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Corporate Personhood and the Corporate Persona

Margaret M. Blair

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In 2010, the U.S. Supreme Court held in Citizens United v. FEC *that restrictions on corporate political speech were unconstitutional because of the First Amendment rights granted corporations as a result of their status as "persons" under the law. Following this decision, debate has been rekindled among legal scholars about the meaning of "corporate personhood." This debate is not new. Over the past two centuries, scholars have considered what corporate personhood means and entails. This debate has resulted in numerous theories about corporate personhood that have come into and out of favor over the years, including the "artificial person" theory, the "contractual" theory, the "real entity" theory, and the "new contractual" theory.*

This Article revisits that debate by examining the various functions of corporate personhood including four functions I have identified in previous work: (1) providing continuity and a clear line of succession in property and contract, (2) providing an "identifiable persona" to serve as a central actor in carrying out the business activity, (3) providing a mechanism for separating pools of assets belonging to the corporation from those belonging to the individuals participating in the enterprise, and (4) providing a framework for self-governance of certain business or commercial activity. In this Article, I focus on the historical evolution of the corporate form, and specifically on how and why corporations have tended to develop clearly identifiable corporate personas. This corporate persona function is highly important to today's corporations and, because of this function, corporations can become more than simply the sum of their parts. This Article suggests that scholars should keep the corporate persona function in mind in evaluating corporate personhood theories, and return to a theory that sees corporations as more than a bundle of contracts.

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INTRODUCTION

The decision by the U.S. Supreme Court in *Citizens United* v. *FEC* struck down restrictions on corporate political speech on the grounds that such restrictions violated the First Amendment rights of corporations, rights extended to them in consequence of the fact that corporations are considered "persons" under the law.[1] The decision thus reopened a debate that has occupied legal scholars for at least two centuries about the meaning of "personhood" status under the law for corporations.[2]

When a corporation is formed, the law immediately recognizes the existence of a new legal entity that is separate from the organizers and investors, an entity that can carry out certain business activities as a "person."[3] Previous scholarly debates about the significance of this legal designation have sometimes focused on philosophical and metaphysical questions,[4] or on reductionist economic theories.[5] In my own prior work I have argued that, for policy questions about what rights, protections, remedies, and responsibilities corporations should have, we should begin with a clear understanding of the functions that personhood status plays in corporate law and in the effectiveness of corporations as business organizations, and then consider each constitutional or legal issue in terms of whether the particular right, protection, or remedy in question is necessary or important for carrying out those functions.[6]

1. 130 S. Ct. 876, 900, 913 (2010).

2. Chief Justice Marshall, in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), said, for example, that the corporate form permits "a perpetual succession of many persons [to be] considered as the same, and [to] act as a single individual." *Id.* at 636. The Supreme Court recognized corporations as "persons" for purposes of Fourteenth Amendment protections in 1886 in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886). *See infra* Parts II.B, II.C (further discussing *Santa Clara*). Phillip I. Blumberg provides an excellent summary of the legal concept of personhood for corporations and the implications for constitutional protections for corporations. Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 AM. J. COMP. L., SUPP: U.S. LAW IN AN ERA OF DEMOCRATIZATION 49 (1990).

3. RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720–1844, at 18 (2000) ("What were the consequences of incorporation? Incorporation involved the creation of a new personality, distinct from that of individual human beings."); *see also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443 (1987) (tracing the history of how business corporations were "personified" in U.S. law).

4. *See, e.g.*, Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257–58 (1911) ("What, then, is the corporate entity? Is it real or imaginary? Is it natural or artificial? Is it 'created by the state,' or does it spring into existence spontaneously? Is it a person or is it not? The difficulties of the inquiry are manifold; for the most abstruse questions of philosophy become pertinent."); *see also* Mark M. Hager, Essay, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 578 (1989) (observing that proponents of the real entity theory of corporations sometimes "stretched metaphysical analogies to lengths we find quaint in retrospect").

5. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976) ("It is important to recognize that most organizations are simply *legal fictions which serve as a nexus for a set of contracting relationships among individuals*.").

6. The four functions, as well as the discussion about how corporate law evolved to serve these functions in Part I of this Article, are taken from Margaret M. Blair, *The Four Functions of Corporate*

The four functions I have identified are:

(1) Providing continuity and a clear line of succession in the holding of property and the carrying out of contracts.[7]

(2) Providing an "identifiable persona" to serve as a central actor in carrying out the business activity.[8] This persona is the counterparty to all contracts that the corporation enters into with its various participants (including managers, employees, customers, suppliers, and investors). This persona can also sue and be sued in its own name.[9] Employees and investors in the enterprise, as well as customers of the enterprise, may recognize and perhaps identify with this persona, and the persona serves as the bearer of important intangible assets that are valuable to the business, such as capabilities, goodwill, reputation, and brand.[10]

(3) Providing a mechanism for separating pools of assets according to which assets are dedicated to the business, and which assets are the personal assets of the human persons who are participating in the enterprise.[11] The ability to partition assets in this way makes it easier to commit specialized assets to an enterprise and to lock-in those assets so that they remain committed to the enterprise where they can realize their full value.[12] The other side of capital lock-in is limited liability, which makes it clear that when the corporation borrows money, it is the corporate person that is the debtor, not the individual human persons involved in the enterprise.[13] Limited liability, in turn, makes it easier to raise equity capital for the enterprise because shareholders are assured that they will not be held personally liable for the corporation's debts.

(4) Providing a framework for self-governance by the participants in the enterprise. Although corporations are not often regarded primarily as units of governance, in fact, self-governance was one of the earliest purposes of incorporation.[14] Some early corporations were created as

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Personhood, *in* HANDBOOK OF ECONOMIC ORGANIZATION, at 440 (Anna Grandori ed., 2013). Other scholars have similarly argued that questions about constitutional rights for corporations should be decided on the merits on a case-by-case basis, regardless of which concept of personhood for corporations one adopts. *See, e.g.*, John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926) (arguing that the corporate person is "simply . . . a synonym for a right-and-duty-bearing unit" and that such a title conveys nothing "except that the unit has those rights and duties which the courts find it to have"); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 299 (1928) ("Whether a corporation, or a partnership, or other unincorporated association is to be treated as a legal person in any particular respect, is improperly decided unless decided on its own merits. That it is so regarded in other respects, though perhaps relevant, is certainly not conclusive.").

7. Blair, *Four Functions*, *supra* note 6, at 441–42.

8. *Id.* at 442.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; *see also* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 391 (2003); Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 391 (2000).

13. Hansmann & Kraakman, *supra* note 12, at 395.

14. Blair, *Four Functions*, *supra* note 6, at 452. One of the earliest uses of the corporate form was to organize merchants into self-governing groups that determined the ground rules for trading in

"quasi-governmental bodies, existing largely independent of the state, with broad political, taxation, and coercive powers," according to one scholar of corporate history.[15] Once a corporation is created, the separateness of the corporate entity requires a legal mechanism for determining who can take actions for it, and how the enterprise is to be governed. The governance structure prescribed by corporate law since the early nineteenth century is a managerial hierarchy topped by a board of directors that is distinct from shareholders, managers, and employees, and that has fiduciary duties to the corporation itself as well as to shareholders.[16]

In this Article, I build on prior work to examine the historical evolution of the idea of "legal personhood" as a mechanism for addressing certain business and organizational needs, focusing especially on how corporations came to have clearly identifiable corporate personas. I conclude with some thoughts on the importance of the persona function of the corporate form.

I. EVOLUTION OF THE CORPORATE FORM

Centuries ago, courts recognized that an institution like a church or university could hold property, sue and be sued, and enter into contracts in its own name, apart from any of the individuals who were members of or affiliated with the institution, provided that the institution had a charter from the King or Parliament, or possibly the Pope.[17] Importantly, property held by the chartered entity would continue to be held by the entity upon the death or departure of any of the natural persons associated with the entity.[18] Organizations that had these features were called "corporations," from the Latin word corpus, meaning body, because the

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certain goods or in a certain region, enforced the rules and resolved disputes among the merchants. *See* Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 126–29 (2004).

15. Andrew Lamont Creighton, The Emergence of Incorporation as a Legal Form for Organizations 34 (1990) (unpublished Ph.D. dissertation, Stanford University).

16. Gevurtz, *supra* note 14, at 92–95.

17. *See* JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 37–40 (1832); *see also* HARRIS, *supra* note 3, at 78 ("Acting as a corporate body without incorporation by charter or act was deemed illegal by common law prior to the act [the Bubble Act of 1720]. Thus, such undertakings could not enjoy the capacities and privileges of corporations as legal entities, including perpetual succession, the right to sue and be sued in the corporate name, and the ability to purchase land."); PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 4 (1993) ("These [17th Century] jurists uniformly described the corporation as a legal unit with its own legal rights and responsibilities, distinct from those of the individuals who constituted its members or shareholders from time to time. It was a creation of the law and could achieve legal status only by act of the King or Parliament."). George F. Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 COLUM. L. REV. 128, 128 & n.1 (1917) (pointing out that the word person, when used in the context of "the acts of the group itself [being legally] conceived of as if it were a separate individual or legal 'person,' and not the acts of the human beings composing the group," is a "relic of medieval scholasticism"). Part I of this Article is based heavily on Blair, *Four Functions*, *supra* note 6.

18. BLUMBERG, *supra* note 17, at 218, 223; ANGELL & AMES, *supra* note 17.

law recognized that the group of people who formed the corporation could act as one body or one legal person.[19]

The earliest corporations were not organized for business purposes. Corporate law as we know it today evolved out of laws and practices governing municipalities, churches, and religious institutions in Europe during the Middle Ages.[20] Such institutions were often granted charters by the local lords or kings. Charters gave religious institutions the authority to operate as separate entities for purposes of holding property. The ability of the institutions to hold property in their own names ensured that the property would not be handed down to heirs of individual persons who controlled and managed the property on behalf of the institutions (such as bishops or abbots), nor would the property revert to the estate of the lord or be heavily taxed when those controlling persons died or were replaced. In other words, the charters granted to religious institutions gave them "the power of perpetual succession."[21]

The idea that a group of people could act together, in law, as a single entity with an indefinite life, at least for the purpose of holding property, was subsequently applied to boroughs, municipalities, and guilds. By the sixteenth century, corporations were being used for a wide range of institutions, including "the King himself, cities and boroughs, guilds, universities and colleges, hospitals and other charitables, bishops, deans and chapters, abbots and convents, and other ecclesiastical bodies."[22] Notably absent from this list are business or commercial organizations. The purpose of incorporation for all of these entities was primarily perpetual succession, so that the property and wealth of the institution could be accumulated and held over time for the relevant public or quasi-public purposes, and not be taxed, revert to the state, or be subject to division and distribution to heirs upon the death or departure of any of the administrators of the property or members of the corporation.[23]

A few categories of corporations involved only a single individual, such as the King or a bishop. These corporations were called sole corporations, and their purpose was simply to make it clear that the property they controlled did not belong to them personally, but was held on behalf

19. Reuven S. Avi-Yonah & Dganait Sivan, *A Historical Perspective on Corporate Form and Real Entity: Implications for Corporate Social Responsibility*, *in* THE FIRM AS AN ENTITY: IMPLICATIONS FOR ECONOMICS, ACCOUNTING, AND THE LAW 153, 155 (Yuri Biondi et al. eds., 2007) ("The corporation as a legal person separate from its owners is a uniquely Western institution.").

20. Henry Hansmann, Reinier Kraakman, and Richard Squire argue that there were antecedents to the corporate form in the traditions, practices, and law of business people in the Roman Empire and in medieval Italy. *See* Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1354–74 (2006). But for my purposes in this Article, we need not go back beyond the charters granted to municipalities and religious institutions in Europe in the Middle Ages.

