1

Introduction

States, Firms, and Their Legal Fictions

Melissa J. Durkee

What is a corporation? What is a state? These are not biological creatures. They do not have flesh, blood, or organic parts. They are artificial, human creations. They are also abstract. You cannot point to a thing in the world and say: "That is a state" or "that is a firm." Rather, what you see is a logo, a person in uniform, workers in a building, flashing lights. It is law that gives meaning to these objects and that tells us which people speak and act for which entity: the firm or the state. Firms and states are thus constructed objects, not natural ones. Laws imbue the collections of logos, uniforms, workers, and weapons with legal salience, assigning identity, rights, and responsibilities.

Although these legal entities are not natural, their activities nevertheless have profound consequences for people and things in the natural world. In fact, as this book explores, the artificial, legal construction of identity and responsibility has produced a Swiss-cheese pattern of rules and holes. The picture is hard to see from the vantage point of one legal regime alone: International law has certain expectations, objects, and concerns, and national laws have a separate set. The interface between the two leaves gaps. The picture is also not complete when you consider how domestic and international legal regimes apply to only one of these actors: the state or the firm.[1] Layering both actors and regimes together offers a new way of understanding what exactly the law is doing, and not doing.

The project of this book is, therefore, synthetic in that it is placing diverse things together to try to create a new form of coherence. It combines analysis of two kinds of artificial entities – states and firms – and two regimes – national law and international law – to try to better understand the way law builds and maintains the identity of entities. Specifically, it tries to better understand how this legal construction of entities leads to responsibility gaps.

[1] International lawyers tend to use the term "domestic" or "municipal" law to refer to the internal laws of a nation, as distinct from international laws. *See, e.g.*, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 Am. J. Int. L. 310 n.2 (1992) (noting this usage).

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

There are many potential points of entry for such a project. Indeed, this book builds on rich literatures in corporate social responsibility,[2] business and human rights,[3] theories of the firm,[4] and conceptions of state sovereignty and responsibility.[5] Each of these addresses one or more aspects of the volume's central question about how law constructs the identities and responsibilities of firms and states.

This book begins its analysis from the concept of attribution. "Attribution" is a term of art with a defined meaning in international law, as I will review shortly.[6] "Attribution" also has a defined meaning in domestic corporate law, where it is related to the law of agency.[7] Beyond these specific doctrines, the concept itself does work that is helpful for this project. "Attribution," according to the *Cambridge English Dictionary*, is "the act of saying or thinking that something is the result or work of a particular person or thing."[8] The *Collins Dictionary* offers another formulation: "Attribution" is "the act of attributing; ascription," and, in an archaic usage, an "authority or function assigned, as to a ruler, legislative assembly, delegate, or the like."[9]

Attribution is a useful concept for the purposes of this volume because the noun characterizes an activity: the *act* of ascribing something to someone. This is helpful because the book is trying to draw attention to the idea that the law is actively constructing artificial entities. Attribution has synonyms, such as "ascription," "charge," "credit," and "blame."[10] Artificial entities do not have innate characteristics or identities, but

[2] Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 Bus. Soc. 268 (1999) (reviewing the literature).

[3] *See, e.g.*, Gwynne L. Skinner, Transnational Corporations and Human Rights (2020); Anita Ramasastry, *Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability*, 14 J. Hum. Rts. 237 (2015); John Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 Am. J. Int'l L. 819 (2007); Stephen Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. (2001).

[4] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law (1991) (shareholder primacy); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247 (1999) (team production theory); Grant M. Hayden & Matthew T. Bodie, Reconstructing the Corporation: From Shareholder Primacy to Shared Governance (2020) (reviewing "stakeholderism" and proposing democratic participation). For theories of the firm in an international legal context, *see*, e.g., Fleur Johns, *Theorizing the Corporation in International Law*, *in* The Oxford Handbook of the Theory of International Law 635 (Anne Orford & Florian Hoffman eds., 2016); Joshua Barkan, Corporate Sovereignty (2013); Jose E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int'l L. 1 (2011).

[5] *See, e.g.*, André Nollkaemper, *Responsibility*, *in* Concepts for International Law 760 (Jean d'Aspremont & Sahib Singh, eds., 2019) (reviewing the literature on state responsibility).

[6] *See infra*, notes 35–38, and accompanying discussion.

[7] *See* Restatement (Third) of Agency §2 (2006) (offering "[p]rinciples of attribution," which define when an agent acts with the authority of a principal).

[8] Attribution, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/attribution.

[9] Attribution, Collins Dictionary, www.collinsdictionary.com/us/dictionary/english/attribution.

[10] *Id.*

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

ascribed ones. A person or a thing can be ascribed characteristics, activities, intentions, functions, or authority. The book considers the law's diverse ways of saying that characteristics, functions, authorities, rights, credit, or blame belong to a firm or state.

If the starting point for the book is attribution, its ending point is responsibility. That is, the book is trying to understand how law attributes various characteristics to firms and states so that it can better explain how the law assigns responsibility for harms, or fails to do so. If attribution is "saying … that something is the result or work of a particular person or thing,"[11] then attribution enables judgments about responsibility. How does the law determine that something is the work of a firm or a state, and assign consequences?

One reason for the Swiss-cheese–like legal construction of responsibility is that states and firms are both *transnational actors*. They are rooted, supposedly, within the territorial boundaries of the nation-state.[12] But their activities and effects are not so confined.[13] After all, territorial boundaries and borders are artificial creations as well.[14] The transnational activity of firms and states can fall into an interstitial space, not adequately captured by either domestic or international regimes.

Other responsibility gaps exist because of the *pliability of the entity form*, which allows states and firms to trade roles, hide behind each other, and exploit uncertainty.[15] For example, governments sometimes shrink themselves: They outsource activities to private actors, privatizing utilities, jails, border security, or even military functions.[16] Alternately, governments sometimes expand into the market, owning or controlling companies and using ownership to accomplish policy objectives.[17]

[11] Cambridge Dictionary, *supra* note 2.

[12] Peter T. Muchlinski, Multinational Enterprises and the Law ix (2d ed. 2007) ("[I]f one were to look at legal sources alone, the [multinational enterprise] would not exist: all one would find is a series of national companies.").

