WHAT A STATE WANTS: THE LANGUAGE OF ANOTHER LEGAL FICTION

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Introduction

States are the villains in Justice Anthony Kennedy’s majority opinion in Obergefell v. Hodges, the 2015 marriage equality decision. Toward the end of the opinion, Justice Kennedy describes states as tormenting the couples who brought the case:

James Obergefell . . . asks [in this case] whether Ohio can erase his marriage to John Arthur for all time. April DeBoer and Jayne Rowse . . . ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children . . . Ijpe DeKoe and Thomas Kostura . . . ask whether Tennessee can deny to one who has served this Nation the basic dignity of recognizing his New York marriage.¹

While his Obergefell opinion has been much examined and criticized, Justice Kennedy’s personification of states in this passage and throughout the opinion has not drawn attack. Indeed, all of the justices who wrote opinions in Obergefell use this technique, even though, of course, the dissenting justices use it to very different ends. Justice Kennedy’s casting of the states as villains allows him to avoid vilifying human opponents of same-sex marriage.² The dissenting justices, in contrast, stress the states’ roles as actors with a kind of freedom of moral choice. Chief Justice Roberts, for instance, argues in his dissent that “[a] State’s decision to maintain the meaning of marriage that has persisted in every culture

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³ Justice Kennedy also writes, for example, that “the States are now [at the time of the case] divided on the issue of same-sex marriage.” Id. at 2597. Justice Kennedy also writes, “It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.” Id. at 2602.
throughout human history can hardly be called irrational,” and describes the petitioners as claiming “[a] right to make a State change its definition of marriage.” Justice Scalia observes that “the States are free to adopt whatever laws they like.” Although Justice Thomas is generally more circumspect in describing states’ actions, he too refers in his dissent to the states’ “commitment to religious liberty,” and his overall legal point is that state sovereignty should trump individual claims of liberty. To be sure, the dissenting justices also often discuss “the People” as victims of the majority’s decision. Each of these justices, however, mixes such references with others that personify the states. None criticizes Justice Kennedy for this aspect of his opinion.

The justices apparently agree that it is appropriate to describe states as entities that can choose, want, and even feel. Justices and commentators are, in contrast, sharply divided over the personification of other non-human groups, such as corporations. Although justices and laypeople attribute actions, rights, and thoughts to corporate entities, those attributions remain intensely controversial. Critics insist that it is morally and even metaphysically wrong, as well as linguistically sloppy, to speak and write about corporations in this way. Of course, these controversies mainly concern the extension of legal rights to corporations, not just the rhetorical attribution of human traits to them. As this essay will show, however, American legal discourse also often attributes legal rights and entitlements to states as such, even though Obergefell did not involve this kind of legal personification.

Why do American lawyers and Supreme Court justices, at least, find the personification of states so much less troubling than the personification of business associations? Is the difference justified? This Essay explores these questions, examining the implications of language attributing desires and commitments to the fifty states. The subtitle of the Essay, and its initial focus on the forms of language used to personify the states, are inspired by a 1987 law review article by Sanford Schane, *The Corporation Is a Person: The Language of a* 5

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5 *Id.* at 2611 (Roberts, C.J., dissenting).
6 *Id.* at 2619 (Roberts, C.J., dissenting).
7 *Id.* at 2629 (Scalia, J., dissenting).
8 *Id.* at 2638 (Thomas, J., dissenting). Justice Alito’s account is similar: “[T]hose States that do not want to recognize a same-sex marriage have not yet given up on the traditional understanding. They worry that by officially *abandoning* the older understanding, they may contribute to marriage’s further decay.” *Id.* at 2642 (Alito, J., dissenting).
9 Chief Justice Roberts describes the “voters and legislators” in the states as the sources of same-sex marriage bans. *Id.* at 2637 (Roberts, C.J., dissenting). Justice Thomas argues that “when the States act through their representatives or by the popular vote, the liberty of their residents is fully vindicated.” *Id.* at 2637 (Thomas, J. dissenting). Justice Scalia refers repeatedly to the “people” in his dissent. *Id.* at 2627–29 (Scalia, J., dissenting). Justice Alito also refers repeatedly to the “people” in his dissent. *Id.* at 2642–43 (Alito, J., dissenting).
Legal Fiction. Part I below discusses the intriguing approach—combining linguistic and legal analysis—that Schane developed. Part II uses a modified version of this approach to analyze the language used to discuss states in the federal Constitution and in two important decisions from the same Supreme Court term as Obergefell: Walker v. Texas Division, Sons of Confederate Veterans and Glossip v. Gross. Part III discusses some surprising implications of these findings for our understanding of legal activity, including lawyers’ treatment of individuals.

I. The Language of Legal Personhood

Sanford Schane’s 1987 article on corporate personality contributed to a long-running debate on the topic. Usually, that debate proceeds in normative or metaphysical terms: some participants argue that corporations should be treated, legally, as akin to human beings (e.g., because corporate activities both benefit and harm humans in ways similar to the effect of human actions on other humans), and others argue the contrary (pointing out, e.g., that corporations lack the kind of coherent embodiment necessary for rational action and thus for moral responsibility). To the extent that lawyers, judges, and observers have debated the “personhood” of states—and they do so very seldom—they have conducted that debate in similarly normative terms, focusing on how we should consider and discuss states’ rights and obligations, rather than whether and how we already do so.

Schane’s article did intervene in the standard normative debate about corporate personhood. In conventional legal fashion, he drew on judicial opinions to outline the history of legal approaches to corporate personhood. Today, scholars cite Schane’s article mostly for his observations on this history.
and competing “theories” of corporate personality. But Schane also used a much less traditional method in the last section of his article. To support his conclusion that “[i]t is . . . a part of ordinary language—to speak about institutions as though they are persons,” Schane used simple examples of everyday language, not legal language. A typical set of examples looks like this:

(12) a. The corporation has aligned itself with labor.
    b. *The corporation have aligned themselves with labor.
    c. *There is dissension among IBM.

These sentences show that in American English, outside the legal context, nouns referring to corporations take singular-form verbs and pronouns. Schane thus presents a descriptive account of language use and, by implication, of conceptualization, alongside the standard normative arguments about corporate personality more familiar to lawyers.