21. Mark, *supra* note 3, at 1449–50; *see also* ANGELL & AMES, *supra* note 17, at 4.

22. HARRIS, *supra* note 3, at 16–17.

23. *Id.* at 19 (noting that the "legal personality of a corporation . . . did not terminate with the death of any individual," but, because kings tended to oppose "land-holding by immortal legal persons such as corporations," a corporation generally had to have a special license in the charter of incorporation to hold land, or be permitted to hold land by special statutes called statutes of mortmain).

of the institution or public function they served, and the contracts they made were not entered into on their personal behalf, but only in their official capacity.[24] This would ensure that the property, contract rights, and liabilities would pass to successors in that office when the officeholder died or otherwise vacated the office.

All of the other categories were called "aggregate corporations," and as to these, another important purpose of the corporate form was self-governance among a group of people. Charters granted to municipalities in the Middle Ages, for example, explicitly provided for self-governance.[25] For purposes of their external relations, the incorporated group was able to act as a single individual in buying, selling, or holding property or entering into contracts. Within the group, they had to work out their own rules of governance and resolve their own disputes. Importantly, decisions about internal governance were largely protected from interference by the state or sovereign, except perhaps to enforce grants or franchises that were specified in their charters.[26]

In the seventeenth century, in England and on the Continent, charters came to be issued to trading companies.[27] Trading companies were initially organized as "companies," which were essentially partnerships, a legal category that was recognized as contractual at common law and as such did not require a charter.[28] These partnerships were usually formed between a merchant sea captain and one or more passive partners who would provide financing for a fleet of ships that would sail to some fara-

24. *See* JAMES TREAT CARTER, THE NATURE OF THE CORPORATION AS A LEGAL ENTITY, WITH ESPECIAL REFERENCE TO THE LAW OF MARYLAND 14 (1919) (Ph.D. dissertation, Johns Hopkins University), *available at* http://archive.org/details/natureofcorporat00cart.

25. ANGELL & AMES, *supra* note 17, at 16.

26. Gevurtz, *supra* note 14, at 126–29, provides one of the few scholarly accounts of the origin of the board of directors as a governance structure for corporations. He suggests that an early precursor to modern corporate boards were the governing boards elected by groups of merchants who banded together in the fifteenth and sixteenth centuries into "Companies" to secure monopoly trading rights for their member merchants. "[T]he boards of the Company of Merchant Adventurers and the Company of the Merchants of the Staple existed to resolve disputes and to pass ordinances regulating the conduct of the members." *Id.* at 126. "[C]orporate boards developed as a governance mechanism for merchant societies . . . or merchant cartels (like the Dutch East India Company) and only later evolved into the governance mechanism for large business ventures with passive investors." *Id.* at 129. Today, ordinary internal governance matters are rarely reviewed by the courts under the "business judgment rule," which provides that "if certain conditions are satisfied a director or officer will not be liable for the consequences of a decision unless the decision was irrational." MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 176 (9th ed. 2005). For this and other reasons, the board of directors of a corporation has long been regarded as a "court of last resort" regarding decisions about the management of corporate personnel and assets. Courts will not hear a case involving a dispute between two managers of the same corporation over division of a bonus pool, for example. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 284–85 & n.80 (1999) (quoting Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 274 (1991) for the proposition that courts "refuse to hear disputes between one internal division and another").

27. HARRIS, *supra* note 3, at 40–45; Gevurtz, *supra* note 14, at 121–22.

28. Gevurtz, *supra* note 14, at 121; Ron Harris, Institutional Innovations: Theories of the Firm and the Formation of the East India Company 22–23 (Feb. 2004) (working paper), *available at* http://www.escholarship.org/uc/item/2216c263.

way place to purchase spices or other goods.[29] When the ship returned, the merchandise acquired would be sold, the proceeds would be divided, and the partnership dissolved.[30] Successive missions were organized as new partnerships.[31] Hence, these organizations did not have the features of perpetual succession, identifiable persona, and asset separation, although such features may not have been needed given the nature of their business model.[32]

These trade missions were inherently extremely risky, and the risks of shipwreck, piracy, and disease were compounded by the risk that if too many ships returned with too much spice, spice prices could collapse causing even an otherwise successful venture to lose money.[33] So in 1600, Elizabeth I of England granted a charter to a group of merchants organized as the East India Company, along with monopoly rights to control the spice trade on behalf of England.[34] Two years later, the Netherlands did the same thing, chartering the Dutch East India Company.[35] These companies initially were formed for a limited number of years, which suggests that their initial purpose was not perpetual succession in the holding of property, as it was with churches and charitable organizations. Rather, their initial purpose was to create a separate entity that could administer the monopoly rights granted over the spice trade on behalf of a group of merchants. These companies were at first reorganized at the end of each mission, but within a few years, they were granted charters in perpetuity.[36]

Because of their origins in partnership law, early trading companies were generally governed like partnerships, with major decisions made by vote of investors on a one-person, one-vote basis.[37] But trading companies that had received franchises from Parliament or from a monarch were sometimes governed like partnerships, and sometimes governed by councils that may have included individuals appointed by the King.[38]

By the end of the seventeenth century, numerous European chartered trading companies were building, populating, and governing colonies around the world, as well as controlling international trade between

29. Harris, *supra* note 28, at 20, 22–23; *see also* Hansmann et al., *supra* note 20, at 1371.

30. *See* Gevurtz, *supra* note 14, at 121–22.

31. Harris, *supra* note 28, at 20–23; *see also* Hansmann et al., *supra* note 20, at 1373.

32. *Id.* at 1400 (speculating that the asset partitioning function on successive voyages was largely carried out by the physical separation of assets loaded onto each ship).

33. *See* HARRIS, *supra* note 3, at 40–41; Harris, *supra* note 28, at 30–32.

34. HARRIS, *supra* note 3, at 43–44.

35. Gevurtz, *supra* note 14, at 127.

36. Hansmann et al., *supra* note 20, at 1376.

37. Harris, *supra* note 28, at 33–34.

38. The Dutch East India Company, for example, was originally organized as a combination of smaller, city-based trading companies, and managed by directors who were appointed by governors of the cities in the combination. *See* Paula J. Dalley, *Shareholder (and Director) Fiduciary Duties and Shareholder Activism*, 8 HOUS. BUS. & TAX L.J. 301, 314 (2008); Gevurtz, *supra* note 14, at 127; *see also* Creighton, *supra* note 15, at 34 (noting that early corporations had a substantial governance function).

the colonies and Europe. For these organizations, the most important purposes of the charter were most likely the monopoly rights that came with the charters—the charters, in effect, established governance structures for cartels. Perpetual succession became important, however, after the organizations ceased to be dissolved at the end of each voyage and were given charters in perpetuity.

Just as guilds', towns', and church organizations' membership changes over time, it became useful for trading companies that continued in existence from one trade mission to the next to have different investors over time. This was made possible when the chartered companies issued investment "shares" in exchange for financial capital, and investors began trading these shares among themselves.[39] Such companies were called "joint-stock companies." Joint-stock companies might have evolved rather quickly into modern corporations in the eighteenth century after this development, except that English courts considered them to be a species of partnership.[40] Moreover, the English Parliament and the King jealously protected and hoarded the special franchises that had come with early charters, issuing them rarely.[41] Then in 1720, Parliament passed the so-called "Bubble Act," which made it illegal to trade in the shares of unincorporated joint-stock companies.[42] From that time until Parliament repealed the Bubble Act and passed the first general incorporation act in England in 1844, England had a two-tier system of business organizations in which only chartered companies had the primary characteristics we have come to associate with corporations, including entity status (but not necessarily limited liability),[43] while unchartered joint stock companies could not (legally) have tradable shares and were treated as partnerships by English courts.[44]

The Joint Stock Companies Act of 1844 gave many more firms ac-

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39. Walter Werner, *Corporation Law in Search of Its Future*, 81 COLUM. L. REV. 1611, 1631 (1981).

40. Blair, *supra* note 12, at 419; *see also* RONALD E. SEAVOY, THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855, at 47 (1982); EDWARD H. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 327–28 (1929).

41. Creighton, *supra* note 15, at 34 (noting that incorporation remained rare until the nineteenth century). *Wikipedia* lists only twenty-one English Crown Charters issued from 1407 (Company of Merchant Adventurers of London) to 1693 (Greenland Company), plus the South Sea Company charter issued in 1711 as a British Crown Charter. *See Chartered Company*, WIKIPEDIA, http://en.wikipedia.org/wiki/Chartered_companies (last updated Feb. 25, 2013).

42. *See Bubble Act*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bubble_Act (last updated Feb. 2, 2013

43. ANGELL & AMES, *supra* note 17, at 23–24; HARRIS, *supra* note 3, at 109; Hansmann et al., *supra* note 20, at 1378. Blumberg asserts that limited liability was not considered "among the essential attributes of the corporation" in the early nineteenth century. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 579–80 (1986).

44. From 1700 to 1800, in England, only about a dozen corporate charters were issued and of these, only six were for manufacturing firms. *See* BLUMBERG, *supra* note 17, at 14. So business people used the unincorporated joint-stock company form, which flourished in England despite confusion over whether partnership law would apply to them, or whether they would be treated as entities like religious and educational institutions. *Id.*

cess to charters, and the Joint Stock Companies Act of 1856 streamlined the chartering process and served as the basis of modern company law in England. As a result of travelling this path, modern company law in England can be seen as having evolved out of partnership law rather than out of the law governing eleemosynary institutions.[45] Some scholars have argued that this helps explain why some corporate law features in Britain are more contractual and partnership-like than corporate law is in the United States.[46]

In the U.S. colonies, most business activities were carried out either by individual proprietorships or by partnerships through the end of the eighteenth century, but the joint-stock company was a well-known organizational form because such companies had in many cases helped to establish, settle, and even govern the colonies on behalf of the Crown. Business people would also have encountered the corporate form in other contexts, because it was used by eleemosynary institutions, including churches, libraries, and universities, and for some public works projects such as canals, bridges, water works, turnpikes, and banks.[47] Most corporate charters in the colonies in the early eighteenth century had actually been granted by the governors of the colonies, who granted charters much more liberally than did the King or Parliament in England.[48] As a result, this form was more readily available in the colonies than in England, and its status less ambiguous than that of joint-stock companies (which would probably have been considered partnerships by colonial courts).[49] After the Revolution, however, when the authority of the English monarch and Parliament were no longer recognized, state legislatures took over the task of issuing charters, and did so with greater frequency and for more different types of organizations than had the King or Parliament.[50] Nonetheless, it was still costly and time consuming to organize a business as a chartered corporation rather than as a partnership or unchartered joint-stock company because, throughout the eighteenth century and well into the nineteenth century, corporate charters

45. Blumberg observes that "modern English business law . . . developed as company law—or the law applicable to joint stock companies—not as corporation law." *Id.* at 15.

46. *See* ALAN DIGNAM & JOHN LOWRY, COMPANY LAW 395 (6th ed. 2010); Marc T. Moore, Private Ordering and Public Policy: The Paradoxical Foundations of Corporate Contractarianism 2 (Nov. 9, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1706045.

47. Creighton, *supra* note 15, at 30, reports that prior to the Revolution, only seven corporations were chartered for business purposes (other than public works, banks, and insurance companies) in the U.S. colonies.

48. CARTER, *supra* note 24, at 25 (identifying two corporations formed by the Colony of Connecticut, and one by the Governor of New Jersey, between 1731 and 1785). BLUMBERG, *supra* note 17, at 10, observed that "state legislatures did not share English reluctance to create new corporations." *See also* 2 JOSEPH STANCLIFFE DAVIS, *Eighteenth Century Business Corporations in the United States*, *in* ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 3, 4 (1917) (discussing corporations formed in the colonies from the mid seventeenth century through the American Revolution, and noting that after the Revolution, the new U.S. states granted numerous charters).