[13] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l L. 295 (2013) ("[T]oday's [sovereignty] … is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families."); Muchlinski, *supra* note 8, at 8 (transnational activity of multinational business enterprises can "affect the international allocation of productive resources").

[14] Gail Lythcoe, *Distinct Persons; Distinct Territories: Rethinking the Spaces of International Organizations*, 19 Int'l Org. L. Rev. 365, 367 (2022) (territory is a "socially produced space").

[15] E.g., Julian Arato, *The Elastic Corporate Form in International Law*, 62 Va. J. Int'l L. 383, 384–87 (2022) (investor–state dispute settlement tribunals address corporate formalities in an inconsistent manner that results in an "elastic" or "plastic" corporate form).

[16] *See* Michael J. Strauss, Hostile Business and the Sovereign State: Privatized Governance, State Security and International Law (2019) (describing and assessing the "massive worldwide shift of state activities to the private sector since the late 1970s"); *see generally* Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996) (observing the declining authority of states and a growing diffusion of power and authority to impersonal market forces and agents other than states).

[17] *See, e.g.*, Curtis Milhaupt, *The State as Owner: China's Experience*, 36 Oxford Rev. Econ. Pol'y 362, 362–65 (2020) (in the twenty-first century the state-owned entity "has proliferated and evolved into a major player in the global economy"; "many governments have 'rediscovered' [state-owned entities] as useful instruments for dealing with specific policy objectives").

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

The fact that governments can expand and contract in this way demonstrates the artificiality of boundaries between "state" and "firm." International law has little to say about what functions are "governmental,"[18] leaving this to domestic law. But most domestic entity laws have no special reason for concern about privatization, state ownership, or the responsibility of states for internationally wrongful acts. International law's entity agnosticism and domestic law's identity minimalism can create room for regulatory arbitrage and leave responsibility gaps.

Another explanation for responsibility gaps is the opportunistic *cocreation of firms and states*. Firms and states have constructed each other over time through facilitation and borrowing, as several chapters in this volume show,[19] and they can do so in ways that are less focused on public goods than "quelling societal conflict and securing group or class power."[20]

Because they draw on different areas of law, questions about attribution of entity identity and responsibility are often considered separately, fragmented by doctrinal boundaries. Yet, the law can function across regimes to facilitate harmful effects – the consolidation of power or resources, and the avoidance of consequences for harm. Attribution questions both broaden and narrow the aperture. They allow for a focused discussion across legal regimes: How does the law conceive of the entity of the state and of the firm? What values does it advance? Does it promote accountability and fairness? Predictability? Is it coherent enough to advance values?

The ultimate aim of the book is to highlight the potential malleability of law. Exposing the fundamental contingency of the legal construction of entities should also expose the law's vulnerability to change. That is, if the law constructs firms and states, it can also deconstruct and reconstruct them.

[18] *See* STRAUSS, *supra* note 11, at 5–6 (describing the "absence of an international standard for the functions that a government must exercise"); *see also* Frédéric Mégret, *Are There "Inherently Sovereign Functions" in International Law?*, 115 AM. J. INT'L L. 452, 452 (2021) ("[I]nternational law has sometimes appeared agnostic … about … privatization" but places some very limited constraints on functions a sovereign state can outsource.).

[19] *See, e.g.*, Doreen Lustig, "The Enduring Charter: Corporations, States, and International Law," *infra*, Chapter 5; James Gathii & Olabisi Akinkugbe, "Corporate Structures and the Attribution Dilemma in Multinational Enterprises," *infra*, Chapter 6; David Ciepley, "The Juridical Person of the State: Origins and Implications," *infra*, Chapter 12; Joshua Barkan, "Corporate Personhood as Legal and Literary Fiction," *infra*, Chapter 13; *see also* Taisu Zhang & John Morley, *The Rise of the Modern State and the Business Corporation*, 132 YALE L.J. (2023) ("[T]hroughout history, the rise of the modern state has almost always been a necessary precondition for the rise of the modern business corporation.").

[20] Joshua Barkan, "Corporate Personhood as Legal and Literary Fiction," *infra* Chapter 13. Sundhya Pahuja describes this relationship as a "rivalry over public authority." Sundhya Pahuja, *Public Debt, the Peace of Utrecht, and the Rivalry between Company and State*, *in* THE 1713 PEACE OF UTRECHT AND ITS ENDURING EFFECTS (Alfred Soons, ed., 2016) (characterizing the parties in this relationship as the "sovereign-territorial arrangements we now call the state" and "the commercial-political groupings of merchants associated in the juridical form of the joint-stock company").

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

IMAGINATION, FICTIONS, AND CONSEQUENCES

Consider some of the particular concerns that motivate the project of this book. Again, abstract entities are "things" only because the law makes them so. This requires an act of "legal imagination."[21] Attributing rights and duties to an abstract entity requires a conceptual story explaining why a set of individuals or activities belongs to a single thing. It involves a choice about how to aggregate individuals into a legally cognizable whole.

Sometimes, this choice is based on a metaphor: To structure thinking and guide decisions about rights and duties, a corporation is a "person"; a state is a "sovereign." Sometimes, the choice is the product of a set of incremental and historically contingent facts: A right or responsibility seems inherently "sovereign" because the state has generally monopolized it, or a firm is shielded from international legal obligation because it has long been considered "private." Theoretically, one could instead use first principles, or an instrumentalist approach to attributing identity and responsibility. In the case of firms and states, however, legal actors have leaned into storytelling modes of metaphors and traditions.

Each of these bases for attributing identity and responsibility – the metaphor, the historical legacy – brings a separate set of consequences. One potential consequence of a metaphor is that it can take on a life of its own in the minds of legal actors, expanding over time. Does "personhood" characterize the firm only for the purposes of legal standing in court, or does it also entitle the firm to human rights or constitutional protections? What exactly is a corporate person? The metaphor can escape the confines of a legal fiction – an untrue but legally convenient shorthand[22] – and become an organizing conceptual principle. At the same time, a potential consequence of historical tradition as a basis for attributing identity and responsibility is path dependence. The law can ossify even as the underlying context evolves.