Schane’s descriptive conclusion does not concern just the personhood of business associations. Rather, he concludes that speakers of American English treat “institutional” nouns similarly to the way they treat nouns referring to human individuals, not like other kinds of nouns, such as “collective” and “mythical” nouns. Schane concludes that “[i]nstitutional nouns have unique properties.” Such nouns do not take what Schane calls “physiological” verbs (such as “eat,” “sleep,” or “run”) except in a metaphorical sense. But institutional nouns can take all cognitive verbs—verbs like “think,” “believe,” “doubt,” and “want.” Although Schane does not put the point quite this way, his argument is that we are willing to infer things about corporate actions (and

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15 See, e.g., Robinson, supra note 8, at 613 n.32; Carl J. Mayer, Personalizing the Impersonal: Corporations and the Bill of Rights, 41 HASTINGS L.J. 577, 580 n.16 (1990).
16 Schane, supra note 9, at 595.
17 Id. at 601. According to conventions common in scholarship on language, the asterisks mark sentences deemed nonstandard or deviant. The italicized words are the focus of attention.
18 Id. at 595. The examples Schane gives are “corporation,” “Harvard University,” “Supreme Court,” “Catholic Church,” and “sporting industry.”
19 Id. Schane calls these “human” nouns.
20 Id. For example, “committee,” “jury,” and “team.”
21 Id. For example, “angel” and “unicorn.”
22 Id. at 607.
23 Id. at 597, 602–03. This distinguishes institutional nouns from both human and mythical nouns.
24 Id. at 597, 607. This also distinguishes institutional nouns from mythical nouns. Id. at 597, 604, 606. Institutional nouns are also distinct from collective nouns because the latter sometimes take plural verbs and adverbs (see example (c) above) and can also take physiological and “action” verbs (such as “read,” “play chess,” “cook,” “vote”). Schane concludes that these linguistic data are most consistent with the “real entity” theory of corporate personality, which holds that corporations exist in some sense as identifiable things beyond the individuals who create them. (Those individuals are the focus of the “group entity” or “nexus of contracts” theory, which Schane links to collective nouns.) The real entity theory also acknowledges an existence for corporate entities independent of their legal projection by the state, the focus of the “creature theory,” which Schane analogizes to mythical nouns.
thoughts) from corporate attributes in a way that is similar to the way we infer things about human individuals, and different from the way we infer things about mythical creatures. He concludes that corporate personality is, despite his article’s subtitle, something more than simply a legal fiction; the law “did not invent the linguistic imagery resulting from the assignment to institutions of cognition and other human abilities.” Rather, “[t]he law has been able to exploit to its advantage and to maximize for its needs conceptualizations that are deeply embedded within the structure of language.”

Schane’s approach suggests that one way to justify a particular legal treatment of an issue may be to ask whether that legal treatment is consistent with the ways we otherwise discuss that issue. This was, and still is, a novel way of evaluating the legitimacy of legal theories, doctrines, and decisions, and this essay will follow Schane’s suggestion that descriptive accounts of language use should inform our normative conclusions. Schane’s study does have some limitations. One is inherent in his linguistic method, which depends on the theorist’s intuitions about standard and nonstandard usage. Schane’s intuitions might or might not be representative. His approach does not acknowledge the possibility that members of different groups might discuss institutions differently, either now or over time. In addition, Schane treats all institutional nouns alike; he places nouns naming both governmental and non-governmental entities in the same category of “institutional nouns,” even though he relates his findings specifically to theories of corporate personality.

The following pages continue and update Schane’s project. Part II presents descriptive accounts of the ways users of legal language have treated a different institutional noun—“state”—both historically and more recently. The goal of this description is not to evaluate the merits of recognized theories of state personhood, but rather to begin identifying those theories, or to describe the models of state personhood that seem to be implicit in legal language recognizing and addressing this fundamental American legal fiction.

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25 Id. at 609.
26 Id.
27 Most subsequent citations to Schane’s article point to his description of corporate personality as a legal fiction or to his accounts of the legal doctrines and theories of corporate personality, rather than to his linguistic analysis. A few studies published since Schane’s article have, like him, focused on analyzing patterns of language use, but these studies have addressed specifically legal language and a broader array of issues than personification, such as historical shifts in judicial accounts of the dynamics of racial discrimination, see Amsterdam & Bruner, supra note 9, and patterns in the language of the federal Constitution, Epps, supra note 9.
28 Amsterdam and Bruner, supra note 9, at 150 (addressing the “extent to which governmental players [e.g., states, municipalities, school districts, etc.] dominate the scene” in the “text of” the Supreme Court opinions in Prigg v. Pennsylvania, 41 U.S. 539 (1842); Brown v. Board of Education, 347 U.S. 483 (1954); and Freeman v. Pitts, 503 U.S. 467 (1992)). Amsterdam and Bruner’s analysis of “the frequencies of nouns and verbs, referring to human and governmental beings and their actions” in these opinions is another influence on the approach used in this essay.
II. The Legal Language of States as Persons

“State” and “corporation” both name types of “institution,” but of course they are quite different kinds of institutions in several respects. States have physical territory, while corporations do not. In American political mythology, states preexisted the federal union, while corporations did not (or at least did not constitute the union as states arguably did); the federal Constitution refers to “states” many times, but not once to corporations. States enjoy some immunity from suit as political sovereigns, while corporations do not. Still, Schane’s classification of “state” as linguistically akin to “corporation” is sound; the noun “state” (or the names of individual states, as in Justice Kennedy’s Obergefell opinion) does take cognitive verbs in singular form, at least in American English. As the next section will explain, this linguistic pattern has been part of U.S. legal convention for more than two centuries.

A. States in the Constitution

As the “word cloud” above shows, “state” is the noun that occurs most often in the United States Constitution. That document, including all of its amendments, is a bit more than 7,000 words long, and the word “state(s)” appears in it 206 times. More than 100 of those times, the word appears alone (that is, not as part of the phrase “United States”). The frequency of references to the states in the ratified document reflects the significance of state affiliation among the participants at the Constitutional Convention. Of course, the ultimate role of the states in the federal order created by the Constitution was a contentious issue at the framing and a main point of disagreement between Federalists, who favored a strong central government, and anti-Federalists, who

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29 Word cloud created on April 15, 2017, using the WordItOut application (www.worditout.com).
30 By comparison, “President” appears 121 times, “person” roughly 60 times.
31 As Epps points out, “[t]he first draft of the Preamble [to the Constitution]... read, ‘we the people of the States,’ rather than just ‘we the people.’” Epps, supra note 9, at 4 (emphasis in original).
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favored strong state powers. The document we now have mostly reflects the Federalists’ victory but retains traces of this debate. It also suggests some historical limitations of Schane’s account of institutional nouns.

In the Constitution, 87 of the appearances of “state” make the word the object of a preposition, such as “in,” “of,” “for,” or “among.” Some prepositions, especially “of,” might suggest the personification of their objects as entities capable of possessing other things. Overall, however, the occurrences of “state” as the object of a preposition in the Constitution convey a more territorial or abstract conception of states as organizational subdivisions or geographical spaces. An example appears in Article I, Section Two: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.”