49. Blair, *supra* note 12, at 422.

50. *See* BLUMBERG, *supra* note 17, at 10.

required individual special acts by the governor or state legislature.[51] By 1800, only 335 charters had been issued in the United States to business corporations.[52]

Partnerships and unchartered joint-stock companies, while easier to establish, had a substantial drawback for industrial enterprises relative to chartered corporations. Assets accumulated by a business organized as a partnership were subject to being withdrawn at any time if a partner decided to pull out of the business, and if a partner died, the partnership had to be dissolved and reformed after paying out an appropriate share of assets to the heirs of the deceased.[53] By contrast, courts recognized that any business organized with a corporate charter obtained from the state was a separate legal "person," that could hold the property in perpetuity, even as a stream of investors and managers came and went in the enterprise.[54] Investors could sell their shares to another investor, but could not demand that their share of the assets be paid out of the corporation to them.[55] Thus, by early in the nineteenth century, business people began seeking corporate charters for a wider variety of businesses, particularly for any business that required a substantial commitment of long-lived capital. As a consequence, the law governing business corporations developed in the United States earlier and faster than it developed either in England or in other European countries.[56]

Despite the cost and difficulty of obtaining a charter, demand for charters increased rapidly. By 1850 there were thousands of corporations in existence in the United States that were chartered to carry out business activities, and fourteen of the thirty-one states had either general incorporation statutes, or state constitutional amendments or provisions that provided that any group that met certain requirements and filed the appropriate papers could form a corporation.[57] As many as half of all corporations in existence by the mid-nineteenth century were business enterprises.[58] By 1890, there were 500,000 business corporations in existence in the United States, according to Votaw,[59] substantially more

51. *Id.* at 22.

52. *See* 2 DAVIS, *supra* note 48, at 8, 24 tbl.I. And eighty-eight percent of the charters for these business corporations had been issued after 1790.

53. *See* Blair, *supra* note 12, at 409–10; *see also* HARRIS, *supra* note 3, at 21, 142.

54. *See* BLUMBERG, *supra* note 17, at 4.

55. Blair, *supra* note 12, at 414.

56. By 1673, France developed an organizational form called a "*Société en commandite*," which was equivalent to a limited partnership. ANGELL & AMES, *supra* note 17, at 40. This form was also used in various parts of Europe, though not in England. The limited partnership form permitted some participants to be passive partners, protected the passive partners from liability for the business, and permitted the shares of the passive partners to be transferrable. New York and Connecticut passed limited partnership statutes in 1822. *See* Naomi R. Lamoreaux, *Partnerships, Corporations, and the Theory of the Firm*, 88 AM. ECON. REV. 66, 68 (1998).

57. Creighton, *supra* note 15, at 142 tbl.6.1 (showing seven states with state constitutional amendments providing general incorporation by 1850); *id.* at 151 tbl.6.4 (showing seven other states with general incorporation statutes by 1850).

58. *Id.* at 30.

59. DOW VOTAW, MODERN CORPORATIONS 24–25 (1965).

than existed in any other country, and almost every state had a general incorporation statute.

Incorporation statutes did not always provide for limited liability for corporate shareholders, especially early in the nineteenth century.[60] So while this feature of corporations later became important, it was not initially the feature that caused so many business people to seek out and adopt this organizational form.[61]

What was compelling and attractive, however, was the legal standing that chartered corporations had as separate entities, or legal persons.[62] In particular, separate entity status provided continuity by assuring a clear line of succession in the holding of property and the carrying out of contracts, as it had traditionally done for eleemosynary or public purpose corporations. It also provided an identifiable persona that business people could contract with, and that could hold important intangible assets, such as monopoly rights, patents, special knowledge, competences, reputation, and brand, which became extremely important in the late nineteenth century to support mass production and mass marketing. The corporate form also provided a mechanism for partitioning assets and committing them to a particular enterprise while protecting not only those assets from creditors or heirs of the corporation's participants,[63] but also investors in the corporation from creditors of the corporation.[64] Further, by the mid-nineteenth century, an emerging body of corporation law provided that when a state issued a charter, the entities created were to be governed by boards of directors.[65]

60. BLUMBERG, *supra* note 17, at 10; Blumberg, *supra* note 43, at 588–89; Nina A. Mendelson, *A Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1209–11 (2002). Angell and Ames observed that some "corporations of our own time . . . are those which have been created in different parts of the United States by charters, that impose upon each member a personal responsibility for the company debts, and in that respect, resemble an ordinary copartnership." ANGELL & AMES, *supra* note 17, at 45. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1651 (1988), asserts that "during the first third of the nineteenth century, American states experienced a general legislative and judicial reaction against limited liability." Limited liability became a standard feature of business corporations in the second half of the nineteenth century, although California corporate law did not provide for limited liability until 1931. Mark I. Weinstein, *Limited Liability in California 1928–1931: It's the Lawyers*, 7 AM. L & ECON. REV. 439, 448–51 (2005).

61. *See* Blair, *supra* note 12, at 440; Creighton, *supra* note 15, at 41.

62. The legal recognition of corporations as separate entities eventually led courts to absolve shareholders of liability for corporate debts, at least after they had paid in their full initial capital, so limited liability came to be associated with entity status. But entity status preceded limited liability. *See supra* note 60.

63. Blair, *supra* note 12, at 392.

64. Hansmann et al., *supra* note 20, at 1340.

65. Blair, *supra* note 12, at 393.

II. CORPORATE "PERSONHOOD" AND THE LAW

We have seen that, at least for some purposes, separate entity status was a defining feature of the corporate form from the time institutions were first organized in this manner. Churches and monasteries in the Middle Ages were viewed as separate entities from the priests or abbots who administered them, as well as from the parishioners or monks who were members of the communities those institutions served at any point in time. This separate status made it clear that the assets used by these institutions belonged to the institutions, though a perpetual succession of individuals might administer them. The separate entity device also provided for continuity in contractual relationships between the institutions and other parties. We have also seen how separate entity status served to partition these assets. Assets that were committed to support the work of the institutions could not be pulled out for private use by the members or administrators, nor could they be used to pay off the debts of those members or administrators—a feature I have elsewhere called capital "lock-in."[66] By the late-nineteenth century, the corporate form also usually came with "limited liability," which further clarified the partitioning of the assets to make sure that the individual members and administrators of incorporated organizations could not be held liable for corporate debts. And we have seen how the separate entity status of corporations facilitated self-governance by requiring some sort of governance arrangement by which individuals would be chosen to make decisions for the entity. Recognition of separate entity status also helped assure that neither courts nor governmental agencies would interfere in internal matters within the corporations.

These three functions of corporate personhood—continuity in contracts and property ownership, asset partitioning, and self-governance by boards—have been recognized in legal scholarship at various times and, with the exception of limited liability, have generally not been controversial. But these three functions could have been adequately served by the device of making the chartered corporation a separate "entity," (like a trust, for example)[67] without the additional anthropomorphic device of

66. *Id.* at 388, 453.

67. Business trusts have been used to accomplish some of the functions of corporations in some states. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 69 (1966) (noting "the effectiveness of [business trusts] for making combinations permanently cohesive and easily manageable"); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (explaining that trusts provide for the partitioning off of assets to be shielded from the claims of the trustee's personal creditors). The trust form was also notoriously used in the late nineteenth century to consolidate control over industries such as railroads, oil, steel, and sugar. Prof. David Millon points out that "the railroads were the first of these huge consolidations, followed by processing and distribution firms, and then by massive integrated manufacturing enterprises. By 1890, great 'trusts' dominated the petroleum, cottonseed oil, linseed oil, sugar, whiskey, and lead processing industries." David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1225 (1988) (citations omitted). Noting that trust-making was considered the "tendency of the times" and not limited to

making the corporation a "person." Nonetheless, the language of corporate personhood entered legal discourse from the early days of the corporate form, and keeps reappearing.[68] Moreover, controversy around the idea of corporate personhood (or sometimes, "corporate personality") seems to bubble up in the law every few decades, and legal decisions that make reference to the idea have often been sources of confusion.[69] In fact, "[t]he idea that a corporation is a 'person' for legal purposes," according to corporate law and antitrust scholar Herbert Hovenkamp, "is one of the most misunderstood doctrines in American legal history."[70]

Much of the confusion and controversy arises around what I have called the "persona" function of personhood status. By the expression "corporate persona," I mean the fact that the corporation is the legal counterparty to all contracts that the corporation enters into with its various participants (managers, employees, customers, suppliers, and investors), that it can sue and be sued in its own name, and that it can do things and take on characteristics that distinguish it from any of its participants.[71] Hovenkamp tells us that when questions began to come up in the late nineteenth century about the extent to which constitutional protections applied to corporations, the Supreme Court needed to solve two problems: The first was "guaranteeing that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name," and the second was determining who would have standing to assert those claims in

large industries and markets, Letwin further identifies other smaller industries controlled by combinations, including the "Envelope, Salt, Cordage, Oil-Cloth, Paving-Pitch, School-Slate, Chicago Gas, St. Louis Gas, New York Meat, and Paper-Bag" trusts. LETWIN, *supra*, at 70; *see also* Henry D. Lloyd, *Lords of Industry*, 138 N. AM. REV. 535 (1884) (declaring that business trusts controlled most U.S. commerce in the late nineteenth century).

68. Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563–64 (1987).

69. Supreme Court rulings have not adopted a consistent view of corporate personhood. The majority opinion in *Citizens United v. FEC* argued that the government may not suppress political speech on the basis of the speaker's corporate identity, explaining that "the worth of speech 'does not depend upon the identity of its source, whether corporation, association, union, or individual.'" Citizens United v. FEC, 130 S. Ct. 876, 904 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978)). Despite this recognition of the corporate identity as distinct from an association of individuals, the Court also declares that "if the antidistortion rationale were to be accepted . . . it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form." *Id.* Mark points out that in 1978, the Supreme Court said in *Bellotti*, that the view that "corporations, as creatures of the State, have only those rights granted them by the State" is "extreme," and found that corporations have First Amendment speech rights. Mark, *supra* note 3, at 1442 n.3 (quoting *Bellotti*, 435 U.S. at 778 n.14). Then in 1987, the Supreme Court, in *CTS Corp. v. Dynamics Corp. of America*, held that states could regulate takeover activity because "state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." 481 U.S. 69, 89 (1987). Mark notes also that Justice Powell wrote both opinions. Mark, *supra* note 3, at 1442 n.3. Blumberg, *supra* note 2, at 59, cites Justice Brown in *Hale v. Henkel*, 201 U.S. 43 (1906), as relying on the "artificial person" theory to justify a finding that corporations are not protected against self-incrimination, but later in the same case, utilizing the contractual, or associational theory to find that corporations are protected against unreasonable searches and seizures.

70. Hovenkamp, *supra* note 60, at 1640.

71. Blair, *Four Functions*, *supra* note 6, at 449–50.

the courts.[72] Identifying the corporation as a separate "person" solved the first problem by implying that corporations should have the same property protections as natural persons. But if the corporation is a separate "person," and not just an aggregate of its shareholders, as in a partnership, then should the shareholders have the right to assert constitutional rights on behalf of the corporation? As its own legal person, the Court eventually decided, only the board of directors would be empowered to act for the corporation. Hence, only the board would have standing to pursue claims on its behalf in court.[73]

The idea that a corporation has its own name and is able to act in that name also means that it can take on an identity that is separate from any of its individual participants, an identity I refer to as the corporation's persona. Courts recognized that a corporation may have rights and responsibilities both under the law and under the terms of contracts it has entered into, rights and responsibilities that are separate from any such rights and responsibilities of the individual members or participants in the enterprise. Moreover, employees and investors in the enterprise, as well as customers of the enterprise, may be able to recognize, interact with, and perhaps identify with the persona of a corporation, and the persona can thereby serve as the bearer of important intangible assets such as goodwill, reputation, and brand.[74] Customers of the National Biscuit Company (later Nabisco) in the early 1900s, for example, did not need to know who William Moore or Adolphus Green were, or that they owned two bakery companies that merged in 1898 to form National Biscuit Company,[75] to have confidence in the quality of cookies and crackers that bore the company's label.

