* Patrick E. Hobbs, *Entity Classification: The One Hundred-Year Debate*, 44 CATH. U. L. REV. 437, 440-41 (1995). Hobbs discusses the legislative history of how and why Congress decided to tax individuals and corporations differently:

The entity classification debate began a century ago with the passage of the Revenue Act of 1894, which, in addition to levying a tax on the income of wealthy individuals, imposed an entity level tax on corporate income. The imposition of a tax on corporations raised the issue of Congress' intent in singling out this class of business entities rather than imposing a broad-based tax on all business organizations. As it turns out, Congress based its decision more on an effort to soothe the psyche of the American public than on any theoretical underpinnings.

Id. at 441.

143 *See* Linda M. Beale, *Congress Fiddles While Middle America Burns: Amending the Amt (and Regular Tax),* 6 FLA. TAX REV. 811, 820-21 (2004). Beale provides a comprehensive discussion of why horizontal and vertical equity theories are vital in formation of any tax law:

Commentators also frequently refer to the concepts of horizontal and vertical equity as components of the "ability to pay" tax fairness concept. As generally understood, horizontal equity requires that taxpayers with the same ability to pay be taxed alike, while vertical equity requires that people with different abilities to pay be taxed differently. Vertical equity supports a progressive tax system that imposes graduated rates ranging from 0% (an exemption from tax) for those at the bottom to relatively high rates applicable at the top of the scale. As with the ability-to-pay concept generally, horizontal and vertical equity both require an answer as to what 'counts as' the same ability to pay. Is income the appropriate measure, or should we also consider wealth? The decision as to what items to include may predetermine the equity conclusion. The uncertainties, and the related debate over progressivity, go back to the origins of the federal income tax in the 1860s, when Congress considered whether to have a flat rate system or a graduated rate structure. In spite of periods of stronger opposition, Congress has consistently treated progressivity as a fundamental aspect of the federal tax system, and scholars who take seriously the need to define the normative foundations of tax policy continue to explore this ongoing consensus in favor of progressivity. For example, in a recent article, Thomas Griffith suggests that a redistributive progressive tax increases people's happiness because of the primary importance of relative, rather than absolute, incomes.

Id.

144 Jack P. Greene, MODERATION AND LIBERTY: MONTESQUIEU AND THE AMERICAN FOUNDING 535 (The Johns Hopkins Univ. Press, 1989). Analysis has shown that based on a compilation of American Revolutionary polemic writing, "Montesquieu was cited more often than any other author, accounting for 8.3 percent of all citations to specific thinkers" and moreover, "[w]hat made Montesquieu's relevance even more remarkable was its continuation from one period of the Revolution to the next. Whereas Locke was scarcely cited after 1780, Blackstone was rarely mentioned before 1770." *Id*.

145 William B. Turner, *Putting the Contract into Contractions: Reproductive Rights and the Founding of the Republic*, 2005 WIS. L. REV. 1535, 1541 (2005). Lockean property analysis can be summed up as follows, "[t]he argument for the foundational status of private property goes like this: individuals under a Lockean government need no permission from that government to create and retain private property because individuals in the state of nature had the capacity to create private property without government but chose to create government in order to protect the private property they had created." *Id*.

146 *See* 26 U.S.C.A. § 316 (West through P.L. 116-259). For a statutory definition of a dividend from a tax perspective, see the following,

General rule - for purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders - (1) out of its earnings and profits accumulated after February 28, 1913, or (2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Id.

147 *See* 2 ADVISING SMALL BUSINESSES § 23:1 (2016). For a definition of dividends consider that,

As a general rule, a corporation has the right to pay dividends to its shareholders in cash, property, or in shares of its stock. But the right to pay dividends can be limited by the provisions of a corporation's articles of incorporation or by contract with a third party. In order to protect creditors of a corporation, there is a statutory prohibition on the payment of dividends that would result in the corporation's becoming insolvent.

Id.

148 *See* WILLIAM MEADE FLETCHER ET AL., 11 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5329.15 (2020). Indeed, based on the corporate conception of how money is distributed, money must be formally disbursed from corporations. Such distributions can be done in various ways. "Most corporation statutes contain some type of balance sheet test. Earned surplus statutes provide that dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation."