The Constitution also contains nearly 50 uses of “State” as a grammatical subject or agent. The verbs describing states’ exertions in the Constitution are mostly not the kind of cognitive verbs Schane describes as conventionally used with institutional nouns, but rather “activity” verbs, which Schane classified as potentially appropriate for use with such nouns. This pattern does not mean, however, that the Constitution presents the states as dynamic entities with a variety of capacities for action. Article IV, for instance, is the portion of the 1787 document that most directly concerns the states’ powers after union, and it includes many passive constructions, many without grammatical agents. The Full Faith and Credit Clause is particularly evasively worded: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial

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32 Zick, supra note 13, at 224, 226–43.
33 See, e.g., Epps, supra note 9, at 31, 63, 77–78, 87.
34 See generally U.S. Const. This count includes such constructions as “of the State legislature,” that is, instances where “State” modifies a noun in a prepositional phrase.
36 The table below shows the frequency with which “state” appears in the Constitution as the subject of each of the listed verbs:

<table>
<thead>
<tr>
<th>Verb</th>
<th>Frequency</th>
<th>Verb</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deny</td>
<td>5</td>
<td>Be entitled</td>
<td>1</td>
</tr>
<tr>
<td>Abridge</td>
<td>4</td>
<td>Be erected</td>
<td>1</td>
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<tr>
<td>Appoint</td>
<td>3</td>
<td>Coin</td>
<td>1</td>
</tr>
<tr>
<td>Lay/laid</td>
<td>3</td>
<td>Deprive</td>
<td>1</td>
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<tr>
<td>Be formed</td>
<td>2</td>
<td>Emit</td>
<td>1</td>
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<tr>
<td>Enter</td>
<td>2</td>
<td>Enforce</td>
<td>1</td>
</tr>
<tr>
<td>Grant</td>
<td>2</td>
<td>Engage</td>
<td>1</td>
</tr>
<tr>
<td>Make</td>
<td>2</td>
<td>Have</td>
<td>1</td>
</tr>
<tr>
<td>Assume</td>
<td>1</td>
<td>Have power to enforce</td>
<td>1</td>
</tr>
<tr>
<td>Be</td>
<td>1</td>
<td>Pay</td>
<td>1</td>
</tr>
<tr>
<td>Be a party</td>
<td>1</td>
<td>Prohibit</td>
<td>1</td>
</tr>
<tr>
<td>Be admitted</td>
<td>1</td>
<td>Ratify</td>
<td>1</td>
</tr>
<tr>
<td>Be deprived</td>
<td>1</td>
<td>Think</td>
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</tr>
</tbody>
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37 Schane, supra note 9, at 603–04.
Proceedings of every other State." 38 These passive constructions, perhaps accommodating the anti-Federalists’ concerns, limit the freedom of the states (or more precisely, their officers) without describing the states themselves as directly regulated or acted upon. Such direct federal fettering of state freedom was just what anti-Federalists feared and criticized. The Full Faith and Credit Clause addresses their concern by presenting the state as simply the site where unspecified agents acknowledge the speech acts of other states, assuming the existence of the states as actors but not as recognizers, while still commanding recognition.

The drafters’ linguistic treatment of states shifts between the 1787 document and its early amendments, on the one hand, and later amendments, including the Civil War amendments, on the other. 39 The early clauses of the 1787 document, such as those in Article I, describe the states as contributing to the formation of the federal legislature (and electing the federal president). Often, the document presents this power as exercised through others, such as “people,” “electors,” and the state “legislatures.” 40 But structurally, the Constitution treats the states as players in the federal game. The organization of the Senate—which treats states like individuals by giving each one an equal, if divisible, vote—perhaps displays this attitude toward the agency of the states as states most clearly. 41 In a less egalitarian mode, the Migration and Importation Clause of Article I, Section 9, also reflects the influence of advocates for state power at the framing. This clause, the only place in the Constitution where states “think” anything, provides: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.” 42 This clause committed the federal government to permit continued trade in slaves for thirty years following the framing. The clause’s built-in expiration date suggests its status as a concession to the demands of a powerful coalition by drafters who may have perceived those demands as inconsistent with other commitments implied by the document. 43

38 U.S. Const., art. IV, § 1. Another example appears in Section 3 of Article IV, addressing the formation of new states: “no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned.” U.S. Const., art. IV, § 3, cl. 1; see also Epps, supra note 9, at 63–65.

39 Articles IV and VI restrict the states’ activity, but do so relatively indirectly. See Epps, supra note 9, at 76–78, 87–88.

40 See, e.g., U.S. Const., art. I, § 2, cl. 1, 3; art. I, § 3, cl. 1, 2; art. I, § 4, cl. 1; art. II, § 1, cl. 2, 3.

41 U.S. Const., art. I, § 3, cl. 1; see also Zick, supra note 13, at 231. The electoral college of Article II, Section One, Clause Three is another example of structural power conferred on the states.

42 U.S. Const., art. I, § 9, cl. 1.

43 See Epps, supra note 9, at 27: “[The Migration and Importation Clause] represented a generous concession to the deep South states, which feared that their interests would lose any fair political battle after ratification; on the other [hand], it is
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The Migration or Importation Clause was an early American model for a rhetorical practice that lawyers and judges still use: the personification of states (or other organizational entities) as a way of shifting responsibility from the drafter or other individuals. The next part of this Essay will consider some examples of this tactic.

The drafters of later constitutional amendments were less cagey about the matter of states’ independence from federal norms. To be sure, the Thirteenth Amendment, abolishing slavery, does not refer to individual states at all.44 But the very next amendment begins a pattern carried through several subsequent amendments45 of forbidding aggressive action by states against their citizens: “abridg[ing] privileges or immunities,” “depriv[ing] any person of life, liberty, or property,” “deny[ing] any person . . . the equal protection of the laws.” This language, too, created a rhetorical model for American legal discourse; Justice Kennedy’s villainization of states in Obergefell echoes it. But this approach to the linguistic treatment of states has never replaced the older approaches. Rather, it has supplemented them. The Constitution as of 2017 offers several conceptions of states as actors, not just one. States are preexisting contributors to the union, exercising equal influence on the federal lawmaking apparatus, but they are also powerful if possibly irrational negotiators and occasional violators of individual rights.

The Constitution even acknowledges the status of states as a kind of legal fiction.46 The Twenty-Third Amendment, ratified in 1961, grants the District of Columbia “[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State.”47 The Amendment dictates, that is, that the District of Columbia be regarded in certain respects as if it were a state, while insisting on the District’s distinct, non-state identity. It is thus a demonstration of states’ susceptibility to legal-linguistic construction, empowerment, and deconstruction. It offers yet another conception of statehood as a kind of ascribed status.

The varied models of state identity, agency, and moral authority offered by the text of the Constitution reverberate throughout U.S. law. In Supreme Court opinions, as the next part of this Essay will explain, justices take these models to sometimes surprising lengths and use them in sometimes contradictory ways.