But while the idea of a business corporation as a separate person simplified many business transactions and became an important source of value with the development of mass markets, it continued to be controversial. As corporate law developed in the United States during the nineteenth and early twentieth centuries, corporate personhood took on at least three different meanings, which I call the "artificial person" theory, the "contractual" theory, and the "real entity" theory.[76] I discuss each

72. Hovenkamp, *supra* note 60, at 1641.

73. *Id.*; *see also* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) ("Delaware law imposes on a board of directors the duty to manage the business and affairs of the corporation."); Zapata Corp. v. Maldonado, 430 A.2d 779, 782–83 (Del. 1980) (declaring that since the managerial decision-making power encompasses decisions whether to initiate, or refrain from entering, litigation, "a stockholder cannot be permitted . . . to invade the discretionary field committed to the judgment of the directors and sue in the corporation's behalf when the managing body refuses" (quoting McKee v. Rogers, 156 A. 191, 193 (Del. Ch. 1931)). Although only the board of directors has standing to assert constitutional rights for a corporation in court, shareholders might be able to obtain the right to act for the corporation to enforce claims against directors or against a controlling shareholder through the device of a "derivative suit." *See* EISENBERG, *supra* note 26, at 912–1039.

74. Blair, *Four Functions*, *supra* note 6, at 450.

75. *Nabisco—History*, WIKIPEDIA, http://en.wikipedia.org/wiki/Nabisco#History (last updated Feb. 27, 2013).

76. Sanford A. Schane has called these three meanings "the creature, the group, and the person

of these in Parts II.A, II.B, and II.C below. Then in Part III, I discuss the role of corporate personas in the development of mass markets at the end of the nineteenth and early twentieth centuries. In Part IV, I describe how corporate law theorists at the end of the twentieth century adopted an economic theory of the firm that rejects any role for a corporate persona, and I discuss some of the problems with this new approach.

A. *The Artificial Person Theory*

The earliest scholarship and legal cases on the nature of corporations emphasized that corporations were created by acts of a sovereign which granted to a group of individuals the right to act together as a single person for purposes of holding property, entering into contracts, and suing and being sued in court. Requiring a special act by a king, a governor of a colony, or a legislature meant that corporations could not come into existence on their own, nor were they a product solely of the efforts and will of their incorporators, but were rather an artificial construct of the law, a privilege granted to a group of natural persons by the state. The special-privilege status of corporations was highlighted by the fact that the earliest business corporations often received some franchise or monopoly rights from the state as part of their charter.[77] As an artificial person, each corporation was no more and no less than what the law made it to be. As Blackstone concluded in the late eighteenth century: "artificial [persons] are such as created and devised by human laws for purposes of society and government; which are called corporations or bodies politic."[78] And in the early nineteenth century, Chief Justice Marshall, in *Trustees of Dartmouth College v. Woodward*,[79] elaborated:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are

theories." Schane, *supra* note 68, at 564. Other scholars have referred to them by such names as the "concession" theory, the "aggregate" or "association" theory, and the "natural entity" theory. *See, e.g.*, Nicole Bremner Cásarez, *Corruption, Corrosion, and Corporate Political Speech*, 70 NEB. L. REV. 689, 717 (1991) ("According to the association theory, corporations received their powers not from the state, but rather from their individual shareholders."); Dewey, *supra* note 6, at 666–68 (discussing how the concession theory restricts the corporate body to having only those legal powers derived from an express grant of the State); Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 185 (1985) (highlighting that the natural entity theory "sought to represent the corporation as private, yet neither as 'artificial,' 'fictional,' nor as a creature of the state"); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 213–14 (explaining that proponents of the "aggregate" theory viewed the corporation as a collection of individuals and therefore regarded the corporation's rights as belonging to its individual members rather than to a separate entity).

77. *See supra* notes 34–38 and accompanying text.

78. 1 WILLIAM BLACKSTONE, COMMENTARIES *119.

79. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[80]

Through the first half of the nineteenth century in the United States, corporate status was granted increasingly for business purposes, but was primarily reserved for business activities that were understood as having some sort of public benefit—to build a bridge or turnpike, operate a water works, or establish a bank or insurance company.[81] One of the main reasons for incorporation was to make it possible for the group of individuals who would carry out this public task to unite "under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes is considered a natural person."[82] One can easily imagine that if a group of individuals were being commissioned to carry out some public task, the state would want to ensure that the project would continue, even if some of the individual persons in the group could no longer participate.

On the question of what powers a corporation has, and the extent to which states could regulate the contracts entered into by the corporation, the artificial person theory implied that corporations had no inherent rights in their relationships with the state. In an 1880 Maryland case, for example, the court found that the corporation "has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted."[83] Similarly, the Maine Supreme Court found in a 1903 case that the state legislature could "prohibit the acquisition of any more property by the corporation [or] . . . prohibit the making of any new contracts whatever by the corporation, or any new contract except one of a particular prescribed kind and form."[84]

In matters such as these, courts treated corporations as creatures of the state, in contrast with partnerships, which were regarded as aggregates of the individual members of the partnership.[85] Under the common law of partnership, business people could form a partnership by agreement among themselves, with no approval or other sanction by the state.[86] Partnerships were recognized as contractual relationships, and entered into privately among their members. But corporations only came into existence when a charter was issued by the state, and were thus

80. *Id.* at 636.

81. SEAVOY, *supra* note 40, at 47; Henry Hansmann & Mariana Pargendler, The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption, 123 YALE L.J. __ (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2219865.

82. ANGELL & AMES, *supra* note 17, at 1.

83. Shaffer v. Union Mining Co., 55 Md. 74, 79 (1880).

84. *In re* Opinion of Justices, 55 A. 828, 829 (Me. 1903).

85. Hovenkamp, *supra* note 60, at 1647–48.

86. *Id.*

subject to regulation by the state.[87]

Over the course of the nineteenth century, as more corporate charters provided for limited liability for corporate shareholders, some courts emphasized that the artificial person theory was necessary to justify this feature.[88] As Justice Taney put it in *Bank of Augusta v. Earle*, "[w]henever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members."[89] Reasoning that if the corporation were not separate from the individuals for the purposes of entering into contracts, as the artificial person theory holds, Taney questioned why those individuals should be able to escape responsibility for debts incurred under those contracts.[90] But if the entity is separate, it has no existence unless such is granted by a charter from the state, and therefore, "[t]he only rights it can claim are the rights which are given to it in that charter, and not the rights which belong to its members as citizens of a state."[91]

B. *The Contractual Theory*

As general incorporation statutes were passed and the corporate form came to be used more widely in business enterprises in the late nineteenth century, business people increasingly chafed at the idea that the use of the corporate form was a privilege granted by the state, and its implied corollary, that the state could regulate corporations at will.[92] During this period incorporation statutes became more generalized and less restrictive, which made it increasingly easy for business people to use the corporate form, whether the business had some public purpose, or no purpose other than the convenience and profit of the organizers and investors.[93] General incorporation statutes meant that anyone could form a corporation simply by filing the required paperwork with the state.[94] Corporate charters could take almost any form that the incorporators wanted them to take, and corporations could engage in almost any legal business activity.[95]

In this environment, business people came to think of corporate sta-

87. *Id.* The joint-stock form was not used widely in the United States (relative to England) since it was regarded as a form of partnership and did not provide the advantages of corporate status. Blair, *supra* note 12, at 422.

88. Hovenkamp, *supra* note 60, at 1647.

89. 38 U.S. (13 Pet.) 519, 587 (1839).

90. *Id.* at 586.

91. *Id.* at 587; *see also* Horwitz, *supra* note 76, at 185 (citing *Bank of Augusta*, 38 U.S. (13 Pet.) at 586).

92. Hovenkamp, *supra* note 60, at 1641.

93. *Id.* at 1634–40.

94. Horwitz, *supra* note 76, at 203 (quoting VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS OTHER THAN CHARITABLE 25 (1882), as observing that general incorporation laws "leave the right of forming a corporation and of acting in a corporate capacity free to all").

95. *Id.*

tus as a right available to all[96] so that they could organize their business affairs in the way that they perceived to be the most convenient and efficient. Since corporate charters were available to almost anyone for almost any purpose, it no longer seemed significant that a corporation was technically a creature of the state. Instead, business people, judges, lawyers, and legal scholars began to think of corporations as having been created by the people who came together to form them. Corporate charters, they came to argue, were contracts among the incorporators and investors and, as such, were similar to partnership agreements for purposes of considering what activities corporations could engage in and what constitutional rights and protections they would have.[97]

The idea that a corporation is a contract of sorts had strong precedent going back to Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*.[98] While Chief Justice Marshall's decision in this case is also cited prominently for the proposition that a corporation is a mere creature of the state,[99] he also states clearly that the charter of Dartmouth College, granted in 1769,

> is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution . . . .[100]

Under this contractual view of corporations, courts addressed the degree to which a state could regulate corporations or otherwise change the rules after a corporation was formed. Following the Court's approach in *Dartmouth College*, courts generally found that the state could regulate after the fact, but only if it had reserved the power to do this in the original charter or by general statute before the charter was issued.[101] In the wake of this decision most states quickly passed general statutes reserving the power to change the terms of corporate charters after they had been issued.[102] Business people, in turn, intensified their efforts to keep corporate charters as short, broad, and unrestrictive as possible.[103]

96. *See id.* at 181.

97. Mark, *supra* note 3, at 1442 ("The corporate bar sought to release the corporation from the strictures of artificiality and to protect corporate property from emerging regulation. They did so by reformulating the corporation as a species of partnership.").

98. 17 U.S. (4 Wheat.) 518 (1819).

99. *Id.* at 636; *see also supra* Part II.A.

100. *Id.* at 643–44; *see also* Hovenkamp, *supra* note 60, at 1605.

101. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 638; *see also* Hovenkamp, *supra* note 60, at 1605–10 (discussing the history of constitutional Contract Clause cases).

102. Hovenkamp notes that during the mid-nineteenth century, "the general reservation clause or statute, giving the state the power to amend corporate charters, became the principal mechanism by which states hedged on commitments to business corporations." Hovenkamp, *supra* note 60, at 1616.