Questions about the theoretical and conceptual bases for attribution are not purely academic. Legal choices about attribution have sweeping consequences. In international law, scholars and practitioners struggle to attribute behavior – and thus responsibility – to states in areas as diverse as military contracting, environmental accountability, human rights, international investment, and cyber espionage and warfare.[23] States can often avoid attribution of responsibility in these areas by privatizing their functions, outsourcing key responsibilities to firms.[24] Sometimes,

[21] Martti Koskenniemi, To the Uttermost Parts of the Earth (2021) (offering a "history of the legal imagination as it operates in relationship to the use of power").

[22] Lon Fuller, Legal Fictions 9 (1967) ("A fiction is either (1) a statement propounded with complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.").

[23] *See* James Crawford, State Responsibility: The General Part 205 (2013) (laying out these debates).

[24] *See, e.g.*, Alex Mills, *State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework*, EJIL:Talk! Blog (Aug. 4, 2021) at www.ejiltalk.org/

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

the state outsources to a firm in which the state itself holds a significant ownership stake. Those firms, in turn, avoid responsibility under international law by operating below the level of international personhood. They are not traditionally "subjects" of international law, and so do not hold internationally recognized rights or duties.[25] At the same time, these firms avoid responsibility in national jurisdictions by organizing in complex transnational parent–subsidiary structures, creating globally dispersed families of entities and nimbly organizing and reorganizing subsidiaries to take advantage of jurisdictions with favorable laws or enforcement environments.[26] The law resists attributing responsibility to a corporate parent for acts taken by a subsidiary because veil-piercing doctrines preserve the fictitious legal separateness of entities, even while proceeds flow freely between them.[27]

Each of these exclusions of responsibility by the state and the firm is facilitated by legal doctrines that demarcate the boundaries of an artificial entity and cut off responsibility at those boundaries. Attribution doctrines allow the entities to retract into narrow, sharply drawn confines that protect them from consequences such as international responsibility or financial liability. The firm and state use attribution doctrines as shields to avoid responsibility.

The firm and the state also use attribution doctrines as swords to claim rights. The state has long relied on its status as a sovereign to claim certain prerogatives.[28] It holds territorial dominion, jurisdiction, immunities, and a monopoly on the legitimate use of force, among other rights.[29] In the United States, the corporation has been on a steady campaign to claim rights deriving from its status as a "person."[30] Most recently, corporate claims to the rights of personhood have produced

state-responsibility-and-privatisation-accommodating-private-conduct-in-a-public-framework/ (privatization "is often designed to transfer control and thus responsibility away from the state"); *see generally* Richard Mackenzie-Gray Scott, State Responsibility for Non-State Actors (2022) (examining and critiquing the attribution of responsibility doctrines).

[25] 1 Lassa Oppenheim, International Law: A Treatise 341 (1905) ("Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations."); *see generally* Markos Karavias, Corporate Obligations Under International Law (2013).

[26] *See, e.g.*, Gwynne Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, 72 Wash. Lee L. Rev. 1769, 1799 (2015) (noting these responsibility gaps); *see also* Rachel Brewster & Philip J. Stern, *Introduction to the Proceedings of the Seminar on Corporations and International Law*, 28 Duke J. Comp. Int. L. 413 (2018) (describing corporations as "jurisdictionally ambiguous and spatially diffuse").

[27] *See, e.g.*, Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 Wisc. L. Rev. 1367 (2022); Skinner, *supra* note 26; Arato, *supra* note 15.

[28] Daniel Lee, *Defining the Rights of Sovereignty*, 115 AJIL Unbound 322, 324–25 (2021).

[29] *See, e.g.*, Nigel D. White, *Outsourcing Military and Security Functions*, 115 AJIL Unbound 317 (2021) (monopoly on use of force); *see generally* Oppenheim's International Law 432 (Robert Jennings & Arthur Watts eds., 2008).

[30] *See, e.g.*, Adam Winkler, *The Long History of Corporate Rights*, 98 Boston U. L. Rev. Online 64 (2018) ("Today, corporations have nearly every right a corporation might want under the [U.S.] Constitution: free speech, freedom of religion, Fourth Amendment privacy rights, due process, equal protection, property rights.").

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

headlining debates among U.S. scholars and in the popular press about whether these entities can claim constitutionally protected speech rights, moral identity, and religious beliefs. Each of these claims can shift responsibility away from the firm and shield it from consequences.

Attribution doctrines and their consequences have produced extensive but siloed literatures. Scholarship on the international legal doctrine of attribution of responsibility for an internationally wrongful act is significant and continues to grow.[31] A robust business and human rights literature has scrutinized the moral hazard and human rights consequences of protecting separate entity status in the transnational context.[32] Interest in the nature and consequences of corporate personhood remains keen.[33] Notwithstanding the volume of analysis in each of these literatures – and in adjacent disciplines such as political theory, history, and international relations – they are not often in conversation, even as they increasingly intersect.

The project of this book is to bring together conversations about entity construction and its consequences in these three distinct legal spaces: international, transnational, and domestic. Contributors to this volume bring diverse kinds of expertise. The volume includes established experts and rising stars in international law, business and human rights, constitutional and corporate law, history, geography, and political theory.[34] Contributors have been invited to consider the common theme – attribution of identity and responsibility to states and firms – across these three legal domains: international, transnational, and domestic. Contributions explore the theoretical, doctrinal, and conceptual choices that drive attribution of identity and responsibility for states and firms. They focus especially on attribution questions at

[31] Several notable contributions on attribution of responsibility for the conduct of private actors include Marko Milanovic, *Special Rules of Attribution of Conduct in International Law*, 96 Int. L. Stud. 295 (2020); Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 U. Penn. J. Int. L. 895 (2019); Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 Eur. J. Int. L. 563 (2017); Oona A. Hathaway, et al., *Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors*, 95 Tex. L. Rev. 539 (2017); Kristen E. Boon, *Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines*, 15 Melb. J. Int. L. 330 (2014); *see also* André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 Eur. J. Int. L. 15 (2020).

[32] *See, e.g.*, Brewster, *supra* note 27; Gwynne L. Skinner et al., Transnational Corporations and Human Rights (2020).

[33] *See, e.g.*, Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2019); Susanna Kim Ripkin, Corporate Personhood (2019); Visa A.J. Kurki, A Theory of Legal Personhood (2019); Anna Grear, Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity (2010).