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44 U.S. Const., amend. XIII, § 1: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

45 U.S. Const., amend. XIV. The Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which all expanded the franchise, use similar language.

46 This topic receives more extensive discussion in Part III.

47 U.S. Const., amend. XXIII, § 1.
B. State Speech and Rights in the Contemporary Supreme Court

The first decade of the twenty-first century saw a flurry of legal commentary on the Court’s personification of states in opinions addressing doctrines of state sovereign immunity. But in fact, the justices personify states in a much wider range of legal contexts. Cases addressing individual rights under the Fourteenth Amendment—such as Obergefell—are one such context. Among the many other examples that could be discussed, this part will focus on just two additional cases from the Court’s 2014 term: Walker v. Texas Division, Sons of Confederate Veterans, a case concerning First Amendment government-speech doctrine, and Glossip v. Gross, a death penalty challenge. As the opinions in these cases show, justices’ willingness to attribute mental states, preferences, and rights to states does not track those justices’ ideological positions in any simple way.

Walker arose from a dispute about symbolism and “specialty” license plates. Texas law allows members of the public to design their own license plates, subject to the approval of a DMV board. The Texas Division of the Sons of Confederate Veterans, an organization of male descendants of Confederate war soldiers, submitted a specialty plate design that included an image of the Confederate flag. The DMV board responsible for approving proposed plate designs rejected the Sons’ application, citing comments it had received indicating that “many members of the general public find the design offensive.” The Sons sued the DMV board and its members, alleging that the rejection of their application violated their First Amendment speech rights. In the Court’s analysis, the case turned on whether or not license plates with “specialty” messages—like the name of an organization or a school—qualify as government speech. Thus, the justices decided that the proper analytic framework for the dispute was a branch of First Amendment doctrine that presupposes a kind of state personification. Justice Breyer, writing for five justices, concluded that license plates do qualify as the “speech” of the state that issues them. Justice Alito, writing for four, argued that they do not.

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48 See, e.g., Sherry, supra note 13; Zick, supra note 12.
50 Justice Breyer’s opinion analogized the case to a 2009 case, Pleasant Grove City v. Summum, 555 U.S. 460 (2009), in which the Court had held that monuments donated by private individuals for display in a city park should be considered government speech. This decision allowed the Court to characterize the City’s refusal to display some monuments as a refusal to speak, rather than a restriction on the speech of the private people or entities donating the monuments. The argument in Summum involved personification of the city in that case and of government actors in general: “[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thoughts or instill some feeling in those who see the structure.” Walker, 135 S. Ct. at 2247 (quoting Summum, 555 U.S. at 470). As Garrett Epps noted at the 2016 colloquium at Savannah Law School at which this Essay was presented, First Amendment doctrine demands that legal analysis take a monolithic, simplifying approach to disputes susceptible to discussion in a government-speech framework. The law itself, that is, discourages critical examination of the legitimacy of multiple competing Texan voices belonging to both individuals and groups.
In Justice Breyer’s majority opinion, states do not just “think”; they do more than register information about the environment and assert power over their residents. States also “want” and “wish” for certain specific states of affairs. They have states of mind—including the state of mind of wanting a specific state of mind (not just behavior) in members of the public. Justice Breyer’s opinion notes, for instance, that Texas “may . . . wish[] to convey” “many more messages” than the city in an earlier government-speech case did.\textsuperscript{51} He denies that this makes the state an irrational communicator: “Texas’s desire to communicate numerous messages does not mean that the messages conveyed are not Texas’s own.”\textsuperscript{52} Justice Breyer’s account emphasizes the state’s ability to choose its message. Giving Texas final approval authority over plate designs “allows Texas to choose how to present itself and its constituency.”\textsuperscript{53} This freedom to choose is necessary, according to Justice Breyer, for the state government to function as a government rather than a mere megaphone for the messages of individuals and private groups: “Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?”\textsuperscript{54} On Justice Breyer’s account, however, the state is not just like any other communicator. It has a privileged status: “a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers.”\textsuperscript{55} On this view, individuals want to be associated with the state, while the state “wants” to cultivate and protect its citizens. Although this relationship is not one of equality, it is reciprocal and positive.

Justice Alito’s dissent presents a rival model of the relationship between individuals and states. Justice Alito does not simply criticize Justice Breyer for personifying the state of Texas. Although Justice Alito’s analysis suggests that the function of a state government agency is to provide a ground or forum for private activity, and not to be an actor alongside citizens, he too winds up personifying the state in his opinion. Justice Alito’s Texas is not the popular guardian of Justice Breyer’s vision. It is instead a greedy enterprise whose decisions are likely to be arbitrary and partisan.\textsuperscript{56} Countering Justice Breyer’s

\textsuperscript{51} Walker, 135 S. Ct. at 2251.
\textsuperscript{52} Id. at 2251–52.
\textsuperscript{53} Id. at 2249. Justice Breyer’s opinion went on to note, “[J]ust as Texas cannot require SCV to convey ‘the State’s ideological message,’ . . . SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.” Id. at 2253.
\textsuperscript{54} Id. at 2246.
\textsuperscript{55} Id. at 2249.
\textsuperscript{56} “While all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle),” Justice Alito writes, “the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what
assertion that citizens will naturally want to convey the impression that the state has endorsed the messages on their license plates, Justice Alito invites readers of his opinion to judge for themselves whether this claim seems sound:

Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents?57

Although this passage lampoons Justice Breyer’s portrait of the state as speaker, it would oversimplify Justice Alito’s position to say that he consistently debunks the treatment of states as persons. Rather, he depicts the state of Texas as a different kind of person, a less admirable character. Justice Alito’s Texas is not only greedy and irrational, but inept. The state, in his account, presumes to understand what its citizens are thinking but overestimates its abilities in this regard. Describing the DMV’s rejection of another proposed specialty plate design supporting Texas state troopers, Justice Alito dismisses the board’s “apparent concern that the plate could give the impression that those displaying
it would receive favored treatment from state troopers.”

This remark does not quite assert the implausibility of the board’s “concern,” but it does clearly question the board’s ability to perform the kind of exercise that Justice Alito asked his readers to pursue just a few pages earlier.

Justice Alito’s judicial writings consistently exhibit this sort of opportunistic skepticism about the feasibility of understanding others’ states of mind. His variable approach to this issue permits analyses that relocate responsibility in sometimes unpredictable ways. For example, Justice Alito’s majority opinion in *Glossip* seems much more comfortable with the casual attribution of mental states and responsibility to political bodies as well as inmates condemned to die by lethal injection. But after pharmaceutical companies began refusing to supply this drug for use in executions, state decision-makers turned to alternatives, settling eventually on midazolam, “a sedative in the benzodiazepine family of drugs,” which includes relatively mild relaxing drugs such as Valium and Xanax. The point of administering this initial drug is to keep the inmate from feeling the pain (or “noxious stimuli”) resulting from administration of the second and third drugs in the protocol: a “paralytic agent” that stops the inmate from moving and breathing, and a dose of potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.” (The Court acknowledged that the dose of potassium chloride on its own would cause “excruciating pain.”)