103. According to Horwitz, the doctrine of ultra vires—stating that a corporation cannot act beyond the powers granted to it in its charter—was strictly applied by U.S. courts prior to the Civil War,

If corporations were creatures of contract and freely available to anyone who wanted to use them, then they should presumably be treated like partnerships—as aggregates of their investors—when it comes to questions about the protections they should receive under constitutional law. Ironically, it is this view of corporations that the Supreme Court likely had in mind in 1886 in *Santa Clara County v. Southern Pacific Railroad Co.*,[104] although this case has come to be interpreted very differently.[105] *Santa Clara* addressed the question of whether states could tax corporate property differently from individual property. In a very short decision on the case, the Court noted that it did not want to hear arguments about whether the Fourteenth Amendment requirement of equal protection for all persons was meant to apply to corporations, explaining: "We are all of the opinion that it does."[106] This was the first time the Court had ever ruled that corporations had constitutional rights as "persons," and this case has since been interpreted as laying the foundation for later recognition by the courts of a wide array of constitutional rights and protections for corporations, including First Amendment rights to freedom of speech.[107] But both Horwitz[108] and Hovenkamp[109] persuasively argue that the Supreme Court's use of the word person in this context was not intended to constitute recognition of the corporate entity as an independent, rights-bearing entity, but rather was an assertion that the corporation was a stand-in for the natural persons that formed the corporation and owned its shares. Horwitz tells us that John Norton Pomeroy, the attorney for Southern Pacific Railroad Co. in California, the corporation involved in the *Santa Clara* case, argued that the Fourteenth Amendment undoubtedly protects the property rights of the individual shareholders, so its protections should also extend to corporations.[110] State and federal constitutions must apply to corporations, Pomeroy argued,

as a reflection of "the old vision of corporate powers as a state-conferred privilege." Horwitz, *supra* note 76, at 187. Such a doctrine allowed courts to strike any corporate act beyond the express and implied corporate powers as illegal and unenforceable, regardless of whether there was any actual injury caused. *Id.* at 188. During the latter half of the nineteenth century, however, "even in jurisdictions that still dealt harshly with ultra vires acts, the definition of legitimate corporate powers had for a long time been expanding," a consequence of "general incorporation laws, which had become the norm between 1850 and 1870." *Id.* at 187. Unable to sustain itself due to the growing number of exceptions and internal inconsistencies, the ultra vires doctrine was effectively dead by the 1930s, a reflection of "the triumphant view that corporate organization was a normal and natural form of business activity." *Id.* at 186–87.

104. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

105. *See, e.g.*, Horwitz, *supra* note 76, at 173.

106. *Santa Clara Cnty.*, 118 U.S. at 396 (official court Syllabus).

107. For a comprehensive review of the expansion of constitutional rights or protections granted to corporations, see Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 GEO L.J. 1347, 1352–66 (1979); Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1655–59.

108. Horwitz, *supra* note 76, at 174, 177–78.

109. Hovenkamp, *supra* note 60, at 1640–43.

110. Horwitz, *supra* note 76, at 177–78.

> not alone because such corporations are "persons" within the meaning of that word, but because *statutes violating their prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons*. In applying and enforcing these constitutional guaranties, *corporations cannot be separated from the natural persons who compose them.*[111]

In a subsequent case just two years later,[112] the Court clarified its position:

> Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. . . . The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State.[113]

Horwitz credits Victor Morawetz's 1882 treatise as being part of the "first sustained effort to reconceptualize the corporation in light of the triumph of general incorporation laws"[114] that made the corporate form available to all. Morawetz treated corporations as essentially partnerships, arguing that a corporation "is an association formed by the agreement of its members,"[115] and "the existence of a corporation independently of its shareholders is a fiction."[116]

The main thrust of the contractual view of corporations that emerged in the late 1800s was to provide a counter-argument against state regulation to those who emphasized the artificial entity view in advocating for state authority to regulate corporations. The most logical alternative to the artificial entity view, at the time, seemed to be a view of corporations as organizations that, like partnerships, emerged naturally as individuals joined together to undertake some business enterprises.

While the contractual theory of corporations enjoyed a brief heyday, however, it was not sustainable in the context of the rapid emergence of very large corporate organizations that dominated their industries in the last decade of the nineteenth century—especially as a growing number of these big corporations had shares that traded on stock exchanges and complex administrative structures that made it clear that they were no longer controlled by a small, fixed body of shareholders.[117] This development called for a new theory, which soon overshadowed the contractual theory. The contractual theory was to be revived later, however, when corporate law scholars adopted a "law and economics" ap-

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111. *Id.* at 177 (internal quotation marks omitted) (quoting Argument for Defendant, San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1882)).

112. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888).

113. *Id.* at 189.

114. Horwitz, *supra* note 76, at 203.

115. MORAWETZ, *supra* note 94, at 3.

116. *Id.* at 2.

117. The problem, as Horwitz, explains, was that "many of the special attributes of the corporation could not be explained or defended by partnership analogies." Horwitz, *supra* note 76, at 182.

proach to thinking about corporation law in the last two decades of the twentieth century.[118]

C. *The Real Entity Theory*

Numerous historians and other scholars have noted and commented upon the rapid transformation of the U.S. economy, and of society, in the last few decades of the nineteenth century, when a relatively few large corporations organized and carried out a large share of economic activity, and industrial wealth came to be highly concentrated in those corporations.[119] From the middle of the nineteenth century, large railroad corporations had emerged to run a vast transportation network that was essentially independent, not only of the states through which the railroads ran, but also of the federal government.[120] By the end of the century, manufacturing and marketing corporations were operating on a similarly large scale, also effectively removed from any government control.[121] Thus, it did it not seem particularly useful or plausible to think of corporations as creatures of the state—corporations had, it seemed, outgrown that view. Moreover, the railroads had been financed by selling equity and debt securities to thousands of small investors, and by the early 1890s, other industrial organizations were beginning to finance themselves the same way.[122] It was no longer credible, then, to think of the great railroad corporations, or the big trusts that dominated oil, steel, tobacco, and sugar, as just some sort of partnership of shareholders.[123]

Instead, legal theorists and philosophers embarked on a new intellectual agenda, to come up with a better conceptual framework for understanding the giant corporations that were beginning to dominate the economy. Within the last decade of the nineteenth century, these scholars began to articulate the idea that corporations were "real" entities that came about as a result of the "natural" tendency of human beings to organize themselves into productive groups.[124] This idea provoked a flood of scholarly debate.[125] Horwitz asserts that the scholarly discussion began

118. *See infra* note 143 and accompanying text.

119. Important works that describe and analyze this transition include: ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977); LOUIS GALAMBOS & JOSEPH PRATT, THE RISE OF THE CORPORATE COMMONWEALTH: U.S. BUSINESS AND PUBLIC POLICY IN THE TWENTIETH CENTURY (1988); NAOMI R. LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904 (1985); OLIVIER ZUNZ, MAKING AMERICA CORPORATE: 1870–1920 (1990).

120. SEAVOY, *supra* note 40, at 210–12.

121. Mark, *supra* note 3, at 1445.

122. SEAVOY, *supra* note 40, at 206–12.

123. Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1067 (1994) (suggesting that the most likely reason for the demise of the contractual or aggregate theory of corporations by 1900 was "the emergence of large, management-dominated corporations, which rendered shareholder-based conceptions of the corporate aggregate increasingly implausible").

124. *See, e.g.*, Hager, *supra* note 4.

125. Horwitz, *supra* note 76, at 179 ("There was a flood of writing on the subject of 'corporate

in Europe (especially in Germany and France) with the writings of the German legal theorist Otto Gierke, whose work on the history of associations in Germany[126] was partially translated into English by Frederic William Maitland and published in 1900.[127] Gierke's work emphasized the role of associations in the structure of the state, arguing that associations were capable of having collective goals and could have their own separate personalities.[128]

In the United States, legal scholars had likewise began to develop a theory of corporations as real or natural entities in the 1890s, partly in an effort to explain and justify the holding of the Supreme Court in *Santa Clara*.[129] Ernst Freund built on Gierke's ideas in his work developing administrative law and in his study of the legal nature of corporations.[130] Other scholars similarly began exploring the idea that groups of people organized into associations, and especially those organized into corporations, might take on a group personality that was different from the personality of each member of the group.[131]

As a result of this theorizing, scholars came to perceive the corporation as something more than either a creation of the state or just an aggregate of the shareholders—rather, it was "an organic social reality with an existence independent of, and constituting something more than, its changing shareholders."[132] This view of corporations has been called the "real entity" view, "natural entity" view, or the "realism" view, and it regards the corporation as a unit recognized in the law "with its *own* claims, much like those of a natural person, that extend beyond both the circumstances of its legal creation by the state and the claims or interests of its shareholders."[133]

The Supreme Court did not immediately adopt these developing perspectives, and Horwitz makes a strong case that the Justices had no such idea in mind when they decided the *Santa Clara* case or the other related cases.[134] But, beginning with *Hale v. Henkel* in 1905,[135] the Supreme Court began articulating real entity theory arguments for the ex-

personality' in Germany, France, England, and America near the turn of the [twentieth] century.").

126. *Id.* (citing OTTO GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (1868)).

127. OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE (Frederic William Maitland trans., 1900).

128. Horwitz, *supra* note 76, at 179.

129. *Id.* at 179–80. Horwitz argues that the Court did not intend to adopt a real entity theory of corporations at the time it decided the *Santa Clara* case—indeed, he maintains, the real entity theory "was nowhere to be found in American legal thought when the case was decided." *Id.* at 174.

130. *Id.* at 179–80; *see also* ERNST FREUND, THE LEGAL NATURE OF CORPORATIONS (1897).

131. Horwitz, *supra* note 76, at 179–80.

132. Blumberg, *supra* note 2, at 50.

133. *Id.*

134. Horwitz, *supra* note 76, at 223–24; *see also, e.g.*, Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888); Railroad Tax Cases, 13 F. 722, 743–44 (C.C.D. Cal. 1882) *appeal dismissed as moot sub nom.*, San Mateo v. S. Pac. R.R. Co., 116 U.S. 138 (1882). In these cases, the Court reiterated and clarified its view that corporations were to be understood as associations of people for purposes of determining their constitutional rights.

135. Hale v. Henkel, 201 U.S. 43 (1905).

tension of further constitutional rights to corporations.[136]

Horwitz asserts that the real entity theory helped resolve at least four problems facing the Court under contractual theory:

> First, by 1890 it was no longer easy to conceive of shareholders as constituting the corporation. Changes in the conception of the shareholder from active 'owner' to passive 'investor' weakened the evocative power of partnership theory. Moreover, the entity theory was better able to justify the weakened position of the shareholders in internal corporate governance.
>
> Second, the partnership theory represented a threat to the legitimacy of limited liability of shareholders. The entity theory, by contrast, emphasized the distinction between corporations and partnerships.
>
> Third, while the partnership theory pushed in the direction of requiring shareholder unanimity for corporate mergers [and other major changes], the entity theory made the justification of majority rule possible.
>
> Fourth, the entity theory was superior to the partnership theory in undermining Chief Justice Taney's foreign corporation doctrine which represented a substantial legal threat to the emergence of national corporations doing business in each of the states. The foreign corporation doctrine's reversal, shortly before World War I, can be associated with the triumph of the entity theory.[137]

The decline of the contractual theory, and the rise of the real entity theory, Horwitz further claims, marked the general acceptance of the role of big business in the economy and in society. "By rendering the corporate form normal and regular, late nineteenth century corporate theory shifted the presumption of corporate regulation against the state," he asserts.[138]

But the real entity theory was not to remain in ascendance in legal theorizing permanently. From about the mid-1920s to the 1980s, theoretical discussions about the corporate form essentially disappeared from Supreme Court jurisprudence, as well as from much of corporate law jurisprudence at the state level.[139] Phillips notes that a turning point in scholarly interest in legal personhood came with an essay by philosopher John Dewey in 1926. He argued that the theoretical debates about the nature of the corporation were essentially irrelevant because the theories were indeterminate, and, in case after case, legal theorists could (and did) reach the conclusion they needed to reach for other reasons, and

136. *Id.* at 76–77.

137. Horwitz, *supra* note 76, at 223. The "foreign corporation doctrine" held that states were not required by the Constitution to allow "foreign corporations" (corporations chartered in other states) to operate within their boundaries. *See id.* at 188–89, 223.

138. *Id.* at 183. Horwitz goes further and argues that the acceptance of real entity theory legitimized the large corporation in which management was separated from control. *Id.* at 183, 221.