[34] To promote a dialogue between the authors and the eventual chapters, contributors to the volume were invited to a two-day conference cohosted by the Dean Rusk International Law Center at the University of Georgia, and the International Legal Theory Interest Group of the American Society of International Law. Authors were encouraged to read and discuss all the draft chapters. Each was also asked to lead discussion on a contribution from a different doctrinal or disciplinary area than the author's own.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

the dividing line of these two entities, and on areas where attribution questions are currently most live in theory and practice.

The book moves through the three legal domains – international, transnational, domestic – in that order, though there are interconnections and themes that run through all three. The first part focuses on attributing responsibility for internationally wrongful acts; the second part on attributing responsibility for externalities across the conceptual boundaries of territory and separate entity status; and the third part on attribution of identity characteristics to abstract entities. The fourth part offers cross-disciplinary context. Next, we turn to a preview of the progression between these themes and the contributions within each part.

INTERNATIONAL ATTRIBUTION

In international law, attribution is associated with the law of the international responsibility of states for wrongful acts. It is the "legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage."[35] According to the International Law Commission's (the ILC's) classic articulation of the rule of state responsibility, the conduct of a private actor can be attributed to the state when it is performed by an agent or organ of the state, acting under the state's direction or control, performing "elements of the governmental authority," or later adopted by the state.[36] This formulation has been widely accepted as authoritative, and it was confirmed by the International Court of Justice in the *Bosnia* case.[37] However, it harbors ambiguities that even the ILC acknowledges, and offers little theoretical substance to answer newly pressing questions. For example, in the context of a state that has disaggregated and privatized many traditionally "sovereign" functions, with diverse forms of state investment in private entities, who obtains the legal rights and responsibilities of the state? How should doctrinal tests navigate increasingly murky lines of ownership and control between the state and private entities? And how and when should responsibility be shared between entities?

The book begins with a chapter by Kristen E. Boon, "Attribution in International Law: Challenges and Evolution."[38] Boon argues that the attribution doctrines within the regime of international responsibility for internationally wrongful acts are premised on a vision of the state that is both culturally embedded and increasingly outdated. Boon points out that the rules governing attribution of responsibility were developed "before the rapid hollowing out of the state" due to widespread

[35] Malcolm N. Shaw, International Law 595 (8th ed. 2017).

[36] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 38–42 (2001); *see also* Kristen E. Boon, "Attribution in International Law: Challenges & Evolution," *infra* Chapter 2.

[37] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. and Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Reports at 43 (Feb. 2007).

[38] Boon, *infra* Chapter 2.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

outsourcing of previously governmental functions such as "prisons, immigration services, and security," which has produced closer connections between states and corporations. The rules also imagine a "limited state," more common to western liberal democracies than other contexts, such as China and Norway, where state-owned entities proliferate. Boon explores these doctrinal limitations in the context of international investment law, where tribunals have grappled with the question of when "effective" control by the state over private conduct exists, and what functions provided by private entities are sufficiently "governmental" to pierce the veil between a private entity and the state, whose interests the private entity serves. The failure of international attribution rules to imagine the potentially extensive links between firms and states has created an accountability gap that shields state actors from international legal responsibility for private acts, protects firms from responsibility as international legal persons, and bars claimants from access to remedies.

Also drawing on the extensive jurisprudence of international investment tribunals, Mikko Rajavuori argues in "Between States and Firms: Attribution and Construction of the Shareholder State" that the attribution doctrines can influence how states organize their ownership interests in private entities.[39] Rajavuori shows that when investment tribunals are confronted with attribution questions in the context of entities with a state ownership interest, the tribunals construct a "hypothetical ordinary shareholder" and compare state behavior to that fictitious, imagined standard. The tribunals conceptualize shareholders' "*ordinary* roles, competencies, and interests, as well of those of *ordinary* company law and … *ordinary* commercial interests," finding that the state avoids attribution of responsibility if state ownership does not stray outside of these "ordinary" roles. States, understandably, respond by organizing their ownership interests accordingly. They use the tribunals' fictitious ordinary as a "template for managing the relationship" between themselves and market actors they partially own. Over time, therefore, applying the attribution doctrines becomes an exercise in the "legal construction of state shareholders."

As Chapters 2 and 3 noted, one method by which states can avoid international responsibility is by outsourcing their agendas to private actors. The problem, as Laura A. Dickinson diagnoses it, is the law of state responsibility's "overly formalist reliance on purportedly clear dividing lines between what is state and what is non-state," which breaks down in practice.[40] In "Contractors and Hybrid Warfare: A Pluralist Approach to Reforming the Law of State Responsibility," Dickinson argues that states that do not embrace the rules-based international order can flout that order when they hire private military contractors who then "commit atrocities or flout other substantive international legal rules." Dickinson offers a case study

[39] Mikko Rajavuori, "Between States and Firms: Attribution and Construction of the Shareholder State," *infra* Chapter 3.

[40] Laura A. Dickinson, "Contractors and Hybrid Warfare: A Pluralist Approach to Reforming the Law of State Responsibility," *infra* Chapter 4.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

focused on the Wagner Group, to which Russia has seemingly outsourced many military and security functions. Dickinson proposes a functional approach to attribution, focusing on questions such as: How is private power being used to aggrandize state power and in what ways are the state actors and the non-state actors so intertwined that they become part of the same legal activity? She proposes that the attribution rules ought to assess whether the contractor is "performing a role that is governmental – one that is considered to be in the inherent or core domain of a government." The core normative insight driving this reform is the idea that governments should not be able to evade responsibility by shifting their "inherent" or "core" activities to contractors.

One theme running through these three chapters is that the international attribution rules are based on a particular conception of the state that is overly rigid and frozen in time. Not only are these rules pinned to a fixed and outdated concept of the state, but they continue to lose ground by inadvertently disciplining future behavior by state-owned, state-controlled, or state-related entities. These entities learn to adapt to the attribution rules over time, constituting themselves and their behavior to fall on the *private* or *ordinary corporate* side of the public/private divide, thus operating below the level of international law. This is not a new phenomenon, as the next chapter shows.