The inmates who brought the challenge in *Glossip* pointed out that medical professionals do not use midazolam to induce unconsciousness, but rather give it at a much lower dose to relax patients who remain awake, and argued that “overdoses” of midazolam, like those used in Oklahoma’s execution protocol, had never been clinically studied. The inmates sought an injunction ordering Oklahoma not to use the midazolam protocol to execute condemned inmates, given the substantial and “demonstrated risk of severe pain” it created. The district court to which the inmates first presented this argument rejected it after a three-day evidentiary hearing, and the Supreme Court, in an opinion written by Justice Alito for a five-justice majority, found no error in this decision.

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58 Id. at 2261 (Alito, J., dissenting).
60 Id. at 2732 (quoting Baze v. Rees, 553 U.S. 35, 44 (2008)).
61 Id. at 2734.
62 Id. at 2740.
63 Id. at 2781 (quoting Baze, 553 U.S. at 44).
64 Id. at 2781 (quoting Baze, 553 U.S. at 71 (Stevens, J., concurring)).
65 Id. at 2736.
66 One of the four inmates originally involved in the challenge, Charles Warner, was executed using the protocol before the Court issued its decision. As of the publication of this essay, the others—Richard Glossip, Benjamin Cole, and John Grant—have not yet
In Justice Alito’s opinion, the issues in Glossip revolve around two sets of mental states: first, the mental states of the inmates after receiving the dose of midazolam and while experiencing the effects of the second and third drugs of the protocol; and second, the “mental states” of the states whose executive authorities plan and implement executions. Throughout his opinion, Justice Alito assigns responsibility for decision and choice to the states, rather than to the more specific human individuals and commissions directly responsible for identifying midazolam as a part of Oklahoma’s protocol. He describes the states as searching for humane execution methods: in the early twentieth century, for example, “other States followed New York’s lead in the ‘belief that electrocution is less painful and more humane than hanging.’” Not only are the states actors, they have rights. “If States cannot return to any of the ‘more primitive’ methods used in the past,” Justice Alito writes, “and if no drug that meets with the principal dissent’s [Justice Sotomayor’s] approval is available for use in carrying out a death sentence, [then] the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not per se unconstitutional.” Concerns about state ineptitude, of the kind Justice Alito presented in his Walker dissent, are missing from his account of Oklahoma’s execution regime.

Two justices wrote major dissenting opinions in Glossip, Justices Breyer and Sotomayor. Each took a very different approach to refuting the majority’s argument. Justice Breyer’s dissent asks the Court and the legal and political community to reconsider the constitutionality of the death penalty, given the irregularity of its imposition. As Justice Breyer notes, in 2014, only seven states conducted executions, and only 33% of Americans lived in a state “that at least occasionally carries out an execution.” From a defendant’s perspective,”

been executed, despite the Court’s ruling, due to decisions by Oklahoma officials resulting from concern about the design and implementation of the Oklahoma execution protocol. In the November 2016 general election, Oklahoma voters approved an amendment to the state constitution deeming constitutional execution by “any method[,] unless prohibited by the United States Constitution.” See Josh Sanburn, Oklahoma Votes to Add Death Penalty to Its Constitution, TIME (Nov. 8, 2016), http://time.com/4563488/oklahoma-death-penalty-referendum/.

For an account of the processes behind this identification, see Eric Berger, Gross Error, 91 WASH. L. REV. 929, 963–64 (2015).

Glossip, 135 S. Ct. at 2732 (quoting Baze, 553 U.S. at 42 (quoting Malloy v. South Carolina, 237 U.S. 180, 185 (1915))).

Id. at 2739. Justice Scalia strikes a similar note in his Glossip concurring opinion: “It is impossible to hold unconstitutional that which the Constitution explicitly contemplates.” Id. at 2747 (Scalia, J., concurring) (emphasis omitted). Justice Thomas would go even further. In his account, states have not only rights but also the capacity to act with benevolence or malice. The legal standard Justice Thomas advocates applying would require a showing of malicious intent on the state’s part before an execution method could be found unconstitutional: “Because petitioners make no allegation that Oklahoma adopted its lethal injection protocol ‘to add elements of terror, pain, or disgrace to the death penalty,’ they have no valid claim.” Id. at 2750 (Thomas, J., concurring).

Id. at 2774 (Breyer, J., dissenting).
Justice Breyer argues, having a death sentence imposed and then actually carried out is “the equivalent of being struck by lightning.” Moreover, by the time a recipient of a death sentence is executed, “the community is a different group of people” than it was when the sentence was imposed. In this opinion, Justice Breyer presents states as considerably less coherent and able actors than he had in Walker. As Justice Breyer portrays them in Glossip, states are arbitrary (perhaps even atavistic) geographical and demographic designations, not community guardians deeply enmeshed in residents’ lives.

Justice Sotomayor’s dissent, in contrast, focuses specifically on the actions of Oklahoma’s officials. She describes the hasty process by which “a group of officials from the Oklahoma Department of Corrections and the Attorney General’s office” selected midazolam as an ingredient in the Oklahoma protocol. She is willing to personify Oklahoma as an actor, but unlike Justice Alito, she refuses to assume its good faith: “Nothing compels a State to perform an execution,” she writes. “It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty; its ends do not justify any and all means.” Indeed, Justice Sotomayor’s account suggests that states are not only able to make mistakes, but also that they are able to feel shame, to be conscious of the questionable morality of their actions. Explaining the need to review lethal injection protocols with care, she writes, “[L]ethal injection represents just the latest iteration of the States’ centuries-long search for ‘neat and non-disfiguring homicidal methods’ . . . . The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.” Justice Sotomayor’s vision of the state—as a kind of ambivalent experimenter or even a mad scientist—is more like Justice Alito’s Walker account of the state as a cynical and inept money-grubber than like Justice Breyer’s accounts in either Walker or Glossip.

Earlier accounts of Supreme Court justices’ treatment of states as persons suggested that the justices’ attitudes toward such treatment align with their doctrinal or ideological allegiances. The Walker and Glossip opinions indicate a more complex rhetorical landscape. The same justice will personify a state positively in one context—as a benevolent protector (Justice Breyer in Walker) or a worthy holder of constitutional rights (Justice Alito in Glossip)—and negatively in another—as a mere loudspeaker for the mob (Justice Alito in Walker, Justice Kennedy in Obergefell) or a dysfunctional cabal (Justices Breyer and Sotomayor in Glossip). The cases suggest the influence of unarticulated theories of state personhood analogous to those recognized by Schane and so many others in the corporate-personality context. The next part of this Essay

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71 Id. at 2764.
72 Id. at 2769.
73 Id. at 2782 (Sotomayor, J., dissenting).
74 Id. at 2795.
75 Id. at 2797.
76 See, e.g., Sherry, supra note 13, at 1125–30; Zick, supra note 13, at 220–24.
will consider other similarities between these state “fictions” and the fictions of corporate personality discussed by Schane, explore some implications of these personifying practices that have received relatively little attention because of the focus on competing “theories” of corporate personhood, and explore some of the potential benefits of this shift in focus.