139. Phillips, *supra* note 123, at 1070.

then backed into the theory they needed to support that conclusion.[140] "[F]or the purposes of law the conception of 'person' is a legal conception; put roughly, 'person' signifies what the law makes it signify."[141] But this did not trouble Dewey because, as Phillips notes, "he evidently thought the decision whether to treat something as a legal person or to give it certain rights and duties should be governed by the consequences of doing so."[142]

Once the real entity theory was widely accepted, and large corporations had been legitimized in the law, it seemed that there was no further need to debate the question of their nature. This remained true until the 1980s, when legal scholars began turning to economic arguments to provide new interpretations and understandings of legal questions. In so doing, they took up the argument that corporations were nothing more than contractual devices to allow a group of people to work together in a common enterprise. Under the new contractual theory, corporations were said to be mere "nexuses" of contracts.[143] This position was adopted in the late twentieth century by scholars of law and economics because, among other things, it justified the use of a simple model of corporations as bundles of assets owned by shareholders, in which directors and managers were "agents" of shareholders. According to Jensen and Meckling,

> Viewing the firm as the nexus of a set of contracting relationships among individuals also serves to make it clear that the personalization of the firm implied by asking questions such as "what should be the objective function of the firm," or "does the firm have a social responsibility" is seriously misleading. *The firm is not an individual.* It is a legal fiction which serves as a focus for a complex process in which the conflicting objectives of individuals (some of whom may "represent" other organizations) are brought into equilibrium within a framework of contractual relations.[144]

While the nexus of contracts view of corporations has had enormous influence on corporate law, corporations have continued to operate as if their "personas" really matter,[145] devoting billions of dollars to developing and promoting their distinctive separate identities.[146]

140. *Id.* at 1073, 1079–80 (citing Dewey, *supra* note 6, at 669).

141. Dewey, *supra* note 6, at 655.

142. Phillips, *supra* note 123, at 1075.

143. Jensen & Meckling, *supra* note 5, at 310 ("It is important to recognize that most organizations are simply *legal fictions which serve as a nexus for a set of contracting relationships among individuals.*"). This article was among the first to adopt this view.

144. *Id.* at 311.

145. The literature on the debate about whether a corporation should be regarded as little more than a nexus of contracts is too huge to cite in full. But for indications of the impact of this theory on corporate law, see, e.g., Melvin A. Eisenberg, *The Conception that the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1998); Henry N. Butler, The Contractual Theory of the Corporation, 11 GEO. MASON U. L. REV., Summer 1989, at 99, 99 nn.1–2.

146. *See infra* notes 163–70 and accompanying text.

III. DEVELOPMENT OF THE CORPORATE PERSONA

It seems likely that the "real entity" theory of the corporate form found acceptance in late nineteenth- and early twentieth-century courts and legal scholarship because it seemed more consistent with the public's observations about corporations at the time. The corporations that took center stage in the economy in the late nineteenth and early twentieth centuries had grown beyond mere extensions of their founders and principal shareholders and executives. They had operations and reputations that reached widely across markets, intruding into the lives of the average person in a way that business people organized as partnerships had not previously done. By 1890, Justice Stephen Field estimated that corporations controlled four-fifths of the wealth of the United States.[147] By 1893, twenty-seven railroad companies each had more than $100 million in capitalization (for a total of more than $8 billion in railroad capital), and together controlled more than 118,000 miles of railroad lines across the country.[148] These railroads had sophisticated organizational structures, with managerial hierarchies developed to coordinate the efforts of thousands of employees working to maintain the tracks and equipment, operate the trains, and control the movement of trains so that they came and went at predictable times and did not crash into each other.[149] In these firms, thousands of people were deployed on behalf of a common enterprise and thousands more invested their savings to provide the financial capital.[150] These undertakings could not credibly be understood as species of partnerships. They were viewed with suspicion, fear, and awe, and had begun to inspire literature, art, and songs.[151] And while the railroads were leaders in establishing these new kinds of enterprises, by the 1890s, manufacturing, mining, and other industrial firms, as well as wholesale and retail firms, were also growing to substantial size and

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147. SEYMOUR D. THOMPSON, I COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS, at v–xi (1896).

148. CHANDLER, *supra* note 119, at 168 tbl.3.

149. *Id.* at 86, 97.

150. *Id.* at 3.

151. For an ample collection of songs and print ads about railroads in nineteenth-century America, see NORM COHEN & DAVID COHEN, LONG STEEL RAIL: THE RAILROAD IN AMERICAN FOLKSONG (2d ed. 2000). In addition to the songs and graphics, Cohen's commentary indicates the profound impact railroads had on American life:

> Many of the songs in this book reflect the concerns not of the railroader or the railroad construction worker, but of the ordinary citizen, whose life and language were permeated by trains, real and symbolic. Busy tunesmiths from both city and country fashioned an extensive garland of songlore that attested to the pervasive presence of the trains.

Id. at 18. Other artistic and literary expressions from this time convey an unmistakable sense of both awe and fear of railroads, thereby supporting the proposition that the industry was an inescapable source of inspiration. *See, e.g.*, Christopher P. Cranch, *The Locomotive*, *in* ARIEL AND CALIBRAN, WITH OTHER POEMS 144, 144 (1887) ("Whirling along its living freight, it came,/ Hot, panting, fierce, yet docile to command—/The roaring monster, blazing through the land/Athwart the night, with crest of smoke and flame; . . ."); Walt Whitman, *To a Locomotive in Winter*, *in* LEAVES OF GRASS (1881–82) (describing the locomotive as "type of modern—emblem of motion and power—pulse of the continent" and as a "fierce-throated beauty" with "lawless music" and madly-whistled laughter").

seemed to be taking on attributes such as character and purpose and reputation, similar to those of individual persons, yet larger-than-life. Legal scholars, philosophers, and social scientists struggled with how to understand and interpret organizations that seemed to be taking on their own personalities. Legal historian A.J. Laski observed that "there is compulsion in our personalising. We do it because we must. We do it because we feel in these things the red blood of a living personality. Here are no mere abstractions of an over-exuberant imagination."[152] Even Dewey, who came to the conclusion that theorizing about the nature of corporations was not particularly useful in deciding constitutional law questions, conceded that "groups such as corporations have a real underlying social identity of their own, distinct from the identities of the people who form them."[153]

This quality that corporations began to have, of their own personality or unique identity, was not just a consequence of their size, and did not come about entirely by accident. As corporations emerged to organize large scale manufacturing, transportation, and wholesale and retail trade, business people working in these corporations devised ways to market their products to customers across great geographic, social, and economic distances.[154] The scale of the market meant that customers no longer had personal relationships with the people who produced the goods. How could a customer be sure that a product would be well-made, or that the producer or seller would stand behind the product? One solution to this problem turned out to be the development of the idea of "branded" goods, such as Coca-Cola and Quaker Oats.[155] The brand, then, became a key part of the corporate persona.

Firms that produced factory-made machinery in the mid-nineteenth century, such as guns, sewing machines, and farm equipment, had to convince potential customers that the manufacturer would stand behind the product and provide for repairs and maintenance. In the late 1850s and early 1860s, sewing machine maker I.M. Singer & Co.—originally organized as a partnership—developed a network of distributors in local communities who were direct employees of the firm (rather than independent distributors), who could sell the machines, teach women how to

152. Phillips, *supra* note 123, at 1101–02 (internal quotation marks omitted) (quoting Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 405 (1914)).

153. Phillips, *supra* note 123, at 1075 (citing Dewey, *supra* note 6, at 673).

154. CHANDLER, *supra* note 119, at 209–39 (describing the development of mass distribution systems in the late 1800s and early 1900s); *see also* William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1483 (1989) (noting that "production by great collective entities becomes a reality rather suddenly" during this period). Material in the rest of this Section draws heavily from Blair, *Four Functions*, *supra* note 6.

155. "Campbell Soup, Coca-Cola, Juicy Fruit gum, Aunt Jemima, and Quaker Oats were among the first products to be 'branded', in an effort to increase the consumer's familiarity with their products." *Brand*, WIKIPEDIA, http://en.wikipedia.org/wiki/Brand (last updated Mar. 5, 2013). *See also generally* DAVID A. AAKER, MANAGING BRAND EQUITY: CAPITALIZING ON THE VALUE OF A BRAND NAME (1991) (exploring how brands add value to businesses, their products, and services).

use them, provide financing for households to buy the machines, and repair the machines if they broke.[156] This network of employees, each of whom contributed in some way to help build a reputation for quality, reliability, and service, made it possible to sell sewing machines to customers who never met, and would never meet, Mr. Isaac M. Singer, the inventor of the machines, or his business partner Edward Clark.[157] The Singer sewing machine thus became one of the first branded factory-made machines to be used in many households.

By 1860, the reputational value that the I.M. Singer & Co. partnership had built up since its founding in 1851 was vulnerable to the extent that it was tied to Mr. Singer the person, because Singer was growing old and becoming increasingly eccentric and flamboyant as he aged.[158] Singer's partner Clark intuitively understood that it was crucial to the long run success of the business that it have an identity separate from Singer, the person that could be the bearer of the reputation for quality products and continuing service after the sale. He convinced Singer to reorganize the business as a corporation, the Singer Manufacturing Co.[159] This decision had the effect of transferring all of the tangible assets of the business into a separate corporate entity—an entity that could have its own persona—and helped to link the intangible reputational assets of the business to that persona. Importantly, the corporate persona could be distinguished from Singer the person, and, as it happened, would continue in existence for more than a century after Singer was gone.[160]

Having a corporate entity that serves as the identifiable persona—the bearer of reputational and organizational capital, results in a significant change in the relationships among customers and employees of the firm. In a market of individual producers and shops, customers trust the quality of the meat, bread, and candles because they trust the competence and honesty of the individual butchers, bakers, and candlestick makers. Where corporations make and sell mass produced branded products in many markets, however, the customer often comes to trust the branded product first, and soon develops confidence in the competence and ethics of individuals involved in making and selling the products without knowing them personally because they are employed by the corporation and identified with its brand.[161] One of the biographers of

156. *See* CHANDLER, *supra* note 119, at 302–04; Blair, *supra* note 12, at 447.

157. Blair, *supra* note 12, at 448–49.

158. *Id.* at 445–46.

159. *Id.* at 446.

160. *Id.*; Marion Crain, *Managing Identity: Buying Into the Brand at Work*, 95 IOWA L. REV. 1179, 1182 (2010) ("[B]rands allow a firm to separate itself and its reputation from the people who make the products or provide the services . . . ."). Singer Corp. still exists as of 2013 as a subsidiary of SVP Worldwide Corp.

161. Social identity theory argues that individuals define and identify themselves partly in terms of the social groups to which they belong. *See* DONALD M. TAYLOR & FATHALI M. MOGHADDAM, THEORIES OF INTERGROUP RELATIONS: INTERNATIONAL SOCIAL PSYCHOLOGICAL PERSPECTIVES 61–94 (2d ed. 1994) (discussing social identity theory). Empirical research has shown that most indi-

Henry Heinz, who founded H.J. Heinz Co.—one of the first companies to produce and sell a packaged food product to a mass market—tells us that Heinz understood that "consumers had to be able [to] identify a particular product's source, functional attributes, and perceived quality relative to rival goods.... And also needed to be made to appreciate the intangible aspects of a good—the associations and expectations they attached to it."[162] Heinz worked systematically to create a corporate persona around its branded food products by building a substantial sales organization, with trained full-time employees who were urged to establish ongoing, personal relationships with the retailers in their respective territories.[163] In this way, the use of the corporate form of organization and the careful cultivation of a corporate persona with a reputation for quality and consistency made it possible to extend the reputational value created in the firm across time and space, so that numerous firm employees could share in the reputation of the firm, and so that the reputational value reaches many more possible customers.