In "The Enduring Charter: Corporations, States, and International Law," Doreen Lustig traces the origins and effects of what she calls the "separate spheres presumption" in international law. This is the basic presumption that states are "public" entities and business enterprises are "private" ones; the presumption is useful to "private" enterprises in that it serves to shield them from international legal scrutiny.[41] Lustig weaves together an origin story for this presumption that focuses on the end of the nineteenth century, homing in on the formal end of the corporate charter as a monopolistic device that granted corporations sovereign governance privileges in their colonies. With the end of the charter, lawyers began to view corporations as formally separated from the state. This formal legal separation obscured the persisting "deep interdependence" between the entities. Moreover, rather than producing greater regulation of private entities by governments, this formal legal separation rendered their close relationship "informal and flexible." Because corporations were identified as falling on the "private" side of the public–private divide, they became invisible under international law.

The post-charter "separate spheres" presumption has had a substantial influence on the development of international law, Lustig observes. Corporations have come to be "conceived by international law as 'nationals' in the context of diplomatic protection or 'investors' and 'individuals' in international investment law and international human rights" but "that nexus of nationality was not a sufficient basis for

[41] Doreen Lustig, "The Enduring Charter: Corporations, States, and International Law," *infra* Chapter 5.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

state responsibility" over their activities. Moreover, corporations exercise formal and informal regulatory authority themselves, blurring "the distinction between the corporation as a private individual and the state as the architype for public governance authority." Thus, "during the post-charter era, the international legal doctrines of state responsibility, diplomatic protection, human rights, and investment law weaved a veil that concealed much of the activities of corporations from legal scrutiny and nurtured the alliance between powerful governments and commercial corporations."

The result of this historical legacy, which continues to today, seems to be overly formalist conceptions of state and firm. These operate to exclude the behavior of states from international scrutiny when states outsource that behavior to private firms, even when those firms are wholly or partially state owned. These formalist demarcations also operate to exclude the behavior of firms, as they are conceived as private and, thus, below the level of scrutiny of international law. Nevertheless, moving below the level of international law to domestic law, there is another accountability gap at the transnational level, as the next part reviews.

TRANSNATIONAL ATTRIBUTION

When an abstract entity is not held accountable under international law because, for instance, it is found to be a private company and not a state, then the relevant law will be national law, known to international lawyers as "domestic" law. In other words, moving one rung down from the international legal context to the transnational context, national laws dictate how and when to attribute conduct to abstract entities that may commit wrongful acts, even when those entities are part of sprawling multinational corporate families. This transnational attribution involves questions of jurisdiction and extraterritoriality: Will a government apply its laws to a "foreign" entity organized under the laws of a foreign jurisdiction? Will a state apply its laws to conduct occurring outside its borders?

The transnational attribution question involves another area of extreme formalism based on a legal fiction. Domestic law doctrines will almost exclusively preserve the artificial legal "separateness" of entities, resisting the call to "pierce the corporate veil" and disregard that separateness for the purposes of attributing behavior from one entity to another.[42] Thus, when entities wholly own or control each other, the law permits financial proceeds to flow up from subsidiaries to parents, while cutting off liability for torts and contractual breach at the artificial borders of each entity.[43] Entities can organize corporate children all around the world. Proceeds of actions taken in those far-flung jurisdictions flow upward from corporate subsidiaries to parents and on to their shareholders, most often from the developed world,

[42] Brewster, *supra* note 27; *see also* SKINNER, *supra* note 32.

[43] Skinner, *supra* note 12, at 1807–08.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

while the upstream entities remain free from the burden of liability. That liability stays grounded with the often minimally funded corporate child, far from home.[44]

The result of these national law doctrines that preserve the separateness of entities despite their financial interdependence is another set of accountability gaps. Entities below the level of international law evade accountability under national law by doing business in jurisdictions unequipped to hold them to account, or at levels of capitalization that will not suffice to make victims whole. As the first chapter in this section shows, the accountability gap is complicated in the context of financial liabilities because separate entity status can also facilitate corruption.

In "Corporate Structures and the Attribution Dilemma in Multinational Enterprises," James T. Gathii and Olabisi D. Akinkugbe observe that the structural complexity of multinational enterprises operating in developing countries, particularly Africa, creates difficulties for domestic jurisdictions seeking to attribute tax responsibilities and financial liabilities to the appropriate entity.[45] Attribution of financial liabilities is particularly problematic for poorly resourced developing countries that host corporate subsidiaries. The problem is worsened in Africa by the involvement of domestic elites who complicate attribution questions through various forms of opportunistic and corrupt behavior. The story begins with colonialism, Gathii and Akinkugbe show, and specifically the strategies of transnational enterprises anxious to reinvent themselves from "guardians of the colonial order" to "partners in building the new post-colonial states." To avoid a post-colonial legitimacy crisis and curry favor with African governments, multinational corporations have adopted "Africanization" policies, such as recruiting African elites as officers and directors, which has allowed "transnational capitalist elites" to siphon public funds, block investigations, and generally create conduits for illicit financial flows. Legal rules that attribute liabilities among the members of a transnational corporate family are inadequate if they do not account for this complex post-colonial context.

Taking as a given that separate entity status produces an accountability gap in the transnational context, academic debates in this area principally focus on how to address it. Existing conversations have focused on whether entity separateness should be set aside in the context of vast corporate families, with up to thousands of subsidiaries around the world. Should entity separateness be set aside when harms are foreseeable? When conduct is particularly hazardous? When the parent meddles too much, or when it was inadequately diligent?

The following two chapters explore out-of-the-box approaches to these questions. Perhaps, Kishanthi Parella suggests, *reputational* attribution can help address the

[44] As Doreen Lustig observes, the governance gap results from "[t]he regulatory weakness of host states and limited to no regulatory responsibility of home states." *See infra* Chapter 5.

[45] James Gathii & Olabisi Akinkugbe, "Corporate Structures and the Attribution Dilemma in Multinational Enterprises," *infra* Chapter 6.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

gap? Or perhaps, Dalia Palombo proposes, we need a new conceptual frame that binds corporations to society with a social contract? Both approaches take as an inevitable given that corporations will continue to enjoy the protection of the fiction of separate entity status – a seemingly necessary condition as a political matter, although not as a conceptual or legal one.