149 *See* Donna M. Byrne, *Locke, Property, and Progressive Taxes*, 78 NEB. L. REV. 700, 724-25 (1999). Speaking of supple forms of antithetical Lockean ideals:

> Under the instrumentalist version of Lockean theory discussed above, the reason for allowing an individual to reap the rewards of effort is to provide an incentive for that effort. If enough incentive is left in place after taxation, the effort should still occur under this theory. Taxing the product of labor, however, reduces the incentive to engage in productive labor, at least in theory. Thus taxes, which remove some of the incentive, seem to be antithetical to the instrumentalist form of Lockean labor theory. This is only true, however, if there is no windfall inherent in the rewards to labor. Windfalls by definition are unexpected and unpredicted and should have no effect on incentives. The windfall portion of market prices is analogous to economic rent--that part of, say, an individual's salary that exceeds the price the individual could command in the next best activity. If a lawyer is willing to work for $45,000 a year, the lawyer will probably be delighted to work for $200,000 a year. The additional $155,000 per year does not perform the instrumentalist function of inducing the lawyer to practice law; it is more like a windfall or a bonus. To the extent that taxes are taken out of this "windfall" amount, there should be little or no effect on the lawyer's willingness to engage in the practice of law. Of course, at least some of the lawyers working for $200,000 would, at least in theory, not work for less.
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> *Id*.

150 Randy Beck, *The Faith of the "Crits": Critical Legal Studies and Human Nature*, 11 HARV. J.L. & PUB. POL'Y 433 (1988).

151 OECD Model Convention, Art. 10.3 (*available at* https://www.oecd-ilibrary.org/deliver/fulltext?itemId=/Content/publication/mtc_cond-2017-en&mimeType=freepreview&redirecturl=chttp://www.keepeek.com/Digital-Asset-Management/oecd/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2017_mtc_cond-2017-en&isPreview=true). It is unclear whether the American term for mineral rights would fall into the definition of dividends or royalties.

152 *See* *Chapman v. C.I.R.*, 107 T.C.M. (CCH) 1433 (T.C. 2014). Interest expenses and their underlying debt are allocated according to the use of the debt proceeds. *Id*.

153 *See* OECD Model Convention, Art. 11.3.

154 *See* 26 U.S.C.A. § 543.

155 *See* 60 Am. Jur. 2d Patents § 925. A patent licensor may require the licensee to pay a royalty for the privilege of practicing the invention. The obligation to pay such a fee is founded on the agreement between the patentee and licensee. The right to collect royalties owed on a patent licensing agreement can be assigned without also assigning the underlying patent rights. Ordinarily, mere use of a patented article, even with knowledge of the patentee, raises no implied promise to pay royalties thereon. *Id*.

156 *See* OECD Model Convention, Art. 12.2.

157 *See* OECD Model Convention, Art. 12.2.

158 *See* Andrew D. Lewis, *The Ever-Protruding Stick in the Bundle: The Accommodation of Groundwater Rights in Texas Oil and Gas*, 2 TEX. A&M L. REV. 79, 86-87 (2014). This is speculation by the author. Other countries may have private mineral rights for subterranean minerals. Although it may be fair to say that private - rather than private - ownership of mineral rights however distributed promotes economic growth. "If Texas courts are willing to acknowledge the economic perspective on this analysis rather than just the narrow, premises-based perspective, they may likely find, as the alternatives become economically viable for oil and gas producers, that reasonable alternatives do exist." *Id*. Also, it may be fair to say that private ownership of mineral rights could also mean more tax revenue for the state.

159 *See* Derek Cook & Jennie K. Martin, *Oil and Gas Basics Understanding the Sticks to Avoid Stones and Broken Bones*, 76 TEX. B.J. 319 (2013).

To understand the impact of an oil and gas lease, imagine an individual receiving a fee simple absolute grant of land under a land patent. Under the common law ad coelom doctrine, that person would own the surface of the land, all of the space above it, and everything below it, including the mineral estate. Before the execution of an oil and gas lease, the owner would possess the entire 'bundle of sticks' in the mineral estate, i.e., the rights to: (1) execute an oil and gas lease; (2) receive bonus for executing a lease; (3) receive delay rental payments; (4) receive royalty payments; and (5) produce oil and gas from the property (including necessary rights of ingress and egress.

Id. See also William Blackstone, *Commentaries on the Law of England 18* (William Draper Lewis ed., 1902).

160 *See* IBFD, Glossary, Technical Assistance Fees. (last accessed Sept. 27, 2016, 6:07 PM).

161 *See Id*.