This phenomenon was evident in the evolution of the various du Pont family businesses in the late nineteenth century. From the 1870s through the end of the century, Henry du Pont and his nephew Lammot (operating together as a partnership) were the faces and reputations behind the various explosives and gun powder products that were produced at plants owned by the partnership.[164] Business historian Olivier Zunz tells us that "Old Henry" personally "corresponded with an extensive network of independent agents" in the early days of the effort by the firm to serve a national market.[165] These agents were often men of prominence in their communities who could vouch for the quality of the Du Pont products. But after Du Pont was incorporated as the E.I. Du Pont de Nemours Powder Co. in 1902, independent agents were either brought into the company as managers or the relationships were generally severed, so that, within a relatively short period of time, Du Pont's explosives products were sold only by company employees. As a result, the company came to be seen as the person behind the products, not the individual sales people, nor any specific du Pont family member.[166] In this way, the brand creates value for customers by reducing the transaction costs associated with identifying reliable sources for products, and reliable people with whom to do business. Similarly, if the brand is attached

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viduals have strong needs to identify with social groups. *See* Blake E. Ashforth & Fred Mael, *Social Identity Theory and the Organization*, 14 ACAD. MGMT. REV. 20 (1989). Numerous scholars have studied how employees tend to identify with the firms that employ them, as well was with groups within the firms. *Id.* at 22–23; *see also* George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9 (2005).

162. Nancy F. Koehn, *Henry Heinz and Brand Creation in the Late Nineteenth Century: Making Markets for Processed Food*, 73 BUS. HIST. REV. 349, 362 (1999).

163. *Id.* at 383–88.

164. ZUNZ, *supra* note 119, at 17.

165. *Id.*

166. *Id.* at 17–36.

to the corporate entity rather than to any of the individual investors, managers, board members, or employees, the work force of a firm can more easily identify with the firm and with each other, which in turn creates value because employees who identify with each other and with the firm have been shown to be more productive.[167]

In contemporary times, the importance of corporate persona for commercial and financial success has, if anything, greatly expanded. Tens of thousands of corporations, some owning dozens or hundreds of brand names, vie for the attention and allegiance of customers, investors, and employees around the globe, in an internet-enhanced market. Interbrand, a global consulting group specializing in brand management, estimates that the total brand value of the top ten global brands—which they identify as Coca-Cola, Apple, IBM, Google, Microsoft, GE, McDonald's, Intel, Samsung, and Toyota—exceeded $460 billion in 2012.[168] And brand is just one of a number of types of intangible assets that contribute substantially to the value of modern corporations, with others including reputation, capacity for innovation, and social and commercial networks, all of which are tied, in some way, to the corporate personas that own or encompass these assets.

One of the things these intangible assets have in common is that they are not solely a product of the financial and physical assets of a corporation—they all depend for their value on the ongoing actions and contributions of managers and employees. The value of corporate personas can also be destroyed by the actions of managers and employees. Enron comes to mind as a corporation that had a remarkably valuable persona prior to 2001,[169] but this value collapsed when the misleading accounting that had artificially pumped up its assets was exposed. The word "Enron" now has a negative value as a slang term for cheating or taking money unjustly.[170]

Corporate personas today are at least as important to the value that

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167. *See* Akerlof & Kranton, *supra* note 161, at 10; Steven Boivie et al., *Me or We: The Effects of CEO Organizational Identification on Agency Costs*, 54 ACAD. MGMT. J. 551, 570–71 (2011); Roy Chen & Yan Chen, *The Potential of Social Identity for Equilibrium Selection*, 101 AM. ECON. REV. 2562, 2564, 2587 (2011).

168. *Best Global Brands 2012*, INTERBRAND, http://www.web.archive.org/20130117082520/http://www.interbrand.com/en/Default.aspx (archived Jan. 17, 2013). Determining the value that a brand adds to the asset value of the corporate owner is more art than science. Another organization, using a different methodology, estimates that the top ten global brands (a different group of firms than the Interbrand top ten) had a combined value of about $840 billion in 2011. *2011 Brandz Top100 Report*, SCRIBD, http://www.scribd.com/doc/55076143/2011-BrandZ-Top100-Report (last visited Mar. 5, 2013).

169. The company was named by *Fortune Magazine* as "America's Most Innovative Company" six years in a row, 1995–2000, and was on Fortune's list of the "100 Best Companies to Work for in America" in 2000, before it collapsed in scandal in the fall of 2001. Bethany McLean & Peter Elkind, *The Guiltiest Guys in the Room*, FORTUNE, July 5, 2006, http://money.cnn.com/2006/05/29/news/enron_guiltyest/index.htm; Robert Levering et al., *The 100 Best Companies to Work For in America*, FORTUNE, Jan. 10, 2000, http://money.cnn.com/magazines/fortune/fortune_archive/2000/01/10/271718/index.htm.

170. *See Enron*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=Enron (last visited Mar. 5, 2013).

corporations create (or destroy) for their employees, investors, and customers as they were in the early twentieth century, which might lead one to believe that the real entity theory of corporations would still be accepted and applicable in legal discourse today. And yet the real entity theory of corporations went out of fashion in legal scholarship in the 1980s, pushed aside by the ascendancy of a new version of the contractual theory, the "nexus of contracts" theory.[171] In the last Part of this Article, I make a few observations about this change in the intellectual framework of corporate law scholarship.

IV. RETHINKING THE NEW CONTRACTUALISM

In much of my prior work, I have, in one way or another, explored the idea that successful business corporations are, and should be treated by the law as, more than just bundles of assets that belong to shareholders.[172] While the role of shareholders in corporations is not trivial—without financial capital, few business enterprises could get out of the starting block—it is the efforts and vision of the entrepreneurs, managers, and key employees, as well as business practices that cultivate innovation and collaboration in teams, that create corporations whose value greatly exceeds the value of the financial capital that has been put in them. The real entity theory of corporations provided a vocabulary that embraces and acknowledges these self-evident facts. But numerous legal scholars since the 1980s have rejected the real entity view of corporations in favor of a theory that dismisses the idea that a firm is more than the sum of the contracts it embodies.[173]

Legal scholars started down this path by adopting the frameworks that had been developed by economic theorists to provide insight into key relationships within firms and by applying these reductionist models to the law of corporations. Beginning in the 1980s, they produced a substantial literature that starts from three simplifying premises that economists had adopted: (1) that shareholders are the "owners" of corporations, which are simply bundles of assets owned collectively by shareholders; (2) that directors and managers are the agents of shareholders and therefore are supposed to apply themselves to maximizing

171. *See* Jensen & Meckling, *supra* note 5.

172. *See, e.g.*, MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY (1995); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 275–76 (1999).

173. This legal scholarship is built on the work of economists who created stripped-down models of firms to understand key relationships. *See, e.g.*, Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Jensen & Meckling, *supra* note 5. Another variation of this reductionist view of firms is that a firm is a bundle of assets owned by the shareholders. *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119 (1990).

the value of the shares; and (3) that the best way to achieve higher value for shareholders is to give shareholders more power and control rights so that they can compel managers and directors to maximize share value.[174]

Frank Easterbrook and Daniel Fischel, for example, wrote a series of articles together in which they developed the implications for corporate law of the idea that corporations are essentially a contracting device with no separate existence and embodying no distinct rights and interests apart from the individuals who contracted together through the corporations.[175] They focused especially on what they thought of as the central or most important contract in any corporation, the principal-agent contract between shareholders and directors/managers.[176]

Other legal scholars followed this lead, and within a few years, the legal literature on corporations as contractual devices and managers as agents of shareholders exploded. In an insightful analysis of this transformation of legal thinking about corporations, William Bratton notes that the real entity theory of the corporation was essentially "managerialist"—it accepted and legitimized the large corporation in which a managerial hierarchy exercised control.[177] The new nexus of contracts theory, by contrast, was antimanagerialist, emphasizing that managerial authority is derived from the agency relationship with shareholders and that managers serve at the behest of shareholders.[178] It is beyond the scope of this Article to explore all of the reasons why corporate law scholarship began to tilt so strongly in an antimanagerialist direction in the 1980s, after having been quiescently managerialist for nearly half a century. But the 1980s was a period in which many leading thinkers in the United States believed that the country was in decline and that the decline probably had to do with the failures of the bureaucratic and sclerotic corporations that dominated so many industries. "[I]n the 1980s national economic decline-revival became one of the foremost domestic issues, a new

174. *See* Blair & Stout, *supra* note 170, at 252 n.15 (citing some of the leading articles in the law and economics literature that assume and/or advocate for maximizing share value and giving shareholders more power).

175. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J. L. & ECON. 395 (1983); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271 (1986). Ultimately they brought these ideas together into a single volume. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

176. EASTERBROOK & FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, *supra* note 175.

177. Bratton, *supra* note 154, at 1476 ("The managerialist picture put corporate management groups at the large corporation's strategic center.").

178. *Id.* ("The issue was whether management held and exercised the power legitimately. Antimanagerialists charged that management exercised its power without accountability. This argument had three parts. First, legal doctrine vested governing power of the corporate entity in the board of directors subject to shareholder vote. Second, management in fact controlled the board. And third, the financial community supported management. Therefore, management groups were unaccountable to higher authority.").

and uncomfortable prospect for Americans," wrote historian Otis Graham.[179]

By the latter half of the decade, vigorous public discussion had melded an impressively broad consensus that the erosion of U.S. economic strength was a reality, that it had not been and would not be stemmed by the Reaganite reforms, and that both relative and in some cases absolute decline had continued through even the remarkable years of expansion in 1983–1990.[180]

Concern about decline manifested itself in a number of ways. The most salient for our purposes was the idea that executives in the corporate sector, on the whole, had become uncreative, unwilling to take risks, self-serving, empire building, and unaccountable.[181] The new antimanagerialist contractual theory of the firm may have been attractive because it offered a framework for thinking about how the law could help to unseat these executives and bring in new industrial leadership.

The new literature on the nexus of contracts theory of the corporation also offered a way to think about the legal and policy issues raised by a phenomenon then sweeping the financial markets—hostile takeovers.[182] According to the theory, corporate managers cannot be expected to always work tirelessly to maximize the value of a corporation's stock because they are merely hired agents with their own preferences that are not necessarily the same as the preferences of their principals, the shareholders. If managers fail to maximize the value of the shares of their company, however, the stock price of the company will be lower than its potential, and there will be an incentive for an outside investor to buy up a controlling position in the corporation, then proceed to fire management or otherwise compel the company to cut its costs or redirect its assets so that they have a higher value.[183]

This story line made the investors who were actively bidding for control of numerous corporations in the 1980s into heroes who were adding value, rather than greedy raiders (as corporate executives initially tried to portray them) who were opportunistically stripping value out of the corporations by ending employee pension plans, renegotiating contracts with unions, or closing plants and shipping production overseas—all while paying themselves large bonuses. Not surprisingly, the image of financiers as the heroes rather than the villains was congenial to corpo-

179. OTIS L. GRAHAM, JR., LOSING TIME: THE INDUSTRIAL POLICY DEBATE 1 (1992).

180. *Id.*

181. *See, e.g.*, BLAIR, *supra* note 172, at 7, 99 (discussing the theory that the takeover wave of the 1980s was the financial market's response to high agency costs associated with managerial empire building).

182. *See id.* at 94.

183. *See* ROBIN MARRIS, THE ECONOMIC THEORY OF 'MANAGERIAL' CAPITALISM 46–109 (1964); OLIVER E. WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM 28–37 (1964); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. R. 323, 323–24 (1986); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–13 (1965).

rate finance practitioners and scholars, and scholarship exploring and testing these ideas soon dominated the finance literature as well as the corporate law literature.[184] The nexus of contracts/principal-agent model has thus formed the framework for a large part of the theoretical and empirical scholarship of both finance and corporate law over the last three decades.