In "Transnational Blame Attribution: The Limits of Using Reputational Sanctions to Punish Corporate Misconduct," Parella lays out the landscape: Because attributing responsibility among members of complex transnational families of entities presents an array of difficult challenges, including home state reluctance to enforce laws over foreign domestic subsidiaries operating abroad, legal sanctions may be wholly inadequate.[46] Reputational sanctions can offer a complementary strategy, Parella proposes. She unpacks the legal difficulties by exploring a case study: a prominent recent U.S. Supreme Court case, *Doe v. Nestle*, which reflects U.S. courts' "unwillingness to recognize causation between the types of corporate decision-making that occurred in the United States and the harms suffered elsewhere." The reason is the United States' restrictive presumption against the extraterritorial application of its statutes – a presumption mirrored in the comity doctrines of other capital-exporting countries. Legal rules may, however, facilitate the operation of reputational markets, which can trigger penalties that "magnify the costs of the misconduct, thereby (hopefully) encouraging companies to alter their conduct for the better going forward." Nevertheless, reputational sanctions are not a panacea. Blame attribution is difficult in both the legal and reputational contexts for factual reasons ("lack of information concerning what happened … why it happened …, and by whose hand it happened…."), and normative reasons – neither legal systems nor reputation markets have figured out who, in complex production and consumption networks, is to blame for the externalities of this system.

In "Mind the Agency Gap in Corporate Social Responsibility," Palombo widens the aperture, looking beyond the individual doctrinal hurdles that prevent attribution of harmful conduct from subsidiaries to corporate parents.[47] These doctrinal gaps are attributable to a larger failure of law to define principles of corporate accountability to society, Palombo claims. Existing frameworks for corporate accountability are inadequate: corporate social responsibility involves only voluntary commitments, not legal obligations, and corporate accountability to shareholders does not address harms to the rest of society. For states, by contrast, social contracts embedded in constitutions and public law set the terms of the relationship between society and its government, transforming public officials into agents, and society

[46] Kishanthi Parella, "Transnational Blame Attribution: The Limits of Using Reputational Sanctions to Punish Corporate Misconduct," *infra* Chapter 7.

[47] Dalia Palombo, "Mind the Agency Gap in Corporate Social Responsibility," *infra* Chapter 8.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

into the principal. Corporations already have important relationships with society: they accomplish public goods, control the means of production, and produce externalities. There is no principled reason why society should not have a social contract with corporate actors as it does with states, which would transform those entities into agents accountable to society, Palombo asserts. Since this framework has not yet been established, or even imagined, Palombo concludes that we are in the "prehistory of corporate social accountability."

The fiction of separate entity status creates rigid segmentation of responsibility, these chapters have observed; and the problem is compounded when that status facilitates corruption, restrictive extraterritoriality doctrines, and normative uncertainty about what responsibilities corporations should bear. The result is that harms can be externalized, with responsibility for them safely squirreled away within the confines of individual, far-flung, undercapitalized entities. While capital comes home, liabilities do not. The solution these chapters suggest is either incremental – a turn to reputational levers, or an acknowledgment of post-colonial context – or it is radical – a dismantling of separate entity status, or an entirely new social contract between firms and society.

DOMESTIC ATTRIBUTION

At the same time that corporations assert the protections of separate entity status to defend against liability for human rights violations, they have also used that entity status and its accompanying personhood metaphor to seize rights that belong to human persons. While concepts of corporate personhood reach as far back as Roman law, corporate personhood in the U.S. context expanded in the nineteenth century with the end of slavery and the passage of the 14th Amendment.[48] It originally comprised the legal right to sue and be sued, then "expanded fairly quickly until it had rendered the corporation a rights-holder, like a natural person."[49] This legal status has recently received intense academic and popular interest.

Debates about the nature and identity of a corporation have been disciplined by the compelling metaphor of personhood – which entities use as a tool to claim more rights. However, the metaphor functions imperfectly as a legal principle, that is, as a coherent rationale for assigning rights to artificial persons. A flurry

[48] *See infra* Chapter 12 at n38. While this portion of the book focuses principally on corporate identity debates within the United States, these relate to important discussions about corporate identity under international and European human rights law. *See, e.g.*, Silvia Steininger & Jochen von Bernstorff, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate "Human" Rights in International Law*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 280, 290 (Ingo Venzke & Kevin Jon Heller eds., 2021); GREAR, *supra* note 33; UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2008); Andreas Kulick, *Corporate Human Rights?*, 32 EUR. J. INT. L. 537 (2021).

[49] *See infra* Chapter 9 at n50.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

of recent scholarship in the United States responds to the U.S. Supreme Court's recent struggles to define what, precisely, the corporate person is. This inquiry has been precipitated by corporate claims for constitutional speech rights, exemptions from regulation on the ground of moral identity, and immunity from liability for matters that require a mental state, among other matters. Each of these issues raises questions of identity attribution. What is the principle by which features of human personhood – speech, mind, moral soul – should be attributed to artificial entities? As the following chapters show, the personhood fiction and metaphor break down under scrutiny.

In "To Whom Should We Attribute a Corporation's Speech?" Sarah C. Haan handily deconstructs the "facile" metaphor of corporate personhood in the context of corporate speech. Her argument is conceptual and normative.[50] The personhood "conceit … works poorly for speech attribution, because corporations share few of the characteristics of human persons that are relevant to speech production." Corporations produce speech through governance processes, rather than organic ones, and while human people may express themselves for the purposes of autonomy, self-realization, or "fulfillment," these concepts are meaningless in the context of corporations. "To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes," she quotes U.S. Supreme Court Justice Rehnquist as saying, "is to confuse metaphor with reality." Nevertheless, U.S. jurisprudence on corporate speech attribution for constitutional purposes has historically done exactly that, with important implications. As Haan points out, in the realm of speech and expression, basing legal expressive rights on a concept of corporate personhood "expresses the normative judgment that corporations and human actors are functionally equal." The approach facilitates corporate power, sows confusion and distrust of corporate speech, and devalues human expression. Haan would have the law dispense with the fiction that corporate and human speakers are analogous for speech purposes, and instead base rights and responsibilities on the internal governance processes that produce corporate speech.

Benjamin P. Edwards, in "What Is a Corporate Mind? Mental State Attribution," explores an area of law where the personhood fiction appears to be useful to hold corporations to account for bad acts such as securities fraud.[51] But while the personhood fiction allows the law to bring business entities within the ambit of the criminal law, differences between human and corporate persons complicate the analysis and ultimately allow corporate persons to more easily evade scrutiny. The challenge is that attributing mental states to business entities "requires law to embrace a double fiction" that business entities "exist," and that they have the specific sorts of intent that can makes their conduct liable. Such a compound analysis

[50] Sarah C. Haan, "To Whom Should We Attribute a Corporation's Speech?," *infra* Chapter 9.