III. Characterizing States Carefully

Discussions of the puzzle of corporate personality often criticize courts, and the Supreme Court in particular, for failing to adopt a consistent theory of corporate personality.\(^77\) Since different theories of corporate personality may support different conclusions in a single case, inconsistency regarding the attributes and capacities of corporations may make the outcomes of disputes less predictable. If judges are free to choose theories of corporate personality suiting the results the judges want to reach, their conclusions are vulnerable to criticism as based on considerations other than the publicly avowed ones. Similar points could be made about the implicit theories of state personality revealed by the brief discussion above.

The next part of this Essay will explain additional problems potentially generated by these kinds of selective characterizations and responsibility attributions. Unlike the points noted in the previous paragraph, these problems are specific to the characterization or personification of institutions. The final part of this Essay will reconsider the relationship between these practices of personification and the familiar classification of corporate and (often) state personhood as legal “fictions.”

A. Effects of State Characterization

The Constitution and the Supreme Court’s opinions provide U.S. lawyers with models of appropriate description and reasoning. These materials include, as shown above, examples of the attribution of responsibility to people and other entities. The linguistic packaging of these attributions is much more than a mere matter of stylistic choice. Canonical attributions affect and constrain the shape of the legal arguments and conclusions available in particular cases.\(^78\) If we describe and thus conceive of a state as an inept bureaucracy, for example, it becomes impossible to describe the state’s actions as rational or just and as deserving deference. Inconsistencies in the characterization of institutions generate more specific problems as well. First, the way these materials justify a lawyer or judge in ascribing personhood to a state or withholding that status at will may encourage the opportunistic ascription of responsibility in other circumstances. Second, this freedom interacts with the absence of legal conventions requiring judges and lawyers to look at how decisions are made within state and sub-state

\(^77\) See, e.g., Orts, supra note 8, at x–xi; Robinson, supra note 8, at 623.

entities. Together, these customs encourage lawyers and judges to “black-box” state processes, perpetuating civic ignorance and potentially facilitating corrupt or otherwise problematic decisionmaking and action. Third, the freedom to ascribe mental states to political entities only when convenient also allows lawyers and judges to engage in a kind of opportunistic “mindblindness,” or skepticism about the feasibility of inferring what others think or intend.79

This Essay has presented multiple examples of opportunistic ascriptions of responsibility, often in the form of passing the buck from individuals to institutions. Justice Kennedy’s Obergefell opinion, as noted at the very beginning of this article, casts the states as oppressors in a way that allows him to avoid directly criticizing the human opponents of same-sex marriage rights as wrong or undeserving of legal regard. Similarly, the Migration and Importation Clause, discussed in Part II.A, assigns to states—not to slaveholders, slave merchants, or politicians—the decision whether or not to continue the slave trade.80 In some cases, it might be desirable or appropriate to avoid directly vilifying political or ideological opponents. Like other legal techniques of avoidance, passing the buck to an institution may allow an overlapping consensus to form when ascriptions of responsibility or intent to individuals would block agreement. But the constant possibility of such buck passing generates problems beyond the imprecision and inconsistency that may result from avoidance.

One such problem is that ascribing responsibility to the state seems to condone if not to promote treating the internal decisionmaking processes of states as invisible or irrelevant. For understandable reasons, the federal Constitution treats states this way. Its model, however, has broadly shaped discourse throughout the federal legal system, even when the importance of deference to state political units is not at all clear. Justice Alito’s majority opinion in Glossip offers an especially striking example. Justice Alito all but describes the Court’s death penalty jurisprudence as recognizing a constitutional right, held by the states, to execute certain individuals.81 His account of the selection of midazolam as the first drug in Oklahoma’s execution protocol at no point considers the alarmingly flawed process by which that selection occurred.82 Justice Alito is able to do this because our conventions of legal (and everyday) language allow us to describe states as possessing rights and making decisions. Such descriptions, though, may also insulate the decisions made from criticism: as long as a decision was made by a person with the right relationship to state officials, its attribution to the state raises no linguistic (and thus no conceptual) red flags, even if the decision did not result from a reasoned process or even

79 My use of the notion of “mindblindness” draws on Blakey Vermeule, Why Do We Care About Literary Characters? 195 (2010) (“Situational mind blindness is a kind of dehumanization, albeit a very complex one: the point of it is to deny other people the perspective of rational agency by turning them into animals, machines, or anything without a mind.”).
80 See supra note 43 and accompanying text.
81 See supra note 69 and accompanying text.
82 For a description of the processes Oklahoma officials used to select midazolam, see Berger, supra note 67, at 938–42, 949–51, 957–76.
Thus, the option of ascribing responsibility flexibly may exacerbate the legal tendency to avoid examining the processes by which law is made and official acts are determined at both state and federal levels. And this linguistic and conceptual avoidance in turn may make it difficult to respond to real harms resulting from process failures.

Finally, judicial freedom to ascribe or refrain from ascribing mental states to political units reflects a more general phenomenon of opportunistic “mindblindness” on lawyers’ and judges’ parts. Consider the contrasts between Justice Breyer’s and Justice Alito’s opinions in Walker. Justice Breyer’s opinion is full of confident assertions about the mental states of a variety of players, from the citizen who displays a specialty license plate and the members of the public alarmed by the Sons of Confederate Veterans’ design to the “city government” seeking to “create a successful recycling program.” Justice Alito’s opinion, in contrast, mixes confidence about some mental states—such as the perceptions of his imaginary highway observer—with skepticism about others—such as the real level of offense or fear felt by some who see an image of the Confederate flag on a state-issued license plate.

Justice Alito’s opinion for the Glossip majority also exhibits selective mindblindness. Both Justice Alito’s and Justice Sotomayor’s opinions in that case turned on the accessibility of two distinct mental states: the cognitive state of certainty about the noncognitive state of pain potentially suffered by the condemned. The three experts who testified at the hearing on the inmates’ motion (two for the inmates, and one for the state) all qualified their opinions about the “level of unconsciousness” that would be induced by a 500-milligram dose of midazolam. Nevertheless, Justice Alito wrote, the district-court judge was entitled to “credit[]” the state expert’s “central point[,] . . . that a properly administered 500-milligram dose of midazolam will render the recipient unable to feel pain.” Justice Alito describes the expert’s “central point” as the basic proposition accepted by the district court, but his expression of this point is neither a quotation nor accompanied by any citation. Rather, it is a confident attribution by Justice Alito to the state expert and the trial court judge of a state of certainty about the uncommunicated subjective experience of those who are administered Oklahoma’s protocol. The message of this assertion, and of Justice Alito’s opinion more generally, is that it is appropriate for justices to “mindread” other legal actors, especially other judges, but that it is not appropriate for appellate judges (or Supreme Court justices) to try to assess the experience of condemned inmates.