This literature includes arguments that corporate boards and managers should be required to be passive in the face of hostile offers so that shareholders could take advantage of the opportunity to sell their shares at a higher price.[185] Similar reasoning has been applied to consideration of a long list of takeover defenses, which generated a large body of literature during the 1980s arguing that takeover defenses reduced the value of corporate shares and that they should therefore be disallowed or constrained.[186] Arguments were also made that managers and directors should be paid in stock options or other equity claims so that their inter-

184. *See* Clifford G. Holderness & Dennis P. Sheehan, *Raiders or Saviors? The Evidence on Six Controversial Investors*, 14 J. FIN. ECON. 555, 556 (1985) (noting that the typical corporate raider was characterized as "a liar of the worst kind," a "racketeer," an "unprincipled predator who will stop at nothing in his search for a quick buck," or a looter whose goal was "to prey upon and defraud stockholders of a carefully chosen series of corporations by means of a corruptly conceived and maliciously executed strategy of corporate warfare" but arguing that these portrayals lack empirical support); Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1863 (1989) (asserting that takeovers motivated by corporate raiders seeking "to profit from large-scale asset liquidations or corporate restructurings" were widely believed "to threaten jobs, established customer and supplier relationships, tax revenues, charitable contributions, and other economic and social benefits provided by resident companies to local communities"). While finance and legal scholarship often refuted these negative portrayals and defended hostile takeovers, the vilification of corporate raiders remained firmly entrenched in popular culture. *See, e.g.*, BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990) (declaring that the 1988 takeover of RJR Nabisco was "the ultimate story of greed," one that transformed "an old-line industrial powerhouse" into a "victim of the ruthless and rapacious style of finance in the 1980s"); Robert Epstein, *Sterner Runs with 'Other People's Money,'* L.A. TIMES (May 25, 1991), http://articles.latimes.com/1991-05-25/entertainment/ca-2117_1_jerry-sterner (describing "Larry the Liquidator," the fictional financier behind a hostile takeover in Jerry Sterner's 1989 play, later made into a movie starring Danny DeVito and Gregory Peck, as "a doughnut-devouring, one-lining corporate raider who believes that 'money is unconditional acceptance' and that life is 'the survival of the fattest'"); Simon Goodley, *Brace Yourself, Gekko Is Back*, TELEGRAPH (Aug. 28, 2007, 12:01AM), http://www.telegraph.co.uk/finance/markets/2814749/Brace-yourself-Gekko-is-back.html (reporting that fictional corporate raider Gordon Gekko, the well-known antagonist from the 1987 film *Wall Street*, was partly based on Michael Milken, best known as the "Junk Bond King" of the 1980s). Indeed, public perception of 1980s-era corporate raiders has not softened over time, as President Obama and his supporters repeatedly attacked Republican candidate Mitt Romney as a 1980s-style corporate raider. *See, e.g.*, Rick Klein, *Mitt Romney vs. Gordon Gekko*, ABC NEWS BLOG (Jan. 9, 2012, 2:55 PM), http://abcnews.go.com/blogs/politics/2012/01/mitt-romney-vs-gordon-gekko/.

185. *See, e.g.*, Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819, 829, 850 (1981).

186. EASTERBROOK & FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW, *supra* note 175, summarizes early empirical evidence that suggests that takeover defenses depress stock prices. Lucian Bebchuk et al., *What Matters in Corporate Governance*, 22 REV. FIN. STUD. 783, 783–85, 794 (2009), finds that an index of the presence in public corporations of staggered boards, limits to shareholder bylaw amendments, poison pills, golden parachutes, and supermajority requirements for mergers and charter amendments is monotonically associated with economically significant reductions in firm valuation, as well as large negative abnormal returns, during the 1990–2003 period.

ests would be more closely aligned with the interests of shareholders.[187] The corporate bar initially defended corporate directors and managers on the question of takeover defenses.[188] But over time, as managers and directors increasingly adopted compensation packages based on stock options, these had the predicted effect of focusing the attention of directors and managers at firms across the economy—so that most directors and managers now say that their primary duty is to maximize the value of the equity shares of the corporations they run.[189]

The view of corporations as simply contracting devices has also permeated corporate finance, with practitioners and scholars learning to use the corporate form of organization in a whole new way, as a pure asset-partitioning device that does not implicate any of the other three functions of corporate personhood (continuity in property and contract; self-governance; and the development of intangible assets attached to a corporate persona). So called "special purpose vehicles" (SPVs), or sometimes "special purpose entities" (SPEs) or "structured investment vehicles" (SIVs), are corporations that have no employees, no operations, and no products.[190] Their sole purpose is to facilitate "securitization" of financial assets by allowing the sponsoring corporation to isolate a bundle of financial assets, such as mortgages, car loans, other consumer debt, or commercial debt instruments, and issue debt securities that are

187. *See, e.g.*, Michael C. Jensen & Kevin J. Murphy, *CEO Incentives—It's Not How Much You Pay, But How*, HARV. BUS. REV., May–June 1990, at 138, 139–41.

188. *See, e.g.*, Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979); Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. LAW. 59 (1992). Lipton is widely credited with inventing the "poison pill," which can provide a powerful defense for existing boards and managers to prevent their company from being taken over in a hostile deal. *See, e.g.*, Josephine Carr, *Corporate America's White Knight*, 8 INT'L FIN. L. REV. 24 (1989); *see also*, Shira Ovide, *Marty Lipton: Why I Invented the Poison Pill*, WALL ST. J. BLOGS (Dec. 29, 2010), http://blogs.wsj.com/deals/2010/12/29/marty-lipton-why-i-invented-the-poison-pill/.

189. In a 1981 publication, the Business Roundtable, an organization whose membership is made up of chief executive officers of large corporations, came to the following conclusion:

> Corporations have a responsibility, first of all, to make available to the public quality goods and services at fair prices, thereby earning a profit that attracts investment to continue and enhance the enterprise, provide jobs, and build the economy. . . . That economic responsibility is by no means incompatible with other corporate responsibilities in society . . . . The issue is one of defining, and achieving, responsible corporate management which fully integrates into the entire corporate planning, management, and decision-making process consideration of the impacts of all operating and policy decisions on each of the corporation's constituents. Responsibility to all these constituents in *toto* constitutes responsibility to society, making the corporation both an economically and socially viable entity.

BUS. ROUNDTABLE, STATEMENT ON CORPORATE RESPONSIBILITY 12 (1981). One of its most recent publications, BUS. ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 30 (2012), however, says, "Corporations are often said to have obligations to shareholders and other constituencies, including employees, the communities in which they do business and government, but these obligations are best viewed as part of the paramount duty to optimize long-term shareholder value."

190. SPVs, SIVs, and SPEs are often structured as Limited Liability Corporations (LLCs), which is a variation on the corporate form that can be used by firms with a small number of shareholders (or only one shareholder), and that have certain tax advantages. Mei Feng et al., *Special Purpose Vehicles: Empirical Evidence on Determinants and Earnings Management*, 84 ACCT. REV. 1833, 1838 (2009) ("SPVs are often created as flow-through entities, such as LPs or LLCs, to afford maximum flexibility in allocating tax benefits to those investors who can best utilize them.").

claims to the cash flow solely from those assets.[191] By creating a separate corporation to hold the assets and liabilities of the SPE, the sponsoring financial firm that creates the entity attempts to protect itself from default or bankruptcy if the assets behind the securities fail to generate the projected amounts of cash flow. These entities thus resemble pure nexuses of contracts for the purpose of partitioning assets into entities that have none of the elements that we have identified as part of a corporation's persona.

But it turns out that, without a persona component,[192] the value of these entities nearly collapsed during the financial crisis when the assets that had been isolated in them lost value. In response, many of the financial firms that created these entities stepped up and took responsibility for making good on the debt securities that had been issued by them, although the terms of the contracts that had created them did not require this.[193] Why? Because the sponsoring firms had something to lose, which the individual SPVs did not have, a corporate persona with substantial reputational value at risk. In other words, some of the value that those entities had was due to an asset of the sponsoring firm that was not listed on the balance sheet of either the sponsoring firm or the SPE. That asset could have been badly damaged if the sponsoring firm had, in fact, allowed the SPEs to fail. Theories that try to explain value creating corporations in pure contract terms, without acknowledging the role of reputational and other noncontractual relationship assets that contribute to value and that are tied to the corporate persona, may fail to explain aspects of corporations that matter most.

The dominant theory of corporations in the last few decades in finance and in law has been a reductionist, finance inspired approach that regards corporations as mere contractual devices, with no truly separate existence, for which it is misleading and even foolish to speak of such things as the goal, reputation, will, or moral duties of the corporation apart from its contracting agents. The effort by financial market players in recent years to create value by simply repackaging the assets and liabilities of corporations without regard to the impact of such maneuvers on reputation and trust in the entity as a whole, let alone on the financial markets as a whole, it seems to me, is one expression of this mentality.

But while legal and financial scholars seem to have no use for corporations that have any personality, some of the most successful value creating entrepreneurs of the last decade—Larry Page, Sergey Brin, and Eric Schmidt at Google, and Mark Zuckerberg at Facebook, among oth-

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191. *Id.* at 1834.

192. Or, as Edward, First Baron Thurlow might have put it, with "no soul to be damned, and no body to be kicked." John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981) (quoting Edward, First Baron Thurlow).

193. See Margaret M. Blair, *Financial Innovation, Leverage, Bubbles and the Distribution of Income*, 30 REV. BANKING & FIN. L. 225, 262 n.67, 263 n.70 (2010).

ers—have emphasized the importance of such factors as "culture" and "reputation" and "innovativeness" in the value creating process at their corporations, and have expressed concern that financial markets excessively discount the importance such factors.[194] Perhaps it is time for financial and legal economics to rethink the contractarian theories and models that have been guiding much corporate law scholarship in recent years and reconsider the view that corporations are, or can be, substantially more than the sum of their contractual parts.[195] The idea that corporations can have a separate persona would be a useful part of that inquiry.

194. Google's founders have repeatedly expressed that the driving force behind the company is their desire to provide a service that will have a positive impact on as many people as possible. Google's motto, "Don't be evil," is a succinct manifestation of this desire, and it has come to stand for the proposition that Google is "not a conventional company" and "do[es] not intend to become one." *2004 Founder's IPO letter*, INVESTOR RELATIONS, http://investor.google.com/corporate/2004/ipo-founders-letter.html (last visited Mar. 5, 2013). What this means in practice is that Google's primary focus is to foster innovation, maintain a creative and challenging environment, and preserve the integrity of its service, even if "the near term financial returns are not obvious." *Id.* When Google decided to go public in 2004, its founders recognized that "the standard structure of public ownership may jeopardize the independence and focused objectivity that have been most important in Google's past success and . . . most fundamental for its future." *Id.* Therefore, Google bucked convention and adopted a dual-class structure for its IPO, which was "designed to protect Google's ability to innovate and retain its most distinctive characteristics." *Id.* Other companies, most notably Facebook, have structured their IPOs according to this arrangement. Like the founders of Google, Facebook's Mark Zuckerberg stated in the company's registration papers for its IPO that "Facebook was not originally created to be a company," but instead to "accomplish a social mission" to connect the world (rather than to increase short-term share value). Letter from Mark Zuckerberg, Facebook Inc., Registration Statement (Form S-1), at 67 (Feb. 1, 2012), *available at* http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm. The dual-class share structure adopted by Google and Facebook allows each company's respective CEOs to retain essential control, effectively preventing outside investors from interfering in the way things are run and shutting out external pressure to conform to the standard paradigm of shareholder primacy. *See generally* NEW YORKER (May 28, 2012), http://www.newyorker.com/talk/financial/2012/05/28/120528ta_talk_surowiecki; Mark Zuckerberg's Letter to Investors: 'The Hacker's Way,' WIRED (Feb. 1, 2012, 6:35 PM), http://www.wired.com/business/2012/02/zuck-letter/.

195. Phillips has observed that "the real entity theory asserts that a corporation is something more than the sum of its parts and the nexus-of-contracts theory denies this, both cannot be true." Phillips, *supra* note 123, at 1094.