[51] Benjamin P. Edwards, "What Is a Corporate Mind? Mental State Attribution," *infra* Chapter 10.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

challenges courts to "attribut[e] a mental state to a mindless legal fiction." The simplest approach might seem to be to locate this intent in a particular human responsible for the corporate decision, but Edwards rejects this approach. It would problematically absolve a corporation of liability for algorithmically produced decisions and fail to recognize the intentionality of the entity as a whole when bad acts are distributed across actors and cannot be traced to individuals. "Business entities today often behave more like octopi than humans.... One employee may make statements that another employee knows to be false," but "our law makes it unlikely that any mental state would be attributed to an entity for these acts – even though we would likely attribute intentionality if we understood the entity to function as a whole." The law should recognize this decentralization, but the personhood metaphor obscures it.

In "Who Is a Corporation? Attributing the Moral Might of the Corporate Form," Catherine A. Hardee observes that U.S. jurisprudence has begun to give corporations "deeply personal rights," including "the freedom of religion," while at the same time corporations face calls to express moral agency in response to societal problems like racism and climate change.[52] The result is widespread agreement from across the political spectrum that the corporation can generate and act upon moral principles. But who or what is the moral conscience of the entity? The question matters to legal rights when, for example, a corporation claims religious beliefs that exempt the entity from otherwise applicable laws regarding discrimination, or reproductive health care coverage. It may also be "desirable to ensure that those who are impacted by corporate moral decision making have a voice in the creation of the corporation's moral code." U.S. courts have nevertheless struggled to express a consistent theory of morality attribution. Here again, fictional personhood diverges from organic personhood. Only in the former instance does the question of morality attribution arise, yet the personhood, or "separate entity" construct cannot answer it. Hardee thus examines the playbill of potential individuals who may have a claim on the corporation's moral conscience – shareholders, management, employees, and consumers – and offers a nuanced analysis that would peg moral identity to different groups in different contexts. In particular, Hardee draws a distinction between "corporate ethics designed to supplant democratically imposed norms," which should require a heightened level of "true corporate democracy," and "corporate morality working within democratically set limits, [which] may raise fewer representation concerns."

Read together, these three chapters show the how the corporate personhood metaphor cannot offer a coherent rationale for corporate rights, although it has been offered as a legitimizer for them. Analogizing corporate persons to human persons would seem to suggest a "functional equality" between the two, such that

[52] Catherine A. Hardee, "Who Is a Corporation? Attributing the Moral Might of the Corporate Form," *infra* Chapter 11.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

characteristics and rights attaching to the latter should also be attributed to the former.[53] But since personhood can create only juridical personality and not consciousness, it cannot endow corporate entities with the powers to which human rights attach, like self-expression, intention, and morality. Each of these must be traced back to individuals, a fact which the personhood metaphor obscures, rather than resolves.

POLITICAL AND CONCEPTUAL GENEALOGIES

The final section of the book develops origin stories for the current conceptual and doctrinal landscape. In particular, these chapters dig more deeply into the concept of juridical personhood to try to understand how this artificial entity status has come to carry the consequences explored in the previous chapters. The first takes a political history approach, while the second develops a conceptual genealogy. These chapters frame a poignant question: Why do lawyers keep trying to elaborate the personhood metaphor and render it knowable, when the metaphor is thin, holds limited uses, and has a distortive effect when read beyond those uses?

In "The Juridical Person of the State: Origins and Implications," David Ciepley finds the idea of juridical personhood to have been developed in the context of the Catholic church "by canon lawyers, who developed [it] into a robust body of rules for the external and internal operation of corporate bodies – a procedural and constitutional law for corporations. These rules were then applied to the largest 'corporate' bodies of all, the Church, Empire, commune, and kingdom." Two of these canonical ideas were "personification and officeholding," which allowed for the continuity of an entity beyond the lifetime or tenure of individuals. Juridical personhood expresses the concept that there is an entity, and not an individual human person, who "owns all the property, makes all the contracts, and appears in court in its own name rather than in the name of natural persons." To apply these ideas to the state, one had to square them with the idea of sovereignty. How can the state be both a sovereign maker of law and bound by the law? Ciepley says the answer is found in the Americans' experience as corporate colonies. Americans eschewed the idea of a lawless sovereign and wanted their government bound by law in the way that corporations are, so they adopted familiar corporate forms from their colonial experience: "written constitutional charters, constitutional conventions, elected executives, judicial review, and charter amendment." These allowed the American "People" itself to be the sovereign; their creation could maintain "juridicality" through the institutions of government, which they had chartered.

The chapter shows how the idea of personhood is both very old and quite new in its application to the state. It also shows, by illustration, the narrow uses to which juridical personhood can be put. There is nothing necessary about

[53] Haan, *infra* Chapter 9.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

expanding the personhood metaphor to create a false equivalence between corporate and natural persons for the purpose of human or constitutional rights. As Joshua Barkan observes in the next chapter, however, that metaphor metastasized in the legal imagination.

Barkan's "Corporate Personhood as Legal and Literary Fiction" closes out the volume with a Foucauldian "genealogical" approach to juridical personhood. The chapter tries to understand the uses of this legal fiction in "relation to the shifting uses of corporate and state power."[54] Barkan's starting point is the difficulty personhood presents for human rights. In the context of natural persons, personhood rights protect the vulnerability of embodiment, while for corporate persons they "protect and immunize … from regulation and legal oversight" "some of the most powerful institutions in contemporary society." There is no easy fix: Corporations, like embodied persons, can use the language of vulnerability to establish their need for protection.

While legal scholars approach this puzzle by trying to get to the *truth* of the metaphor, to understand the concept in line with some more foundational idea that would allow a pragmatic legal use, Barkan would reverse the inquiry. He proposes to ask, instead, why the law insists on recourse to this fiction, and tries so hard to refine and maintain it. The answer to this question, in Barkan's analysis, has to do with quelling societal conflict and securing group or class power. What dystopian fiction understands about corporations, but law does not, "is that central problems with corporations and corporate power are caused by, rather than resolved by, law." The solution is not "a more accurate image of the corporate person" but something more fundamental that cures the "radical dissatisfaction" of the dystopian nightmare by dismantling the formal structures of collective life.