83 See, e.g., Victoria Nourse, Misreading Law, Misreading Democracy (2016).
84 Walker, 135 S. Ct. at 2246.
85 Glossip, 135 S. Ct. at 2736.
86 Id. at 2744.
87 Justice Alito describes as unjudicial Justice Sotomayor’s efforts to assess the mental state of condemned inmates given midazolam: “[W]e find it appropriate to respond to the principal dissent’s groundless suggestion that our decision is tantamount to allowing prisoners to be ‘drawn and quartered, slowly tortured to death, or actually
In comparison, Justice Sotomayor’s opinion is far more cautious in attributing mental states to the petitioners, the testifying experts, or the trial court, even though she does stress the need to consider the potential for the inmates’ exposure to severe pain under the midazolam protocol.88 Her account suggests that the circumstances of the case may have inspired her circumspection. The incommunicable nature of the “inner” state at issue in *Glossip*—pain—makes it important for those who risk allowing others to cause it to be careful about their decisions,89 especially since the inclusion of a paralytic in the three-drug protocol seems meant to eliminate any external signs from which pain could be read. The protocol is designed to make any suffering by the inmate as opaque as possible.90

The next and final part of this Essay will explain the relationship between these mindreading maneuvers and the “fictions” of institutional personality discussed by Schane and others. The connection suggests a need for lawyers to consider more carefully and perhaps differently how they conceptualize and describe the thoughts and actions of both institutions and human beings.

B. State Character, Fictional Character

When Sanford Schane described the corporation as a “legal fiction,”91 he was referring to the legal convention of treating a corporation as a “person,” able to own property, incur obligations, and bring and defend lawsuits like an adult human being. The standard way of using the term “legal fiction” suggests that it applies when lawyers use a term (like “person”) in a way that departs from everyday usage of the term.92 But Schane’s linguistic analysis showed that we do treat corporations (and other institutions) like persons in everyday language: Nonlawyers regularly ascribe mental states and responsibility to business associations. Schane argued that this linguistic evidence supported the “real entity” theory of corporate personality, which takes corporations to be legal and moral agents above and beyond the human relationships among owners, employees, and officers that make up the corporation.93 But Schane’s analysis also suggested that corporate personality is not, after all, a legal fiction; the “real entity” theory is consistent with the ways nonlawyers talk and think about corporations. Schane’s focus on the classic theories of corporate personality thus suggested a somewhat surprising conclusion: corporate

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88 Id. at 2785 (Sotomayor, J., dissenting).
89 Id. at 2792.
90 Id. at 2796–97.
91 Schane, supra note 9, at 563.
93 The “nexus of contracts” theory, in contrast, reduces corporate responsibility to those human relationships; the “creature” theory considers the corporation to be a product of legal activity and to lack any “reality” other than its purely legal recognition.
personality is not really a legal fiction and perhaps not even a fiction. Schane’s premises, like those of most other writers on “fiction” in the legal context, kept him from fully exploring other dimensions of fictionalization in the legal (and lay) treatment of institutional agency.

Lawyers and commentators discussing “fiction” in law have used that term in a relatively unsophisticated way. A “fiction” is something we discuss that is not “real,” or does not exist. Writers often use “fiction” as a synonym for “lie” or “deceit”94 or to describe the exercise of lawyerly or judicial creativity and arbitrariness. 95 This standard legal approach to fictional discourse 96 is unsatisfying because it is unable to account for certain easily noted features of such discourse. For example, it is perfectly possible for several people to discuss a fictional character and all be discussing the same “thing,” so it is inaccurate to describe references to fictional entities as radically unstable and overly dependent on subjective judgment. The focus in legal circles on understanding fiction as a matter of “known falsehood,”97 following Lon Fuller’s canonical 1930 definition, has resulted in a preoccupation with the question of whether it can ever be acceptable for lawyers and judges to make statements known to be false. This preoccupation in turn has made it difficult for legal commentators and theorists to see how many features of legal discourse use the very same techniques that fictional discourse does. In the decades since Fuller presented his “conscious falsehood” definition of fiction, research in philosophy, literary theory, and cognitive science has developed a robust account of how fictional discourse works, both structurally and psychologically, that is far more nuanced than Fuller’s definition. The remaining portion of this Essay will focus on one

94 A recent example may be found in Mary Anne Franks, WHERE THE LAW LIES: CONSTITUTIONAL FICTIONS AND THEIR DISCONTENT, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 32 (Austin Sarat ed., 2015).


96 One good way to define “fictional discourse” consistent with much recent work on the subject would be to say that it is discourse that refers to “quasi-abstract” entities such as fictional characters and locations. For an application of this approach to the (international-relations) state, see, e.g., Edward Heath Robinson, A DOCUMENTARY THEORY OF STATES AND THEIR EXISTENCE AS QUASI-ABSTRACT ENTITIES, 19:3 GEOPOLITICS 461 (2014). Robinson’s account, which focuses not on the fifty states of the U.S. but on the “states” of international relations, is consistent with recent approaches to metaphysics such as those of Amie L. Thomasson, FICTION AND METAPHYSICS (1999); Jody Azzouni, TALKING ABOUT NOTHING: NUMBERS, HALLUCINATIONS, AND FICTIONS (2010), which in turn influenced the conceptualization of states as akin to fictional characters in this Essay. See also Erik Ringmar, ON THE ONTOLOGICAL STATUS OF THE STATE, 2 EUR. J. INT’L REL. 439 (1996); Edward Heath Robinson, AN ONTOLOGICAL ANALYSIS OF STATES: ORGANIZATIONS VS. LEGAL PERSONS, 5 APPLIED ONTOLOGY 109 (2010).

97 This way of thinking of fiction in the legal context stems from Lon Fuller’s enormously influential trilogy of essays originally published in the 1930s and republished as a book in 1967. See LON L. FULLER, LEGAL FICTIONS 9 (1967) (“A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”).
area of research within this broader field: the study of the language used in
fictional discourse to represent the fictional mental states of fictional characters.