162 *See* Richard L. Doernberg, *The U.S.-India Income Tax Treaty: Breaking New Ground in Taxing Services Income from Licensing Technology*, 44 TAX LAW. 735 (1991). "[T]here is no justification for applying a royalty source rule to certain types of services income (e.g., technical services) and not to other types of services income (e.g., marketing, legal, or accounting services), particularly when the services may have nothing to do with any royalty payment." *Id*.

163 INDIAN TAX CONSIDERATIONS FOR U.S. INVESTMENTS, U.S. Tax. Foreign Cont. Bus. ¶ 18.09 (*available at* https://www.westlaw.com/Document/Iebce6c03609911de9b8c850332338889/View/FullText.html?transitionType=default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

Fees for technical services means any consideration (including any lump-sum consideration) for rendering any managerial, technical, or consultancy services (including the provision of services of technical or other personnel), but does not include consideration for any construction, assembly, mining, or similar project undertaken by the recipient or consideration that would be under the heading 'Salaries.'

Id. at ¶ 18.09.

164 Charles Lincoln, *A Structural Etiology of the U.S. Constitution*, 43 J. LEGIS. 122 (2016).

165 *Id*. at 143. “Eros represents the basic instincts and desires of the soul as represented by the black horse in the Phaedrus. The black horse can wear down the white horse and charioteer.” *Id*.

166 *Id*. at 142. “Thumos represents the spirit of the soul, as represented by the white horse in the Phaedrus. The white horse is spirited but controlled with a sense of potential shame.” *Id*.

167 Consider that this tripartite idea has come up in various fields of study from anthropology, philosophy, and linguistics. The idea of a “tripartite” structure of society being inherent to human cultures is not new, but it has been written about extensively by George S. Dumezil1 and has been addressed by Sigmund Freud's division of psychoanalysis. *See* Charles Lincoln, A Structural Etiology of the U.S. Constitution, 43 J. LEGIS. 122, 125 (2016)

168 David S. Law, *Constitutional Archetypes*, TEX. L. REV. 95 (2016): 153, 160-161. “Such archetypes manifest themselves differently from country to country yet remain recognizable. For example, different constitutions invoke different national heroes, but the very act of invoking a hero by name in the constitution - be it a Bolivar, or a Mao, or a Kim Il Sung - is unmistakably characteristic of a particular kind of ideological narrative. In Jungian psychology, the hero is an archetype: it takes different forms across different cultures, but its meaning transcends any particular culture. Likewise, in constitutional drafting, the invocation of heroic figures is indicative of an ideological archetype, “the names of the heroes vary from one constitution to the next, but the type of constitutional storytelling that invokes heroic figures is deeply familiar and resonates on multiple levels.” *Id. See* CHARLES LINCOLN, THE DIALECTICAL PATH OF LAW 6 (2021). Detailed, is a discussion of anthropological structures of society in relation to Jungian psychoanalysis and Claude Levi Strauss's anthropological theory of materialism. *Id*.

169 *Cf*. Compare with Aristotle's concept of entelechy as an idea for interpreting the impulses that move the arterial chambers of the heart - as a metaphor for interpreting the ends and goals of a treasury. “This concept of existence in the world is consistent with the idea of ‘entelechia,’ as expressed in Aristotle's writings, which he explains as something having an end in itself.” Charles Edward Andrew Lincoln IV, *Aristotle and Animal Law: The Case for Habeas Corpus for Animals*, 55 U.S.F. L. REV. 1, 9 (2020).

170 Charles Lincoln, *A Structural Etiology of the U.S. Constitution*, 43 J. LEGIS. 122, 137 (2016). “*Eros* ... in the Platonic sense represents what Socrates says is ‘that with which it loves, hungers, thirsts, and feels the flutter and titillation of other desires, the irrational and appetitive - companion of various repletions [sic] and pleasures.”’ *Id*.

171 But, certainly not limited to these organs.

172 *See* Lincoln, *supra* note 171, at 137-38. “Thumos ... in the Platonic sense represents the ‘spirit’ of unifying with the logos, but resisting the erotic part of the soul.” *Id*.

173 *Cf*. Compare with the endeavor of the fictional director Guido Anselmi in Federico Fellini's arguably autobiographical Italian surrealist-drama-comedy film. Guido reflects, “I wanted to make an honest film. No lies whatsoever. I thought I had something so simple to say. Something useful to everybody. A film that could help bury forever all those dead things we carry within ourselves.” 8½ (Angelo Rizzoli 1963).

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