THEMES OF THE BOOK

The multinational corporate enterprise "barely exists under international law," as John Ruggie has memorably stated.[55] Enterprises are not single actors, but families of separate legal entities organized under the national laws of individual states; these entities are "invisible" to international law[56] because they do not hold a subject status that could confer formal responsibilities on them, as states do. Nevertheless, the formal legal status of firms under international law belies a much more complex relationship between firms and states.

There has been growing and sustained interest among lawyers in the late twentieth and the early twenty-first centuries in this complex relationship. Observations

[54] Barkan, *infra* Chapter 13.

[55] John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 12 Regul. Gov. 317 (2018).

[56] Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 Melb. U. L. Rev. 893 (1994).

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

in political science and international relations about the global power of multinational corporations have influenced legal inquiries about the rights and duties of the entities.[57] The United Nations has grappled with whether and how to regulate multinational entities, and has increasingly welcomed private actors as partners in global governance agendas.[58] Private market actors have increasingly sought to participate in global governance projects and have signed on in droves to Global Compact and climate change pledging platforms.[59] Literatures have flourished in law about corporate responsibilities to society and for human rights, and the rights these entities may hold within society due to their status as legal persons.[60] New projects in law have started to train their sights on the multinational or "global" corporation as a unitary actor holding various sorts of power, despite its international legal invisibility.[61] In sum, while multinational entities are murky, minimally cognizable entities from the perspective of international law, it is clear that they have various forms of global power. Both international and domestic lawyers have tried to assess the legal bases for that power, and legal means of grounding it in relevant forms of responsibility.

This book organizes these questions through the concept of "attribution," both as a doctrinal instrument and conceptual touchstone. As the chapters that follow show, law has various ways of ascribing and assigning identity and responsibility at the international, transnational, and domestic levels.

As a whole, the volume demonstrates that these ascriptions of identity and responsibility are often elastic in one direction and rigid in another. For example, there is a permeability of the boundary between firms and states, as states enter the market through ownership and retreat from governance through outsourcing. But international legal doctrines of state responsibility for internationally wrongful acts are not flexible enough to offer a nuanced appraisal of the expansion and contraction of the state in order to assign responsibility consequences to relevant actors. These doctrines operate to exclude the behavior of states from international scrutiny when they outsource activities to private firms, even when those firms are wholly or partially state owned. Responsibility doctrines are also based on a particular conception of the state that is overly rigid and increasingly outdated, and they entirely

[57] *See, e.g.*, Joseph Nye, *Multinationals: The Game and the Rules: Multinational Corporations in World Politics*, Foreign Aff. (Oct. 1, 1974); Strange, *supra* note 16.

[58] *See* Georg Kell, *Relations with the Private Sector*, *in* The Oxford Handbook of International Organizations (Jacob Katz Cogan, Ian Hurd, and Ian Johnstone, eds., 2017); *see also* Melissa J. Durkee, *Privatizing International Governance*, 116 ASIL Proc. 147 (2023).

[59] Melissa J. Durkee, *The Pledging World Order*, 48 Yale J Int. L 1 (2023).

[60] See sources cited *supra* notes 2–4, and accompanying discussion.

[61] One salient example is Sundhya Pahuja's pathbreaking Laureate Research Program in Global Corporations and International Law at Melbourne Law School, which aims "to examine the role of international law in enabling global corporate power, to identify the ways in which international law and institutions can be reformed to limit that power, and to [facilitate] a more balanced relationship between states and global corporations." *See* www.lpgcil.org/about (last accessed Apr. 12, 2023).

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

exclude the behavior of firms, as those entities are conceived as private, and thus unreachable by international law.

There is similarly an elasticity and rigidity in the way that corporations can use separate entity status to expand operation all over the world in corporate families of parents and far flung subsidiaries, but separate entity status is flexible in only one direction. It creates an impermeable segmentation of responsibility between those entities. The result is that harms can be externalized, with responsibility for them confined within individual undercapitalized entities in jurisdictions foreign to the parent entity. Separate entity status ensures that capital travels, not responsibility. The interventions in this book show just how difficult it is to overcome this rigidity, suggesting either minor corrections or major reforms that would create a radical reconceptualization of the role and responsibilities of firms in their relation to society.

The book as a whole also spotlights the borrowing between firms and states, and their opportunistic co-creation. These include the post-charter context where firms wrote themselves out of international law by policing the public-private divide, the post-colonial context where firms curried favor with African governments by "indigenization" strategies that increased the complexity of corporate families, the disciplining of the state into an "ordinary" market participant in the investment arbitration context, the transplantation of juridical personhood from firms to states, and the claiming of constitutional protections from states by firms, among many examples.

Ultimately, reading the chapters in this volume together shows how legal constructions ascribing entity identity and responsibilities can come to seem necessary, inevitable, and immutable. They can become invisible, woven so deeply into the legal imagination and the fabric of common life that it becomes hard to perceive them, and to perceive their artificial nature, and thus their fundamental contingency.

CONCLUSION

This volume aims to offer a new point of entry for enduring questions about how the law conceives of firms and states. The point of entry is attribution. Because firms and states are fictitious constructs rather than products of evolutionary biology, the law must make decisions about which acts it should attribute to them, and by which actors. Those legal decisions construct firms and states by attributing identity and consequences to them. And those decisions, in turn, are products of conceptual storytelling. The attribution framework allows the volume to consider together an array of problems that are usually divided into doctrinal siloes, addressing particularly relevant and difficult questions about how the law should deal with artificial entities: attribution of international legal responsibility, transnational attribution of liabilities, and attribution of identity to artificial actors.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

Together, the chapters in this volume show how much conceptual and theoretical work is needed to address the important responsibility challenges of our time. By highlighting the artificiality of doctrines that construct firms and states, the chapters in this volume emphasize their mutability. These doctrines exist, together with their founding metaphors and traditions, in the legal imagination. If law is to be of service to human needs, then it should create entities that reflect those needs. Perhaps those human needs might serve as a touchstone for the entities created to address them.

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press

https://doi.org/10.1017/9781009334709.001 Published online by Cambridge University Press