The ability of most adults in our culture to “read” the “minds” of others
has become a flourishing research topic in cognitive science and literary
studies. The study of mindreading is basically the study of why, as Daniel
Dennett has argued, we are able so much of the time to correctly predict and
adjust to the behavior of other people. Although we have no direct access to one
another’s thoughts, we are normally capable mindreaders in this sense.99
Because fictional discourse in the modern Western tradition focuses heavily on
represented characters’ states of mind and their inferences about the states of
mind of other characters, that discourse provides a model of the activity involved
in actual humans’ development of mindreading skills and offers readers practice
in the activity.100 Our brains work similarly with respect to represented acts as
they do with respect to actual acts. Experimenters have shown that reading
about something (a conversation, say, or an act of aggression) produces brain
states similar to those produced by witnessing the same activity in person and
even by engaging in it.101 This parallel means that we can “rehearse” capacities
that we will use in actual interaction by reading about the use of those capacities
and by exercising our capacities on represented individuals. Lisa Zunshine in
particular has argued repeatedly in recent work that much of the appeal and
value of fictional narrative derives from its function as a kind of cognitive
playground or fitness club for honing our sense-making and mindreading
capacities.102 She emphasizes the special usefulness of fictional discourse

98 When researchers in these fields refer to “mind,” they are not necessarily
expressing any dualistic commitments; “mind” is a label for those aspects of a person
that explain the person’s behavior, not for any mysterious substance inside the person.
100 See, e.g., David Herman, Storytelling and the Sciences of Mind 73–94 (2013); Alan Palmer, Fictional Minds 9–11, 171–238 (2004);
Ted Vermeule, supra note 79; Lisa Zunshine, Why We Read Fiction: Theory of Mind and the Novel 60–100 (2006); Lisa Zunshine, The Secret Life of Fiction,
130:3 Proc. of the Mod. Language Ass’n 724 (2015). Many psychological
studies use fictional scenarios to probe subjects’ capacities and tendencies in reading
others’ minds. A well-known early experiment on children’s acquisition of the concept of
“false belief,” or the understanding that the belief of another person may not accurately
reflect information known to the child, used questions to children about dolls interacting
and moving through a play-acted scenario to identify whether the children did nor did not
have the concept of “false belief.” See Heinz Wimmer & Josef Perner, Beliefs About
Beliefs: Representation and Constraining Function of Wrong Beliefs in Young Children’s
Understanding of Deception, 13:1 Cognition 103 (1983). The vast majority of studies
addressing mindreading as well as imaginative processes in adults similarly ask subjects to
read short written vignettes and answer questions about them. See, e.g., the experiments
described throughout Ruth M. J. Byrne, The Rational Imagination: How
People Create Alternatives to Reality (2005).
101 See Wimmer & Perner, supra note 100.
102 See Zunshine, supra note 100, at 16–27.
involving the interaction of characters in honing our higher-order mindreading skills—often, we do not just infer the state of mind of a character or another person, but we also infer what A thinks B thinks about what A thinks, what A thinks B thinks about what A thinks about B, and so forth. Most adults in modern Western culture engage in conjectures like this all the time but hardly notice that they are doing so. Zunshine argues that we are so limber in this regard in part because of our exposure to fictional narratives whose plots are largely driven by successful and unsuccessful instances of higher-order mindreading by characters.

This training works because of the parallel described above. When we attribute a mental state to another human being, as when we read about a fictional character, we interpret the behavioral and circumstantial signs justifying attribution of a mental state to that person and project that state into the person we confront. Every attribution of a mental state thus involves a kind of fiction-making or “authoring.” The postulation of a mental state in another person—or in an organization—is an explanatory construct, a way of making sense of that person’s or entity’s behavior that does not have a physical correlate in the real world. Attributing a mental state to a real person feels much like attributing a mental state to a fictional character; written attributions of mental states to these two kinds of “person” also look similar. Such attributions differ only in their intensity and their practical consequences, not in the cognitive or creative activities involved.

Lawyers and especially judges are in an almost uniquely powerful position to “author” the mental states of others, including real human beings, in this way. When a judicial opinion ascribes a mental state to an individual or to a group or collective entity, the judge authoring the opinion is also authoring that mental state as well as decreeing its existence. The metaphysical leap involved is no less in the former case than in the latter. We initially perceive a difference between these two scenarios only because of pervasive assumptions about individuals’ behavior and experience. If anything, skepticism about the attribution of mental states to corporations and states might be overly cautious. Insisting that such attributions are inappropriate because only human beings have minds presupposes that human beings do have “minds” that are not themselves explanatory devices or quasi-abstract entities. The attribution of a mental state to an individual is always a matter of inference and imaginative sense-making. The exercise of imagination in performing this task does not necessarily make the resulting inference radically undependable or arbitrary. Yet obliviousness to the fiction-like dimension of all mental-state attributions may also breed overconfidence in lawyers’ and judges’ ability to identify and describe the mental states of other real people. Justice Alito’s Glossip opinion as well as, perhaps, Justice Breyer’s opinion in Walker display this kind of overconfidence.

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Describing the mental state of a real person can look, linguistically, just like descriptions of mental states of fictional characters. And for most lawyers, descriptions of fictional characters’ mental states are the most familiar models for the verbal description of mental states—period. Lawyers thus quite naturally learn to describe mental states using the same techniques that they see in these models, although they are never explicitly taught to use those techniques. Legal discourse rarely exhibits lawyerly or judicial awareness of this practice; Justice Sotomayor’s *Glossip* dissent comes close, but only hints at the issue.

A more nuanced understanding of the properties of fictional discourse might reveal disturbing patterns in the judicial treatment of real people. It might also suggest, along the lines sketched by Schane but for slightly different reasons, that it is a red herring to focus on the legitimacy of “characterizing” collective entities such as states and corporations. Instead, we should focus on what kind of “character” lawyers and judges are ascribing to these entities, and on what basis. This perspective suggests a need for a more sophisticated interdisciplinary study of some of the neglected formal features of legal and judicial discourse, as well as a rethinking of some standard arguments against the attribution of mental states to group agents like corporations, legislatures, and states.105

IV. Conclusion

Instead of denying the possibility of attributing mental states to groups or labeling such attributions deviant or figurative, perhaps legal theorists and practitioners should consider developing a legal “psychology” for group agents like states and corporations. To be sure, this course would require lawyers and judges to acknowledge their creative role in ascribing mental states to legal actors, but the creativity in question is a kind whose regularity we all rely on every day. What is of concern in the judicial exercise of this creative power is not that it involves creativity and imagination, but rather that legal language can and does have the effect of reconfiguring reality as well as reflecting it.

105 Because some group agents—like corporations and government bodies—are the intentional creations of individuals, it might be necessary to take both a “design stance” and an “intentional stance” toward them in order to understand and explain their behavior. See Dennett, supra note 99, at 16–17; Christian List & Philip Pettit, Group Agency: The Possibility, Design, and Status of Corporate Agents (2011).